

Federalism and Civil Liberties

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I. INTRODUCTION

When we think about the Supreme Court's role in American life, most of us would give pride of place to the protection of individual liberties from overbearing political majorities, especially the majorities that control state governments. Judging from the way the Court exercises its discretionary jurisdiction, the Justices apparently agree. Even legislators themselves—against whom we look to the Court for protection—often seem alarmed at the very thought that the Court might relax its vigilance. Although this notion of the Court as guardian of our personal liberties seems thoroughly ingrained in our contemporary legal culture, embraced on the right as well as on the left, it is not by any means self-evidently correct.

On the contrary, a disinterested analysis suggests good reasons for concluding that the Supreme Court should essentially get out of the business of protecting civil liberties against state governments. In doctrinal terms, that would mean abandoning the Fourteenth Amendment incorporation doctrine, as well as substantive due process and some of the wilder extensions of equal protection analysis. Without attempting to show that the Court is absolutely required to take these steps as a matter of constitutional interpretation, I will try to suggest why the Constitution can very reasonably be interpreted to leave the states with much more discretion in the area of civil liberties than current doctrine provides. More important, however, I want to focus attention on a related question that has been too much neglected: Is it a good idea as a matter of constitutional design or constitutional practice for the Supreme Court to play the large role it has assumed for itself in balancing the competing demands of public discipline and private liberty? I suggest that it probably is not.

The questions I focus on here are a subset of a larger group of issues about the proper relation between the states and the federal government.

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Part II offers some comments about this more general question, and Part III discusses the Supreme Court's Commerce Clause cases, where difficulties in applying the Constitution's federalism principles have been most visible. Part IV argues that such difficulties are far less acute in the context of civil liberties than in the context of commercial regulation, and that the Constitution can be interpreted to permit a significant restoration of the preeminent role that was originally assigned to the states. Part V considers theoretical arguments for such a restoration, and Part VI illustrates some of the consequences that would follow from such a restoration. The analysis and illustrations offered in Parts V through VI suggest that it would be safe to return the states to their former ascendancy because there is no good reason to fear a "race to the bottom" in which our important liberties would be lost or badly compromised. The analysis also suggests that such a restoration would be affirmatively useful because the states are likely to manage the tradeoffs between liberty and discipline better than the Supreme Court can, and because abandonment of the incorporation doctrine would permit the Court to create greater safeguards against the federal government for the liberties protected by the Bill of Rights. Part VII closes with brief remarks about the implications for civil liberties that might be found lurking in the Court's recent decision cutting back the scope of the Commerce Clause.

II. THE THEORY OF FEDERALISM

The arguments for a federal structure have been rehearsed many times.¹ Three principal benefits arise from this arrangement. First, a multiplicity of jurisdictions creates choices that enable citizens to approximate the mix of government policies that most closely satisfies their personal tastes and needs. Just as people have different preferences with respect to breakfast cereals (based on a variety of factors ranging from personal taste to medical considerations and religious obligations), so people have different preferences with respect to the public goods whose provision is a principal function of government. For the same reason that private markets can and do satisfy consumer preferences in breakfast cereals much better than these preferences could ever be satisfied by a command-and-control regulatory system, local public goods can be provided most efficiently when there is a "market basket" of local governments from which citizens can choose.² A closely related benefit of federalism,

1. For a concise and elegant presentation, see Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987).

2. The seminal discussion of this principle is Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). Tiebout's argument—which deals primarily with questions about the appropriate levels of taxing and spending—suggests that the trade-offs between

which deserves special emphasis in the context of this Paper, is that it promotes competition among jurisdictions. Cereal makers do a good job of providing the right mix of choices to the public primarily because serious mistakes are punished by a loss of customers. Similarly, state governments that make serious errors in satisfying citizen preferences incur the costs of emigration (and immigration foregone) by the taxpayers who make government possible. Finally, the allocation of political power to the state level prevents destructive rent-seeking by state and regional coalitions. When national policies and regulations can shift costs and benefits from one place to another (which is usually the case), incentives are created for national policies whose costs exceed their benefits. Western water projects and agricultural subsidies are familiar products of these perverse incentives.

Unfortunately, it is difficult in practice to realize all the benefits of federalism. The problems arise largely because the systematic benefits—primarily the obstruction of rent-seeking—cannot easily be disentangled from important costs: the encouragement of negative externalities and free riding. Although it is true that the national government can and does enforce inefficient redistributions of costs and benefits, it is also true that the national government can and does *prevent* inefficiencies that would otherwise occur. Standard examples include national defense and water pollution. If each state were left free to decide what contribution it would volunteer to the defense of the nation, incentives to free ride on the contributions of other states would create enormous obstacles to achieving an adequate national defense. Similarly, upstream jurisdictions have incentives to overpollute interstate rivers when they can shift part of the costs of the pollution to their downstream neighbors.

The pervasive and entangled phenomena of rent seeking, free riding, and negative externalities make it very difficult to devise and administer analytically defensible lines between the spheres appropriate for federal and state jurisdiction. With respect to practically any governmental activity, one can make a rational argument for assigning jurisdiction to the national government. Even in apparently extreme cases such as agricultural subsidies, proponents of the subsidies can argue that the nation as a whole is better off when the national food supply is less

the costs and benefits of public goods like police protection and public parks will usually be made more efficiently by local than by state governments, just as either of them will generally be more efficient than the federal government. *See id.* at 418 & n.9. In this Paper, I will focus on the choice between the state and federal governments, and in particular between the state governments and the federal judiciary, as instruments for making the inevitable trade-offs between the costs and benefits of civil liberties. I leave unexamined many questions about the extent to which it would be advisable for state governments to devolve authority over civil liberties to local jurisdictions.

dependent on unreliable foreign sources, or that market failures require the national government to prevent ruinous competition among farmers. More commonly, any time any problem is regarded as serious, one will hear it said that the failure of the state governments to eliminate the problem demonstrates the need for national action. One can almost always hypothesize some free rider or externality problem that might explain the states' failures, and rarely is it possible to prove *ex ante* that the national government is incapable of doing better than the states have been doing.

The frustrating result is that everybody can genuflect to federalism as a matter of general principle, without thereby being committed to much of anything as a practical matter. A plausible rationale is always available when federal jurisdiction would serve one's personal, political, or ideological interest; similarly, one can usually find an argument for protecting state autonomy when that would advance one's own policy preferences. Elected officials are particularly inclined to adapt to the political demands of the moment, but the same tendencies can be detected in the views of judges and academic commentators.³ This might not matter if the federal Constitution established reasonably definite limits on the encroachments that self-interest will inevitably suggest. The constitutional boundaries imposed on the federal government, however, have proven to be quite indefinite.

3. A recent and striking example, which I choose because it occurs in an exceptionally perceptive discussion of federalism, can be found in Steven G. Calabresi, "*A Government of Limited and Enumerated Powers*": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995). Professor Calabresi defends the wisdom of the Supreme Court's Fourteenth Amendment anti-discrimination jurisprudence, largely on the ground that negative externalities created by the oppression of minorities will not be adequately controlled by competition among the states. *See id.* at 815-16. In a footnote, Professor Calabresi contends that women should be treated as though they were a minority because they were "historically" (note that he does not say "recently") shut out of politics and because of the (unspecified) "lingering effects of that history." *Id.* at 816 n.213. Apart from the utter nonobviousness, as an empirical matter, of the proposition that women as a group are disadvantaged in the political process, there is a striking contrast between Professor Calabresi's willingness to grant minority status to this majority group and his treatment of some genuinely unpopular minorities. Despite a preference for leaving the regulation of sexual mores generally to the state governments, he endorses the suppression of polygamy by the federal government on the ground that its existence in one state might have (unspecified) "serious external effects" on other states. *Id.* at 821. The political attractiveness of Professor Calabresi's allocations of responsibility between the state and federal governments is manifest. Their source in a principled theory of federalism is not.

