2001

A Conversation on Federalism and the States: The Balancing Act of Devolution

Peter B. Edelman
Georgetown University Law Center, edelman@law.georgetown.edu

This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/358

64 Alb. L. Rev. 1091-1132 (2001)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author. Follow this and additional works at: https://scholarship.law.georgetown.edu/facpub

Part of the Social Welfare Law Commons
A Conversation on Federalism and the States: The Balancing Act of Devolution

64 Alb. L. Rev. 1091-1132 (2001)

Peter B. Edelman
Professor of Law
Georgetown University Law Center
edelman@law.georgetown.edu

This paper can be downloaded without charge from:
Scholarly Commons: http://scholarship.law.georgetown.edu/facpub/358/

Posted with permission of the author
A CONVERSATION ON FEDERALISM AND THE STATES:
THE BALANCING ACT OF DEVOLUTION

Welcome and Introduction: Martha F. Davis, Vice-President and Legal Director, NOW Legal Defense and Education Fund; Kate Stoneman Visiting Professor, Albany Law School (Fall 2000).

Moderator: David L. Markell, Professor of Law at Albany Law School.

Discussants:
Andrew G. Celli, Jr., Chief of the Civil Rights Bureau, New York State Attorney General’s Office.

Peter Edelman, Professor of Law at Georgetown Law Center and founder of the Law Center’s family poverty clinic.

Don Friedman, Senior Policy Analyst with the Community Food Resource Center.

Peter Lehner, Chief of the Environmental Protection Bureau, New York State Attorney General’s Office.

Shelley H. Metzenbaum, Visiting Professor at the University of Maryland’s School of Public Affairs; Director of the Performance Management Project at the Kennedy School of Government, Harvard University.

Richard Nathan, Director of the Nelson A. Rockefeller Institute of Government, State University of New York at Albany.

Erik D. Olson, Senior Attorney at the Natural Resources Defense Counsel, National Coordinator of the Campaign for Safe and Affordable Drinking Water.

Concluding Remarks: David L. Markell
Martha Davis:

I want to welcome everyone here today—the folks in the audience, as well as our distinguished speakers and others who are going to be participating in this afternoon's conversation on federalism. Putting together a program that covers such a broad range of issues and involves people from up and down the East coast is not simple. I want to make sure that I acknowledge the important roles played by the sponsors of this program, Albany Law School, the NOW Legal Defense and Education Fund, the Government Law Center here at Albany Law School and Patty Salkin the Director of the Government Law Center, and the Albany Law Review. The ALS Environmental Outlook and Environmental Law Society also contributed, as well as other folks from Albany who helped with logistical issues.

One of the most important functions of higher education is not specialization, it's the opposite, broadening visions and making connections across substantive areas that sharpen our understanding of the world around us. That project is both the genesis of this conversation and also one of the things we hope to achieve this afternoon. This extended conversation started when Dave Markell and I started talking about our respective fields—I work in the area of welfare and civil rights and Dave works in environmental law—and we realized that in terms of federalism, we had a lot to share with each other about what was happening in our fields. Our thought was to broaden that conversation to include a wider range of people and to include folks like you in the audience as well. So we have assembled experts on civil rights, welfare, and environmental law. We could have also included patent law, labor law, international trade, and other areas where devolution is becoming an issue.

What we want to do for the next two hours is explore the nature of the trend of devolution and the national/state interests that are implicated by these shifts in responsibility through levels of government. Among other things, we will be looking for lessons that can be translated from one area to another.

At the end of the day I'm sure that federalism will continue to be one of the most contentious and complex issues in U.S. governance. We are not aiming to solve anything this afternoon. But, I hope this conversation will illuminate some of ways that we can ensure that people benefit from this bi-level system. I want to turn it over now to Dave Markell who will be our moderator. He is perfect for this
task as someone with experience in state government, with the federal system, and, most recently worked in Canada, so he has international experience as well.

**David Markell:**

Thank you, Martha. Welcome everybody. We have four questions to talk about today, as you can tell from the materials that were provided. We are going to start with Peter Edelman, who will begin our conversation by talking about some of the national interests that are at stake in these areas.

**Peter Edelman:**

I'm going to talk about welfare and poverty and civil rights and Shelley will talk about the environment. Much of what we assign to national responsibility is based on values that we don't articulate. It's based on attitudes that are not related so much to some intrinsic facts about who can do what best, and much more to politics. Poverty policy and welfare policy are rife with this. The spoken justifications for the trends, in recent years in particular, relate to the idea that states are closer to the people and, therefore, they know what's best, and the federal government is very far away. I would suggest that arrangements between the national government and the state and local governments in this area relate more to the hierarchy of attitudes that we have toward the poor, toward who is deserving and who isn't.

The 1935 Social Security Act is a great example of what I'm talking about because there, in the same piece of phenomenally important legislation, we enacted three programs with differing federal-state divisions of authority: social security itself, unemployment insurance; and, welfare in the name of a program that became known as Aid to Families With Dependent Children. Social security is a nationally administered program with nationally set benefits. And I think, it is no accident that in our lexicon the elderly are regarded as the most deserving. Of course, the beneficiaries of social security are not just poor people. Unemployment insurance is at a middle level in terms of the federal/state balance. For welfare, benefit levels were left entirely to the states, and for thirty plus years it was tacitly assumed that state and local bureaucracies would deal with poor people in basically any way they wanted.
What's the difference among those three? As far as I can tell, it's a difference in our attitudes about who is the most deserving. If you consider whether there might be a national definition of benefit levels in welfare, you might well ask whether there is a state-by-state difference in people's needs. There are some regional differences in cost of living, but, otherwise, you eat, you need shelter, and so on. The history of disability policy is very interesting in this regard because from 1935 until 1972 (apart from the addition of social security disability in the 1950s), disability was handled as a welfare category. There were separate welfare programs for the aged, blind, and the disabled, and they were structured the way Aid to Families With Dependent Children was structured. But, disability has gradually acquired acceptance as being a more deserving category and in the Social Security Act amendments of the 1950s and then with SSI, Supplemental Security Income, in the early 1970s we created a national definition and a the national floor. I would suggest that this was not because we suddenly decided that the federal government could do a better job than the states, but because there was a change in our attitudes about who is deserving. Welfare recipients weren't regarded as especially deserving in the first place, but the politics became even more negative. There was an insistent drum beat that people were too dependent, and on welfare for too long, so we decided we'll give far more discretion to the states and have much less federal oversight. I don't think that's a result of some elegant definition of federalism; I think it's about politics.

Just a word about civil rights, since I've got that assignment here, too, at least implicitly. Again, much of the issue is about values, although in this case the last half of the twentieth century has seen more positive change. But, we used to hear states' rights over and over again. Those of us with gray in our hair will remember Sam Ervin standing on the Senate floor in the 1960s with his version of the Constitution that these matters of civil rights were really matters of states' rights. Maybe he was in good faith, maybe not, but it was certainly a code phrase for "don't tell us what to do about segregation in the South." Then we enacted the 1964, 1965, and 1968 Civil Rights Acts, and the states' rights talk stopped. When Judge Bork was nominated for the Supreme Court in the late 1980s we were all waiting to see what he would say about Dred Scott and Brown v. Board of Education. He said that Dred Scott was one of the worst decisions in history and he supported Brown v. Board of Education. I won't go through the constitutional doctrine on those
cases, but suffice to say that from a pure "Borkian" point of view those were the wrong answers. The point is that we had arrived at a broad consensus about the need for national law in this field, although not to the exclusion of civil rights enforcement at the state level. We should leave room for stronger civil rights enforcement at the state level. But not weaker.

Now there is somewhat of a cloud of doubt that has been cast by the Supreme Court decision in *United States v. Morrison*, which throws into question the continued validity of the Commerce Clause justification for the Civil Rights Act of 1964. So, it is not an idle question to ask just how radical this current Supreme Court is, and just how dangerous it is in areas where we thought there was a settled political and values consensus around the validity and merit of exercising national power.

*Shelley Metzenbaum:*

You've asked me to talk to the national interests in environmental law. I want to change the question a little bit, to ask, what are the interests of the people in this country that the national government is best able to serve? That gets me a little bit away from debating "national interests" versus "state interests." I fear that answering the question as you have asked it takes us down a very philosophical path. I prefer to address this question with a more practical bent.

First, consider two reasons that we think about government playing a role in the environmental field. Two key reasons are "externalities" and "commons problems." "Externalities" refers to the ability of one party to impose costs on another party without compensating that other party for the costs, as with pollution. To deal with externalities, we establish environmental standards, or sometimes we charge those people who are creating those costs, so that we'll get them to stop imposing those costs on other parties, or, so that we can at least compensate the parties who have been forced to bear the cost burden. There is no reason that the national government, or the state government, or local government can't set standards or establish charges. They can and they do. But those standards and charges don't operate in a vacuum. If one state sets a more stringent set of standards or costs than others it can be perceived as an unfriendly signal to business about the business climate in the state, and there's a very robust and brisk competition to attract business. So, essentially one reason we have national
environmental laws and standards is it functions as a cartel agreement—a monopoly agreement among states—not to compete away environmental quality.

