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The Curious Evolution of Federalism

IN THE LATTER third of the 20th century, federalism would become a centerpiece of American jurisprudence—yet at the hands of both liberals and conservatives, it evolved into often unrecognizable forms, and failed to consistently achieve its goal of promoting individual liberty. In the hands of some liberals, federalism provided a convenient rhetorical rationale for expanded state power. In the hands of some conservatives, states' rights once again became an end in itself, regardless of whether it advanced liberty. This philosophical confusion has had the pernicious and predictable effect of reducing important structural limitations on the scope of state and local government power, and on abuses of that power.

The path to the present has been circuitous. The undoing of federalism began swiftly after the enactment of the 14th Amendment. The U.S. Supreme Court quickly received an opportunity to give meaning to the amendment by using it to restrict tyranny by state governments. But in one of the worst decisions in the history of American jurisprudence, the Court blew it badly.

All three provisions of the 14th Amendment were important. The due process clause expressly limited the states' power to infringe upon life, liberty, and property. The equal protection clause provided a safeguard against the evils of "faction" that Madison had warned about. But it was the amendment's first provision—the privileges or immunities clause—that was intended to protect substantive rights against infringement by state governments, particularly the liberties that had been protected by the Civil Rights Act of 1866.¹

But before the ink on the 14th Amendment was barely dry, the Supreme Court, in a 5-4 decision in 1873, gutted the privileges or immunities clause in the *Slaughter-House Cases*. The cases involved a bribery-procured Louisiana slaughterhouse monopoly challenged by a group of butchers it had put out of business. The majority ruled that the clause was designed to protect only the rights of former slaves and those rights created by virtue of federal citizenship, such as the rights of habeas corpus and of access to navigable waters. In dissent, Justice Stephen Field declared that if such a paltry list of rights was all that the privileges or immunities clause was meant to protect, the 14th Amendment "was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress upon its passage."² Field lamented the decision, "for by it the right of free labor, one of

the most sacred and imprescriptible rights of man, is violated.”³

By removing constitutional protection for freedom of contract, *Slaughter-House* paved the way for the shameful subsequent 1896 decision in *Plessy v. Ferguson*,⁴ in which the Supreme Court upheld a state law requiring “separate but equal” streetcar seating.⁵ *Plessy* was a test case funded by the streetcar company to challenge the inefficient and discriminatory restrictions. Because freedom of contract—one of the essential “privileges or immunities” of citizenship—had been eviscerated by *Slaughter-House*, the plaintiffs were forced to rely on a more difficult equal-protection challenge. The Court rejected the challenge by an 8-1 vote, opening the door to Jim Crow laws and decades of subjugation of blacks by governments at every level. Though *Plessy* would be overturned 58 years later in *Brown v. Board of Education*,⁶ the *Slaughter-House Cases* remain on the books today, nullifying the great promise of the 14th Amendment as a substantive guarantor of fundamental individual rights against abuses by state governments.

Still, over the years, the Court has breathed some life into the 14th Amendment, though all too selectively. Creating a concept called “substantive due process”—a concept made necessary due to the evisceration of the privileges or immunities clause in *Slaughter-House*—a conservative Court prior to the New Deal used the due process clause to shield business activities from arbitrary or excessive economic regulation by the states,⁷ and to protect such personal liberties as the right of parents to direct and control the education of their children.⁸ When liberals gained control of the Court in the 1930s, they jettisoned judicial protection for economic liberty,⁹ and instead used the due process clause to “incorporate” some (but not all) of the protections of the Bill of Rights into the 14th Amendment. Specifically, the Court applied to

the states protections it deemed “fundamental to the American scheme of justice,” such as freedom of speech and press, free exercise of religion, freedom against self-incrimination, and freedom against unreasonable searches and seizures.¹⁰ In more recent years, a more conservative Court has scaled back those protections somewhat, but has applied the “takings clause” of the Fifth Amendment to increase scrutiny of excessive regulation of private property by state and local governments.¹¹ This uneven record demonstrates that neither liberal nor conservative justices have a consistent approach to judicial protection of individual liberties or a coherent grasp on the purposes of federalism.

