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Robert A. Sedler

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Robert A. Sedler*

In my response to Professor Howard's excellent paper,[1] I will focus on the values that may be implemented by a federal system of government and relate those values to the American federal system that exists today. It is not possible to look at the American federal system as it exists today without understanding the historical and evolutionary factors that brought about the particular form that this system takes. The American federal system was not planned. Analytically, it is an "accident of history" that came about as a result of historical circumstance and gradual evolution. Rather, when constitutional planners in today's new nations study the American federal system as a model or source of ideas for their own system, they must look at the American federal system very carefully and understand precisely how that system came into being and how it evolved into its present form. The form that the American federal system takes today is the result of the interaction of three factors: (1) the American Revolution that transferred the sovereignty formerly exercised by Great Britain over domestic matters to the newly-independent individual American states; (2) the Constitution of 1787 that established a federal government and at the same time imposed certain "national unity" type restrictions on the otherwise sovereign states; and (3) the Supreme Court's constitutional interpretation of the nature of federal and state power in such a way as to give rise to what may be called the principle of concurrent federal-state power with latent federal supremacy.

When the thirteen colonies declared their independence from Great Britain in 1776, each colony became an independent and sovereign state for constitutional purposes and succeeded to the sovereignty formerly possessed by Great Britain over domestic matters. Thus, the American federal system that exists today started out only with the states. This means that in American constitutional theory succession is the source of

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* A.B., 1956; J.D., 1959, University of Pittsburgh; Professor of Law, Wayne State University.

1. *See* Dick Howard, *The Uses of Federalism*, 8 AM. U.J. INT'L L. & POL'Y 389 (1993).

state sovereignty over domestic matters, and American states do not depend on the United States Constitution as the source of their power over domestic matters. As a result, each state has its own system of law and its own system of courts. The states can then exercise the panoply of sovereign powers over domestic matters, such as the power to levy taxes, the general criminal law power, and the general regulatory power. The states are limited only to the extent that the federal Constitution prohibits or restricts a particular exercise of state power.[2]

The federal Constitution came about in no small part in reaction to the way that the states were exercising their sovereignty. The states were discriminating against citizens of other states, imposing custom duties on products from other states, and embargoing their own products. In general, they were trying to gain economic advantages for themselves over the other states.[3] However, except for imposing some "national unity" type restrictions, the Constitution did not deal with the excesses of state sovereignty by significantly reducing the scope of state power. Rather, the Constitution established a federal government with specific powers to regulate domestic matters, and provided for federal supremacy in the event of a conflict between the exercise of federal and state regulatory

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2. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (comparing state and federal sovereignty). The principle that the states possess the general sovereign power over domestic matters except as prohibited or restricted by the federal Constitution is textually embodied in the Tenth Amendment, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. In this sense the Tenth Amendment reiterates the Constitution's description of the relationship between national and state governments as it was expressed prior to the amendment. United States v. Darby, 312 U.S. 100, 124 (1941).

The states, however, did not succeed to that aspect of the sovereignty formerly exercised by Great Britain over foreign affairs. That aspect of sovereignty devolved upon the "Union of States" that was waging the Revolutionary War and that eventually concluded the peace with Great Britain. Since sovereignty over foreign affairs never belonged to the states, it is deemed in American constitutional theory to be inherent in the federal government that was subsequently established by the Constitution. Thus, the federal government has the inherent power to conduct the foreign affairs of the Nation, and as regards the constitutional allocation of federal and state power, the foreign affairs power is an exclusive federal power. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-18 (1936). *See* John E. Nowak & Ronald D. Rotunda, *A Comment on the Creation and Resolution of a "Non-Problem": Dames & Moore v. Regan, The Foreign Affairs Power and the Role of the Court*, 29 U.C.L.A. L. REV. 1129, 1146-50 (1982) (discussing the foreign affairs power).

