

## THE FEDERALIST APPROACH TO THE FIRST AMENDMENT

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In this Essay, I propose that the First Amendment should be applied much more stringently against the federal government than it is against the States. Under this view, the federal government should be subject to severe restrictions under the First Amendment. For instance, it should be prevented from regulating speech on moral grounds. By contrast, states should have substantially more room for regulation to prevent what they regard as moral harms. They should be required to respect only the core of the First Amendment that protects political speech.

One could make legal arguments for this position by attacking the incorporation doctrine,<sup>1</sup> or, if one is taken with the current fad of referring to foreign law,<sup>2</sup> by expanding what European Union law calls the “margin of appreciation.”<sup>3</sup> Proponents of the latter concept suggest that subsidiary governments should enjoy greater autonomy in making regulatory decisions.<sup>4</sup>

Instead, however, I want to offer an analysis less focused on text or precedent and more focused on the issue of law and morality. I begin with two simple premises: one about morality’s content and another about its epistemology. First, good societies are concerned with protecting both liberty and condi-

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1. See Edwin Meese III, *The Attorney General’s View of the Supreme Court: Toward a Jurisprudence of Original Intention*, 45 PUB. ADMIN. REV. 701, 704 (1985).

2. See John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303 (2006) (critiquing the turn to foreign law in constitutional interpretation).

3. See Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1483 (2003) (“[The] judicial doctrine of ‘margin of appreciation,’ familiar in European Union law, permits sufficient national variance as to promote tolerance of some measure of this kind of rights distinctiveness.”).

4. See *id.*

tions for human flourishing.<sup>5</sup> In a just society, people should have freedom to act, but legal norms should also help sustain the conditions for the flourishing of family life, friendship, and other social goods. In short, we would like to prevent freedom from turning into what older political philosophers called “license,” with the potential to damage other social goods.<sup>6</sup>

The second, epistemological premise is that the line between liberty and license is very hard to draw.<sup>7</sup> The reason for this is that the consequences of freedoms and restrictions in the social realm are difficult to assess. For instance, what are the effects of pornography? Does it encourage violence against women, or, more subtly but as importantly, does it lead to a coarsening of sensibilities that erodes family life, as Phyllis Schlafly has suggested?<sup>8</sup> Or, to the contrary, does it serve as a substitute for violence and perhaps an outlet for satisfying fantasies the pursuit of which in other ways would tend to dissolve families?<sup>9</sup> Or, as Professor Koppelman has asked, can a government police pornography without counterproductively sweeping in material that may help preserve families?<sup>10</sup>

In the case of pornography, I am intuitively skeptical of regulation for reasons not unlike Professor Koppelman’s.<sup>11</sup> Even a law professor, however, must admit to himself occasionally that he is fallible in his social and moral intuitions.<sup>12</sup> Because of such all-too-human fallibility, a very desirable feature of constitutional design is a structure that helps us calculate the consequences of our social policies by providing us with more evidence than just our intuitions.

The need for such a mechanism of moral and social discovery seems to be the decisive argument for a federalist approach to the First Amendment. If states have the responsibility for

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

6. See *id.*

7. For a superb discussion of the difficulties involved in the tradeoff between liberty and license, see *id.* at 1060–64.

8. See Phyllis Schlafly, *The Morality of First Amendment Jurisprudence*, 31 HARV. J.L. & PUB. POL’Y 95 (2008).

9. For a variant of this view, see Andrew Koppelman, *Why Phyllis Schlafly is Right (But Wrong) About Pornography*, 31 HARV. J.L. & PUB. POL’Y 105 (2008).

10. See *id.*

11. Compare Koppelman, *supra* note 9, with Schlafly, *supra* note 8.

12. See Lund & McGinnis, *supra* note \*, at 1598.

setting social policy, representative legislatures can make hard decisions about the proper line to draw between liberty and license. Moreover, these legislatures, unlike federal judges, are subject to accountability through regular elections. So long as constitutional law protects free movement and the free flow of core political speech among the States, individuals are free to exit if the balance between liberty and license becomes radically off kilter.<sup>13</sup>

Most importantly for the topic of law and morality, federalism creates feedback on a range of possible balances as states experiment with different social policies. Thus, unlike a system in which the Supreme Court enforces some national rule of its own devise, we would be able to make comparisons and learn about consequences by reviewing the actions of many relatively similar jurisdictions. If one state puts restrictions on pornography and another does not, we will be able to compare their results.<sup>14</sup>

In my view, the possibilities of civic learning from federalism are greater today than they were in the age of the Framers, or even twenty years ago, because “we are at the dawn of the greatest age of empiricism the world has ever known.”<sup>15</sup> The reason is that the increasing power of computers improves dramatically our ability to evaluate the consequences of laws. Greater computer capacity enables us to collect and record facts in systematic form, and to make more precise measurements of the effects of a legal regime. Over seventy years ago, Justice Louis Brandeis argued that federalism creates laboratories of democracy.<sup>16</sup> Today, technological innovation can bring this vision to pass. This more scientific approach to social policy can be effective, however, only if the States can experiment so that their different laws can be evaluated. Researchers can then run scores of regressions on their laptops in a few hours and readily assess the results.

