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Federalism and Freedom

By SETH F. KREIMER

ABSTRACT: The argument for devolution of power to state and local governments in contemporary Supreme Court cases regularly relies on claims about the virtues of federalism as a means of maintaining individual liberty. This article explores the plausibility of the argument that supplanting federal with state authority is likely systematically to protect individual liberty. The article argues that if there is a viable argument for "federalism as freedom," it must go beyond the sense that two governments are more repressive than one or that the federal government is more inclined to curtail liberty than is a state or local authority. The plausible claims rely on the abilities of autonomous state governments to provide a competing source of norms and to allow escape from oppressive laws. The availability of sanctuaries in other states is a function of rights of interstate travel and territorial limitations on state jurisdiction, which themselves require federalized constraints on state and local autonomy.

Seth F. Kreimer is a professor of law at the University of Pennsylvania Law School, where he teaches courses on constitutional law, constitutional litigation, and freedom of expression. He clerked in the chambers of Judge Arlin M. Adams of the United States Court of Appeals for the Third Circuit in 1977-78. After three years in private practice, he joined the faculty of the University of Pennsylvania in 1981. He has written and litigated widely in the areas of federalism and the constitutional rights to bodily autonomy, reproductive freedom, privacy, free expression, and interstate travel.

IT comes as no news to thoughtful observers that the Supreme Court is reviving judicially enforced constitutional limits on national power under the banner of federalism. On a number of fronts, a five-member majority of the current Court is moving systematically to substitute state for federal authority as enthusiastically as at any point in the Court's history. In the past two terms, the Court has invalidated six federal statutes as inconsistent with its vision of federalism,[1] a rate unsurpassed since the judicial reaction against the New Deal during 1935-36. Earlier Courts rooted constraints on national power primarily in claims about historical fidelity to founding principles, the "slogan 'Our Federalism,' born in the early struggling days of our Union,"[2] or the legal status of reserved rights of states. By contrast, the argument for devolution of power to state and local governments in contemporary cases regularly relies on claims about the virtues of federalism as a means of achieving other values. Prominent among these claims has been the proposition that federalism is important as a means of avoiding tyranny and maintaining individual liberty.[3]

When I first encountered such arguments, they seemed to embody a peculiarly morbid variety of humor. States'-rights federalism had, after all, begun as a mechanism that found its most prominent calling in defending the "peculiar institution" of slavery against national intervention (Scheiber 1996). It had underpinned the evisceration of Reconstruction.[4] In my formative years as a lawyer and legal scholar, during the late 1960s and 1970s, it was regularly invoked as a bulwark against federal efforts to prevent racial oppression, political persecution, and police misconduct. The most recent spasm of judicial activism has taken its toll on protections against official discrimination based on age, official appropriation of intellectual property, and misogynist violence. On its face, federalism seemed to me an odd candidate for the role of palladium of liberty.

Yet the end of the twentieth century has seen an emergence of some state legal regimes that provide recognizably more protections to individual liberties than their federal counterparts. From medical marijuana in California to assisted suicide in Oregon, from protections of minors' rights to abortion in Florida and New Jersey, to access to handguns in Montana, to gay partnership in Vermont, states provide protections denied by federal law. This article will explore the plausibility of the arguments that the process of supplanting federal with state authority is likely systematically to protect individual liberty, and the constitutional presuppositions that underpin the most plausible arguments.

ARE TWO GOVERNMENTS MORE DANGEROUS THAN ONE?

Initially, if one defined liberty simply as freedom from government constraint, one might believe that curtailing the reach of federal power would be likely to increase the liberty of citizens by limiting the number of sovereigns who may set constraints. If a particular activity, whether it is

abortion, marijuana use, or gun ownership, is subject to potential regulation by both state and federal authorities, the chances of governmental intermeddling might be thought to double. Where two sovereigns may issue commands, before an individual may engage in the practice in question, she must comply with two sets of rules. Interests seeking to limit a practice can succeed by obtaining either state or federal regulation.

