

## FEDERALISM AS A DISCOVERY PROCESS AND A CATALYST FOR HUMILITY

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My subject is federalism and rights. I will argue that jurisdictional competition is, by and large, an effective way for society to discover a good set of rights for people to flourish.

It is wholly appropriate to discuss federalism in relation to law and economics because federalism creates a market for governance.<sup>1</sup> Like other market processes, federalism offers a process of discovery—for individuals who can find states with the rights that allow them to flourish and for society that can allow it to evaluate best the effects of different rights by comparing the results in different jurisdictions.

I draw on work on which Professor Nelson Lund and I collaborated.<sup>2</sup> I will begin with an abstract discussion of the advantages of competitive federalism and then illustrate these advantages in a concrete case, suggesting that competitive federalism provides a better alternative than the judicial doctrine of substantive due process for creating freedoms connected to sexual autonomy. This area is a useful one in which to compare federalism and the Supreme Court as mechanisms for creating rights, not simply because writing about rights of sexual freedom keeps people's attention but because it is in the area of sexual autonomy that the Court has most usurped the process of competitive federalism.

I begin with two simple premises—one about the content of rights and another about their epistemology. First, good societies are concerned with protecting both liberty and other conditions

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1. See John O. McGinnis, *The World Trade Organization as a Structure of Liberty*, 28 HARV. J.L. & PUB. POL'Y 81, 81 (2004).

2. Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1607 (2004).

for human flourishing.<sup>3</sup> In a good society, people should have freedom to act, but legal norms also should help sustain the conditions for the success of family life, friendship, and other social goods. In short, we should seek the set of rights that will maximize freedoms without permitting these rights to turn into license—the kind of activity that damages other social goods.<sup>4</sup>

My second premise is that it is hard to draw a line between liberty and license. This is because it is difficult to assess the consequences of freedoms and restrictions in the social realm—maybe even more difficult than it is to assess than the effects of economic regulation because of their scope and subtlety.<sup>5</sup> Like many law professors, I have predictions about the likely effects of many rights that are debated. But everyone, even a law professor, must admit occasionally that he is fallible in his social and moral intuitions. Because of such all too human fallibility, a desirable feature of constitutional design is a structure that helps us calculate together the consequences of our social policies by providing us evidence beyond just our intuitions.

The need for such a mechanism of individual and social discovery offers a powerful argument of a presumption against a monopolized process for creating rights whether the monopoly is held by Congress or the courts. I say presumption because I do not deny that some rights may best be protected at the federal level, and some should be protected against legislative abridgement. We have a constitutional process that can entrench specific rights at the federal level so long as they obtain supermajority support.<sup>6</sup> That consensus gives us greater confidence than we have in ordinary politics.

In contrast with monopoly power at the federal level, states take part in a process that is relatively competitive, better approximating the private market.<sup>7</sup> To be sure, federal constitutional law plays a crucial role in creating the framework for

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3. See Nelson Lund, *Federalism and Civil Liberties*, 45 U. KAN. L. REV. 1045, 1060–61 (1997).

4. See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 270–71 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

5. John O. McGinnis, *The Federalist Approach to the First Amendment*, 31 HARV. J.L. & PUB. POL'Y 127, 128 (2008).

6. U.S. CONST. art. V (describing the constitutional amendment process).

7. See Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 767–68 (2007) (discussing jurisdictional competition at the local government level).

competitive federalism by protecting the free movement of people and information among the States.<sup>8</sup> These protections leave individuals “free to exit [their states] if the balance between liberty and license becomes radically off-kilter.”<sup>9</sup> The paradox of a system of constitutional federalism is that two levels of government with defined roles can better protect freedom than one by permitting states to choose a bundle of rights while the federal government guarantees the rights of movement and information.