The problem of externalities is often thought of in terms of a business imposing costs on a community, but we also have externality problems which can cross state lines, where one state can impose costs on another state. Again, states could deal with that state by state. But if they did, there would be enormous transactions costs. They would have to negotiate every single time water spilled across state lines causing contamination problems or upsetting the ecological balance of downstream water bodies. So, to some extent we have established national standards because it reduces the transaction costs. It's just a much more efficient way of dealing with environmental problems that cross state boundaries.

National standards can also reduce costs for companies that have to operate in multiple jurisdictions. So, if we want to think about the question of what benefits the people, and in this case the business in this country, sometimes national standards are attractive because it allows a company to respond with the same kind of response in every state and not have to adapt to the codes or environmental requirements of each individual state, or locality. Of course, if you're a company and you're more powerful than the local government or the state, you may, in fact, prefer the different adaptations, because you know you can get a better deal even if you have to deal state by state. If that's the case, when that occurs, where you have a company that's more powerful, again you start to see a reason for a national role, because the national government in that case can counterbalance the power of the local business, what a political scientist might refer to as the local elite.

I also mentioned commons problems. This is a term commonly used by folks who do environmental policy. Commons problems arise when rational decisions by many individuals would deplete a community resource. It could, for example, refer to our water or our air. We could easily overuse them, just following our individual rational decision-making processes, and deplete resources beyond a sustainable level, even though we might want to protect those resources if asked. So, what we do in those cases, is we reach a collective agreement among ourselves to protect what we call the commons—to protect these resources.

Well, a lot of times those agreements are much easier to do when they involve smaller groups and they're easier to do because you have trust among the parties. The boundaries of commons, like
water bodies, sometimes cross state lines, and, in that case, again, you have very strong need for a national role.

Let me mention a few other reasons national action can be very important. One, very simply, I think we should be able to trust the safety of the air and water where we live and where we travel throughout the United States. That has long been an expectation that I think we have had as Americans. It's what Peter was talking about in terms of values. I think we believe that we have a quality of life in America that should entitle us, and I will use that word entitlement without trying to get into big debates that erupt in other policy areas on entitlement, but we should believe we are going to have clean air and water wherever we live. I don't think we want to lose that expectation about basic air and water quality decency.

Increasing our confidence about what we consume is not only important to consumers, it also can be important to producers. Producers sometimes want national standards to build consumer confidence. Fish producers, for example, have tried to get national standards on quality of fish because they want to make consumers comfortable that they don't need to worry about where the fish come from; they can trust that the fish are safe to eat because of the national standards. So, you have both a consumer and a producer reason for national standards, in that case.

Finally, let me talk a little bit about economies of scale in implementing regulatory programs. There are significant economies of scale. Setting standards requires research. It requires evaluation of new technologies. It requires evaluation of program design. It requires marketing so that those who are regulated know what they need to do. All of those activities need to be done, and you can do it one time or you can do it fifty times. And, it's certainly a whole lot cheaper to do it one time. So, in that case it makes sense to have some cooperation among the parties, to do research on what the right water quality standard is.

It doesn't have to be the national government that would do that. It could be a collection of states that have decided that they're going to work together on those standards, on the research, or whatever. The fact is though, while many states participate in interstate collaborative efforts, very few of them, very few of the state legislators have been willing to step forward and pay for that activity. The federal government has funded most of that activity.

One other area that Peter alluded to was unemployment insurance, there is a lot of risk sharing and risk spreading that's
best done at a national level. Or, it can be done on a national level
so that if you have a major incident in one location, the local
government doesn't have to bear the full cost of the loss. You can
think about it as what we do with federal emergency management.
And that happens in the environmental field a lot when you have
major environmental problems.

In sum, there are lots of reasons that we have a role, an
important role, a major role, a primary role in many cases, for the
national government.

So why bother with state and local government? Well, there are a
lot of reasons to have the state and local governments deliver some
of these services and I'm not going to go into them right now. What
I am going to say is that I think it is part of the brilliance of the
federalist system that we live in, that the line, the delineations
about roles and responsibilities are not clearly defined. And, as a
result, governments do compete to serve a shared set of citizens.
It's in that competition, in many ways, that our values can best be
served. We can go to a different level of government for responsive
policies, if one level is not meeting our needs. And so, the different
levels of government both compete for the shared citizenry and
check each other's powers, if the power of one gets too strong. I
think it's that constant tension rather than a clean delineation of
roles that is a critical part of the vibrancy of our democratic system.

David Markell:

Peter and Shelley have raised a couple of important questions.
One is, who should decide what national interests are, and the
second is whether there should be particular criteria that should
guide the decision makers in making that call. And I think implicit
in Peter's remarks is that, essentially, Congress has a role to play in
deciding what national interests are. Congress' decisions may not
always be entirely satisfactory. In fact, they may vary across a
range of activities in a way that sometimes doesn't make much
sense. But, Peter suggests that Congress is the ultimate decision
maker in terms of defining what a national interest is, constrained
by the courts basically.

Shelley offered some of the substantive criteria that might guide
Congress and others who are interested in deciding what the
national interests are—e.g., things like "a race to the bottom"
among states, "externalities," "commons problems." So, I would like
to pose those two questions to the other panelists. First, who should
decide what national interests are and second, what should guide those decision makers in making those calls?

Richard Nathan:

Just to make it interesting, I think there is another way to look at what Peter was saying. He said that when you look at different groups that are target groups for social policy, that it's a matter of politics. The groups that are loved the most are going to get national attention and national standards. An example that I'm particularly going to talk about, where we have been doing a lot of research, is welfare. Welfare is different from a cash payment system for social security in that now in the 1996 Welfare Act, which President Clinton signed, which creates block grants and gives more power to the states. The idea of the law is to give people different kinds of service assistance to help them get into the labor force and stay in the labor force, deal with child care needs, and deal with the needs of their family for health care services. You could make an argument, Peter, that there is a very logical way of thinking about this. If there are criteria, if what you want to do is a service function, that has to be lower in terms of the assignment of governmental responsibilities. That's not something that national government can orchestrate, manage, and implement. So, I think there is more to it than just politics. There are strengths in our federal system and reasons why we ought to be careful. Not just to talk about needs and say, "states are not up to it or the local governments will, some of them, do it badly." There are arguments I'd like to be sure that are made about diversity—different needs, different standards, and different values in a country where communities become engaged in meeting certain kinds of needs, Peter. I disagree with you. I think there is a way to look at allocating functions in our kind of a federal system that involves more than just politics.

Martha Davis:

I'll surprise myself and add my partial agreement with Dick. I wonder to what extent it is valid to rely on historical arguments to justify the balance between federal and state power. The counterargument is that now we have states which are much more capable than they were, even in recent years, with the advent of the Internet, etc., to develop bureaucracies to provide services in a way that is in communication with the federal government,
communication with other states. Maybe we're in a new era where some of the arguments about history no longer apply. When I think about what the national interests are, in welfare and civil rights, that there is no inherent reason to think that the national and state interests would be different. In fact, states and the federal government have the same interest in promoting the well-being of citizens, and promoting opportunities for people to exercise their civil rights. There is no reason that a state would have a different interest than the federal government. What the federal government has that is different from the state is an interest in continuity and consistency across the country, making sure that there is even handedness. Also, the federal government may have international obligations that states are not so party to. So, the federal government may have international accountability that the states don't have, that may influence the way the federal government would approach civil rights, welfare, and the environment.

*Peter Edelman:*

I always know that I shouldn't leave out something that I have made a note to say. In fact, Dick, I take your point, but only up to a point. Because when we started thinking about welfare in a way that is more work-oriented, which I support if it's done right, the subject did acquire some aspects that have to be locally developed. So the specifics of a welfare to work system do differ somewhat from place to place. I also take your point that function partly determines the appropriate federal-state role. Public education is a local responsibility in this country for some very good reasons, without getting into the details of where we should have state standards and so on. But on welfare, and here's the point where maybe we do disagree, I think we went way too far in the 1996 law. There should be some national standards about benefit levels, and some national protection against arbitrariness and against the exceptionally bad policies that we have in some of our states.

*Peter Lehner:*

Let me join for a moment to emphasize that there are two elements to this issue. One element is the standards and another is the implementation of the standards. The federal environmental laws are structured to draw a very big distinction between these elements. The federal government sets the standards for clean air or clean water, and then leaves it to the state governments to
implement air and water policies to achieve them. The federal standards have, by and large, been set at relatively stringent levels, as Shelley said, with a lot of research going into, for example, setting the concentration in parts per million of ozone that is safe to breathe. That takes a lot of research. It makes sense for those standards to be set by the federal government. Even if there may be differences in how people live, the basic human body is the same anywhere around the country. But, what has worked less well in the federal system is the implementation of those federal standards. Thus, in thinking about this, it makes sense to draw a very big distinction between standards and implementation of those standards.