III. THE CONUNDRUM OF FEDERALISM IN THE COMMERCE CLAUSE CASES

There can be no doubt that our original Constitution, which transferred important powers to the new federal government, also reflected a commitment to the preservation of substantial attributes of sovereignty in the states. The Bill of Rights—adopted at the insistence of the Anti-Federalists—was intended to reinforce the commitment to dual federalism. The Reconstruction Amendments transferred substantial additional powers to the federal government, but I will argue in Part IV that these new powers may have been far less significant than we usually suppose. Before turning to that discussion, however, it will be useful to recall the difficulties that the Supreme Court has faced in trying to administer the principles of federalism in its Commerce Clause cases. These familiar difficulties are sometimes taken to mean that the Constitution does not impose any significant limits on federal displacement of state prerogatives. I argue here that the Commerce Clause does present intractable line-drawing problems, but that the Supreme Court's Commerce Clause jurisprudence is better explained as a political effort to shift power from the states to the federal government. In Parts IV and V, I suggest that line-drawing problems are less severe in the context of civil liberties than they are under the Commerce Clause, and that the Constitution can and should be interpreted to leave the states with much more discretion over civil liberties than they now enjoy.

The decision in *Garcia v. San Antonio Metropolitan Transit Authority*⁴ is a useful place to begin thinking about the Court's approach to the Commerce Clause, in part because the Court's conservatives and liberals exchanged places in their use of constitutional rhetoric. In *Garcia*, the Court was asked to decide whether Congress has authority under the Commerce Clause to impose minimum wage and overtime requirements on state employers.⁵ Overruling its 1976 decision in *National League of Cities v. Usery*,⁶ which in turn had overruled the 1968 decision in *Maryland v. Wirtz*,⁷ the Supreme Court held that Congress does have this power.⁸

4. 469 U.S. 528 (1985).

5. See *id.* at 530-31.

6. 426 U.S. 833 (1976).

7. 392 U.S. 183 (1968); see *National League of Cities*, 426 U.S. at 855.

8. See *Garcia*, 469 U.S. at 555-57.

Writing for five Justices who would on many issues be among those least inclined to defer to democratic majorities,⁹ Justice Blackmun rejected the idea that there could be any fixed definition of the proper sphere of state sovereignty.¹⁰ The majority based this conclusion on two main grounds: efforts to find such a definition had generated doctrinal confusion, and would continue to do so;¹¹ and the states must be free to take up tasks that had once been left in private hands.¹² The first point is undeniable, but the second point reflected a somewhat strange alteration of the question actually presented, which was not about the proper allocation of power between state governments and their citizens, but rather about the allocation of power between the state and federal governments. At a rhetorical level, however, Blackmun's argument assumed a strikingly conservative appearance, inasmuch as he seemed to be expressing a solicitude for the rights and liberties of the states. This expression of allegiance to conservative principles was reinforced when Blackmun objected to any rule of state immunity that "invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."¹³ Remarkable words from the author of the Court's opinion in *Roe v. Wade*!¹⁴

This conservative rhetoric carried over into the majority's analysis of the Constitution's mechanisms for putting limits on the federal government's power to interfere with state functions, limits whose existence Justice Blackmun expressly acknowledged.¹⁵ Blackmun offered himself as an apostle of judicial restraint, arguing that the judiciary must carefully restrain itself from deciding questions that the Constitution leaves to the political branches of government.¹⁶ The Constitution does not expressly define a protected sphere of state autonomy,¹⁷ and Blackmun claimed that the Court has no license to employ what he derisively called "freestanding conceptions of state sovereignty."¹⁸ There was no need to decide such questions, according to Blackmun, because the Constitution arranged for the protection of state sovereignty by giving the states a large role in

9. Justice Blackmun's opinion was joined by Justices Brennan, White, Marshall, and Stevens. *See id.* at 529. On a wide range of issues, this group generally made up the liberal or activist wing of the Court at that time (although White was somewhat less consistently inclined in this direction than the other four).

10. *See id.* at 546-47.

11. *See id.* at 538-47.

12. *See id.* at 545-46.

13. *See id.* at 546.

14. 410 U.S. 113 (1973).

15. *See id. Garcia*, 469 U.S. at 547.

16. *See id.* at 546-47.

17. *See id.* at 550.

18. *Id.*

selecting those who would serve as President and in the Congress.¹⁹ Absent procedural failures in the national political process, a category of circumstances that Blackmun left undefined, the courts simply do not have either the tools or the warrant to fashion substantive limits on the federal government's power to interfere with state sovereignty.²⁰

The four most conservative members of the Court strenuously objected to the majority's exercise of judicial restraint.²¹ They considered it judicial abdication.²² Emphasizing the Tenth Amendment and the Framers' strong commitment to a limited federal government, the dissenters argued that our fundamental liberties would be seriously endangered if a group of self-interested federal legislators were allowed to become the sole judges of their own power under the Constitution.²³ The Necessary and Proper Clause, moreover, carries somewhat different implications for the reach of the Commerce Clause with respect to changes that have occurred in the private economy than it does with respect to the enduring principles of federalism.²⁴ While acknowledging that they proposed to employ a less than elegant balancing test in protecting state immunities, the dissenters thought that they must plow ahead because the Supreme Court is duty bound to protect the weak from the strong.

The way in which the liberals and conservatives on the Court departed from their usual rhetorical postures in this case may be largely a matter of posturing. But perhaps there is more to it than that. Indeed, *Garcia* might be one of those rare cases in which both the majority and dissent were largely right.

The Commerce Clause stimulated very little controversy during the Constitutional Convention and ratification debates.²⁵ This strongly suggests that it is was quite clear that the Commerce Clause would give the federal government very limited powers, for there were loud and

19. See *id.* at 550-51.

20. See *id.* at 556-57.

21. See *id.* at 564-67 (Powell, J., joined by Burger, C.J., and by Rehnquist and O'Connor, JJ., dissenting).

22. See *id.* at 567 n.12 (Powell, J., dissenting) ("This Court has never before abdicated responsibility for assessing the constitutionality of challenged action on the ground that affected parties theoretically are able to look out for their own interests through the electoral process."); see also *id.* at 581 (O'Connor, J., joined by Powell and Rehnquist, JJ., dissenting) ("If federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States.").

23. See *id.* at 564-72 (Powell, J., dissenting).

24. See *id.* at 584-86 (O'Connor, J., dissenting).

25. See, e.g., THE FEDERALIST NO. 45, at 329 (James Madison) (Benjamin Fletcher Wright ed., 1961); Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 443-44 (1941).

frequent objections to provisions that were thought to give significant new authority to the proposed government. The Supreme Court nonetheless eventually interpreted the Commerce Clause so as to allow Congress to regulate virtually anything. It is natural to suppose that this is simply a case where changes in the world—especially enormous growth in the number and complexity of interstate commercial relationships—have caused the words of the Constitution to produce effects that its framers may not have anticipated.

However natural this assumption might be, it is not true that uncertainty about the scope of the Commerce Clause developed only after our economy underwent dramatic changes. In fact, the Commerce Clause was involved in one of the very first great debates over the proper interpretation of the Constitution. The occasion was the conflict about Congress's power to charter a national bank, and the structure of the arguments was much the same as those that we have seen repeated over and over again since that time. As in *Garcia*, the friends of federal power emphasized the spacious language of the relevant constitutional provisions, and the absence of well-defined constitutional limitations on congressional discretion.²⁶ And, as in *Garcia*, their opponents emphasized the untenable nature of an interpretation that would give Congress the power to do whatever would be good for the United States, and therefore also the power to do whatever evil Congress pleased.²⁷

Although Chief Justice Marshall finessed this problem in *M'Culloch v. Maryland*,²⁸ and again in *Gibbons v. Ogden*,²⁹ he did not solve it. And neither has anyone else. After 1937, the Court seemed to throw up its hands and adopt essentially the position articulated by Justice Blackmun in *Garcia*: whatever limits the Constitution places on Congress, it is for Congress to discover and enforce them against itself because the Constitution does not provide the kind of guidance that courts need to draw principled lines.