3. *See* Guy v. Baltimore, 100 U.S. 434, 439-41 (1880) (describing state discrimination and economic protectionism).

power.[4]

Nonetheless, only a few of the powers of the federal government, such as the power over immigration and naturalization and the power to coin money, are exclusive federal powers.[5] Thus, in the absence of a conflict between federal power and state power, the states are generally free to exercise their full sovereignty over domestic matters. Over the years, the Supreme Court has interpreted the specified powers of the federal government very broadly, so that today there is no activity, no matter how "local," that cannot be reached by the federal government.[6] Thus, the overriding principle of the American federal system is that the states and the federal government have concurrent power over virtually every domestic matter.

Latent federal supremacy exists in the sense that Congress can restrict or prohibit a particular exercise of state power by federal preemption. However, a strong respect for state sovereignty contributes to a reluctance on the part of Congress to preempt state regulation and, correspondingly, a reluctance on the part of the Court to find that Congress intended to do so.[7] Preemption will only be found where (1) Congress

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4. The Supremacy Clause provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI. § 2.

5. In order for a power to be exclusively federal, it must affirmatively be granted to Congress. *Id.* art. I, § 8. Additionally, it must either be expressly denied to the states in article I, section 10, or be of such a nature that the exercise of that power by the states would be incompatible with its exercise by Congress. U.S. CONST. art. I, §§ 8, 10.

6. The broad interpretation of the specific powers of the federal government has been most prominent with respect to the power of Congress over interstate and foreign commerce. For example, in one case, the Supreme Court held that when regulating wheat production in order to control wheat prices, Congress could prohibit a farmer from feeding wheat that he grew on his own farm to his livestock. Wickard v. Filburn, 317 U.S. 111 (1942). Because wheat grown on a large number of farms for livestock feed could have a nationwide effect on wheat prices, Congress, in the exercise of the commerce power, can require that a farmer not grow wheat on his land and buy his wheat at market instead. *Id.*; *see also* Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264 (1981) (upholding Congress' exercise of the commerce power to regulate local surface coal mining); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §5-4 (2d ed. 1988) (discussing the power of Congress to regulate interstate commerce under the Constitution).

7. *See* Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev.

has expressly preempted certain kinds of state regulation in the text of the federal law,[8] (2) an exercise of state power directly conflicts with an exercise of federal power,[9] and (3) in limited circumstances where Congress has impliedly intended to "occupy the field," so as to leave no room for any state regulation.[10] Thus, federal regulation rarely preempts state regulation. Accordingly, the principle of concurrent power remains operative. Just as the federal government can exercise its power throughout the United States, each state can exercise considerable power within the boundaries of that state. Because the American federal system is comprised of two sets of sovereigns with concurrent powers, there is a great deal of overlapping regulation.

The constitution responded to the excesses of state sovereignty during

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Comm'n, 461 U.S. 190, 206 (1983) (stating that the presumption is against preemption). The Court assumes that, absent clear Congressional intent to the contrary, state police powers are not to be superseded by federal law. *Id.*

8. Congress has established a standard of preemption in the text of the federal law which the courts must apply to determine whether a particular state regulation has been preempted by federal law. *See, e.g.*, Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992) (evaluating state powers in light of a federal law concerning cigarette labelling and packaging). The Supreme Court applied the preemption standard and held that the federal law preempted some state law tort claims, such as one based on a failure to adequately warn of the dangers of smoking, but not others, such as one based on intentional fraud and misrepresentation. *Id.*

If Congress expressly disclaims any intention to preempt by including a "savings clause" in the federal law, state laws on the subject that are not inconsistent are not preempted. Federal civil rights laws dealing with discrimination in public accommodations, employment, education, and housing are examples of such laws.

9. *See* Hisquierdo v. Hisquierdo, 439 U.S. 742 (1979) (holding that where a federal law providing retirement benefits explicitly stated that the benefits provided under it would not be subject to legal attachment, a state could not apply its marital property law to require that a share of these benefits go to the other spouse upon divorce).

10. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52 (1941) (holding that federal law dealing with the registration of aliens preempts all state alien registration laws). "Occupying the field" preemption can occur when state regulation affects an area in which the federal interest is dominant. *Id.* This type of preemption also occurs when both the character and goal of the law are federal in nature. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). The Supreme Court has held, for example, that although the comprehensive federal regulation of nuclear energy preempts all state nuclear safety regulation, it does not preempt the states from regulating the economic aspects of nuclear power. Pacific Gas & Electric Co., 461 U.S. at 222. The Court has further held that states are not preempted from allowing tort recovery of compensatory and punitive damages for the harm caused by the escape of hazardous nuclear energy materials. Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984).

the pre-Constitution first by using the Privileges and Immunities Clause[11] to impose certain restrictions on state power.[12] Additionally, the Full Faith and Credit Clause[13] requires that the states recognize court judgments and other legal acts of sister states.[14] The Supreme Court has also found that the negative aspect of Congress' constitutionally granted power to regulate interstate commerce prohibits the states from discriminating against interstate commerce in favor of local commerce.[15] Finally, in light of the "national unity" that the American federal system was designed to establish, the Supreme Court has held that all Americans have the constitutional right to move freely from state to state and to take up residence in any state.[16]

Thus, the evolution of the attributes of the American federal system

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11. U.S. CONST. art. IV, § 2, cl. 1. The privileges and immunities clause states that "the citizens of each state shall be entitled to all Privileges and Immunities of the Citizens of the several States." *Id.*

12. *See* Hicklin v. Orbeck, 437 U.S. 518 (1978) (holding that a state law requiring private employers to give preference to state residents in employment in all oil and gas operations somehow connected to state-owned oil and gas violates the privileges and immunities clause); Austin v. New Hampshire, 420 U.S. 656 (1975) (disallowing a commuter tax applicable only to non-residents); Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) (holding that a prohibition against the admission of non-residents to the practice of law in the state violated the privileges and immunities clause).

13. U.S. CONST. art. IV, § 1. The full faith and credit clause provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." *Id.*

14. Fauntleroy v. Lum, 210 U.S. 230 (1908).

15. *See generally* Robert A. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885 (1985) (noting that where the essential effect of the regulation is to limit interstate in favor of local interests, the regulation violates the Commerce Clause). To a limited degree, the negative aspect of the commerce clause also precludes the states from enacting regulations that impose an "undue burden" on interstate commerce. *Id.* However, since the source of this limitation on state power is the affirmative power of Congress, this limitation does not run against Congress, and Congress can expressly authorize the states to enact laws that would otherwise violate the negative aspect of the commerce clause. *Id.* at 1000-02.

16. *See* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867) (invalidating the imposition of a head tax on the exit of all persons leaving the state); United States v. Guest, 383 U.S. 745, 757 (1966) (stating that the right to travel between states is fundamental); Edwards v. California, 314 U.S. 160 (1941) (invalidating a state law prohibiting the entrance of indigent persons into the state); Shapiro v. Thompson, 394 U.S. 618 (1969) (striking down a one year waiting period to be eligible for welfare benefits).

can be summarized as follows: (1) the states and the federal government have concurrent power over domestic matters, subject to latent federal supremacy if Congress chooses to displace state power, which it is reluctant to do; (2) the states generally cannot discriminate against citizens of other states or against interstate commerce; and (3) all Americans have the constitutional right to move freely from state to state and to take up residence in any state.

I now want to relate these attributes of the American federal system to the matter of the values of federalism, of which Professor Howard has spoken. The American federal system advances at least three values in this respect. These values may be somewhat different, at least in part, from the values of federalism discussed by Professor Howard. These values may be referred to as structural values, values that reflect the effects of power allocation and exercise in the American federal system.

The first value is that of power-sharing and maximization of regulation. The federal government and states share power in almost equal measure. States can regulate virtually everything in the domestic area unless the federal government prohibits them from doing so. This power-sharing maximizes regulation because individuals and businesses are subject to being regulated by both the states and the federal government. By the same token, this power-sharing promotes experimentation by the states. As Supreme Court Justice Louis Brandeis pointed out many years ago: "it is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[17] One example of this experimentation today is medical care. The United States does not yet have a federal system of universal health coverage and large numbers of people simply do not have access to medical care. Some states, however, are trying to set up state-operated systems that will provide health coverage for all of their residents. If successful, this "experimentation" will provide the residents of those states with health coverage even if the federal government is unwilling to provide universal health coverage for all Americans.