But this perception is not necessarily accurate, for under the supremacy clause of Article VI of the federal Constitution, federal regulation can preempt the effect of state rules. If an area lies within the sphere of federal competence, the federal government may reserve regulation of that area for itself, and if federal rules are more permissive than the rules states may wish to impose, federal authority increases, rather than decreases, liberty. In the founding generation, federal preemption liberated interstate steam transportation from local impediments;[5] during the McCarthy era, it prevented enforcement of the most draconian of state sedition laws;[6] in the struggles of the 1990s, federal preemption was invoked to bar enforcement of California's Proposition 187 against undocumented immigrants.[7] Strikingly, in recent terms, even as the Supreme Court has begun to prune the scope of some federal powers, it has aggressively employed preemption doctrine to immunize a variety of business activities from state regulation in areas that remain within federal authority, invalidating four exercises of state authority in the last year alone.[8] But it is not only business that benefits from federal supremacy. Where the federal government affirmatively seeks to constrain the state's exercise of its monopoly on coercive violence—by, for example, limiting the state's authority to incarcerate mentally ill citizens in secluded institutions[9] or by constraining the authority of local police to abuse the citizenry at large—federal authority unambiguously protects personal liberty.

In most thoughtful definitions, moreover, governments are not the only threats to liberty. Allowing murder, rape, and robbery to go unpunished reduces the amount of government constraint in society, but it is hard to envision the shambles of civil society in contemporary Sierra Leone or Albania as paradigms of individual liberty. A reasonable sense of liberty entails not simply the absence of government constraint, but the absence of unjust private constraints. The addition of federal to state and local authority to prevent unjust private impositions, therefore, may systematically increase liberty either by providing greater sanctions and enforcement agents to enforce common civil norms or by protecting against private violence where state law does not.

In this sense, the extension of federal power has regularly protected liberty. Federal protections against violence directed at citizens who sought to vote or to organize for civil rights or to utilize integrated public facilities clearly increased the liberty of those citizens—though at the cost of decreasing the liberty of their prospective assailants. Conversely, in

the aftermath of Reconstruction, the Supreme Court's decision that private racial violence lay outside of the province of federal authority effectively reduced the liberty of African American citizens. More recently, the removal of federal protections against gender-motivated violence in *United States v. Morrison*[10] decreased the liberty of potential victims of those crimes.

If there is a viable argument for federalism as freedom, therefore, it must go beyond the sense that two governments are more repressive than one.

IS THE FEDERAL GOVERNMENT MORE INCLINED TO CURTAIL LIBERTY?

A second support for devolution as a method of protecting liberty would arise if, as compared with state and local authorities, federal authorities are more likely to seek to interfere with individual liberty and less likely to protect it. Strains of such assumptions accompanied the debates on the framing of the Constitution, and there is certainly reason to believe that, for any individual citizen, ceteris paribus, her potential influence on government is likely to be greater at the local than the national level. Yet responsiveness is no guarantee against repression, for citizens may seek to impose constraints upon others as well as to resist constraints against themselves. Ultimately, a presumption of local virtue is more characteristic of the vanquished Anti-Federalists than of the prevailing Framers. Indeed, one of Madison's arguments for an "extended republic" was precisely that the variety of cross-cutting factions within a larger polity makes oppressive triumph of any one less likely (Rossiter 1961, Federalist 10, 78, 80, 83; Federalist 51, 324-25; Federalist 9, 71, 75). And, despite periodic claims that federal agents are more subject to capture by special interests than are states due to the difficulty of national organization by diffuse interest groups (Rapaczynski 1985, 341, 386-88), there is certainly an adequate stock of examples of state-level special interest oppression in American history—not least in the area of race relations—to leave the issue of whether state or federal governments are more disposed to protect individual liberty at best a subject of debate.