While it is certainly true that there are real difficulties in framing a principled legal test defining the outer boundaries of congressional power under the Commerce Clause, it is hard to believe that these difficulties explain the Court's refusal to put any real limits on that power. For if

26. See, e.g., Alexander Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank*, in 8 THE PAPERS OF ALEXANDER HAMILTON 97 (Harold C. Syrett & Jacob E. Cooke eds., 1965).

27. See, e.g., Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, in 19 THE PAPERS OF THOMAS JEFFERSON 275 (Julian P. Boyd ed., 1974).

28. 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

29. 22 U.S. (9 Wheat.) 1, 195 (1824) ("The completely internal commerce of a State, then, may be considered as reserved for the State itself.")

that were true, how in the world could one explain the Court's "dormant commerce power" doctrine?

Under this doctrine, the federal courts invalidate state regulations that discriminate against interstate commerce³⁰ or put an excessive burden on interstate commerce,³¹ unless Congress has authorized such regulations.³² As a matter of constitutional interpretation, the dormant commerce power doctrine embraced by the Court is truly far-fetched. On its face, the Constitution grants to Congress the power to regulate interstate commerce,³³ but there is no provision forbidding the states from exercising the same power concurrently. The absence of such a provision is telling, because the Constitution does expressly forbid the states from exercising certain powers granted to Congress.³⁴ The Constitution, moreover, sometimes specifies that the states may exercise a power granted to Congress only with the permission of Congress, just as they may under the dormant commerce power doctrine.³⁵ But the Constitution contains no such provision with respect to the regulation of commerce. Thus, exact analogues to the dormant commerce power were included in the text of the Constitution, but the dormant commerce power was not. Overcoming the obvious conclusion that the dormant commerce power cannot be inferred from the Constitution would require compelling evidence for the contrary conclusion, which the Supreme Court has never produced.³⁶

A tenable argument on behalf of something like the dormant commerce power doctrine would have to be based on evidence that there is an inherent conflict between the grant of authority to Congress and the exercise of a concurrent authority by the states. Such inherent conflicts can exist, as one can see with Congress's power to borrow money on the

30. See, e.g., *New Energy Co. v. Limbach*, 486 U.S. 269, 273-74 (1988).

31. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

32. See, e.g., *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 431 (1946).

33. See U.S. CONST. art 1, § 8, cl. 3.

34. See, e.g., *id.* § 8, cl. 17 (granting Congress the power to exercise "exclusive Legislation" over what is now the District of Columbia); *id.* § 8, cl. 5 (granting Congress the power to coin money and regulate its value); *id.* § 10, cl. 1 (forbidding the states to coin money).

35. See, e.g., *id.* § 8, cl. 12 (granting Congress the power to raise and support armies); *id.* § 10, cl. 3 (forbidding the states to keep troops without the consent of Congress).

36. At one point during the Convention, James Madison seems to have toyed with a notion resembling the dormant commerce power doctrine. See 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 625 (Max Farrand ed., 1911) (quoting Madison: "Whether the States are now restrained from laying tonnage duties depends on the extent of the power 'to regulate commerce'. These terms are vague but seem to exclude this power of the States . . ."). Whatever the exact meaning of this remark may have been, it is obviously not sufficient to justify turning the text of the Constitution inside out.

credit of the United States.³⁷ It is at least imaginable that the framers of the Constitution might have perceived a similar conflict with respect to the regulation of interstate commerce, but evidence for this conclusion seems to be entirely lacking.³⁸ In any event, this is not the theory on which the dormant commerce power doctrine is based. If it were, the doctrine would have to proscribe *all* regulation of interstate commerce by the states, and it would seemingly have to forbid Congress from authorizing the states to exercise a power that the Constitution reserved to the national government. The theory on which the Court has rested its doctrine is quite different: that the Constitution forbids the states from regulating a subset of interstate commerce that is most appropriately regulated by the federal government.³⁹ The Court's efforts to define this subset of commerce have generated a bewildering tangle of case law (which is not surprising, inasmuch as the Constitution contains no hint of such a distinction), but the general theory has remained fairly constant. And that theory has been extracted from the air, not from the Constitution.

Although the dormant commerce power doctrine is fatally flawed as an interpretation of the Constitution, it is easily intelligible as an act of constitutional politics. The Supreme Court decided that Congress was not doing an adequate job of promoting free trade among the states, and so amended the Constitution to allow that important constitutional purpose to be more completely achieved. Perhaps the most forthright articulation of this legislative program was Justice Jackson's:

The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state. While the Constitution vests in Congress the power to regulate commerce among the states, it does not say what the states may or may not do in the absence of congressional action, nor how to draw the line between what is and what is not commerce among the states. Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution.⁴⁰

37. See U.S. CONST. art. I, § 8, cl. 2. The Constitution did not, and did not need to, make express the absence of concurrent state authority to borrow on the credit of the federal government.

38. The theory of an inherent conflict between federal and state authority over interstate commerce was suggested as early as *Gibbons v. Ogden*. See 22 U.S. (9 Wheat.) 1, 209 (1824) (dictum); see also *id.* at 226-29 (Johnson, J., concurring). The theory, however, was not supported with any evidence.

39. See *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 279-80 (1872) (citing *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851)). Early suggestions that regulations of interstate commerce might be exempted from the dormant commerce power doctrine if they were called something like "quarantine and health laws," *Gibbons*, 22 U.S. (9 Wheat.) at 205, or if they were not "intended as regulations on commerce," *id.* at 235 (Johnson, J., concurring), have understandably not caught on.

40. *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 534-35 (1949).

The Court launched this political program long before Justice Jackson articulated it, and the Justices have never looked back. When one puts together this aggressive judicial enforcement against the states of imputed Commerce Clause purposes with the Court's professed reluctance to engage in policymaking that would restrict Congress under the real Commerce Clause, the pattern becomes clear: for reasons having little to do with anything in the Constitution, the Justices have steadily shifted power away from the states for political reasons.

At this point, it may be useful to ask how much we should care. The Supreme Court, after all, disregards and misinterprets the Constitution rather frequently. Sometimes the results are very significant, and sometimes they are pretty trivial. Sometimes the results are very bad, and sometimes maybe they are not so bad at all. Although the Constitution is supposed to be the law, that does not necessarily mean it is the best law we could have. Without excusing any of the Court's misinterpretations, I suppose that we should object especially to those that have had significant bad effects in practice.

My own suspicion is that the effects of the Court's strong bias in favor of national economic regulation, both by Congress under the Commerce Clause and by the Court itself under the dormant commerce power doctrine, have, at worst, not been very bad. Discriminatory trade barriers and commercially destructive conflicting economic regulations have all kinds of unambiguously harmful effects, and it is hard to see what their redeeming features could be. Although the federal government is obviously capable of using its commerce powers to impose commercially destructive regulations of its own, I would guess that the Supreme Court's doctrines in this area have done more to promote prosperity than to retard it.

In another respect, however, I believe that the dissenting opinions in *Garcia* were quite correct in fearing that we are headed toward a severe and reckless distortion of the relation between the state and federal governments. In fact, the danger may be worse than the *Garcia* dissenters acknowledged, and the Supreme Court may need to change direction in ways far more profound than they suggested.

IV. THE CONSTITUTION AND CIVIL LIBERTIES

A revival of the principles of federalism is most urgent in areas *other* than those of commerce and economic regulation. Particularly in the area of civil liberties, the federal government has become dangerously domineering, and it is the Supreme Court itself that is the prime offender. The Court, therefore, has considerable power to make things better.

I recognize that skepticism about the propriety of the Supreme Court's heavy involvement in the protection of civil liberties runs contrary to a

long-standing and passionately defended consensus in the legal academy. Let me begin, therefore, by acknowledging an important element of truth in the position that I mean to call into question. We all know—from *The Federalist No. 10* if from nowhere else—that the great danger to liberty in popular regimes arises from majority faction, and that this threat is inherently greater in smaller republics. It therefore seems fairly evident that the federal government—acting both through legislation and through constitutional adjudication—prevents many improper infringements on individual liberties that would go unchecked if we returned to the original principles of federalism.⁴¹

I do not deny this. Nevertheless, I want to suggest that the price we have paid and are paying for federal protection of our liberties may be too high. Indeed, I want to go even further and suggest that the principle of the Tenth Amendment is even more important today than it was two centuries ago, for the threat to liberty posed by state governments is smaller today than it was then, while the threat from the federal government is greater. These conclusions, moreover, are suggested by an analysis that abstracts from my own political beliefs and preferences about specific policy issues.