There is one other point, relating to the historical view of where we're all coming from and how we end up here. I believe the federal environmental laws did not primarily come about for the reason that Shelley was talking about—because of the pollution crossing state boundaries. They came about because states hadn't done the jobs and the economic race to the bottom. The water was dirty. Rivers were catching on fire. People were choking to death. After years and years of the states saying, "no, we can deal with this, leave it to us," and resisting federal intrusion into environmental policy, the country said, "hey, this isn't working." It really didn't have to do with the more analytical explanation of interstate pollution. It simply had to do with the fact that the states had been unable to control the pollution.

_Don Friedman:_

This is sort of some sniping. When you said that history maybe doesn't provide us with guidance. I would say that the change in states' capacity to do things wasn't the reason they weren't doing them before. What comes to mind the most notably is civil rights, if you will. That's a critical point.

Going back to the overall topic of goals, I just want to point out that while it's a worthwhile discussion, I think it's a dangerous area because so often goals are misstated by the bodies that are announcing those policies, purposely or for some reason misstating the goals, or the goals are unstated or implicit. The Welfare Law states right up front four goals. One is to help the needy. One is get them work, promote families, etc. I would say the closest thing the Personal Responsibility law comes to really articulating a goal is in the two places in the law where it says nothing in this law should
be construed to say that there is an entitlement anymore. That comes, for me, to being closer to what the law is really about.

Another example of misstating or unstated goals is the use of block grants. I am now thinking, not so much this law, as right before this, when President Reagan started doing it. And a lot of the justification for his initiatives had to do with federalism and devolution and the lower the level to administer something the better they can do it. The better they understand people. What it was really about was tax funds. They took a whole bunch of programs, they eliminated sixty programs. They combined seventy-seven programs into nine super block grant programs and cut overall funding to that totality by twenty-five percent. That is what was really going on there.

It's a very tough discussion, who should articulate the goals, who should set the goals, etc. But there is danger there, when we analyze stated goals.

**Erik Olson:**

I would agree. It is exactly the same way in the environmental field. We hear quite a bit about getting closer to the state and local governments. I would step back and look at the realities of what is going to happen. We hear these lofty arguments as to why we need to do this, but when we actually see what the implications are and what actually happens, I think the bottom line is that the folks that are advocating this most vigorously and funding it most vigorously are the ones that essentially have captured the agencies at the state level, at least in the environmental field. I think that there is just enormous industry power at the state and local level. There is a potential for brown mail, as it's often called, where the industry can say, "Well, if you crack down on us, we're out of this state or out of this locality." That kind of problem really cannot be dealt with unless there is a major federal presence. So, what I look at is the realities. I think the reasons for the lack of political will at many state and local levels, and the reasons for efforts to send things back down to the state and local levels, often is to deregulate.

**Shelley Metzenbaum:**

I'm going to speak a little bit to your issue about the validity of historic analysis. At the end of my comments, which were quite theoretical, I said something about states and the different levels of government competing with each other to serve the citizenry. My
experience in this field has been that so many of these decisions are about fixing the problems in these systems. So, for example, in welfare, as I understand—where it had evolved, the welfare program had primarily become a cash transfer system, as much as anything, and people who used to be social service workers were, in fact, now simply check writers, even though in many cases their training was in social service. They didn’t even have the authority to do more than that and they were frustrated that they couldn’t knit their services together to serve their clients better.

Certainly in the environmental area, eight or nine years ago when I first started working at E.P.A., after working at a state level, so many of the changes that we tried to make, to give more flexibility to the states, were because of the frustration of a lot of innovators at the state level. These were folks who were very committed to improving environmental quality, and they were frustrated because they had to deal with making their programs work on the ground. They found their program improvement efforts—designed to improve environmental quality—seriously constrained by the little boxes Washington had created to manage its grant monies. Now, we are probably going to get a reaction again because we’re going to go too far on the flexibility pendulum, and so people are going to try to shove things back in boxes again. And probably for good reason, because the flexibility pendulum is moving too far.

So, I think so much of this federalism debate is a debate driven by history and the challenge of implementing the programs. Bureaucracies get rigid. So, whether it’s the state bureaucracy, the local bureaucracy, or the federal bureaucracy, you want to have one butt up against the other to make them actually remember why they’re doing the job they’re doing. You want to force them to change to be more effective and responsive to the citizens.

David Markell:

To wrap up concerning our first issue, the conversation reflects that there are many different ways of approaching the question of national interests. One of them is looking at politics. Another is looking at functions. A third is looking at respective capacities of different levels of government to perform certain kinds of services. Suffice it to say, at this point, that there is a lively debate about what national interests are, how they should be defined, and who ought to define them.
Let's now move to issue two, which involves the extent to which national interests that do exist are being protected through the federal system that we are implementing today. This raises Peter Lehner's "implementation" issue head on.

Andrew Celli:

Thanks. I'm a practitioner and an enforcement lawyer and I feel a little uncomfortable with all this very lofty discussion. But, I want to bring my own personal perspective on something a little more, for me anyway, practical, and I should start by saying my name is Andy Celli and I'm a born-again Federalist. I have shunned this for years, but I finally reached middle age and now I have welcomed federalism into my life. If my political biography, which will never be written, were ever written, there would be a new chapter: I would be a liberal, a civil libertarian, a civil rights lawyer, and a Federalist. The signs were there all along: in college I thought that Jefferson's yeoman farmers were cooler than Hamilton's First Bank of the United States. In law school, I thought that Brandeis' hypothesis of the states as little laboratories was a really intriguing idea. But, I couldn't get past the fact that, throughout our history, federalism—and, more specifically, the argument that there should be independent sovereign power at the state level—that this idea has been used as cover for institutional racism, Jim Crow, and segregation. So, I rejected this idea of state power, thought it was an anachronism, and I worshiped at the altar of federal power. The Supreme Court, the Justice Department, particularly the Kennedy Justice Department, the E.E.O.C. These were the shrines of my youth.

But think of where we are at the turn of the millennium. We had a democratic president who signed into law some of the most punitive welfare legislation in U.S. history. We have a Congress that refused to confirm Bill Lann Lee as the Head of the Civil Rights Division because he was viewed as too extreme. And I found myself rooting for seven elected state judges in a pitched battle with the Supreme Court over voting rights in the deep South. So, I don't think I've changed; it's the world that's changed. And, there is one other small matter that I would like to mention which is that the State Attorney General asked me to head up his State Civil Rights enforcement office for the State of New York. So, federalism has become my personal savior.
The question is, is it our national savior in some way? I don’t know the answer to that, but I can tell you what I saw in devolution. I saw that, in the civil rights arena—and this really goes to Peter’s point about standards—that the playbook and the basic rules of the game are, and will continue to be, the historic Federal Civil Rights Laws. New York State, and not many people know this, has some of the oldest civil rights laws on the books, they were passed in the early 1940s. But when we enforce the law through the A.G.’s office and we look for expansive interpretations, we look at the Civil Rights Act of 1877, the Civil Rights Act of ’64, the Voting Rights Act, the Fair Housing Act, and more recently the A.D.A. and the Freedom of Access to Clinic Entrances Act. These are the fundamentals of civil rights enforcement. These are the tools that I use in my practical life everyday. And, so these standards, at the Federal level, are what we look to.

I also saw that state enforcement officers, like me and like Peter Lehner, with our small and agile offices operating below the national political radar, that we can use these federal laws in creative and aggressive ways and perhaps in a way that is insulated from the kinds of political pressure that, say, the Civil Rights Division of the Justice Department faces. For instance, we have a continuing case involving predatory lending where we use a very old, very unused, law called the Equal Credit Opportunities Act. When we described to our adversary our theory under E.C.O.A. as to why they were liable for targeting African-American and Latino borrowers for the worst kind of loans, the guy said to us, “You guys are out on the frontier.” Which we took as a great compliment—especially when, two months later, his client signed an enormous consent decree based on our lawsuit in federal court, based on our frontier theory. So, I think that state officers can act in ways that are beyond or below, maybe, political pressure to do the kind of things that the national interests wants us to do, as expressed in the federal civil rights laws.

Finally, the other thing that I saw with devolution was that, although state enforcement efforts may appear to lead to a patchwork of inconsistent rules—and this point may only apply in civil rights and less so in environmental law—I’d like to hear what Peter has to say—the need for large corporations, who are usually our targets, to standardize their operations and to create rational systems for doing business can result in a single state’s enforcement of changing national behavior patterns. We have seen that in the
work that we've done in predatory lending and other areas. So, that's my perspective on the question.

**David Markell:**

Thanks, Andy. It's fascinating that you and Peter Lehner took opposite sides of the same question. Peter said, basically, that you've got federal standards and then you've got the implementation side, which is where things are lacking in the federal system. You seem to be suggesting that you've got federal standards and that states can be more nimble and effective in actually doing the implementation work.

**Andrew Celli:**

What I'm saying is that the idea of federalism and the power at the state level is a vehicle for pursuing whatever your ideological agenda might be. And if you have an ideological agenda on the left and you have basic standards at the federal level, you can do some good work.

**Erik Olson:**

I have to agree with you, I think in all the areas we've talked about today, you're going to have some states that are out in front, in the frontier, trying to push things in favor of the federal standards that have been enunciated. But, the question is, what altar would you be worshipping at if you were in Mississippi or if you were in Louisiana, on an environmental matter? I guess that's the question. Just the same way one state can make great law, in interpreting federal statutes to advance things, one could argue one state can make horrible law to undercut things, if they so choose. I wonder how you would answer that.