Liberal Judicial Activism

Liberal judicial activism is legion and legendary. The use of judicial power for the ends of “social justice”¹² has taken many forms: the creation of welfare entitlements and sweeping criminal rights; the invention of two tiers of rights, fundamental and nonfundamental; the recognition of concepts unknown to the Constitution such as “separation of church and state”; the assumption of legislative and executive powers such as judicial taxation and the operation of school and prison systems; and the derivation of rights not from constitutional text or intent but from “emanations flowing from penumbras.” The left’s unbounded judicial adventurism and its failure to exercise any judicial self-restraint inflicted incalculable harm to the integrity and reputation of courts, and led to a predictable backlash that helped elect Richard Nixon and Ronald Reagan and ultimately produced the Rehnquist Court.¹³

But perhaps the most remarkable example of the left’s ends-justifies-the-means jurisprudence was its turnabout on

federalism. Throughout the Franklin D. Roosevelt administration and the subsequent Warren era of the Supreme Court, liberals displayed utter contempt for federalism, invoking Congress's power to regulate commerce as a justification for sweeping national power. Indeed, as early as 1940, the liberal Court dismissed the Tenth Amendment as a mere "truism."¹⁴

But despite disavowing original intent with respect to federalism, liberals perceived value in some degree of state autonomy even early on. As Robert H. Freilich describes it, "Federalism preserves the states not for the purpose of diluting the power of the national government in domestic issues or of overriding minority interests in our society, but of encouraging creativity in government."¹⁵ In other words, federalism was not, as the framers intended, a means by which to limit the power of government, but rather to ensure that state power in the service of "creative" ends would be just as open-ended as the power of the national government.

This liberal version of federalism traces its origins to early 20th-century jurisprudence, when conservatives dominated the Supreme Court and occasionally struck down economic regulations as violations of individual liberty. In its 1932 decision in *New State Ice Co. v. Liebmann*, for instance, the Court struck down an Oklahoma law that prohibited the manufacture or sale of ice without a showing of public convenience and necessity and approval by a state regulatory board. Dissenting, Justice Louis Brandeis articulated the liberal view of federalism:

There must be power in the States . . . to remould, through experimentation, our economic practices to meet changing social and economic needs. . . . It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory.¹⁶

Brandeis didn't explain how it is "courageous" for a state to indulge protectionist sentiments and destroy a person's livelihood. His views were rejected by the Court's majority, speaking through Justice George Sutherland, who declared, "The principle is embedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments."¹⁷ Unfortunately, Brandeis's views would quickly gain ascendancy, and would retain it to this day.

The leading modern theorist of liberal federalism was Justice William Brennan, one of the leading architects of the Warren Court jurisprudence from the 1950s to the 1970s, who remained during the shift to a more conservative Court. Initially, Brennan had little use for federalism, rejecting assertions of "states' rights" and glorifying national power. In a law review article written in 1964, during the heyday of the Warren era, Brennan urged state courts to broadly interpret federal law, because "the fundamental obligation to administer federal law rests on both [federal and state] courts," which possess an "identity of underlying purpose."¹⁸ But by 1977, when the Supreme Court began to change course, Brennan suddenly discovered the virtue of federalism.¹⁹ Calling himself a "devout believer" in federalism,²⁰ Brennan urged that

state courts cannot rest when they have afforded their own citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law. . . .²¹

Indeed, Brennan proclaimed, the "rediscovery by state supreme courts of the broader protections afforded their own

citizens by their state Constitutions . . . is probably the most important development in constitutional jurisprudence of our times.”²² Viewed as independent sources of judicial power, Brennan would subsequently observe, state constitutions could be used to advance “the aspiration to social justice” and “egalitarianism.”²³

Examples of the Brennan doctrine of federalism abound. The Supreme Court, for instance, rejected the argument that unequal educational funding violates the Constitution, or that there is a federal constitutional right to education at all.²⁴ But at the behest of liberal advocacy groups, several state courts have recognized under their own constitutions a cause of action for educational equity and equal funding.²⁵