Before we consider this analysis, it may be useful to examine briefly what the restoration of federalism with respect to civil liberties would mean in legal terms, and why there is no great legal obstacle, other than inertia, to such a restoration. Consider first the unamended Constitution, which by its own terms protected a very limited set of individual rights against the state governments: The states were forbidden to enact ex post facto laws or bills of attainder;⁴² they were forbidden to impair the obligation of contracts;⁴³ and citizens who traveled from one state to another were guaranteed the same privileges and immunities enjoyed by citizens of the states that they visited.⁴⁴ That's it. This is a very short list of restraints. The only significant additions since the Tenth Amendment was ratified have been the Reconstruction Amendments, the Nineteenth Amendment, and the Twenty-Fourth Amendment.⁴⁵

41. In light of the analysis in *The Federalist No. 10*, it should come as no surprise that Madison wanted the principal protections of the Bill of Rights applied against the states as well as the federal government. See Samuel H. Beer, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 291 (1993).

42. See U.S. CONST. art. I, § 10, cl. 1.

43. See *id.*

44. See *id.* art. IV, § 2, cl. 1.

45. In some contexts, it would be misleading to distinguish "individual rights" like the freedom of speech from other rights that may be vindicated by the courts, such as the right not to pay a duty of tonnage imposed by a state without congressional authorization. There is, nonetheless, a useful distinction between constitutional rules that wall off specified spheres of personal conduct from government interference and rules that allocate power among the various institutions of government.

Among these, the Reconstruction Amendments are obviously the most important. The institution of slavery was abolished, and the federal government was given the legal tools that were needed to ensure that those who had been freed were not reduced to some other form of subordinate caste status. Although the Civil War and its aftermath were obviously momentous, I see no reason to assume that the legal relationship between the states and the federal government was fundamentally altered. Slavery was always glaringly inconsistent with American principles. Neither the removal of that anomaly nor the establishment of the Union's indissolubility necessarily required any major adjustment in the principles of federalism. Nor is it at all obvious that the Civil War Amendments contemplated any such adjustment.

Important as they were, the Thirteenth and Fifteenth Amendments (abolishing slavery and forbidding race-based denials of the right to vote, respectively) implied no sweeping change in the state-federal relationship. But neither should we assume that the Fourteenth Amendment implied the sweeping changes that the Court has instituted under its aegis. The three prohibitions in Section One of this Amendment can very reasonably be interpreted as antidiscrimination provisions rather than as sources of substantive rights: the Privileges or Immunities Clause requires that each state give the same basic civil law rights to all its citizens; the Due Process Clause forbids whimsical deprivations of life, liberty, and property; and the Equal Protection Clause requires that whatever legal protections are created must be extended to everyone.⁴⁶ This anti-discrimination interpretation of the Fourteenth Amendment is probably the best reading of the text and its history,⁴⁷ and it is certainly at least as plausible as any of the readings that the Supreme Court has embraced.

Understanding the Fourteenth Amendment as an anti-discrimination provision does not trivialize its significance. Nor does it easily resolve every interpretive question, not the least of which is how far the Amendment was meant to go in forbidding government discrimination outside the context of race. A provision that was doubtless meant

I should note that in adopting that distinction here, I do not mean to draw a distinction between "economic liberties" and other personal rights like the freedom of speech. Neither the original Constitution nor the Bill of Rights draws such a distinction; as one can easily see by considering the Contracts Clause and the Takings Clause of the Fifth Amendment. See U.S. CONST. art. I, § 10 & U.S. CONST. amend. V, cl. 2. Indeed, the Free Speech Clause itself protects commercial speech, although for reasons of its own the Supreme Court has given commercial speech less protection than it gives to political speech. For a penetrating discussion of the Court's commercial speech decisions, see Fred S. McChesney, *De-Bates and Re-Bates: The Supreme Court's Latest Commercial Speech Cases*, 5 SUP. CT. ECON. REV. 81 (1997).

46. See U.S. CONST. amend. XIV, § 1.

47. The argument for this interpretation is advanced and defended in compelling detail in John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992).

primarily to protect the newly freed slaves from state oppression was written so that it clearly must extend to other forms of racial discrimination, and almost certainly to discrimination based on characteristics cognate with race. One can reasonably debate which characteristics are sufficiently cognate to be included within the scope of the Fourteenth Amendment. But this constitutional provision certainly could not have been meant to generate the Fourteenth Amendment jurisprudence that now exists, under which any majority of Supreme Court Justices enjoys what can only be called a remarkably unfettered discretion to invalidate state laws that they find personally offensive.

Nor do I think it likely that the Fourteenth Amendment, which was directed so clearly at forbidding discrimination (especially though not exclusively against black Americans), could also have been meant to federalize some vast category of individual substantive rights like those listed in the first eight amendments to the U.S. Constitution, let alone the miscellany that has collected under the rubric of substantive due process. The vastly complex and confusing legislative history of the Fourteenth Amendment has generated a notoriously prolix academic debate about the incorporation issue.⁴⁸ Without attempting to rehearse that debate here, I believe it is safe to say that the proponents of the incorporation thesis have not won a decisive victory. Skeptics, who include a number of very respectable commentators, have found considerable evidence to suggest that those responsible for ratifying the Fourteenth Amendment likely did not intend to incorporate the Bill of Rights against the states.⁴⁹ When one considers how momentous a change in our federal system the incorporation thesis implies, it seems clear that the evidence advanced by its proponents is at least not adequate to *compel* its adoption as a matter of constitutional interpretation. The Supreme Court itself has recognized this proposition, rejecting a strongly argued historical analysis for

48. "Incorporation" is shorthand for the theory that the Fourteenth Amendment was meant to make the first eight constitutional amendments, which were applied from the beginning only against the federal government, applicable to the states as well.

49. Those casting doubt on the incorporation thesis include: RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1989); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS* 342-51 (1985); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949). The literature favoring incorporation includes: MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993); William Winslow Crosskey, Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority, 22 U. CHI. L. REV. 1 (1954). See also Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992), arguing that all privileges and immunities of citizens recognized in the Bill of Rights became applicable against the states by virtue of the Fourteenth Amendment.

adopting the incorporation thesis.⁵⁰ Although the Supreme Court has selectively applied most of the Bill of Rights against the states, it has done so on the basis of a policy-driven analysis that does not even pretend to be rooted in the intentions of those who framed and ratified the Fourteenth Amendment.⁵¹

Like the selective incorporation of the Bill of Rights, substantive due process is not based on the text of the Constitution or the intentions of those who made it. Substantive due process, whose name is an oxymoron, has been used to create a variety of individual rights, including a right to own slaves,⁵² a right to make employment contracts providing for more than sixty hours of work per week,⁵³ a right to instruct children in a foreign language,⁵⁴ a right to contraceptives,⁵⁵ and a right to abortion.⁵⁶ These and the other rights that fall under this rubric have only one thing in common: a majority faction of Supreme Court Justices have at one time or another been confident that the Constitution simply would not be complete without them. Although substantive due process has produced some important and controversial rights, those currently enforced are rather few in number, and the current Court seems disinclined to engage in a promiscuous multiplication of their number. The Bill of Rights, by way of contrast, continues to be an extremely fertile and relatively noncontroversial source of Supreme Court intervention in state efforts to determine the appropriate scope of personal liberty.⁵⁷ The remainder of

50. See *Adamson v. California*, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting).

51. Rather than investigate the intentions of those who adopted the Fourteenth Amendment, the Court has asked whether particular provisions of the Bill of Rights are "fundamental" in the sense that they are entailed in a "scheme of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). *Palko* stated the test for incorporation as whether a particular immunity is "implicit in the concept of ordered liberty," meaning that the immunity must be "of the very essence of ordered liberty." *Id.* As an example, the Court offered the First Amendment: freedom of thought and speech, said the Court, "is the matrix, the indispensable condition, of nearly every other form of freedom." *Id.* at 327. Eventually, the *Palko* test came to be too constraining for a Court that wanted to forbid the states from doing a variety of things that anyone could easily see are not part of the "very essence" of ordered liberty. In *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968), the Court expressly jettisoned *Palko*'s insistence that a right be essential to ordered liberty, and replaced it with a requirement that the right be "necessary to an Anglo-American regime of ordered liberty." *Duncan* did not exactly abandon the "ordered liberty" test, but it confirmed the Court's inclination to use a much broader, and no less manipulable, standard.