**Andrew Celli:**

Well, I'm glad I'm not from Mississippi, that's the first thing. I guess what I would say is that you have to exercise power where it exists, and I would come back to the point that it really depends on your ideological agenda. The fact of the matter is that there is not going to be the kind of enforcement Peter would like in the environmental area in Mississippi.
You would be surprised at the civil rights enforcement, however, in states like Mississippi. Given the choice between nothing at the federal level and something at the state level, or at some states’ levels, I’ll pick something.

*Don Friedman:*

It seems that, with regards to civil rights, as inadequate as federal activity is now, at least it provides a floor so that in some ways the states are only free to do better, as I would define better, and not worse. I don’t think it worked in the area of welfare, I think it’s different. Let me just try to shoehorn a few things, anomalies, into the question to address this. I was told that you’re supposed to decide what you’re going to say and say it, no matter what you’re asked. I have the power of the chair!

I approach this as a welfare advocate and my perspective is completely skewed, I would say, by looking at things through the warped, perhaps cracked, prism of living and working in New York City. And, it really shapes, in a very serious way all of my thinking on this issue, in fact, it completely governs my thinking on this issue.

The other thing I would say is the direct answer to the question, to what extent are the national interests protected, if one of the national interests is to let homelessness increase, then the national interest is being protected by welfare reform. On today’s front page of the Times, is an article stating that at the height of a ten-year economic boom, “homeless shelters in New York filled to highest levels since 1980.” Some of that may have to do with other things, but clearly some of it has to do with the devolution in welfare reform.

We’ve already discussed about how you would define the national interest and the problems there of defining the national interests. I won’t go through that except to say I’ll substitute my own interest for what I would like to see the national interest in the area of welfare. That everybody who needs it be given a decent income so they can survive, we can afford that, and that people should get an opportunity to improve their life situation. And, that is clearly not the goal that has either been articulated or carried out through welfare reform.

The next question that I thought we need to address concerning federalism: is it a salient factor in this world.
First, I would say that, as long as society at large and the political world at large define the problem of poverty as one of individual blame and not structural, having to do with society and economics, it doesn't really matter what level of government is in control, we're in trouble. Something else is the notion that devolution or federalism can give states the opportunities to do good things. It made me think that what I might spend most of the rest of my introductory time doing, is to discuss an issue commonly raised in the welfare context, that is, fraud.

Welfare advocates generally must address welfare fraud, but I am concerned with devolution fraud. Why is it that Congress took about 130 pages to write, "we are devolving all the authority of governing to the states." Because they were, in fact, setting incredibly strict limits on what the states could do. If my idea is right, in the civil rights context, the states could only do better. In welfare, I believe the states could only do worse, under this setup.

Let me just list a few of the ways that is true. The states have participation rates they are bound by. They have to have a certain percentage of adults engaged in work activities. What is work activity? Work activity, essentially, very heavily discourages involvement in education and training activity, and is very heavily skewed and biased towards workfare, where they learn no skills and then have no chance of getting a job. Participation rate can be reduced by caseload reduction. So, if they are worried about suffering financial penalties in a state because they can't meet their participation rates, one of the ways they can reduce that participation rate is by cutting their caseload. Last year, just to give you an example, the legally mandated rate of participation in New York was about forty percent; given the caseload reduction factor the actual participation rate was eight percent. This was the effect of the caseload having been reduced by more than thirty percent. So, there is a great incentive to reduce the caseload.

Another example is the block grant idea, which I already discussed, the effect of which might be masked right now because of the decline in the rolls, but this is actually a way to cut funding.

Another way that devolution works is the time limits. As we know, under the current welfare law, people can receive federal welfare funds for no more than five years. States are free to make the period shorter, there is no option to make the period longer, in case you feel the person needs more time. There is a little hardship protection, but it is not nearly enough. Sanctions. The states must punish noncompliance with the rules. There is no leeway on that;
the only leeway is either just punish the individual or close the whole case. There is no leeway to do other things that might avoid punishment.

Perhaps the most important factor in welfare—the benefit level—has always been a matter of state choice. That one has been devolved forever, and it’s why, even before the social experiment of devolution happened, every state looked dramatically different in the welfare realm, because benefits were dramatically different in different states. An historical example from a few years ago, that I think is a great example of devolution in action in the welfare area, and that is that for many years the federal government had something called “quality control.” They still do but, under the old system of quality control, states could be penalized for overpaying people, but would not be penalized for underpaying people. That’s devolution that only goes one way, in the direction of allowing you to punish, or worse.

Let me just finish by noting that, in a form of devolution just prior to welfare reform, states were allowed to get waivers of existing welfare laws to try some experiments. What was the one catch? Anything they did had to be cost neutral. That means it couldn’t cost more than the state was already spending on welfare. Most of the things I am in favor for states to experiment with probably cost more money. Those things can’t be done.

The last thing I have to say is that perhaps the most important devolution has not been the devolution from federal to state, but from state to local, and maybe even from local to individual caseworker, as well as another form of devolution, from local to private, and now increasingly local to faith-based, and we’ll see how that plays out. I will finish by saying that in New York City, our mayor initiated welfare reform long before federal welfare reform was adopted. What welfare reform did was it legalized the illegal things he was doing pre-1996, and gave him a license to set a tone that said it’s okay to conduct welfare policy that simply punishes people, and to erect huge barriers so people can’t even get into the welfare center to apply. So I guess, as you can see, my perspective is very dominated by what happened in New York City. Devolution has meant licensing complete closing of access for poor people to the system.
Peter Lehner: It is interesting that the federal/state structure in environmental laws sets a federal minimum and gives the states the ability to do more. We just painted a picture of a law as having the opposite structure. What Andy and I were talking about is that the implications of federalism are very often dictated by practical concerns. The implementation of laws is usually better at the federal level than at the state but, in a few instances, the states are more aggressive. So, in a sense, federalism as a theory is value neutral. State power could be more or less environmental, more or less favorable to civil rights. As a practical matter, it has had a fairly anti-environmental history so far.

It’s also interesting to look at what is also happening in current Supreme Court cases. At the same time you have Supreme Court cases that talk about federalism—cases that I would argue are far more just an effort to reduce environmental standards—you also have dormant commerce clause cases that are limiting state power. When states do try to experiment, industry comes in and says, “we’ve got a global economy, and if you make us do this, it’s going to be an unfair burden.” The Supreme Court, at the same time it is limiting federal power, is also limiting state power. So the notion that we are limiting federal power in order to enhance the states’, is not only shown to be somewhat false in the Welfare Reform Act context, but is also shown false in other areas of jurisprudence.

Peter Edelman: I think it’s important to recognize that we had between the late 1880s and the late 1930s a no-person’s zone. The Supreme Court said that there is no federal power under the Commerce Clause to regulate, and no state power for substantive due process reasons to regulate. So a lot of activity went unregulated until we had the “switch in time.” We’ve got the beginnings of the same thing
developing again here, and it is very important to notice that and for there to a robust public debate about it. We have new Supreme Court cases cutting into the federal power under the Commerce Clause. We have federal Supreme Court decisions that cut into federal power to regulate states because of the Eleventh Amendment. And, we have now the Boy Scout case that says there is some kind of new constitutional right limiting the state power to regulate in the areas of civil rights. So we have a danger that we are having a contemporary reincarnation of the no-man’s land that we had from the 1880s to the 1930s.

Richard Nathan:

We could have used historical examples to make the point. We have to remember that in that same period, the 1920s, the federal government did not act in many areas. It was the progressive initiatives of states for unemployment insurance, child welfare, or retirement systems. It was Wisconsin, New York, and Minnesota. The state role could be different, and the activist energies that you would like to see advanced, along with the ideas that you would like to see advanced, may not come from Washington in conservative periods, indeed like the one we are in. We could have a long discussion about welfare, which you would need a whole two-hour session to get deeply into. But, it never was just a matter of implementation. AFDC was always as long as you wanted to make it. The fact of the matter is, that AFDC benefits have risen, because states have raised the monetary benefits to encourage new recipients to stay in the labor force. It has risen more under this new law throughout the country, than in the previous period, when we had a national law which wasn't very good either, by your standards. There isn't a reason for always saying “let's do it in Washington, because then I can do it better.” In fact, in different periods of our history, things that we wanted to do, activists in government, being upfront and helping people and leading the way in a good cause—it hasn’t always come from Washington. The same voters vote for the people that represent us here in this state capitol that vote for the people that we just got elected in Washington.

Martha Davis:

One more point on the question of civil rights floor. I think one of the reasons that we included civil rights in this conversation is the feeling that because of U.S. v. Morrison and because of the Eleventh
Amendment cases, that the federal floor is starting to develop holes. A good example of the anomalies that have been created is the Age Discrimination Act case—the *Kimel* case—where now state employees can no longer invoke federal protections of the Age Discrimination Act if they are discriminated against by a state employer. Andy, you can tell me—how have states have responded to that? Have they said, “Great! Now we can set whatever standards we want.” Or, have they said, “Oh, gosh, we feel terrible—this group of employees is not being protected in accordance with the way every other employee is, and so therefore we are going to enact statutes that give them that protection,” in acknowledgment of the apparent national interest articulated in the Age Discrimination Act.