The most reasonable resolution of this debate, to my mind, is that both sides are right. For any particular constellation of policy preferences among the electorate, on any given issue, some states will be more oppressive than a unitary national regime, while some will be more vigilant in protection of individual liberties. Remitting a matter to local governments will result in a wider variance of policy outcomes, for unless each state is precisely reflective of the national balance of opinion, it is inevitable on any linear scale that the median voters in particular states will be arrayed around the national median. As a first approximation, it is hardly clear whether such variance is a net gain or net loss for individual freedom, since gains in freedom in the more protective states seem to be balanced by losses in the less protective ones.

DIVERSITY AND FREEDOM: THE DYNAMIC ARGUMENTS FOR FEDERALISM

Assuming that diffusion of authority to the state level will result initially in a variance in the level of individual freedom around the national norm, two mechanisms nonetheless support the claim that a decentralized system still tends to improve individual liberty. First, devolution may change the nature of the national norm itself by providing a mechanism to limit the oppressive enactments of the national government; second, it may allow escape from oppressive state laws that would be unavailable if a nationally uniform scheme were adopted.

"Double security"

Madison claimed, in a frequently cited argument, that the diffusion of power between state and federal governments provides a check against "usurpation" analogous to the security provided by separation-of-power principles at the federal level: "A double security arises to the rights of people. The different governments will control each other at the same time that each will be controlled by itself" (Rossiter 1961, Federalist 51, 323). Hamilton, similarly, argued,

> Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments and these will have the same disposition toward the general government. The people by throwing themselves into either scale will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as an instrument of redress. . . . State governments will, in all possible contingencies afford complete security against invasions of the public liberty by the national authority. (Federalist 28, 181)

In the form in which it was articulated in the *Federalist Papers*, this vision seems both simplistic and a bit of an anachronism. It seems simplistic because, as I have noted, the threats to liberty at the federal level are likely to be supported by some states and opposed by others and "the people" will sometimes be predominantly unprotective of liberty. It seems anachronistic because the core of the redress proposed was a confrontation at arms whose plausibility in the twenty-first century should evoke some skepticism.

Still, if even a few states provide greater protection than the federal norm, the existence of alternatives to the authority of the federal government can legitimate political opposition to repression in ways that would be unattainable in the absence of a diffusion of political authority. At a minimum, the existence of alternative political visions makes it more difficult to demonize and extirpate political dissenters or to claim that the repression in question is unassailably valid. Beyond that, local political bases provide the platform for efforts to oust potentially repressive leaders by political means.[11] From Madison and Jefferson challenging the Alien and Sedition Acts in the legislatures of Kentucky and Virginia, to Ronald Reagan critiquing the Great Society in California, to Bill Clinton, in Arkansas,

building a successful challenge to a sitting president, the existence of state-level alternatives to the nationally dominant political orthodoxy has made an electoral—if not a military—challenge to that orthodoxy more likely. The threat of electoral competition is a check on the temptation of political abuse, and the availability of a variety of exemplars of political values in action increases the variety of live choices that citizens may consider at the ballot box.

At the political level, to the extent that unjust limitations on liberty are often the result of exaggerations of the danger of the alien or unfamiliar, or a miscalculation of the benefits of regulation, the availability of a variety of venues for policy makes it less likely that unjust infringements on liberty will survive. On the one hand, experimentation with policy alternatives will allow the empirical impeachment of claims that liberty will generate a parade of horrors. The positive experience with allowing patients the right to refuse treatment after the *Quinlan* case[12] laid the basis for a national consensus on patients' rights that was unavailable a decade earlier. The fact that recognition of gay couples in Vermont does not wreak havoc with the state's family structure will provide a basis for allowing similar rights in other states. Conversely, if a deprivation of liberty in one state fails to provide the hoped-for benefits, one may join Chief Justice Taft's "hope that the tendency to error in the weakening of constitutional guaranties that is going on in some states may be halted by the . . . actual experience [that] . . . will ultimately bring back the nation to sounder views" (Post 1992, 68).