52. See *Scott v. Sandford*, 60 U.S. (19 How.) 393, 450-52 (1856).

53. See *Lochner v. New York*, 198 U.S. 45 (1905).

54. See *Meyer v. Nebraska*, 262 U.S. 390 (1923).

55. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

56. See *Roe v. Wade*, 410 U.S. 113 (1973).

57. Equal protection jurisprudence, though it sometimes throws up decisions that strongly resemble those made under the rubric of substantive due process, see e.g., *Romer v. Evans*, 116 S. Ct. 1620 (1996), has generally been used to accomplish more or less what the Privileges or Immunities Clause was probably meant to achieve. See, e.g., Michael W. McConnell, *Originalism*

this Paper will therefore focus on Fourteenth Amendment incorporation, but with the understanding that substantive due process is even less defensible.

If the Fourteenth Amendment is interpreted essentially as a ban on discrimination rather than as a source of substantive rights, as it very reasonably can be, the states should be almost as free to define the substantive scope of liberty as they were before the War Between the States. In the next section, I explain why we should not be too quick to assume that this is an intolerable prospect.

V. DISCIPLINE, LIBERTY, AND LAW

One way to start thinking about the consequences of returning substantial authority in this area to the states is by observing that personal liberty and political liberty are to a considerable extent incompatible. Despotism or authoritarian governments can safely allow a great deal of personal freedom to those they rule. So long as the government is able to suppress the ambitions of the small class of men who might aspire to overthrow the government, it has relatively little to fear from licentious behavior among the general populace. For milleniums, however, no one who thought seriously about the question believed that *popular* government could succeed unless the citizens were subjected to extremely strict discipline. A population that indulged itself in a great deal of personal freedom would not be capable of the self-restraint (and sometimes even self-sacrifice) that is needed for self-government. Accordingly, if it were not conquered by foreigners first, a licentious population would soon be taken over by some kind of strong man or oligarchic clique. This is a theme that runs through western political philosophy from Plato's analysis of political education through Rousseau's defense of the sumptuary laws in the Republic of Geneva.⁵⁸ Our own Anti-Federalists gave eloquent voice to the theme,⁵⁹ and thoughtful critics of liberalism like Solzhenitsyn have kept it alive in our own era.⁶⁰

In modern times, serious people began to believe that durable forms of self-government could be devised that would be less dependent on the "republican virtue" that had for so long been considered a prerequisite to successful popular government. The United States is now Exhibit A in support of the case for relaxing governmental efforts to inculcate the

and the Desegregation Decisions, 81 VA. L. REV. 947, 1004 (1995) ("The Privileges or Immunities Clause is a virtual dead letter, while the Equal Protection Clause has expanded to cover all the rights previously protected by the Privileges or Immunities Clause, and more.").

58. See, e.g., PLATO, LAWS; ROUSSEAU, LETTER TO D'ALEMBERT ON THE THEATRE.

59. See generally, e.g., HERBERT STORING, WHAT THE ANTI-FEDERALISTS WERE FOR (1981).

60. See, e.g., ALEKSANDR SOLZHENITSYN, A WORLD SPLIT APART: COMMENCEMENT ADDRESS DELIVERED AT HARVARD UNIVERSITY, JUNE 8, 1978 (Harper & Row, 1978).

citizenry with the politically necessary virtues. Neither the United States, however, nor any other republic that I know of, has ever operated on pure libertarian principles. The moral discipline that republics impose on their citizens varies both in its specific content and in its severity, but it exists everywhere. Even in the United States, which has gone pretty far, by historical standards, in the direction of personal freedom, governments continue trying to shape the character of their citizens with a thousand devices ranging from legal preferences for marital relationships and legal prohibitions against racial discrimination to compulsory education laws and official antidrug campaigns.

Perhaps our governments should get completely out of the business of trying to shape the character of their citizens, undertaking little more than the prevention of force and fraud and hoping that religion or other spontaneous institutions will supply the additional tutelage that a free people requires. This possibility has real attractions as a topic of speculation, but we can hardly be assured that such an experiment could succeed. At least in general terms, moreover, it seems fairly clear why the experiment might seem reckless to people charged with the actual governance of affairs. The human animal, whose selfish cleverness long ago escaped the confining powers of his natural sociability, has no sufficient inborn mechanisms for living peacefully with others in large numbers. Even natural sociability, which might be the basis for families and clan organizations, actually generates centripetal forces in larger groups. Thus, the constraints needed for political self-government do not arise by nature. The role of government in creating these constraints has always been significant, though not always obvious—partly because the greatest acts of governance may appear as something else (as when religious and political authority are intertwined) and partly because they sometimes have such lasting effects that their source is easy to lose in the mists of time. If government did nothing to maintain the social cohesion needed to guard against foreign threats and domestic subversion, what would supply the defect? To count on an extrapolitical religion to foster the political solidarity needed in a durable republic is perhaps to credit religion with greater powers than it claims for itself.

Even if one agrees that republican governments cannot safely relinquish all involvement in the moral and political discipline of their citizens, one must also agree that governments are notoriously prone to overdoing it. The real question, then, is how to achieve the proper *balance* between personal liberty and the discipline of citizens by the government. As a practical matter, that question boils down to *who* will make the judgments about where to strike that balance.

One possible answer to this question is: me. Or if not me, then someone whose judgments are likely to approximate my own. Or, failing that, whichever available decisionmaker I think will depart the least from

my own judgment. This sort of very natural response may go a long way toward explaining the strong consensus in the legal academy, and among the intelligentsia generally, in favor of having federal judges supervise state efforts to balance order and liberty. Federal judges are obviously more likely than members of Congress or state legislators to share the judgments and preferences of professional intellectuals.

If one tries to set aside one's self-interest and self-confidence about one's own judgment, however, it is far from obvious that the Supreme Court is well-suited to the supervisory role it has assumed for itself. First, the life tenure of the Justices removes the most effective incentives that government officials have for avoiding serious mistakes and correcting those they make—namely, elections. The only sanctions that can realistically be brought to bear against a member of the Court are those that affect the Justice's reputation. And that reputation is largely in the hands of a tiny and unrepresentative minority of the population—professors and journalists whose interests and preferences are not necessarily consistent with those of the nation at large. Second, judicial decisions are, by their nature, more difficult to correct in the light of subsequent experience than decisions by the representative institutions of government. *Stare decisis* and the inertial power of precedent are invaluable aspects of the judicial function, but they can be serious obstacles to correcting the errors of judgment that are unavoidably committed by those who undertake the role of lawmaking. Third, Supreme Court decisions apply to the entire country, so that when they prove to have devastating consequences, it is especially difficult for the victims to escape their effects.

It is certainly conceivable that a free people might decide that these disadvantages are outweighed by the benefits of removing a wide range of decisions about the scope of civil liberties from the ordinary political process. As we have seen, the framers of our Constitution did exactly that in a few limited areas, most of which involve discrimination against groups that are particularly vulnerable to political oppression, such as out-of-staters and racial minorities. But that does not imply that it makes sense for the federal courts, acting outside the formalities of the Article V amendment process, to inject themselves into the enormous range of issues that they now decide under the doctrines of incorporation and substantive due process.