*Andrew Celli:*

I think they said, “Great!” I think Peter Lehner was being a little too kind when he said federalism is content neutral. I spoke to a friend of mine who argued the *Dale* case—the Boy Scout case—in the Supreme Court, and he said that he thought the most important part of the argument when he got up there were the first five words that he said, which were “The State of New Jersey.” Of course, they love states up there, right? And, of course, he lost. And, then we have *Bush v. Gore*, where suddenly we have the majority of the court extolling the virtues of the Equal Protection Clause over state power. So, let’s not kid ourselves about what’s really going on here.

*Peter Edelman:*

I want to say Dick, there is a theme here that looks like a difference, but that particular difference is not there. There are many areas where we want to encourage states to be experimental and creative. But, the history I was citing was that the Supreme Court squelched the states and wouldn’t let them innovate. Part of the change in the Roosevelt Court was to support the ability of the states to experiment. Similarly, some of the more successful areas of civil rights and the environment are as a cooperative federalism where you have the baseline national floor and the capacity of states to do more, which accords with what you’ve said about creative state action. What I am concerned about in the welfare area is that we lack a baseline to keep the states from doing really bad things, while still allowing them to do the good things that some states are doing.
David Markell:

Fair enough. That's actually a perfect transition to the third topic. The third topic is to look at, in particular, the kinds of policies that have been effective in the federal system in achieving national interests, essentially, the question of what works. Dick, if you could turn your attention to that.

Richard Nathan:

I don't want to engage in the kind of deep contemplation of policies in a particular functional area that some of us know a lot about, and that we differ on, or interpret in a different way. What we want to think about is what are the benefits of federalism. And, one benefit of federalism is that we can allow for diversity, for experimentation, for communities with different values and different needs, to have their community deal with things in ways that suit them. Federalism can be a way of reconciling unity and diversity. It permits experimentation. It gives citizens more ways in which they can identify with the community, communities doing things to be what are regarded as public needs.

So, I think that we want to try to put at the top of this discussion whether we want this balance to shift. One of the most interesting things in my experience is to watch how the courts have interpreted the welfare clause in the Constitution. Now the current court, in Chief Justice Rehnquist's famous decision, the *Garcia* decision, where the court went five to four in favor of a federal rule in the particular area. His one-liner was, "We'll get you next time." These are not intrinsic matters of right and wrong, morally or even in operational terms of who can do something necessarily.

But, I wanted to pause on that just for a minute and use what may be another thirty seconds of my time to say that I think you should have chosen education for this topic today. Because we are about to enter into a great debate where the President says, "Well, I believe in states. We are Republicans." What we want to have is tests at every grade level. Now, what kind of tests are going to satisfy that federal requirement? Who is going to say what those tests are? It is going to be an interesting debate that really hasn't been firmed up. Seven percent of the total spending for public elementary and secondary education in the country is federal, so ninety-three percent of what we spend for education is state and local.
Do Americans want to make the argument that there are certain kinds of things that you can't do from the center as well as you can do them in the community, in ways that reflect what different people need and want in their lives, and what the conditions are in the community. There are attributes of this reconciling unity and diversity that involve diversity as being advantageous for certain kinds of things that you chose not to standardize, or formulaize, or oversee from a national government. If what you care about now is that people are needy we should help them work, that's a very complicated idea. It involves all kinds of things that some governments are doing much better than they used to do before. If what you want to do is help families make it, and families are very complicated things, having very different conditions with all kinds of health, mental health, child abuse, family violence, child care, transportation, education needs. You need to think about where that kind of relationship can take into account, not just the diversity of the country but the diversity of human needs for families with children. This is constantly shifting balance. Pretty soon all my liberal friends may hate national government. And, maybe that's a good thing. Maybe this equilibrating, Brandeis called ours great laboratories of federalism, maybe this equilibrating capability which the founders put into that great document is a benefit to society. But I hope that we can stay at a high note plane, David, to think about principles of government and not to worry just about where certain issues stand today.

David Markell:

One of the questions in terms of what systems or policies have been effective is actually to look at some of the implementation issues that Peter Lehner alluded to before. What have states been doing to experiment, to try to make things better. Andy alluded to it before, as well. And, where have some of the experiments, the laboratories of democracy, paid dividends? Peter, can you talk a little bit about that?

Peter Lehner:

If I can, just two comments on what was said. First, you were talking about the President's proposals for education—that there should be tests but it is up to the states to decide what the tests are. Although it strikes me as a facially absurd notion, the E.P.A. just promulgated a rule that says that pesticide applicators should be
tested, but that E.P.A. will leave it up to the states to say what the tests are and, thus, when one can apply poisons in an acceptable manner. So the President wasn't the first to come up with this idea. He was just punting, with a token nod toward the federal role and then leaving it to the states.

Second, I would say that you are right that it would be great to have a conversation where we could discuss federalism as a principle. But I would argue that, as it is evolving over the last twenty years, federalism is largely unprincipled. It is not an effort to provide more power to the states, because if that were the case, then you wouldn't have these Commerce Clause cases eviscerating the ability of states to have more aggressive environmental regulation. One area in which we see this clearly is the area of actual enforcement. We often view federalism as a zero-sum game: there is a certain amount of power to be exercised and it is either the feds or the states who will exercise it, but it is not both; cut back the feds, and the assumption is that somehow the states will fill in that role. If you look at actual enforcement, though, that's not the case. The federal environmental laws are structured so that most enforcement is left to the states. The federal government sets the standards and designs what a program should look like, and then, in almost all cases, delegates that program to the state governments to implement. The state governments issue the actual permits under federal guidance. They are the ones who send out the inspectors. They are the ones who bring enforcement actions in the first instance. But, the federal government is supposed to have an oversight role. They are supposed to be there, so if the states don't enforce, the federal government can directly enforce. A sort of gorilla in the closet. However, what is happening in the last few years, especially, is that when the federal government does try to enforce, it gets clobbered. E.P.A. is told that its enforcement budget is going to get cut, or whatever else. So the federal government is now more wary to enforce. The result of that, though, is that there has been less state enforcement. Without the gorilla in the closet, the states are saying, "hey, I don't have to enforce." They will welcome anyone they want with open arms, anyone who wants to pollute. The result has not been that less federal power means more state power, but just the opposite—less federal involvement, when it comes to actual implementation, means less state involvement. So, when you look at it from that point of view, it's a very different vision of federalism than this either-the-states-or-the-feds vision.
Now, going back to what has worked and what hasn’t. As I mentioned, there is a general consensus that the federal government has done a moderately good job in the environmental area in setting standards that are relatively protective of human health and the environment. And, some states have done a relatively good job of enforcing those, but the majority of the states have been relatively slack. The Clean Air Act, when it was passed in 1970, expected there would be clean air—air safe to breathe—by 1977. We still have over 100,000,000 Americans breathing air that the federal government says isn’t safe enough to breathe. The Clean Water Act, passed in 1972, expected that we wouldn’t need this whole permitting structure because there wouldn’t be any more discharges of pollutants by 1985. Waters would be fishable and swimmable by 1985. Well, the most recent survey shows that about one-third of our waters aren’t close to being fishable and swimmable, and those are only the waters that we have actually looked at. So, something clearly has gone wrong and it’s largely state implementation.

But it’s interesting to ask the question, “what has gone right?” One of the things that has made an extraordinary difference is that all the federal environmental statutes, except for one, provide for citizen suits. They allow the individual who is harmed to bring a suit, not against the government, but against the polluter directly. Virtually no state allows any citizen suits. New York has a few very specific citizen suit provisions. We did a survey a few years ago and found that, by and large, no state has any effective citizen suit provision in the environmental arena. The fact that federal citizens suits are out there scares the regulated community to an extraordinary degree. You can capture an agency, as somebody talked about, but you can’t capture the environmentalists or community groups. That forces polluters to think that they should comply because they can’t be guaranteed that they won’t be enforced against.

Another thing that the federal environmental laws have done quite well is to require a fair amount, not enough in most circumstances, but a fair amount, of reporting and to require that all those reports be publicly available. Implementation has not always been perfect, but there is quite a bit of information about pollution that you get from a database. Sometimes you have to go to local or state agency offices to get some files. Now you can get a lot on the web. This information provides citizens with an extraordinary tool to raise the profile of an issue in their local
community if nothing else. There is a debate going on now about
electronic filing of pollution reports. Many companies originally
advocated that because it would be a lot easier. Then they realized,
"Oh, my goodness. If I electronically file, boom, it's up on a web
page. It's not lost in some office down in New Paltz or someplace,
and that means that anybody can find it." So now the general
position of the reporting industries is that they do not want
electronic filing anymore. It's an interesting statement on the
power of information. But it also shows another program that has
worked in the federal environmental laws.