Just as the technological acceleration of our age makes analysis of the consequences of different legal regimes more sophisti-

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13. On the importance of exit rights, see John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 107–10 (2004).

14. See Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 OHIO ST. L.J. 811, 912 (1998).

15. John O. McGinnis, *Age of the Empirical*, 137 POL'Y REV. 47, 48 (2006).

16. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

cated, it also makes the need for the flexible responses permitted by federalism more important. Pornography provides an excellent example. Within 15 to 25 years, technological change will permit intense, interactive pornography in virtual reality. This change in degree, if not in kind, of the nature of pornography may lead to a different tradeoff between its dangers and benefits.

Supreme Court case law is not an effective method for determining what social norms we should apply to this disruptive technology, or any of the other moral issues that technological acceleration will raise in the years ahead. The problem with relying on case law is that its principles are fabricated by a few insulated individuals who can hardly be expected to take the future into account.<sup>17</sup> Moreover, the necessarily formal lawyer's logic that comes from cases frequently makes it hard to be sensitive to changes in context and consequence. In contrast, a federalist structure for the First Amendment will permit states to react creatively to technological change. We can then analyze the costs and benefits of divergent responses.

To be sure, even in this federalist conception of the First Amendment, federal courts have a role to play. First, it is important that states be required to respect core political speech so that their citizens can be aware of the debate over their social policies. In twenty-first century America, however, threats to that right are relatively rare.

Making sure that states do not export their law to other states is a harder goal for federal courts. For instance, if federal courts permit one state to punish an out-of-state publisher because its citizens viewed the publisher's magazine, the risk of prosecution would effectively make it impossible for the publisher to print the material in his home state where it is legal. The courts, however, can craft doctrines that will give states the autonomy to regulate and punish their own citizens for consuming pornography, without penalizing citizens of other states.

It is worth noting that a federalist program has implications beyond matters of the First Amendment. A federalist approach to other moral issues, such as same-sex marriage, might also be effective. Such an approach would reject a Supreme Court decision that interprets the Fourteenth Amendment to permit

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17. See John O. McGinnis, *Justice without Justices*, 16 CONST. COMMENT. 541 (1999) (describing the parochialism of Supreme Court Justices).

same-sex marriage, but it would also oppose a federal marriage amendment prohibiting states from recognizing same-sex marriage. “Laws affecting marriage vary among the states and have varied over time.”<sup>18</sup> This is an example of an area where competitive federalism is effectively conducting experiments that may mature into a lasting consensus.<sup>19</sup>

There are two other strong arguments for adopting the federalist solution to the role of morality in the First Amendment. First, the federalist approach tends to defuse tension among people with different moral views. Instead of having a national rule that alienates those with minority views, jurisdictions generate different rules and those who feel strongly that they want to live under a particular set of rules can move to the appropriate location.

Second, the federalist approach lessens partisanship by creating a structure that facilitates the study of the consequences of moral principles. It is easy for people, particularly partisans, to adhere to their own principles and dismiss those of others, because individuals with opposing principles are often unable to overcome their differences by persuasive means. This sense of incommensurability that comes from focusing on abstract principles is an important cause of partisan conflict. It leads to angry divisions where each side questions the good faith and even the sanity of the other side.

A focus on consequences, however, can sometimes change people’s minds. By permitting the creation of different legal regimes, federalism creates evidence about their effects. Unlike our personal intuitions, evidence from these differences is something we have in common—a potential source of consensus.

Using federalism as a discovery machine<sup>20</sup> accords with the best of the Western tradition that emphasizes skepticism and humility. Over 300 years ago, Oliver Cromwell urged his colleagues in Parliament to remember that even in matters of religion, they may be mistaken.<sup>21</sup> Fifty years ago, Judge Learned

18. Lund & McGinnis, *supra*, note \*, at 1613.

19. *Id.*

20. On the concept of discovery machines in constitutional law, see John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002).

21. Letter from Oliver Cromwell to the General Assembly of the Kirk of Scotland; or, in case of their not sitting, To the Commissioners of the Kirk of Scotland (Aug. 30 1650), in 2 THE WRITINGS AND SPEECHES OF OLIVER CROMWELL 303 (Wilbur Cortez Abbott ed., 1939).

Hand noted that “[t]he spirit of liberty is the spirit which is not too sure that it is right.”<sup>22</sup> A federalist approach to the First Amendment is a concrete manifestation of that spirit which is particularly appropriate in an age of accelerating technology and the many new moral issues it will raise.

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22. LEARNED HAND, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189, 190 (3d ed. 1960).