It is worth remembering, however, that the challenged national orthodoxy may itself preserve liberty. The history of local resistance to national civil rights initiatives is a sobering reminder that local autonomy may come at a cost to individual freedom. A priori, there is no reason to maintain that repressive movements launched from protected enclaves of local authority will be less prevalent than crusades of liberation. Nonetheless, in the last two generations, while it is easy enough to come up with recent examples of state-level innovations that have spread liberty to the national scene—abortion, gay rights, and the right to refuse medical treatment come immediately to mind—it is more difficult to call to mind contemporary examples of local repression that have successfully infected the national polity.

Exit and sanctuary

While the "double security" argument for the linkage between federalism and individual liberty is plausible, it rests on a series of debatable political predictions. A final basis for the claimed linkage between federalism and freedom, however, relies on an analytically unimpeachable claim: state-by-state variation leaves open the possibility to each individual of choosing to avoid repression by leaving the repressive jurisdiction. A nationally applicable norm is unavoidable short of exile; a state law can be avoided with a moving van.

At a minimum, where states adopt different positions on issues of irreducible moral disagreement, the variety of local political regimes gives citizens a choice of the rules they live under that would be unavailable in a centralized system. In its strong form, the argument would hold that as long as there is at least one state on any issue that adopts a position as libertarian as the most libertarian position that a national regime could adopt, a national regime cannot improve on a local regime—since those who value the liberty can migrate to the libertarian state—while national uniformity risks the adoption of a uniform and inescapable repressive norm.

The value and possibilities of geographical sanctuary run through American history. America was, after all, founded in part by immigrants who sought and found sanctuary from political and religious repression. The closing of the western frontier by Great Britain was adduced as one of the justifications for independence (Chafee 1956, 182); after independence, Article IV of the Articles of Confederation expressly protected the right of migration, providing that "the people of each state shall have free ingress and regress from any other state." We see the reflection of the possibilities of interstate escape in the fugitive slave clause, the extradition clause, the full faith and credit clauses of Article IV of the Constitution, and the free soil arguments and personal liberty laws that preceded the Civil War (Finkelman 1981, 293-338; Smith 1997, 809).

After the Civil War, Mormons moved from Illinois to Utah, while African Americans migrated from the Jim Crow South (Bernstein 1998, 781). Rail travel and, later, automobiles and airplanes enabled residents of conservative states to escape constraints on divorce and remarriage.[13] In the years before *Roe v. Wade*,[14] women from states with restrictive abortion laws sought reproductive autonomy in more sympathetic jurisdictions (Kreimer 1992, 451, 453-56). Today, the lesbian who finds herself in Utah, like the gun lover who lives in Washington, D.C., and the gambler in Pennsylvania, need only cross a state border to be free of constraining rules. These are liberties that come only with the variations in local norms made possible by federalism.

To be sure, this exit option is no panacea; the strong form of the argument cannot be maintained, for "only" crossing a border is often no mean hurdle. To the citizen who is unwilling or unable to abandon her current residence, the availability of a freer life in the next state is cold comfort. For the citizen who lacks access to information, funds, or transportation, the legal possibility of liberty in a neighboring state may provide no succor. Between 2 and 3 percent of Americans change their state of residence every year, and two in five live outside of the state of their birth, but a majority never emigrate (*Statistical Abstract of the United States* 1999, 31; United States Census Website). Still, if a species of oppression is so extravagant as to overwhelm ties to job and home and

hearth—or if it can be avoided by an extraterritorial excursion—an adult citizen may escape it.

PREREQUISITES OF FEDERALISM AS FREEDOM

On its face, the judicial enforcement of federalism is concerned primarily with constraining the federal government, and most of the attention in this volume focuses on the emergence of doctrines of this sort. But the more plausible, dynamic theories connecting federalism and freedom presuppose a series of features of the federal system that limit the states themselves. In particular, the argument that federalism is linked with freedom by virtue of the availability of exit and sanctuary requires not only that states be self-governing but also (1) that citizens have the right to move between states (for if state A may prevent its citizens from moving to state B, the possible sanctuary in state B is worthless); (2) that citizens who migrate be entitled to the same rights as those who are native born (for if new emigrants from state A cannot obtain the same rights as the native born, they will be unable to take advantage of the sanctuary that state B offers); and (3) that states' jurisdiction be territorially limited (for if state A may enforce its norm within state B, state B can offer no sanctuary).