The framers of our Constitution had a different approach: Leave the several states free to make the very complex judgments involved in balancing the desirability of personal liberty against the republican need to curtail libertine individualism. This allocation of responsibility never implied or promised that any state would make a perfect success of this impossibly delicate task, or even that the states would do a tolerably good job on every occasion. What I think it did promise was that most of

them would do an adequate job most of the time, and that really serious excesses in either direction would prove transitory. I think the promise was pretty well fulfilled. Apart from the special case of slavery and race discrimination—which had to be, and were, addressed by amendments to the federal Constitution—I am not aware of any state that had a sustained experience with truly oppressive governance. And since the federal government did not become heavily involved in micromanaging the balance of individual rights and responsibilities until well into the Twentieth Century, this suggests that other forces were operating fairly well.

What might those forces have been? Among the most obvious are those identified at the outset of this Paper as the principal justifications for federalism in general. Groups of citizens living in different locations may have somewhat different preferences. Some people, for example, prefer relatively quiet suburban environments, while others have a taste for the raucous or invigorating street life more commonly found in large cities.⁶¹ More important, simple competition among jurisdictions inhibits the development of excessively oppressive or excessively libertarian government in any state, and the allocation of power to the state level inhibits the use of federal power by coalitions that might otherwise impose excessively oppressive or excessively libertarian policies on the country as a whole.

As in private markets, the key to a successful federal system is adequate competition. The key to adequate competition, in turn, is mobility. Because there are and can be few legal obstacles to an American citizen's leaving one place for another, the states are forced to compete with each other for the loyalty of their citizens in a way that nations almost never do. This fact, of course, does not imply that people can move from one jurisdiction to another without cost. And it therefore does not imply that all mistakes by state governments will be corrected instantly by massive emigration. But truly serious and persistent mistakes in balancing discipline and liberty certainly would induce significant movements of people to other states. The large movement of black Americans out of the South during the Jim Crow period is one striking example, and the serious decline in Washington, D.C.'s population in recent years is another.

The threat that people may emigrate in significant numbers does not have to be realized very often in order to have real effects. Interjurisdictional competition operates largely through an invisible hand,

61. This example suggests, as I acknowledged above, *see supra* note 2, that there is no reason to assume that devolution of authority over civil liberties should stop at the state level. One advantage of giving states greater leeway in defining the scope of civil liberties is that it would give them greater leeway to experiment with fostering diversity within their own borders.

and its importance is therefore easy to overlook. Just as pundits and politicians are constantly tempted to believe that they can improve the efficiency of private markets by substituting centralized regulation for competitive forces, so it is tempting to suppose that merely identifying a problem in the way that some state has balanced order and liberty proves the need for federal judicial intervention. The fallacy is the same in both cases.

Admittedly, interjurisdictional competition is even more imperfect than competition in typical private markets for goods and services. It seems safe to assume that fairly large departures from the optimal balance of civil and political liberty might be required before people would begin voting with their feet in numbers great enough to force changes in the offending jurisdiction. But it is not so safe to assume that, on the whole and over time, states will actually depart from the optimum more than the Supreme Court will. Although it may not be possible to delineate on theoretical grounds all the circumstances in which interjurisdictional competition will be superior to federal judicial regulation, it does seem clear that such competition has been growing more effective over time rather than less. Because the costs of transportation and communication have fallen very dramatically during the last few decades, the costs of relocating to another jurisdiction have fallen commensurately. It is thus somewhat strange that the federal courts have become more interventionist rather than less during this period, especially when one considers that the pressing need for centralized regulation had not been apparent even before this large reduction in the costs of relocation had occurred.

Low costs of transportation and communication, combined with tremendous increases in the general level of economic prosperity, have made it feasible for significant portions of the American population to overcome the accident of birth and to decide for themselves where they want to live.⁶² And we have actually exercised this power in tremendous numbers. Almost half of all Americans were born somewhere other than in the state where they now reside.⁶³ Even the poorest citizens have

62. The increased commercialization of American life may also have undermined the ability of extrapolitical institutions like religion to foster the virtues needed for republican politics. To the extent that this is true, there may be a greater need for compensating efforts by government today than there was in the past.

63. See U.S. BUREAU OF THE CENSUS, 1990 SELECTED PLACE OF BIRTH AND MIGRATION STATISTICS FOR STATES, table 1 (1991) (showing that approximately 40% of Americans do not reside in the state in which they were born); F.H. Buckley, *The Political Economy of Immigration Policies*, 16 INT'L REV. L. & ECON. 81, 91 (1996) (stating that the 1990 census shows that 8% of Americans are foreign-born).

demonstrated considerable capacity to vote with their feet,⁶⁴ and state governments apparently reward such behavior.⁶⁵ In light of such evidence about the behavior of the very poor, and the evidence that middle-class people encounter all the time among those they know, it seems completely obvious that the moral climates generated by different state and local governments are (or could be if the Supreme Court would get out of the way) among the most important factors in determining the choices of productive citizens about where to live. Nor is it easy to imagine that any state would foster a moral climate like the one that now exists in the District of Columbia, or that any state would be so resistant to making the changes needed to correct the steady and persistent outflow of taxpayers that the District has experienced in recent years.⁶⁶

The increased nationalization of our economic life and the decreased authority of the states over matters involving civil liberties have greatly diminished the actual effectiveness of interjurisdictional competition. Changes in economic prosperity and in the costs of transportation and communication, however, have actually strengthened the ability of interjurisdictional competition to foster optimal levels of civil liberties. This is an important reason for believing that the restoration of federalism can be undertaken safely. These very same changes have also had effects that make the restoration of federalism desirable, for they have made the federal government more dangerous than it was when the nation was founded. Madison focused his attention on the problem of majority faction and concluded that the federal government would be less dangerous than the state governments. Madison, however, seems to have

64. See, e.g., Margaret F. Brinig & F.H. Buckley, *The Market for Deadbeats*, 25 J. LEGAL STUD. 201, 209-10 (1996) (finding that higher welfare payouts are significantly and positively correlated with immigration and significantly and negatively correlated with emigration).

65. See, e.g., F.H. Buckley & Margaret F. Brinig, *Welfare Magnets: The Race for the Top*, 5 SUP. CT. ECON. REV. 141 (1997) (analyzing empirical evidence that states respond to welfare pressure by increasing welfare payouts, possibly in order to attract voters likely to support a dominant political coalition).

66. The District of Columbia government has been insulated to a great extent from the consequences of its policies by the special federal subsidies that it receives. The need for reform of those policies, and the local government's unwillingness to undertake reform, eventually became so utterly self-evident that the federal government began removing various powers of self-government from the District. For those unfamiliar with the nature and quality of self-government in this jurisdiction, some useful illustrations are provided in a series of four articles on the "death of home rule." See Jeffrey Goldberg, *Smoke Alarm*, THE NEW REPUBLIC, Jan. 20, 1997, at 9-10; Sydney Freedburg, Jr., *In Loco Parentis*, THE NEW REPUBLIC, Jan. 20, 1997, at 10-11; Robyn Gearey, *A Capital Crime*, THE NEW REPUBLIC, Jan. 20, 1997, at 12-13; Erik Wemple, *Democracy's Discontent*, THE NEW REPUBLIC, Jan. 20, 1997, at 20-22.

underestimated the dangers arising from *minority* factions.⁶⁷ The decreased costs of transportation and communication, along with the increasingly specialized division of labor that is at the root of our prosperity, have fostered the formation of narrow special interest groups that are more and more active in securing national legislation and federal court rulings that are contrary to the general good.

Many of these special interests—the dairy farmers, the ship builders, and such—have narrow economic aims, and their activities mostly produce narrow economic effects. But others have wider agendas that are in that respect more dangerous. Obvious examples include teachers, lawyers, journalists, and perhaps certain religious factions. Some of these groups, moreover, appear to have special influence with the Supreme Court. To the extent that the restoration of federalism made it more difficult for interest groups like these to impose their self-serving moral and political agendas at the national level, the political health of the nation would in the long run be improved.