Likewise, in 1972, the Supreme Court ruled that under the First Amendment, which applies by its terms to governmental conduct only, individuals do not have a right to engage in petitioning in privately owned shopping centers.²⁶ Justice Brennan would later complain that the Court had found the First Amendment “insufficiently flexible” to meet the needs of an “evolving society.”²⁷

But fortunately for advocates of liberal federalism, the California Supreme Court saw things differently, interpreting its own constitution to compel owners of private shopping centers to permit access for petitioning.²⁸ When the shopping center owners went to the U.S. Supreme Court to protect their own free speech and private-property rights, they were rebuffed in an opinion written not by Brennan, but by the Court’s most conservative justice, William H. Rehnquist. Indulging his own deference to states’ rights, Rehnquist acknowledged that “there literally has been a ‘taking’” of the owners’ “right to exclude others,” but he concluded that a state may “exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expan-

sive than those conferred by the Federal Constitution.”²⁹ Delighted that a conservative advocate of federalism could be convinced to articulate the liberal vision of federalism, Justice Thurgood Marshall wrote separately to “applaud the court’s decision, which is part of a very healthy trend of affording state constitutional provisions a more expansive interpretation than this Court has given to the Federal Constitution.”³⁰

The liberal view, as articulated by Louis Brandeis, William Brennan, and liberal academics, might properly be described as “situational federalism,” for its proponents essentially defer to state prerogatives except when they don’t. This convenient divorcing of the concept of federalism from its underlying purposes—decentralizing governmental decision-making and protecting individual liberty—has contributed to the contemporary quagmire that engulfs federalism. It has helped transform federalism from a doctrine of liberty into a tool for expanding government. In the hands of unprincipled liberal activists, federalism suffers an identity crisis, and its utility as a protective force for freedom is waning.

States’ Rights Conservatism

Those who champion federalism as a doctrine of state sovereignty typically refer to themselves as devotees of “original intent.” The preeminent theorist of this movement, Raoul Berger, places the framers’ intent “even above the text” of the Constitution.³¹ But in reality, observes legal scholar Stephen Macedo, that view of the Constitution “really comes down to . . . the Jurisprudence of Selective Intent,” in which original intent is vindicated “only when the process serves a deeper political commitment—that of construing government powers and the powers of majorities broadly and individual rights narrowly.”³²

This construct of the Constitution as a charter of majoritarianism is curious given constitutional intent and text. The original constitution was undemocratic, with state legislatures choosing U.S. senators rather than direct election, the Electoral College choosing the president, super-majority requirements for various enactments, and all manner of checks and balances designed to frustrate legislation and protect individual liberty.

In their conception of federalism, states' rights conservatives tend to glorify the Tenth Amendment and ignore completely the Ninth Amendment (and for that matter, the remainder of the Bill of Rights as well as the 14th Amendment). Take for example the constitutional analysis of Robert Bork, a leading adherent of the majoritarian school of thought. For Bork, the Tenth Amendment sets forth a clear constitutional command, in that it

confirms that federal powers were intended to be limited and that the powers not lodged in the national government remained with the states, if the states had such powers under their own constitutions, and, if not, the powers were still held by the people.³³

In stark contrast, the Ninth Amendment, written in equally broad and general terms, presents to Bork an unfathomable mystery. As Bork testified at his Supreme Court confirmation hearings,

I do not think you can use the Ninth Amendment unless you know something of what it means. For example, if you had an amendment that says "Congress shall make no" and then there is an inkblot, and you cannot read the rest of it, . . . I do not think the court can make up what might be under the inkblot.³⁴

Such a reading of the Ninth Amendment is insupportable.