In fact, amid the fanfare accompanying the recent enthusiasm for the Tenth and Eleventh Amendments, we also observe the Supreme Court enforcing these libertarian presuppositions against both state and federal governments.

Right to travel and interstate migration

The constitutional protection for the first two prerequisites, travel and migration, has been a matter of derivation rather than explicit statement. Although Article IV of the Articles of Confederation included an explicit protection of the rights of "ingress and regress," Article IV of the Constitution of 1787 did not carry forward that language. Rather, the parallel section of the Constitution, Article IV, Section 2, simply stated that the "citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." Before the Civil War, there was wide agreement in both Congress and the judiciary that the privileges and immunities clause of Article IV prevented states from interfering with the rights of citizens to travel between states of the Union (Kreimer 1992, 501-4), though the Supreme Court found no occasion to enforce those rights.

The triumph of nationalism in the Civil War brought with it an authoritative affirmation by the Supreme Court that the right to interstate travel was constitutionally protected. Striking down a tax imposed by Nevada on local citizens departing from the state, the Court in 1871 proclaimed,

> For all the great purposes for which the Federal government was formed we are one people, with one common country. We

are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States.[15]

The Court treated the right as one that arose from the nature of the federal structure.

In adopting the citizenship clauses of the Fourteenth Amendment, which bestowed state citizenship by virtue of residency and birthright national citizenship, the framing members of Congress expected the new regime to secure the right of citizens to travel and migrate throughout the country. First, by making clear that African Americans were citizens of the states in which they resided, the Fourteenth Amendment was thought to establish authoritatively that the Article IV privilege of interstate travel and settlement extended to newly freed slaves. Second, by recognizing birthright national citizenship, and guarding the privileges and immunities of that citizenship, the Fourteenth Amendment provided direct protection and authority for Congress to protect national rights of travel and migration.[16] But the Framers failed to embed these expectations in clear constitutional language, and they were not the centerpieces of discussion.

During the next 70 years, the Supreme Court regularly affirmed the right of citizens to interstate travel and migration in dicta but failed to enter decisions enforcing those rights. The Court upheld statutes burdening the efforts of "emigrant agents" to facilitate migration out of the Jim Crow South,[17] and it denied relief to residents of Arizona driven from the state by private violence.[18] In *Edwards v. California*,[19] the Court finally struck down a California statute—adopted in 1901—that punished the act of bringing a nonresident indigent into the state. A minority of four justices relied on a personal right to interstate travel; the majority rested their decision on the proposition that the statute was inconsistent with federal authority over interstate commerce.

It was only the Warren Court that began to enforce a right to interstate travel as a constitutional privilege of national citizenship. *United States v. Guest* relied on the "constitutional right to travel from one State to another, . . . [which] occupies a position fundamental to the concept of our Federal Union" to uphold a federal prosecution of a conspiracy against out-of-state civil rights workers.[20] In subsequent cases invalidating durational residency requirements for state welfare benefits designed to discourage indigents from migrating away from their home states,[21] as well as durational residency requirements for voting[22] and medical benefits,[23] the Warren Court majority reiterated the proposition that the right to travel was a "fundamental" constitutional right that precluded discrimination against newly arrived migrants. But the justices remained opaque as to the source of that right or its precise parameters, relying alternatively on the equal protection clause, the privi-

leges and immunities clause, the due process clause, and inferences from the structure of the federal union.

The right-to-travel analysis splintered during the next two decades. Though the Court struck down durational residency requirements for some tax and social welfare benefits,[24] it upheld durational residency requirements for divorce[25] and stringent residency requirements for access to public education.[26] The justices engaged in increasingly fractious disagreement as to the proper source and scope of the right to interstate travel and migration.