VI. FEDERALISM ILLUSTRATED

Much of the previous discussion has been relatively abstract. To make the analysis more concrete, I shall conclude with two examples which have been chosen for their illustrative value rather than for their likely political appeal. As history has proved many times, it is easy enough to count oneself among the friends of federalism and devolution when those principles coincide with one's own political agenda. The more difficult, but more worthwhile, task is to recall the value of those principles even when one's own oxen may get gored.

First, consider the right to keep and bear arms, which the founding generation ranked among the most important guarantees for the security of a free state.⁶⁸ The federal judiciary has never enforced this right, either against the federal or the state governments—not once in our entire history. So here we have an interesting case for testing what is likely to happen to our fundamental liberties when the Supreme Court decides not to protect them.

67. See, e.g., Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1333-39 (1994); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1500-02 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)).

68. For detailed discussions of the constitutional right to keep and bear arms, including refutations of the widespread misconception that the Second Amendment merely protects the right of state governments to maintain military organizations like the National Guards, see Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 GA. L. REV. 1 (1996), and the large body of literature cited therein.

What has been the result? There are a few jurisdictions—Washington, D.C., for example—with very draconian gun control laws.⁶⁹ But there are other jurisdictions that have gone in the other direction. Kennesaw, Georgia, for example, *requires* heads of households to own a gun.⁷⁰ And between these extremes, there is a lot of variety from one place to another. Some of the differences reflect differing local circumstances. Rural states with low crime rates, for example, tend to have liberal gun control rules, while more urbanized states have tended to adopt more restrictive regimes.

As the nation has become more urbanized, gun control laws have generally become more numerous and restrictive. Recently, however, there has been an important turn in the opposite direction. This began about ten years ago when Florida, which includes a number of high-density, high-crime jurisdictions, instituted a very liberal regime that permits almost any responsible adult to carry a concealed weapon. The results of this experiment have been quite favorable: minuscule numbers of permit holders have misused their weapons, and Florida's violent crime rate declined dramatically after the new law took effect.⁷¹ Florida's successful reform is now being copied by other jurisdictions, including populous states like Virginia and Texas. These are very dramatic expansions of liberty, but they would probably not have been effected by Congress, and the Supreme Court almost certainly would never have interpreted the Second Amendment to require them.

The point here is that the right to keep and bear arms, although never enforced by the federal courts, has not even come close to being extinguished as a practical matter in this country. Gun control laws have varied considerably from place to place and from time to time. In my view, many of them have been very foolish,⁷² and some of them may well deserve to be invalidated under the Second Amendment. But there is clearly a need for some kinds of regulation, and it is not by any means obvious that federal judges can do a better job over time than the states

69. See D.C. CODE ANN. §§ 6-2311 to -2312 (1981 & Supp. 1996).

70. See Don B. Kates, Jr., *Gun Control: Separating Reality from Symbolism*, 20 J. CONTEMP. L. 353, 371 n.59 (1994).

71. See Clayton E. Cramer & David B. Kopel, "Shall Issue": *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 690-94 (1995).

72. There is, for example, strong empirical evidence supporting the hypothesis that prohibitions on the carrying of concealed weapons by law-abiding citizens cause an *increase* in the rate of violent crimes like murder, rape, and robbery. See John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEG. STUD. 1 (1997). The results of the Lott & Mustard study are consistent with the standard economic theory of deterrence. Judging by the very considerable publicity the study has received in the popular press, however, its results appear to have been quite a shock to our nation's opinion leaders.

as a group in deciding where to draw the line between appropriate and inappropriate regulations.⁷³

Nor, as the history of the right to arms demonstrates, are state governments condemned to engage in some kind of "race to the bottom" when they are left with their original authority over fundamental rights. The absence of such a race to the bottom is especially striking here because the right to arms undoubtedly enjoys much less popular support today than it did when the Constitution was adopted. Other rights, such as expansive notions of free speech and the free exercise of religion, just as clearly enjoy more popular support today than they did during the pre-incorporation era. There is no reason to think that the federal courts are needed to prevent the states from snuffing out these other rights, and very little reason to think that federal courts are better equipped than state governments to determine exactly how expansive these rights should be.

My second example comes from the First Amendment, which of course is where the federal courts have been most zealous in protecting us from our state governments. If one makes a casual survey of the Court's First Amendment decisions, it is striking how few cases involve federal laws and how relatively marginal the issues have been in most of the cases that involve state laws. I personally find many of the decisions quite appealing, in the sense that I would probably be inclined to reach the same result if I were a state judge applying a state version of the First Amendment. But I am seldom left with the impression that the fundamental core of the freedom of speech or the free exercise of religion would be seriously endangered if the federal courts were to leave the states alone. Nor is it easy to find evidence of a serious threat to these core freedoms in the historical record of the nation prior to the Court's incorporation of the First Amendment.

73. This is not meant to imply that there is any merit in the Supreme Court's refusal to apply the Second Amendment against the states while continuing to treat other provisions of the Bill of Rights as incorporated. For an argument that the failure to incorporate the Second Amendment is intellectually untenable given the Court's announced incorporation principles, see Lund, *supra* note 68. For a contrasting view, see DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 129 (1995). Shapiro states:

To read the Privileges and [sic] Immunities Clause, the Due Process Clause, the Equal Protection Clause, or any other provision of the Fourteenth Amendment as somehow extending this restriction to the states would be so ironic that even one who shared Justice Black's version of incorporation theory would be likely to balk.

Id. (footnote citing the views of Professor Lawrence Tribe omitted). We are not told why it would be "so ironic" to read the Constitution to incorporate the Second Amendment. Professor Shapiro, however, emphasizes how clear he believes it is that the Second Amendment neither will nor should be applied against the states, so his reference to an ironic reading of the Constitution may simply be a way of indicating how shocked he would be to encounter someone who did not share his assumptions about gun control policies.

With respect to the *federal* government, however, the historical record is somewhat less reassuring. Consider the history of the Church of Jesus Christ of Latter-Day Saints. This religion was the victim of very serious religious persecution, which occurred before the Supreme Court incorporated the First Amendment. Driven out of several states by mob violence and official persecution, the Mormons eventually settled the Utah territory. Having secured themselves from local oppression by the simple, if very costly, expedient of isolating themselves in an area where they could achieve complete political dominance, the Mormon solution to the religious and political hostility they encountered might seem to have embodied the virtues of federalism. The political threat they offered in the states from which they were driven was almost certainly exaggerated, but the Mormons' efforts to integrate religion, politics, and economics was sufficiently distinctive and cohesive that local concern was probably not the product of mere religious prejudice. Whatever the extent of the validity of those concerns, however, any political threat posed by the Mormons after they removed themselves to Utah must have been extremely small. As Madison himself had pointed out: "A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source."⁷⁴

Although it would be difficult to explain the continuing persecution of the Mormons after their removal to Utah except by reference to religious prejudice, neither the principles of federalism nor the First Amendment prevented such persecution from occurring. After the Mormons settled in Utah, the federal government outlawed the Mormon practice of plural marriages, and went on an extraordinary campaign to destroy the Mormon church. The courts did nothing to stop this concentrated assault on the free exercise of religion,⁷⁵ and the Mormons had little choice but

74. THE FEDERALIST NO. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961).

75. See, e.g., *Davis v. Beason*, 133 U.S. 333 (1890) (approving an Idaho territorial statute denying Mormons, polygamists, and advocates of polygamy the right to vote and to hold office), *overruled in part by Romer v. Evans*, 116 S. Ct. 1620 (1996); *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890) (upholding federal statute dissolving the Mormon church and providing for the seizure of all its property); *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (approving unanimously the conviction of a Mormon for violating a federal antipolygamy statute, and holding that "Congress was deprived [by the First Amendment] of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."). As the Court has recently demonstrated, a strong case can be made for reasoning along this line if the First Amendment is assumed to apply to the state governments. See *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990). It is less apparent why this reasoning was required when the First Amendment applied only against the federal government, especially in the case of a statute aimed at a particular religious group. In our own time, when the state of Hawaii appeared on the verge of legalizing the far more radical and novel practice of homosexual marriage, the federal government confined itself to an effort to protect

to alter their religious practices to suit the commands that were being issued from Washington.⁷⁶ This may well have been the most significant prohibition on the free exercise of religion in our nation's history, and it is no accident that the federal government was responsible for it.