“Construing the ninth amendment as a mere declaration of constitutional truism, devoid of enforceable content, renders its substance nugatory and assigns to its framers an intention to engage in a purely moot exercise,” declares law professor Calvin R. Massey. “This view is at odds with the contextual historical evidence and the specific, articulated concerns of its framers.”³⁵

States’ rights conservatives like Bork trace their conception of federalism not to the Constitution’s framers, but to theorists like John C. Calhoun. States’ rights conservatives do not view the Constitution as a social contract between individuals and their government, but rather as an act consummated by independent, sovereign states who are little affected by the Constitution’s limitations.³⁶ For Bork, the “protection of individual liberty” is not the central purpose of federalism, but merely an “important benign aspect.” But Bork’s conception of liberty consists not of any limitation on the power of state governments; rather it lies in the fact that “if another state allows the liberty you value, you can move there.”³⁷ Surely it would have been news to the American founders to learn that the liberties they cherished were not universal or transcendent, but rather subject to the whims of the majority in each particular geographic enclave.

States’ rights conservatives reach their goal through a deft rhetorical sleight of hand. Acknowledging the premise of the framers (expressly stated in the Tenth Amendment) that sovereignty lies in the people, they proclaim loudly the people’s “right to self-government.”³⁸ From there, however, they go on to define self-government not in the obvious manner—the right of individuals to be masters of their own destinies—but as the power to construct majorities in order to govern others. Contending ahistorically that “the original Constitution was devoted primarily to the mechanisms of democratic choice,”

Bork concludes that “the major freedom . . . of our kind of society is the freedom to choose to have a public morality.”³⁹ As for other “[l]iberties that are deeply rooted in our history and tradition,” those are “matters the Founders left to the legislature, either because they assumed no legislature would be mad enough to do away with them or because they wished to allow the legislature discretion to regulate the area as they saw fit.”⁴⁰

In such a conceptual framework, constitutional guarantees of freedom of speech, religion, or private-property rights are mere suggestions to legislatures and popular majorities. Unfortunately, as the succeeding chapters will show, legislatures routinely are sufficiently “mad” to violate such precious liberties, with frequency and impunity. Happily, we have a republic, not a democracy; and the courts have not fully accepted the invitation to abdicate their duty within our constitutional framework to protect individual liberties against majoritarian tyranny.

At bottom, states’ rights conservatives confuse means and ends. State autonomy under our system of federalism was not conceived as an end in itself, providing carte blanche authority to states to invade individual rights with impunity. Rather, it was intended as a means to securing individual liberty. When federalism is employed to shield state deprivations of individual liberty—whether the institution of human slavery in the 18th century or myriad instances of grassroots tyranny today—it subverts the purposes of federalism. As Professor Amar aptly puts it, “Whenever the rhetoric of ‘states’ rights’ is deployed to defend states’ wrongs, our servants have become our masters; our rescuers, our captors.”⁴¹ Freedom-loving conservatives need to resuscitate the true intent of federalism and wield it in service of fundamental individual liberties.

The Supreme Court's Federalism

Considering the schizophrenia among conservatives and liberals regarding federalism, it is little wonder that the Supreme Court's modern federalism jurisprudence is often incoherent and inconsistent. Occasionally, the underlying purposes of federalism peek through the muddled rhetoric, but typically the battle comes down to a clash between the respective spheres of national and state power, with sides chosen up not on the basis of which is consistent with the underlying libertarian values of federalism, but on whether the justices prefer state or national power in a particular instance.

Having dispatched federalism as a "truism," the Court found little vitality in the Tenth Amendment for many decades following the New Deal. The debate over federalism began to resurface in the 1970s as conservatives on the Court began to gain ascendancy. But instead of breathing new life into the libertarian principles underlying federalism, the conservatives have tended to attach themselves to notions of states' rights. Though the Court should "recognize that federalism is for citizens, not states," remarks constitutional scholar Michael Greve, "[a]ll too often, . . . the Court has retreated from that insight into a kind of neo-Confederate romanticism."⁴²

Contemporary federalism jurisprudence traces to two landmark cases, *National League of Cities v. Usery*⁴³ and *Garcia v. San Antonio Metropolitan Transit Authority*,⁴⁴ in which the liberal/conservative argument over national power versus states' rights played out in predictable fashion. In the 1976 *National League of Cities* case, the Supreme Court confronted an attempt by Congress to extend the minimum-wage and maximum-hours provisions of the Fair Labor Standards Act

to employees of state and local governments. (It is revealingly ironic how frequently governments seek to exempt themselves from their own and one another's regulations, but that is a story for another book.) Thus was presented a choice between the power of the national government to regulate employer/employee relationships on the one hand, and the right of state governments and their employees to freely bargain over the terms and conditions of employment on the other.