It might be thought that democracy at the federal level itself would be enough to generate optimal rights. But relying on a single level of government is defective for economic reasons. Because the chance of one’s vote influencing a large election is less than being hit by lightning on the way to the polls,<sup>10</sup> citizens are rationally ignorant of politics.<sup>11</sup> As a result, citizens sensibly spend their time on information that is useful more useful or more interesting to them. After all, if politics rises to the level of entertainment, it has been well-described as show business for ugly people.<sup>12</sup>

In contrast, individuals can be assured of gaining the advantages of the bundle of rights in the state to which they move and thus put more effort into deciding where to live than for

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8. See Kathryn E. Wilhelm, Note, *Freedom of Movement at a Standstill? Toward the Establishment of a Fundamental Right to Intrastate Travel*, 90 B.U. L. REV. 2461, 2464–69 (2010) (discussing the right to interstate travel).

9. McGinnis, *supra* note 5, at 129.

10. Alice LaPlante, *Citizens Get Satisfaction from Voting*, STANFORD GRADUATE SCH. OF BUS. NEWS (Oct. 15, 2004), [http://www.gsb.stanford.edu/news/research/pubpolicy\\_voting.shtml](http://www.gsb.stanford.edu/news/research/pubpolicy_voting.shtml).

11. “Rational ignorance” describes the systematic tendency of diffuse citizens to pay little attention to political information. This phenomenon occurs because acquiring political information is both costly and unproductive. It is costly because to acquire such information, individuals must invest time they could be using for more lucrative or pleasurable enterprises. It is unproductive because the principal instrumental use of such information is to guide voting, but the vote of any individual is unlikely to influence the outcome of an election. DENNIS C. MUELLER, PUBLIC CHOICE III 303–08 (1989).

12. *Politics is show business for ugly people*, BIG APPLE (Dec. 14, 2009), [http://www.barrypopik.com/index.php/new\\_york\\_city/entry/politics\\_is\\_show\\_business\\_for\\_ugly\\_people](http://www.barrypopik.com/index.php/new_york_city/entry/politics_is_show_business_for_ugly_people) (“‘Politics is show business for ugly people’ dates to at least 1991, when Texas political consultant Bill Miller used the phrase.”).

whom to vote. That is why “foot voting” can impose greater discipline on government than ballot voting.<sup>13</sup>

Moreover, like other market processes, federalism generates a discovery machine that creates feedback information on a range of possible choices as states experiment with different sets of rights.<sup>14</sup> “Thus, unlike a system in which the [federal government] enforces some national rule of its own devise, we [are] able to make comparisons and learn about consequences by reviewing the actions of many relatively similar jurisdictions.”<sup>15</sup> If one state has same-sex marriage and another does not, everyone can compare the results, both in the benefits to those in same-sex marriages and in any costs to society.

The possibilities of civic learning from federalism are greater today than they were in the age of the Framers or even twenty years ago because computers continue to grow exponentially in their capacity.<sup>16</sup> More information about the effects in different jurisdictions can be collected and recorded in systematic form. More complex calculations can then be made on the data. In fact, the recent victory of the computer Watson on *Jeopardy!* suggests that computers themselves might soon be making connections between social phenomena that have previously eluded humans.<sup>17</sup>

Economic history teaches us that new forms of measurement were at the heart of the industrial revolution, accelerating innovation and the assessment of private productivity.<sup>18</sup> Today, forms of measurement can be at the heart of a movement in government innovation that offers similar processes for radical improvement in well-being. But this kind of more scientific approach will be most effective if the States are allowed to experiment for subsequent evaluation in our new silicon test tubes.

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13. See Ilya Somin, *Foot Voting, Political Ignorance, and Constitutional Design*, 28 SOC. PHIL. & POL’Y 202 (2011).

14. McGinnis, *supra* note 5, at 129.

15. *Id.*

16. John O. McGinnis, *Age of the Empirical*, 137 POL’Y REV. June & Jul 2006, at 47, 57–58.

17. For further discussion of the role of computers in helping social science, see John O. McGinnis, *Accelerating AI*, 104 NW. U. L. REV. 1253, 1259–60 (2010).