Based as it had been in inferences from constitutional structure and open-ended analysis of equal protection norms, one might have imagined that the right to interstate travel and migration would fall victim to the hostility of the Rehnquist Court to extratextual individual rights. When the Court granted certiorari in 1998 to address the constitutionality of a California statute that limited welfare benefits available to arrivals from out of state during the first year of their sojourn in California to those the migrants would have received in their state of origin, only three justices remained on the bench who had previously addressed the right-to-travel issue. Each of them had dissented from Burger Court cases upholding right-to-travel claims. Moreover, the California statute was specifically authorized by a part of the recently enacted Personal Responsibility and Work Opportunity Reconciliation Act of 1996 through which Congress sought to devolve authority over welfare expenditures to the states, thereby giving color to the claim that the interests of the nation as well as the states supported the challenged limitation.

Yet when the opinion was released in *Saenz v. Roe*,[27] Justice Stevens wrote for all but two justices in striking down California's statute. The opinion reaffirmed the propositions that the Constitution protects

> the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.[28]

Invoking the citizenship and privileges and immunities clauses of the Fourteenth Amendment in place of the equal protection analysis that underpinned the Warren Court decisions, Justice Stevens announced that "citizens of the United States, whether rich or poor have the right to choose to be citizens of the state wherein they reside" while "the states, however, do not have any right to select their citizens."[29] The Court held that Congress has no more authority to dilute this right than any other guarantee of the Fourteenth Amendment.

The broad support of these forceful declarations makes perfect sense if the purpose of federalism is to preserve individual liberty, for it is the opportunity to choose a new home and take advantage of the benefits it offers that underwrites the claim that state autonomy serves the

purpose. For justices who see federalism as a guardian of liberty, neither the states nor the federal government should be able to interfere with that opportunity, either by direct prohibition or by indirect discouragement and denial of the fruits of the citizen's choice of residence.

Territorial limits

The final prerequisite to the availability of exit and sanctuary is so much a matter of common experience that we may fail to notice it: in general, states are territorially defined. When I drive across the border between Pennsylvania and New Jersey, I assume, correctly, that the speed limit with which I must comply becomes New Jersey's rather than Pennsylvania's. I can return to Pennsylvania's law by returning to its territory, and in general, I am subject to only one state's law at any given time.[30]

This limitation of state authority—and its attendant guarantee of exit and sanctuary—is familiar, but it is neither a natural fact nor a political inevitability. Pennsylvania may have reason to seek to control my actions outside of its territory, whether because they have effects within Pennsylvania (as if I were to post a letter bomb to Pennsylvania from a New Jersey address) or because the state believes that its interests are otherwise affected (as if Pennsylvania sought to prevent me from gambling in Atlantic City or prevent New Jersey doctors from providing abortions to young Pennsylvania women without parental consent). Unless otherwise constrained, it can punish me directly for my extraterritorial actions if and when I return to Pennsylvania, and, under the extradition powers and the full faith and credit clause of Article IV, it can invoke federal authority to impose its sanctions even if I choose to remain away.

Often states limit the reach of their laws to their own borders as a matter of comity, but in an increasingly mobile and interconnected society, the occasions to abandon this rule of self-restraint increase. During the first hundred years of the Republic, state courts treated the territorial limitation of state power as a presupposition of the federal structure, underwritten by the privileges and immunities clause of Article IV; after the adoption of the Fourteenth Amendment, the Supreme Court found a basis to enforce territorial limitations on state authority in the due process clause (Kreimer 1992, 464-72).[31] The New Deal constitutional revolution worked a change in this area as in others; the Supreme Court's due process jurisprudence has come to recognize a wider array of state interests and local effects to constitute reasonable bases for the exercise of prescriptive jurisdiction (Kreimer 1992, 473- 78).[32] The Court has continued, however, to discern in the commerce clause and the federal structure limits on the authority of states to seek to regulate extraterritorially.[33]

Even as the Court in recent years has reinforced state authority against federal intervention under the banner of federalism, it has reaffirmed the existence of limits on the authority of any state to seek to control actions within the territory of one of its fellows. The Court has

reiterated that "a State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State";[34] it has held that "it follows from [the] principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States";[35] it has determined that "Michigan has no authority to shield a witness from another jurisdiction's subpoena power in a case involving persons and causes outside of Michigan's governance."[36] These limits not only preserve the possibility of exit and sanctuary, but they respond to the underlying argument for devolution that "the Constitution . . . contemplates that a State's government will represent and remain accountable to its own citizens."[37] To the extent that states seek to control citizens of other jurisdictions, they lose the political accountability that the analysis of the Courts' opinions holds as a crucial safeguard against overreaching.