The fate of the Mormons suggests a good effect, apart from the advantages of competitive federalism, that might arise from abandoning the incorporation doctrine. In applying Bill of Rights provisions against the states, the Supreme Court has been forced to employ a variety of balancing tests, for the simple reason that a civilized society could hardly be maintained if everyone enjoyed an absolute right to say anything he wants, and to keep any kind of weapons that he wants, and to engage in any kind of behavior that he characterized as a religious practice. But these rights *could* be very close to absolute if they were good only against the federal government. Inasmuch as the federal government has very little need to regulate these matters, and poses a grave threat to liberty when it overregulates them, the Supreme Court could perform a truly valuable function if it applied the Bill of Rights much more strictly than it does now, but only against the federal government.

Lest this suggestion be considered merely idiosyncratic, it may be worth recalling the warning that Justice Harlan issued when the Court held that jury trials are required for crimes punishable by more than six months imprisonment and that criminal juries may have fewer than twelve members:

The recent history of constitutional adjudication in state criminal cases is the ascendancy of the doctrine of *ad hoc* ('selective') incorporation, an approach that absorbs one-by-one individual guarantees of the federal Bill of Rights into the Due Process Clause of the Fourteenth Amendment, and holds them applicable to the States with all the subtleties and refinements born of history and embodied in case experience developed in the context of federal adjudication. Thus, with few exceptions the Court has "incorporated," each time over my protest, almost all the criminal protections found within the first eight Amendments to the Constitution, and made them "jot-for-jot and case-for-case" applicable to the States.

.... It is my firm conviction that "incorporation" distorts the "essentially federal nature of our national government," one of whose basic virtues is to leave ample room for governmental and social experimentation in a society as diverse as ours, and which also reflects the view of the Framers that "the security of liberty in America rested primarily upon the dispersion of governmental power across a federal system." The Fourteenth Amendment tempered this basic philosophy but did not unstitch the basic federalist pattern woven into

other states from being forced to recognize such unions. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

76. See, e.g., JAMES B. ALLEN & GLEN M. LEONARD, *THE STORY OF THE LATTER-DAY SAINTS* (1976); Leonard J. Arrington & Davis Bitton, *THE MORMON EXPERIENCE* (1979).

our constitutional fabric. The structure of our Government still embodies a philosophy that presupposes the diversity that engendered the federalist system.

“Incorporation” in *Duncan* closed the door on debate, irrespective of local circumstances, such as the backlogs in urban courts like those of New York City, and has, without justification, clouded with uncertainty the constitutionality of these differing state modes of proceeding, see Appendix, pending approval by this Court; it now promises to dilute in other ways the settled meaning of the federal right to a trial by jury. Flexibility for experimentation in the administration of justice should be returned to the States here and in other areas that now have been swept into the rigid mold of “incorporation.” I agree with THE CHIEF JUSTICE: “That the ‘near-uniform judgment of the Nation’ is otherwise than the judgment in some of its parts affords no basis . . . to read into the Constitution something not found there.” Opinion of THE CHIEF JUSTICE in *Baldwin*.

It is time, I submit, for this Court to face up to the reality implicit in today’s holdings and reconsider the “incorporation” doctrine before its leveling tendencies further retard development in the field of criminal procedure by stifling flexibility in the States and by discarding the possibility of federal leadership by example.⁷⁷

Harlan offered this analysis in the context of criminal procedure, but the danger of diluting other provisions of the Bill of Rights may be even greater. It should be considered more troubling than it usually is, for example, that the Supreme Court has permitted the federal government to engage in content-based censorship of broadcasters,⁷⁸ to limit the freedom of citizens to support political candidates,⁷⁹ and to criminalize “conspiracies” to advocate revolution.⁸⁰

VII. CONCLUSION

If the Supreme Court were ever to relinquish its incorporation doctrine, and refrain from creating a substitute for it under some other name, the task of constitutional adjudication would become at once more straightforward and rather less interesting. This obvious fact may go a long way toward explaining why the Justices have never shown the slightest inclination to take this step. It is possible that the loss of so many interesting cases under the Bill of Rights might be made up in part by a more aggressive effort to prevent the states from inhibiting emigration by

77. *Williams v. Florida*, 399 U.S. 78, 130-38 (1970) (Harlan, J., concurring in the judgment, consistent with his dissent in *Baldwin v. New York*, 399 U.S. 66, 117 (1970)).

78. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-90 (1969).

79. See *Buckley v. Valeo*, 424 U.S. 1 (1976).

80. See *Dennis v. United States*, 341 U.S. 494 (1951).

their residents,⁸¹ but it is hard to imagine that the Justices would regard this as adequate compensation.

Although the Supreme Court seems unlikely to embrace the conclusions suggested by the analysis in this article, the recent *Lopez*⁸² decision may give a little hint of some small movement by the Court in my direction. Unlike most other Commerce Clause cases, *Lopez* did not involve an economic regulation. Instead, it involved a gun control law that criminalized possession of a firearm within 1,000 feet of a public, parochial or private school.⁸³ The Court invalidated this statute because the Court concluded that possession of a gun is "in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."⁸⁴ The Court signaled its reluctance "to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States,"⁸⁵ and in thus standing up for the principles of federalism, the Court also served to protect the right embodied in the Second Amendment.⁸⁶ Although the gun control statute at issue in *Lopez* could hardly be numbered among the greatest threats to American liberty, the Supreme Court's decision was consistent with the insight that the protection of individual liberties is not necessarily best

81. A kind of precedent for such a development already exists in the substantive due process "right to travel" cases such as *Shapiro v. Thompson*, 394 U.S. 618 (1969). Although substantive due process has no more grounding in the Constitution here than elsewhere, it is at least possible to imagine a right-to-travel jurisprudence that would strengthen the constitutional principle of federalism and thus reduce the pressures for a wide range of other substantive inventions that undermine that principle. For a theoretical discussion suggesting the desirability of expanding existing protections of the right to emigrate, see Richard A. Epstein, *Exit Rights Under Federalism*, 55 L. & CONTEMP. PROBS. 147 (1992).

82. *United States v. Lopez*, 115 S. Ct. 1624 (1995).

83. See 18 U.S.C. §§ 921 to 922 (Supp. V 1988).

84. *Lopez*, 115 S. Ct. at 1634. Two members of the five-Justice majority stressed that the Court's decision did not in their view "call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature." *Id.* at 1637 (Kennedy, J., joined by O'Connor, J., concurring).

85. *Id.* at 1634.

86. As the Fifth Circuit noted in the *Lopez* case, the federal statute at issue criminalize[d] any person's carrying of any unloaded shotgun, in an unlocked pickup truck gun rack, while driving on a county road that at one turn happens to come within 950 feet of the boundary of the grounds of a one-room church kindergarten located on the other side of a river, even during the summer when the kindergarten is not in session. *United States v. Lopez*, 2 F.3d 1342, 1366 (5th Cir. 1993), *aff'd*, 115 S. Ct. 1624 (1995). The defendant in *Lopez* had not raised the Second Amendment, so that issue was not before the courts in this case. The *Lopez* decision nevertheless had the effect of protecting the rights of citizens who would otherwise have faced great difficulties in transporting their firearms in ways that their state governments had very reasonably not forbidden.

entrusted to the federal government.⁸⁷ That principle applies with even more force to the federal judiciary than it does to Congress, and an increased acceptance of that insight by the Justices would lead them increasingly back to the original plan of the Constitution.

87. Justice Kennedy stated in *Lopez*:

"Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front In the tension between federal and state power lies the promise of liberty."

Lopez, 115 S. Ct. at 1638 (Kennedy, J., concurring) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991)).