Similarly, the National Environmental Policy Act requires
agencies to, in essence, look before they leap. It tells the federal
government to think about the environmental consequences before
it undertakes an action. Many states have passed similar laws
requiring state and local governments to consider environmental
consequences before they take an action. And again, there are a lot
of questions of how well they've worked. But what they have
definitely done is given citizens the opportunity to say "you haven't
thought about this enough." And they have offered to citizens
litigation options to change that situation. Through litigation, a
citizen has an opportunity, instead of being powerless, to actually
enter into the debate and, if nothing else, delay a project for a
couple of years and, therefore, have some bargaining power.

So, interestingly, the common theme of all of the programs that
have worked is not devolution from the federal government to the
states, but from the federal government directly to individuals; how
they empowered individuals in a way that states have never been
willing to do. That is a pretty telling statement of how federalism is
working.

Another side of this issue is to ask what has worked for state
governments. Is carrying out federal mandates where they've done
a good job? Is it through the implementation of federal programs?
Sometimes. But in some ways, at least in the environmental arena,
we've been able to be most creative and most aggressive going back
to good old-fashioned common law, something that predates the
federal structure. We just today, by the way, had a great seven-zip
decision in the Court of Appeals affirming the public trust
document—that certain land is held in trust by the public and that
local governments can't use it for non-park purposes without going
to the state legislature. This doctrine goes back to Roman times.
So, in some ways, where the states have been most effective has not
been in what the federal government has given them, but in
common law and the public trust provisions of law that long predate our federal structure. That again, is a telling commentary on federalism.

I would offer one last thought on why it is that state governments have by and large not taken the opportunities given to them by the federal laws and done better. I would offer two words on that, which are "campaign finance."

**Andrew Celli:**

Just a very quick point. I mean, your point about devolution for individuals applies equally, if not more so, in the civil rights arena. The impact of fee-shifting, requiring defendants to pay winning plaintiffs in civil rights cases on enforcement, on private enforcement efforts, is enormous. There would be no private civil rights enforcement—my former law firm would be dust—if it were not for fee shifting. That's an example of federal government priorities being enforced by individual citizens, and I think that is a great model.

**Shelley Metzenbaum:**

I just want to try to extract two lessons I'm hearing about things that are working. What works in terms of the national role. I'm talking about the national government, instead of the federal, because I think that the federalist government is both the state and national government. Peter, when you talk about laws that work (by the way, I think your comment about the need for national standards in the education system is right on point), I think we've got two lessons from the environmental area.

One is the Clean Air Act, where there are very clear national standards, what I'll call a floor of decency where the federal government, the national government, sets up minimum standards for air quality. That's in contrast to the Clean Water Act where the states are supposed to set the standards. In fact, they have not done it, in most cases. So, under the Clean Air Act, you have this floor of national decency, you also have required measurement of states meeting that floor, and you have sanctions if they're not making that floor of decency. It's a law that's working pretty darn well.

There is a provision of another law which is called the Toxic Release Inventory, and it requires companies to report in a standard method the quantity of toxics they release to the
environment. Now, there are problems with TRI, but it's better than what existed before. Companies have to report TRI information in the same way across the country, more or less. Just by putting that information out to the public, we have begun to see real reductions in corporate release of toxics to the environment.

I think these two examples teach us a lesson on the education debate, which is coming up, which is, we probably want a national floor of decency regarding education, for each of our kids. But, this notion of the state setting up their own tests, is going to be like the Clean Water Act, where state standards, if established, are not very informative because they cannot be compared across states.

*Peter Lehner:*

- Depending on how you count, forty percent of waters.

*Shelley Metzenbaum:*

- Are clean?

*Peter Lehner:*

- Are not clean. Don’t meet the standards that the states have set for them.

*Shelley Metzenbaum:*

- But only thirty percent of the waters are even monitored. If that. It's like fourteen percent in some kinds of water bodies. So, we don't even know if state programs are working or not because no one is measuring the water quality. When I hear people talk about the laboratories of democracy, I keep coming back to this measurement issue and the need for the federal government to really force standardized, credible, and comparable measurement of these outcomes that we care about. That will let us see how far we are relative to the floor of decency. But also, if we're going to have these laboratories, you can't have them if there are no scientists in the laboratory evaluating the experiments and if they're all using different kinds of instruments to evaluate it with. You've got to have some comparable metrics.
Don Friedman:

Richard Nathan invited us to rise and be principled in this discussion and I decline that invitation. I just spent two days lobbying the legislature, so how could I possibly do that? I do want to ask, in the welfare context, what has been the impact of welfare reform and its devolution? What has been happening? You did mention a few good things that have been done, and I would agree, by some states. But overall, we may not agree with this assessment, but we have some information about what's happening.

First of all, we probably all know the welfare rolls have gone down dramatically. From as much as ninety percent declines to I don't think any states lost less than fifty percent of its welfare population. So, around the country, there has been a huge decline in welfare rolls. Many people would define that, in fact, I believe that's a defining fact of welfare reform success. What's happened to the people who are leaving the rolls? Many of them are working. A very large percentage of them who are working are doing as poorly or worse than they were doing when they were on welfare. They have some increased costs and they're not matched by their earnings, they tend to be low wage, temporary, no benefit jobs, without any chance for advancement. Many people who were working and left the rolls are back on the rolls. That has always been true that there is a lot of cycling on and off. Many of those who are off the rolls are not working. One of the most important reasons why people are off the rolls is because they were sanctioned off the rolls. Sanction is the punishment of people on welfare who have not complied with the rules and, as I would submit, is the driving force of all of the welfare activity. Actually, one research piece that I read recently said that in a three month period, forty percent of the caseload decline in the nation was explainable by sanctions. Not jobs, but sanctions. Because of the strong economy there has been some reduction in poverty. I say because of the economy because I don't think that welfare reform has anything to do with the decline in poverty. Something I do think is attributable to welfare reform is that to the extent that people are poor, there is deeper poverty. The number of people who are deep in poverty has been increasing in these boom times.

But, the last thing I just want to say that gets a little more directly to the federalism discussion is that a number of states have done interesting things. Let me use Wisconsin rather than generalize. We'll use one state. They did interesting things after
they cut eighty percent of their case load. If you weight the good things, some more money for child care, some more money for education and training, against the bad, namely an eighty percent reduction in caseload, it's a mismatch. The damage has been done.

Richard Nathan:

I'm not here to argue about welfare, but what they've done in Wisconsin has served people who are working. They've spent more money than they've ever spent before, for more services to help working families. You can't just talk about the cash assistance caseload decline and be telling enough. I'm not saying you're wrong, but I don't think we should just talk about one person's view of welfare reform in Wisconsin.

David Markell:

To sum up in terms of this issue, notably what systems and policies have been effective, I think you can, as Shelley was saying, glean a few general principles from the discussion. One of them is that, at least in a couple of the contexts, there is a federal floor that seems to have motivated the states to a certain level of performance. Thus, there is the suggestion that a federal floor is valuable in promoting enhanced performance.

The second issue is the issue of sanctions. Andy remarked before that one of the things New York has done that is positive is to use federal authority in ways that sometimes the feds themselves haven't used. The idea is that the creation, and existence, of federal authority, regardless of who is exercising that authority, is a way in which the federal system has been constructive and productive.

The third issue is one that Peter Lehner focused on, empowering citizens. Whether that is part of federalism, per se, or just part of the federal infrastructure, is something that you can discuss, but clearly it's an inherent part of the environmental laws. The environmental laws empower citizens in a wide variety of ways, ranging from bringing a suit themselves, to getting information so they can vocalize and interact with regulated parties who are engaging in pollution. Peter suggests that this is a third feature of having a federal system that is paying dividends.

A fourth feature of the federal system that I'll close with hasn't been mentioned here today but I don't think it should be ignored, is the issue of capacity. The states in recent years have done an enormous amount to increase capacity on their own to engage in
environmental protection and other activities. Many would say that the federal government has played an instrumental role in enhancing state capacity and giving the states the tools they need to regulate and to engage in efforts to promote environmental protection. So, these are four features of our federal system that seem to have provided dividends in the view of one or more of our panelists.

With that brief summary, let's turn to our fourth topic, the obstacles to achieving an appropriate state federal balance and how those can be overcome. I'll start with Erik.

**Erik Olson:**

I do think that there are three areas where the system has clearly worked. One is the devolution to individuals, as Peter was saying, in the situation of civil rights. And, also certainly in the environmental area that I'm familiar with. In that area there is a direct federal standard and there are the individual citizens. Who is closer to the people than the people themselves? Where you have that situation, we actually have had some success. In California they have succeeded at the state level with Proposition 65. Proposition 65 was adopted, over the objection of virtually the entire industrial complex in California, by the citizens. Now, citizens can directly sue to enforce environmental standards. That's the only strong citizen suit supervision that I know of in state law that was basically and essentially adopted by citizens over the objection of the state government as well as industry.

The second area that has been successful is where the federal government can act unilaterally. I will offer a couple of examples, such as lead phase-out in gasoline, which is documented to have enormous impact in blood lead levels across the country, and the phase-out of chlorofluorocarbons, which has clearly had significant environmental benefit. That is where there didn't have to be a federalist argument.