CODA: THE INTERNET AND THE FUTURE OF FEDERALISM

Many of the recent federalism cases have sought to preserve liberty by contracting federal authority. I have highlighted the fact that other cases—less celebrated—have preserved the underlying libertarian presuppositions of the federal system by constraining state authority. As the Internet emerges as a primary mode of interaction, the next generation will confront the Court with increasingly insistent calls for broader limits on state authority based on the same logic that now underpins devolution.

Given current technology, any posting to a Web page ineluctably makes that posting available to viewers in every state. Every state, therefore, has an incentive and a colorable claim to regulate that posting in the service of its preferred policies, even if the posting is entirely lawful both at its point of origin and under the laws of most states where the Web page is accessed. Conversely, because current technology provides no method for a Web-page poster or a chat-room participant to accurately determine the physical locations to which their information may be directed, prospective posters can find no sanctuary short of leaving the Internet entirely. Every state, if it can exercise jurisdiction over Web-page content, can effectively ban the material from all other states. Far from allowing citizens to achieve the most libertarian result offered by any state, therefore, the devolution of regulatory authority to the states would impose the least permissive state regime on the citizens of all other states. On the Internet as currently constituted, state-protective federalism will be unambiguously tipped from an arguable bastion of liberty to an engine of repression.

In light of these concerns, several lower courts have held that state efforts to regulate the content of Web sites are unconstitutionally extraterritorial.[38] To the extent that this proposition survives, regulation of

the Internet will be remitted to federal jurisdiction. And federal regulation is likely to be uniform; in a case that the Supreme Court will almost inevitably review, the Court of Appeals for the Third Circuit has held that by incorporating local community standards of decency into the Child Online Protection Act, Congress violated the First Amendment, since the standards of the community most likely to be offended by any message are effectively imposed on residents of more broad-minded communities.[39]

Any functional justification for a legal regime is hostage to the facts that inform predictions about the regime's effects. To the extent that the newly assertive federalism of the Court is based in a linkage between freedom and federalism, the values that underlie the Court's recent forays against federal power are likely to move the regulation of cyberspace—and with it an increasingly pervasive aspect of the nation's life—away from the states and toward the federal government.

Notes

1. See *United States v. Morrison*, 120 S. Ct. 1740 (2000); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999); *Saenz v. Roe*, 526 U.S. 489 (1999).

2. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

3. See *Alden*, 527 U.S. at 758 (1999) (Kennedy, J.); *College Sav. Bank*, 527 U.S. at 689 (1999) (Scalia, J.); *Printz*, 521 U.S. at 921 (1997) (Scalia, J.); *United States v. Lopez*, 514 U.S. 549 (1995) (Kennedy, J., concurring); *New York v. United States*, 505 U.S. 144, 181 (1992) (O'Connor, J.); *Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991) (O'Connor, J.); *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting).

4. See *Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Harris*, 106 U.S. 629 (1883); *Slaughter-House Cases*, 83 U.S. (1 Wall.) 36 (1873).

5. See *Gibbons v. Ogden*, 22 U.S. (1 Wheat.) 1 (1824).

6. See *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

7. See *League of United Latin Amer. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995).

8. *Norfolk Southern Ry Co. v. Shanklin*, 120 S. Ct. 1467 (2000) (preempting state tort liability); *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000) (preempting municipal effort to require contractors to boycott Burma); *United States v. Locke*, 120 S. Ct 1135 (2000) (preempting state regulation of oil tankers); *Geier v. American Honda*, 120 S. Ct. 1913 (2000) (preempting state tort liability for failure to install airbags).