Justice William Rehnquist, the most consistent states' rights conservative on the Court, writing for a 5-4 majority, struck down on federalism grounds the imposition of federal law, holding that Congress could not directly regulate traditional state functions. Rather than buttressing his decision by noting the federal law's interference with individual liberty, he explicitly repudiated any liberty-based conception of federalism. In fact, he declared that the decision would be altogether different if the regulations were addressed to private rather than state employers. "It is one thing to recognize the authority of Congress to enact laws regulating individual businesses," he stated, but "it is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to States as States."⁴⁵ The dichotomy illustrates the logical consequence of states' rights federalism: National regulation of private economic activities is permissible, no matter how extensive or injurious; but national regulation of traditional state functions is impermissible, no matter how important its purpose or how insubstantial its effect.

Rehnquist's decision to eschew the libertarian underpinnings of the Tenth Amendment allowed dissenting Justice William Brennan to chastise him for "differentiating 'the people' from 'the States'" under that constitutional provision.⁴⁶ Brennan also insisted that limits on the national power to reg-

ulate commerce were found in the political process and not in the judicial process,⁴⁷ sounding more than a bit like a Borkian apostle of majoritarianism and judicial restraint.

Once conservatives removed federalism from its foundations in concern for individual liberty, they jettisoned the only principled basis on which to establish any meaningful structural limits on national government power. That would come back to haunt them only nine years later in *Garcia*, which marked a serious setback for federalism. In *Garcia*, a metropolitan transit authority sought exemption from the provisions of the Fair Labor Standards Act. This time, a 5-4 majority discarded the *National League of Cities* “traditional state functions” framework as unworkable and upheld imposition of the federal regulations.

Writing for the majority, Justice Harry Blackmun found that congressional authority to regulate commerce was essentially boundless, and that “the principal and basic limit” was not the judicial enforcement of the Tenth Amendment, but rather “the built-in restraints that our system provides through state participation in federal action”⁴⁸—in other words, the good old political process.

The liberals’ reasoning in *Garcia* hoisted the states’ rights conservatives on their own majoritarian petard. States’ rights conservatives were aghast that the majority would leave states no refuge for the protection of their rights other than the rough and tumble of the political process, even though those conservatives often would have no such concern with respect to assertions of individual rights against authoritarian state laws.

Perhaps recognizing the need to place the case for federalism on more solid and congenial constitutional moorings, Justice Lewis Powell set forth in his dissent a cogent explication of the true foundations of federalism. The Court’s ruling,

Powell charged, “effectively reduces the Tenth Amendment to meaningless rhetoric,”⁴⁹ an outcome he viewed as tragic in that “judicial enforcement of the Tenth Amendment is essential to maintaining the federal system so carefully designed by the Framers.”⁵⁰ Powell emphasized, “The Framers believed that the separate sphere of sovereignty reserved to the States would serve as an effective ‘counterpoise’ to the power of the Federal Government.”⁵¹ But “federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of powers between the States and the Federal Government, *a balance designed to protect our fundamental liberties*.”⁵² As Powell concluded, the effect of eviscerating structural limits on national power meant that “federal political officials, invoking the Commerce Clause, are the sole judges of the limits of their own power,” a result “inconsistent with the fundamental principles of our constitutional system.”⁵³