The third area, and this is a little more murky, is where there was a clear federal floor and clear sanctions for not meeting that at the state level that were essentially self-executing. That is relatively rare in environmental law, but there are a few examples, that I won't go into, where this actually worked. And, usually they are where funding is automatically withdrawn and it's too bad if the state doesn't adopt it. There isn't any discretion there. So, those are a few bright lights that I think are worth highlighting.
I was asked to talk about obstacles, and I think there are a lot of them, and we've heard many of them touched upon. I'd like to do a parade of horribles for some of the obstacles, and since I was just Pollyanna and talked about all the successes, I do think that some of the obstacles are more significant than others. I would say that perhaps that the number one obstacle in the federalist debate right now is the Supreme Court of the United States. I think that where we are headed right now, there are several recent court decisions under the Tenth Amendment, under the Eleventh Amendment, and in interpreting the Commerce Clause, that are taking us in the direction that I think is close to where we were in the time of *Lochner* and *Schechter Poultry*. That is, close to the time when, essentially, the federal government, for reasons that I view were largely unprincipled, will be prohibited from moving into certain areas of regulation, and the real reasons are that there are very powerful interests in campaign finance. That's one area.

I would say my proof in the pudding of why this is unprincipled, is every time I go up to Capitol Hill and I have these debates about federalist issues, on one hand I hear how it is so important to delegate and send things back to the states. However, when an industry comes in and wants federal preemption, well, suddenly that's not very important. It's very clear.

The other proof in the pudding is that now at least nineteen states have adopted "no-more-stringent-than" clauses in the environmental area. What does that mean? That means that the state legislature, and I wonder who asked the state legislature to do this, the state legislature says we can be no more stringent than the least stringent federal rule. This is true in nineteen states now, but it's not necessarily across the board in each state. That tells me that the race to the bottom is quite real. That many states go as far down to the bottom as they possibly can, and if you removed the federal requirements, they would go all the way down to the bottom. At least some states would. The reason for that, I think frankly, is the campaign finance issue, political power, and realities.

That brings me to the underlying basic problem, which is the power of money in the United States in the twenty-first century. I think we all know it, but that's really the bottom line for a lot of these problems. For the environmental problem and many others, I'd like to talk about lofty principles, but I think that the bottom line in many of these debates is, who has the money. The person with the money is the one that controls the agenda and it is much more difficult to overcome where it is invisible at the state level.
very often. Of course, it’s very difficult to overcome, even at the federal level.

At the state level, several identifiable obstacles are important. There is the lack of funding staff and expertise at many states. Very often, even if they have the political will, which is another huge obstacle, the states simply cannot take on a major industry. The industry can throw enormous resources and essentially wear the state down to the point where a twenty-four year old kid straight out of school who is tasked with fighting the thirty industry lawyers simply cannot muster the attention and will to take them on. The imbalance between power and between technical and scientific expertise and resources is so enormous that it’s a real impediment to really delegating things very often at the state level. Which is not to say that it doesn’t happen at the federal level. It certainly does.

Another significant issue, and frankly this is one of real concern, is that at the state and local government level, very often there is no public interest community. There is no watch dog. If there is a watch dog, they’re watching the entire state agency and they simply don’t have the expertise or ability to even know what’s going on, much less try to advocate. They don’t have the resources, and they don’t have the expertise, and it makes it, essentially, a sham to say that this is being delegated down to the state or local level, because there isn’t anybody to watch what’s going on.

There is also a very significant problem of lack of public disclosure and a lack of transparency at the state level. One question in the written material is: would transparency help? Yes, it would help. It’s not going to solve the problem, if you’ve got a huge industry that can overwhelm the resources of a small community group. Having the permit available to the citizen-group to read, it doesn’t really help them very much or enable them to understand how much Chromium IV is in their drinking water, it may not help them very much if they don’t know what Chromium IV is.

The last significant impediment I wanted to mention is that, I think the gorilla in the closet is being locked in the closet. The solution that we often hear is, “Well, we need this federal gorilla in the closet who can beat his chest and say, ‘Well the state doesn’t do their job and then the federal government is going to come in and step in to make sure that the state does.’” Well, that gorilla is increasingly being locked into the closet and can’t come out and, therefore, as Peter just suggested, there isn’t really the pressure for
the states to go forward, so we have overall less enforcement effort, less implementation effort, and with the Supreme Court decisions I think that’s only going to get worse.

Richard Nathan:

I’m trying to figure out about what we’re talking about. The comments you just made are supposed to be on federalism, but what I hear you saying is that federalism, to you, means national control. Could we do a balance sheet about a system that shares power versus a system that doesn’t share power? Ours is a system of shared powers, that’s how you should think about and assess American federalism. That’s really what we should be discussing.

There are pro factors for sharing power. Some states can innovate and lead. We have diversity. You can decide you want to strengthen community as a political value. In some areas you can decide you want to enhance competition if states are trying to do certain things that we would like them to compete to do better than other states. What is the down side of sharing power? It seems to me that’s what the discussion ought to be, “What is the up side and what’s the down side of the kind of very subtle sharing of power that we have in our political system?” And, I hear most of you saying here that what federalism means to you is just, “Please have more national power,” which I don’t think is all you should talk about when you have a seminar on federalism.

On the other side of the ledger, I would put that the argument for national power, which is most of what I have heard here, is that you get uniformity. You can reduce the cost and effects of externalities. You can, and this is what we have been seeing a lot, make it easier for business to compete in the global economy. You can achieve purposes that involve equal treatment across state boundaries of citizens. (Equal bad and equal good, by the way).

What I think the audience should go away from this thinking, is that there are arguments for and against sharing power. This is a key point. Federalism is not necessarily a bad thing. Read the Constitution. Read the Federalist Papers about divided responsibility and shared sovereignty. Shared in different ways. It’s very complicated. There are three ways that governments carry out functions. They set standards, they pay for achieving them, and they administer programs. Our sharing of power involves very complicated mixtures of those three things for different functions. Do you want to share power, or do you not, should be the federalism
question that you should ponder when Professor David Markell finishes moderating this forum.

David Markell:

Thanks, Dick. What I think we should do, because we are running out of time, is give Peter a chance for a thirty second comment, and then I'm going to invite questions and comments from the audience.

Peter Lehner:

In response to what you were saying, it's important to distinguish between federalism as a theory and federalism as a matter of reality. I would argue, and as I said earlier, federalism in theory is value neutral. State powers could be better if campaign finance realities were different and, in fact, states were more responsive to individual concerns than other levels of government. Then federalism would be a terrific tool for more civil rights, more environmental protection. Given our poor campaign finance system at all levels of government, however, it's arguably the federal government that, in a weird way, is actually more responsive to most people than are the state governments. You have to look at federalism, or at least those of us who are living it look at it, as a matter of reality. I would love to think of it as divorced from campaign finance and the reality of how responsive state governments are.

[Question & Answer Session Omitted]

David Markell:

This has been a very interesting discussion. We've had a very active group of participants. Martha and I very much appreciate your active engagement and your vigorous participation. And we truly appreciate your venturing forth to Albany in February, the day after a significant snow storm, to join us. For the audience, and the participants, we have raised a lot of issues today. The purpose of this conversation is to help to facilitate other conversations about these very important principles. Again, four of the questions to consider are the ones we outlined at the outset: 1) what are the national interests at stake; 2) to what extent are they being
effectively achieved; 3) what are some of the successes that we have realized, how do we emulate those, and how can we communicate them better; and 4) where have things gone awry, and how can we learn from these experiences. The participants offered some very insightful comments on each issue that we hope will inform your thinking.

Participant Biographies:

Andrew G. Celli, Jr.

Andrew G. Celli, Jr. is Chief of the Civil Rights Bureau in the Office of New York State Attorney General Eliot Spitzer. The Civil Rights Bureau conducts affirmative litigation, investigations, and policy initiatives in the areas of reproductive rights, disability rights, police misconduct, and discrimination in employment, mortgage lending, housing, public accommodations, and other sectors. The Bureau employs an “impact litigation” model to court cases, drafts and proposes civil rights-related legislation for consideration by the State Legislature, releases reports, and facilitates educational seminars on civil rights controversies around the state. Finally, the Bureau assists the New York State Solicitor General in the preparation and submission of amicus briefs in civil rights cases of interest to the State. The Bureau is comprised of twelve lawyers and includes a Reproductive Rights Unit and a Disability Rights Project. As chief, Mr. Celli is responsible for selecting cases, formulation of litigation strategy, and overall supervision of the Bureau’s docket.