It is precisely because the states have so much power that differing state regulation can have a significant impact on the quality of life from state to state. This raises the value of *choice* within a federal system.

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17. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting). That decision, which held unconstitutional a particular state economic regulation, has subsequently been effectively overruled. North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973).

This value ties in with the problem of inequality within a federal system, of which Professor Howard has spoken. However, this inequality results from different policy choices made by different state governments, all of whom have been democratically elected. As a result of these differences, to use the above example, in some states people will be guaranteed access to adequate medical care, while in most states they will not. Likewise, welfare and social insurance benefits differ widely from state to state. Some states regulate businesses extensively while others do not. So too, the level and nature of taxation differs significantly from state to state. All of these differences do bring about a degree of inequality within a federal system, but they also serve to implement the value of choice within a federal system. Again, people have the absolute right to leave one state and take up residence in another state. To the extent that differing state regulation can affect the quality of life within the different states, people make choices about the quality of their lives by deciding where they will live.[18]

My home state of Michigan, for example, is supposedly an "anti-business" state. Labor unions are strong, business is highly regulated, welfare and social insurance benefits are relatively high, and so are taxes. Correspondingly, Michigan has a good educational system and a skilled work force. There is a purported concern that new businesses will not locate in Michigan and that established businesses will leave for states that are considered "pro-business," namely those where business is less regulated, business taxes, workers' compensation and unemployment benefits are lower, and where labor unions are weaker. Michigan's economy has revolved in large part around manufacturing jobs in the automobile and related industries, where wages and benefits are relatively high. Michigan's unemployment rate has traditionally been higher than most states, but those who are working receive good wages and "fringe benefits," and unemployment and welfare benefits are better than in many other states. Thus, there are "trade-offs" in Michigan, and individuals and businesses can make choices in light of those "trade-offs."

The American federal system produces inequalities, but at the same time implements a value of choice. People can choose to live in one state or another with reference to quality of life concerns that are affected by the way that a particular state exercises its sovereignty. Thus, choice is a very important value that is implemented by the American

18. Experience indicates that significant numbers of poor people also manage somehow to move from one state to another, in the hope of bettering their situation in life.

federal system.

A third value that the American federal system implements is the value of national consensus. Because of the principle of latent federal supremacy, whenever there is a national consensus on an important question of public policy, that national consensus, as reflected in the enactment of a federal law, will control. This is a constitutional political consensus, which simply means that there is a measure of agreement between Congress and the President on an important question of public policy.[19] The possibility of the federal government acting in response to a national consensus is in a sense a safety valve, which enables the people of the United States to decide collectively that a given matter involves a sufficient national concern so as to require a national solution.

Perhaps the best illustration of such a national consensus is the federal Civil Rights Act, which prohibits racial and other forms of group discrimination in employment, education, public accommodations and housing.[20] When Congress enacted the Civil Rights Act in 1964, some states had enacted anti-discrimination laws, but a number of states, especially the states in the South, which had a long history of racial discrimination, had not. The result of the Act was a national commitment to the principle of equality for racial minorities and other traditionally victimized groups in American society.

These three values, power sharing, choice, and national consensus are implemented most strongly by the American federal system as it has developed and evolved over the years. Through these values, the American federal system as it exists today, may be able to provide some guidance for the emerging new nation of South Africa.

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19. Robert A. Sedler, *Review Essay, Employment Equality, Affirmative Action, and the Constitutional Political Consensus,* 90 MICH. L. REV. 1315, 1321-23 (1992). Congress and the President are the political branches of the federal government, because they are electorally accountable, and the consensus is a constitutional one because the Constitution envisages legislation and the creation of federal policy as primarily a collaborative and cooperative effort between Congress and the President. *Id.* Our system of representative democracy looks to the actions taken by the political branches to determine popular will and the constitutional assumption is that the actions of these branches do represent the popular will, regardless of whether these actions in fact reflect the wishes of a majority of the electorate. *Id.*

20. 42 U.S.C. §§ 2000 *et seq.* (1988 & Supp. II 1990).