Justice Rehnquist, who dissented separately in *Garcia*, promised that the rule of *National League of Cities* “will, I am confident, in time command the support of a majority of this Court.”⁵⁴ And indeed, although *Garcia* has not yet been explicitly overruled, the conservatives have prevailed on a number of occasions, often laudably reining in national government power on federalism grounds.⁵⁵ In particular, the Court under Chief Justice Rehnquist has concluded that the national government’s power to regulate commerce—which was invoked during the New Deal and Great Society as the constitutional basis for sweeping regulatory enactments related tangentially at best to interstate commerce—is not without boundaries.⁵⁶ In the 1995 decision in *United States v. Lopez*,⁵⁷ the Court struck down for the first time since the New Deal a law predicated on the Commerce Clause: the Gun-Free School Zones Act, which prohibited possession of a fire-

arm within 500 feet of a school. Five years later, in *United States v. Morrison*,⁵⁸ the Court invalidated a civil remedy provision of the Violence Against Women Act. Both decisions were 5-4, with Chief Justice Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas forming the majority.

In *Lopez*, the Court recognized that the “few and defined” powers of the national government were meant to “ensure protection of our fundamental liberties”; and that the purpose of a “healthy balance of power between the States and the Federal Government” is to “reduce the risk of tyranny and abuse from either front.”⁵⁹ In more narrowly construing the national government’s power to regulate commerce, the Court noted that in order for Congress to possess authority, the nature of its act must actually affect commerce in a substantial manner.⁶⁰ The fiction that had been invented by liberal activists that *everything* affects interstate commerce sufficiently to trigger congressional regulatory authority under the Commerce Clause was at last repudiated (albeit by a single vote) in a victory for the true principles of federalism.

The Court also clipped Congress’s wings with regard to its enforcement authority under the 14th Amendment. Following a narrow interpretation by the Supreme Court of the First Amendment’s guarantee of free exercise of religion,⁶¹ the Court in *City of Boerne v. Flores*⁶² struck down the Religious Freedom Restoration Act, which was designed to restore the lost protections. The Court held that Congress’s enforcement power under the 14th Amendment was purely “remedial” and “preventative,” rather than “substantive” in the sense of defining or creating rights.⁶³ The decision was something of a mixed bag from a federalism standpoint: It held Congress to its defined powers, but those powers in that instance were exercised in a manner intended to expand liberty. In the long

run, *City of Boerne* likely will exert a pro-freedom influence by curbing congressional power to create entitlements.

Additionally, the Court has acted to limit the scope of *Garcia*. In *New York v. United States*,⁶⁴ the Court took on the common congressional practice of making federal funding contingent upon states taking certain desired actions. In striking one provision of a radioactive waste law, the Court concluded that under the Tenth Amendment, such choices must be truly voluntary. As Justice O'Connor declared, "A choice between two unconstitutionally coercive regulatory techniques is no choice at all."⁶⁵ The Court's majority established that "Congress may not simply 'commandeer[r] the legislative processes of states by directly compelling them to enact and enforce a federal regulatory program.'"⁶⁶ The Court subsequently invoked the "anti-commandeering" principle by striking down a provision in the Brady Act that required state law-enforcement officials to conduct background checks for gun owners, holding that under the Tenth Amendment, Congress cannot compel "ministerial" acts by state governments.⁶⁷

In sum, recent jurisprudence has advanced the goals of federalism by limiting the powers of Congress, as they directly regulate both the states and the conduct of individuals. But what about the flip side of federalism, in which federal courts are entrusted with the duty under the 14th Amendment to defend federal constitutional rights against violations by state and local governments? Here, sadly, the record is much more mixed—as the subsequent chapters will illustrate—and depends largely on which types of rights are involved. Conservatives generally are more vigilant in protecting individuals against racial preferences and abuses of private-property rights, liberals more trustworthy when it comes to protecting privacy and the rights of criminal defendants, and ideological lines are blurry on free-speech issues. Again, much of this

inconsistency emanates from confusion over the proper meaning and role of federalism.