18. See Ajay K. Mehrotra, *American Economic Development, Managerial Corporate Capitalism, and the Institutional Foundations of the Modern Income Tax*, 73 LAW & CONTEMP. PROBS. 25, 37–38 (2010).

Let me provide an illustrative cost-benefit analysis comparing the exercise of competitive federalism to substantive due process in the area where the latter is most active and most controversial—issues of sexual autonomy. I will proceed with an economic cost-benefit approach.

First, it may appear that some rights protected by the Court's substantive due process decisions have substantial benefits. Examples include *Griswold v. Connecticut*,<sup>19</sup> protecting the right to contraceptives, and *Lawrence v. Texas*,<sup>20</sup> protecting the right to sodomy. In fact, these Supreme Court decisions "had relatively small benefits: they prevented few actual infringements of people's liberty, they invalidated laws that would probably have soon become . . . dead letter[s] anyway, and they likely prevented the enactment of few, if any, new laws."<sup>21</sup>

It was federalism, not the Court, that was crucial to development of these rights. Long before *Griswold* and *Lawrence*, individuals who felt oppressed by local sexual regulations, not to mention by the social mores over which the Court has no power, migrated to more tolerant jurisdictions like New York and San Francisco.<sup>22</sup> There these jurisdictions have publicized their lifestyles and used the media to promote the loosening of sexual inhibitions. In doing so, the residents of a few places whose autonomy was protected by federalism generated by consensus the rights thought to be valuable.

By contrast, the decisions that have not been supported by the political consensus made possible by the operation of jurisdictional competition have had large effects whose net value is at best open to serious question. *Roe v. Wade*<sup>23</sup> is, of course, the most notorious example. Moreover, the *Roe v. Wade* regime has made it impossible to experiment domestically with the wide variety of abortion regimes found around the world.

National constitutional rules also have another cost: they are very difficult to reverse, whatever our reevaluation of its costs and benefits. Substantive due process deprives the nation of the sober second thoughts that competitive federalism permits.

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19. 381 U.S. 479 (1965).

20. 539 U.S. 558 (2003).

21. Lund & McGinnis, *supra* note 2, at 1598.

22. See RICHARD A. POSNER, *SEX AND REASON* 127 (1992) (discussing the advantages of urban environments for homosexuals).

23. 410 U.S. 113 (1973).

Let me close by suggesting the fundamental ways in which competitive federalism shares in the virtues of the market. The market allows people of diverse tastes to satisfy their desires by choosing from the assortment of products offered. Federalism makes it easier for citizens to choose a bundle of rights by moving to one of the many states of the union. As a result, federalism, like the economic markets, also dissipates the social tension created by forcing everyone to live under a uniform rule.

The market forces people to serve others in order to better themselves by disciplining individual selfishness. Federalism forces government officials to serve the people, reducing agency costs and thus promoting genuine efficiency.

The market is future oriented. Changes in preferences and circumstances are reflected in changed prices and new products. Federalism is similarly future oriented. When old legal norms do not serve, states have an interest in creating new ones.

Above all, like the market, federalism encourages a spirit of humility and experimentation.<sup>24</sup> This benefit is insufficiently recognized. Anyone involved in business recognizes that their ideas, however good in theory, must be tested. Similarly, by offering a comparison of policy effects, federalism creates a focus on consequences as well—on the facts that we have in common rather than on the personal intuitions about rights that divide us. Thus, federalism, like other markets, cultivates what Learned Hand called the spirit of liberty that is “not too sure that it is right.”<sup>25</sup> Economic markets and federalism can continue to capture this spirit for our time.

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24. For detailed discussions regarding federalism's promotion and facilitation of experimentation, see Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1445–48 (1992); Charles Fried, *Federalism—Why Should We Care?*, 6 HARV. J.L. & PUB. POL'Y 1, 2–3 (1982); Richard W. Garnett, *The New Federalism, The Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 18 (2003).

25. LEARNED HAND, *THE SPIRIT OF LIBERTY* 190 (2d ed. 1953).