9. See *Olmstead v. L. C.*, 527 U.S. 581 (1999).

10. 120 S. Ct. 1740 (2000).

11. See Federalist 28 ("Projects of usurpation cannot be masked under pretenses so likely to escape penetration.... The [state] legislatures will have better means of information. They can discover danger at a distance, and possessing all the organs of civil power and the confidence of the people, they can at once adopt a regular plan of opposition.") (Rossiter 1961, 181).

12. *In re Quinlan*, 355 A.2d 647, 664 (N.J. 1976).

13. Hendrik Hartog gives an account of the effects of mobility and the successive roles of Indiana, Illinois, Rhode Island, Iowa, South Dakota, Arizona, Utah, and Nevada as "divorce havens" between the Civil War and the 1950s (Hartog 2000, 19-23, 247, 282).

14. 410 U.S. 959 (1973).

15. *Crandall v. Nevada*, 73 U.S. (1 Wall.) 35, 48-49 (1867) quoting *Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849) (Taney, J., dissenting).

16. See generally Kreimer 1992, 504-6.

17. See *Williams v. Fears*, 79 U.S. 270 (1900); see also Bernstein 1998.

18. See *United States v. Wheeler*, 254 U.S. 281 (1920).

19. 314 U.S. 160 (1941).

20. 383 U.S.745, 757 (1966). See also *Griffin v. Breckenridge*, 403 U.S. 88, 106 (1971) (relying on right of interstate travel to uphold congressional power to grant civil rights action).

21. See *Shapiro v. Thompson*, 394 U.S. 618 (1969). The Court rejected efforts by states to reimpose durational residency requirements. See, for example, *Lopez v. Wyman*, 329 F. Supp. 483 (W.D.N.Y. 1971), aff'd, 404 U.S. 1055 (1972); *Rivera v. Dunn*, 329 F. Supp. 554 (D. Conn. 1971), aff'd, 404 U.S. 1054 (1972).

22. See *Dunn v. Blumstein*, 405 U.S. 330 (1972).

23. See *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974).

24. See *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986). See also *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982).

25. See *Sosna v. Iowa*, 419 U.S. 393 (1975).

26. See *Martinez v. Bynum*, 461 U.S. 321 (1983).

27. 526 U.S. 489 (1999).

28. Id. at 500.

29. Id. at 510-11.

30. Since states have no authority comparable to the supremacy clause to immunize conduct from each other's sanctions, horizontal limitations on state authority (unlike limitations on federal authority) unambiguously function to protect against imposition of a double set of governmental constraints.

31. For antebellum thinking, see *Lemmon v. People*, 20 N.Y. 562 (1860). For analysis after the Fourteenth Amendment, see *Huntington v. Attrill*, 146 U.S. 657 (1892); see also *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

32. See *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985); see also *Sun Oil Co. v. Wortman* 486 U.S. 717 (1988).

33. See *Bigelow v. Virginia*, 421 U.S. 809 (1975). See also *Healy v. Beer Institute*, 491 U.S. 324 (1989); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

34. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571 n. 16 (1996), quoting *Bigelow*, 421 U.S. at 824.

35. *BMW of North America, Inc.*, 517 U.S. at 572.

36. *Baker v. General Motors Corp.*, 522 U.S. 222, 240 (1998). See also *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (holding physical presence necessary for state taxation of income).

37. *Printz v. United States*, 521 U.S. 898, 920 (1997).

38. See *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999). See also *Psinet Inc. v. Chapman*, 2000 U.S. Dist. LEXIS 11621 (E.D. Va. 2000); *American Library Assn. v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *Cyberspace Communications, Inc. v. Engler*, 55 F. Supp. 3d 737 (E.D. Mich 1999). Cf. *Consoidated Cigar Corp. v. Reilly*, 218 F.3d 30 (1st Cir. 2000). For an earlier discussion, see Burk 1996, 1095.

39. See *ACLU v. Reno*, 2000 U.S. App. LEXIS 14419 (3d Cir. 2000).

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