A classic clash along those lines involved the application of federal antitrust laws to limit the anticompetitive actions of local governments (states have long been exempted from antitrust laws). In many instances, local government regulations directly and substantially affect interstate commerce; and unlike the monopolistic acts of private entities, the market often cannot overcome the rules set by government. That would seem to warrant congressional intervention to limit the anticompetitive actions of local governments under both the Commerce Clause and, arguably, the 14th Amendment.

In a pair of decisions in the late 1970s and early '80s, the Supreme Court applied the antitrust laws to curb such abuses by local government.⁶⁸ In dissent to *Lafayette*, Justice Potter Stewart complained of the intolerable threat of liability, for local governments “often take actions that might violate the antitrust laws if taken by private persons, such as granting exclusive franchises, enacting restrictive zoning ordinances, and providing public services on a monopoly basis.”⁶⁹ Exactly! That time, in his majority opinion, Justice Brennan—ordinarily no friend of free markets but a strong advocate of national regulatory power—weighed in with incisive analysis, declaring that local governments

participate in and affect the economic life of this Nation in a great number and variety of ways. . . . [T]hey are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender. If municipalities were free to make economic choices counseled solely by their own parochial interests and without

regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.⁷⁰

The Supreme Court decisions touched off a bitter struggle within the Reagan administration between states' rights conservatives and free market advocates, which brought to the surface the broader battle among conservatives over the principles of federalism. Unfortunately, the states' rights crowd prevailed, and President Reagan signed legislation in 1984 sharply reducing antitrust liability for local governments, thereby removing a weapon against grassroots tyranny.⁷¹

Two recent cases in particular illustrate the shifting perspectives on federalism and the ends-justify-the-means approach of liberals and conservatives toward issues of individual rights and state autonomy. In its 1996 decision in *Romer v. Evans*, a majority of the Supreme Court invalidated, under the equal protection guarantee of the 14th Amendment, a ballot initiative that amended the Colorado Constitution to prohibit local governments from enacting laws forbidding discrimination against homosexuals. In a 6-3 decision authored by Justice Kennedy,⁷² the Court found that the provision singled out homosexuals as "a solitary class with respect to transactions and relations in both the private and governmental spheres."⁷³ That created a "special disability," wherein homosexuals alone could not seek protection against discrimination through ordinary democratic processes but instead would have to secure a new constitutional amendment.⁷⁴ Declaring that the guarantee of equal protection states "a commitment to the law's neutrality where the rights of persons are at stake,"⁷⁵ the Court held that a state "cannot so

deem a class of persons a stranger to its laws,”⁷⁶ and struck down the provision.

Not surprisingly, the dissenters—Chief Justice Rehnquist and Justices Scalia and Thomas—objected strongly on federalism grounds. Characterizing the issue as a debate over cultural norms, Justice Scalia argued, “Since the Constitution of the United States says nothing about this subject, it is left to be resolved by normal democratic means, including the democratic adoption of provisions in state constitutions.”⁷⁷ Declaring that the right as articulated by the majority “has no foundation in American constitutional law,”⁷⁸ Scalia concluded that the Court had “invent[ed] a novel and extravagant constitutional doctrine to take the victory away from traditional forces” of majority rule.⁷⁹

The Court’s lineup in *Romer v. Evans* was unsurprising—the Court’s liberals and moderates joining together to apply federal constitutional protections to prevent abuses by a state, and the conservatives voting to preserve state prerogatives and majority rule. So when similar equal protection issues were presented to the Court four years later in the midst of a bitter presidential election struggle, one might have predicted a similar outcome.⁸⁰ Indeed, the outcome *was* similar—the Supreme Court intervened and overturned local election processes—but seven of the nine justices had switched sides.

In *Bush v. Gore*, the five-member Court majority (Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and Thomas) anchored its decision in the fundamental right that encompasses “equal weight accorded to each vote and the equal dignity owed to each voter.”⁸¹ Recognizing their vulnerability to attacks on federalism grounds, the majority admonished, “[n]one are more conscious of the vital limits on judicial authority than are the members of this Court, and none stand more in admiration of the Constitution’s design to

leave the selection of the President to the People, through their legislatures, and to the political sphere.”⁸² Indeed, in a concurring opinion, Chief Justice Rehnquist acknowledged that “[i]n most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns.”⁸³ However, the Court found, “we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards,”⁸⁴ and it halted the recount ordered by the Florida Supreme Court.