Before joining the Attorney General’s Office, Mr. Celli was a partner in the firm of Emery, Celli, Brinckerhoff & Abady, LLP (1996-1999; previously Richard D. Emery, PC, 1993-1996), a firm that specializes in plaintiff’s civil rights, police misconduct, First Amendment, and related matters. Prior to that, Mr. Celli was an associate at Cravath, Swaine & Moore (1991-1993), and a law clerk to Hon. Charles P. Sifton, U.S. District Judge (E.D.N.Y.) (1990-1991). Mr. Celli is a 1990 cum laude graduate of the New York University School of Law, where he was a member of the Law Review and a Libel Law Fellow.
Martha F. Davis

Martha Davis is Vice President and Legal Director of NOW Legal Defense and Education Fund, an independent public interest legal and advocacy organization. As legal director, Ms. Davis oversees NOW Legal Defense litigation and advocacy in the areas of economic justice, violence against women, education, reproductive rights, and employment. Her Supreme Court litigation has included *U.S. v. Morrison*, 120 S. Ct. 11740 (2000), which addressed federalism issues, and *Nguyen v. INS*, which she argued before the Court in January of this year. The focus of Ms. Davis' work has been economic justice, and she writes and speaks frequently on the legal rights of poor women. Ms. Davis is the author of the prizewinning book *Brutal Need: Lawyers and the Welfare Rights Movement*, as well as an adjunct professor at the New York University School of Law. In 1998, she was named a Wasserstein Fellow at Harvard Law School in recognition of her public interest work, and in the fall of 2000 she served as the inaugural Kate Stoneman Visiting Professor of Law and Democracy at Albany Law School. Ms. Davis holds a B.A. from Harvard University, an M.A. (Oxon.) from Oxford University, and a J.D. from the University of Chicago.

Peter Edelman

Peter Edelman is a Professor of Law at Georgetown University Law Center where he has been on the faculty since 1982. He took leave from 1993 to 1996 to serve in the U.S. Department of Health and Human Services, first as Counselor to Donna Shalala and then as Assistant Secretary for Planning and Evaluation. Professor Edelman was Associate Dean of the Law Center in the late 1980s, Director of the New York State Division for Youth in the late 1970s, and Vice President of the University of Massachusetts before that. He was a Legislative Assistant to Senator Robert F. Kennedy from 1965 to 1968 and was Issues Director for Senator Edward Kennedy's Presidential campaign in 1980. He served as Law Clerk to Supreme Court Justice Arthur J. Goldberg in 1962-63 and before that to Judge Henry J. Friendly on the U.S. Court of Appeals for the Second Circuit, and was Special Assistant to Assistant Attorney General John Douglas in the U.S. Department of Justice following his Supreme Court clerkship.

Professor Edelman's book, *Searching for America's Heart; RFK and the Renewal of Hope*, was published by Houghton-Mifflin in
January 2001. He is the author of many articles on poverty, constitutional law, and issues relating to children and youth. His article in the Atlantic Monthly entitled, "The Worst Thing Bill Clinton Has Done" received the Harry Chapin Media Award. Professor Edelman grew up in Minneapolis, Minnesota, and attended Harvard College and Harvard Law School.

**Don Friedman**

Don Friedman is a Senior Policy analyst with the Community Food Resource Center, a non-profit organization that addresses food, hunger, nutrition, and income issues in New York City. In that capacity, he focuses particularly on welfare and welfare reform issues, engaging in advocacy, education, and advice concerning public assistance issues. Before joining CFRC, Friedman worked for 21 years as a staff attorney and then as a government benefits specialist with Legal Services for New York City. He also teaches in the Urban Studies Department at Queens College. Friedman obtained his B.A. from the University of Michigan, and his J.D. from Harvard Law School.

**Peter Lehner**

Peter Lehner is currently the Chief of the Environmental Protection Bureau in the New York Attorney General's office. The Bureau both enforces state and federal environmental laws and defends state agencies when sued on environmental matters. Lehner worked previously for five years at the Natural Resources Defense Council, where he was senior attorney and director of the Clean Water Project. From 1985-1994, Peter worked with the New York City Law Department, first in the Affirmative Litigation Division and later as Deputy Chief of the Environmental Law Division. He also teaches environmental law at Columbia Law School. Lehner obtained his J.D. from Columbia Law School in 1984, and his B.A. from Harvard College. He clerked for Chief Judge James Browning of the United States Court of Appeals for the Ninth Circuit.

**David L. Markell**

Professor David L. Markell joined the Albany Law School faculty in 1992. He teaches a series of environmental law and other courses at the Law School. Professor Markell is the author of
numerous publications on environmental law and related topics. One book co-authored by Professor Markell received the Award for Scholarship from the American Bar Association Section of Administrative Law and Regulatory Practice and was designated the “most outstanding work of legal scholarship in the field” published in 1995. Professor Markell has been actively involved in environmental issues at the international, national (U.S.), state, and local levels while a member of the Albany Law School faculty. He has testified numerous times before the U.S. Congress and the New York State Legislature. He also has served on several work group and other advisory bodies. Professor Markell serves as a member of the New York State Bar Association Environmental Law Section’s Committee, and in 1997 received its Certificate of Achievement award. Professor Markell took a leave of absence from the Law School between August 198 and June 2000 to serve as Director, Submissions on Enforcement Matters, for the North American Commission for Environmental Cooperation (CEC).

Prior to joining the Albany Law School faculty in 1992, Professor Markell served as Director of the Division of Environmental Enforcement for the New York State Department of Environmental Conservation (DEC). He also has served as an attorney with the United States Environmental Protection Agency and as a Trial Attorney with the United States Department of Justice’s Environmental Enforcement Section. Professor Markell is a 1975 magna cum laude graduate of Brandeis University and a 1979 graduate of the University of Virginia School of Law.

Shelley H. Metzenbaum

Shelley H. Metzenbaum is a Visiting Professor at the University of Maryland’s School of Public Affairs, where she leads the Environmental Compliance Consortium, a project that brings state environmental protection agencies together to develop better ways to measure and manage state environmental compliance and enforcement programs. She also serves as Director of the Performance Management Project at the Kennedy School of Government, Harvard University, a project that convened public and private leaders from the federal, state, and local level to identify ways to make public sector performance measurement more useful. Professor Metzenbaum is the author of several articles on ways to strengthen the environmental protection system by making it more information-driven and performance focused.
During the first term of the Clinton Administration, Professor Metzenbaum served as Associate Administrator of the U.S. Environmental Protection Agency for Regional Operations and State/Local Relations. As Associate Administrator, she managed the design and implementation of the National Environmental Performance Partnership System (NEPPS) and the Sustainable Development Challenge Grant program. Previously, Metzenbaum served as Undersecretary of the Massachusetts Executive Office of Environmental Affairs (EOEA). As Undersecretary, she initiated a program that certifies private sector third-parties to oversee clean-ups of contaminated sites, greatly accelerating the clean-up of all but the most seriously contaminated sites. She also launched the “money-back-guarantee” permit reform program. Under this program, which has since been replicated in several states, the business community agreed to pay higher fees to cover the cost of permit review and compliance assurance and the state committed to speedier action—although not assured approval—of permits. Prior to serving as Undersecretary, Professor Metzenbaum was Director of Capital Budgeting for the Commonwealth of Massachusetts. Professor Metzenbaum holds a Ph.D. and Masters degree from the Kennedy School of Government, Harvard University, and a B.A. degree in Humanities and Asian Studies from Stanford University.

Richard Nathan

Richard Nathan directs the Nelson A. Rockefeller Institute of Government, the public policy research arm of the State University of New York, which is located in Albany. Prior to coming to Albany, he was a professor at Princeton and before that a Senior Fellow at The Brookings Institution. His government service includes directing domestic policy research for the National Commission on Civil Disorders (the Kerner Commission) and the national campaigns of Nelson A. Rockefeller. He was assistant director for the U.S. Office of Management and Budget and deputy undersecretary for welfare reform of the U.S. Department of Health, Education and Welfare. His books include Implementing the Personal Responsibility Act of 1996: A First Look (Rockefeller Institute Press, 1999), Turning Promises Into Performance (Columbia University Press, 1993), and Social Science in Government (Rockefeller Institute Press, 2000). Nathan is an advisor to the U.S. General Accounting Office.
Erik D. Olson

Erik D. Olson joined the National Resources Defense Council (NRDC) in 1991 as a Senior Attorney, specializing in public health issues including drinking water, pesticides, toxics, and food safety. Mr. Olson is the National Coordinator of the Campaign for Safe and Affordable Drinking Water, a coalition of over 300 public health, environmental, consumer, and other groups dedicated to improving drinking water protection. He is also the Coordinator for the D.C. Area Water Consumers Organized for Protection (D.C. Area Water COPs), a coalition of local citizen, public health, environmental, and other groups fighting for better drinking water in the Nation's Capital. Erik also sits on the EPA-American Water Works Association Research Committee. Until 1997 he served as the national environmental group representative on the congressionally-chartered National Drinking Water Advisory Council. From 1986-1992, he was counsel for the Environmental Quality division at the National Wildlife Federation (NWF), the largest environmental group in the country, where he worked on pollution issues. He teaches an environmental law seminar at the University of Virginia School of Law, and has taught courses in environmental law at the University of Maryland. From 1984-1986, he was an attorney at the Office of General Counsel, of the U.S. Environmental Protection Agency, where he litigated environmental cases in numerous courts. At EPA’s General Counsel’s office, he worked on the Safe Drinking Water Act, hazardous waste, and the Clean Water Act. Olson received his J.D. from the University of Virginia and his B.A. in an independently-created major, Environmental Biology and Management, from Columbia University.