This time, the liberal dissenters—Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer—wielded the sword of states’ rights. Declaring the decision a “federal assault on the Florida election procedures,”⁸⁵ they asserted that the Constitution’s provisions regarding national elections “can hardly be read to invite this Court to disrupt a State’s republican regime.”⁸⁶ To the contrary, Justice Ginsburg declared, “Federal courts defer to state high courts’ interpretations of their state’s own law. This principle reflects the core of federalism, on which all agree.”⁸⁷

The lesson arising from the inconsistent perspectives in those cases is that we are all federalists now, except when we are not. It is difficult to find anyone, other than the swing justices, O’Connor and Kennedy, who agrees with both *Romer* and *Bush*, or who disagrees with both. And surely, there are jurisprudential grounds other than the policy preferences of the particular justices to justify the divergent votes. But the apparent flip-flop, at least in terms of rhetoric, by both liberal and conservative justices, underscores the current ad hoc

state of federalism jurisprudence practiced by both sides of the ideological divide.

That is not to say that the current Court has not scored some important advances for true federalism, particularly in applying principles of federalism to restrain the reach and power of the national government. But because it has lost its grasp on the core values underlying federalism, too often the Court has allowed the doctrine to shield rather than root out abuses of individual rights. “Today’s Court has lost sight of the People,” charges Akhil Amar, “and so it has transmogrified doctrines of federalism and sovereignty into their very antitheses.”⁸⁸

It is not only the Supreme Court justices who are inconsistent about federalism, but activists on both sides of the ideological divide as well. Many liberals love to eviscerate state autonomy when they propose all manner of federal mandates, from wage and hour laws to education to environmental regulations to government-run health care. Conservatives often resist such incursions on states’-rights grounds. But turn the tables and the positions switch. When the Massachusetts Supreme Judicial Court decided to interpret its constitution to allow same-sex marriage, many social conservatives responded with a proposed constitutional amendment to forbid that exercise of state sovereignty. The decision and the response by some social conservatives allowed liberal constitutional scholar Cass Sunstein to characterize the Massachusetts decision as “a remarkable tribute to U.S. federalism.”⁸⁹ Indeed, it is difficult to square the argument by social conservatives in the abortion context that states should have the power to define life, with the view that states should not be able to define marriage.

This is not to suggest any particular position on the merits of the underlying issues, but rather to puzzle over the maddening inconsistency with which advocates across the ideo-

logical spectrum invoke the mantle of federalism and just as easily jettison it when the mood strikes. Such constitutional relativism erodes the integrity of federalism and its value in protecting precious freedoms.

As envisioned by the framers of the original constitution and perfected by the authors of the 14th Amendment, the framework for federalism is fairly simple and straightforward. The Constitution creates a national government of strictly defined and limited powers, and expresses a judicially enforceable preference for the decentralization of decision making, ultimately resting sovereignty with each individual. However, in order to protect individual liberty, the Constitution invests both the national and state governments with the power to curb violations of those rights by one another. Hence, there is no ultimate preference for either national or state power. Rather, the goal of federalism is to secure individual liberty.

The failure of American jurisprudence to remain faithful to the principles of federalism has led, painfully and predictably, to an erosion of freedom. The notion of federalism as a mere “truism” has abetted a sweeping expansion of the powers of national government, an expansion that has been widely documented. Meanwhile, the notion of federalism as a justification for unfettered “states’ rights” has given rein to a phenomenon that is less remarked upon: the explosive growth of state and local government and the resulting epidemic of grassroots tyranny.

Grassroots tyranny—the violation of the fundamental rights of individuals by their own local governments, often unremedied by state or federal courts—takes many forms. It is to the documentation of some of the many manifestations of grassroots tyranny that the next several chapters are devoted.