THE FAILURE OF FEDERALISM: DOES COMPETITIVE FEDERALISM ACTUALLY PROTECT INDIVIDUAL RIGHTS?

*Owen Lipsett**

It is axiomatic among legal scholars and jurists that, as a structural value, federalism promotes innovation and diversity in government.[1] A broadly held corollary to this view is the concept of "competitive federalism," whereby states compete with one another to lure citizens and businesses. One of its advocates, Michael S. Greve, argues that competitive federalism is omnipresent, "operat[ing] at all levels of government and irrespective of whether citizens consume government services as business owners, investors, workers, or for that matter as retirees or welfare recipients."[2] Under this hypothesis, citizens'

---

* J.D. Candidate, University of Pennsylvania Law School, 2008; M.A., University of Dublin, Trinity College, 2005; B.A, University of Dublin, Trinity College 2002. I would particularly like to thank Neela Mookerjee, Jocelyn D'Ambrosio, Nabeel Yousef, Doron Kenter, George Gerstein, and Dean Wendell Pritchett for their assistance. I would also like to thank the Board, Senior Editors, and Associate Editors of the *University of Pennsylvania Journal of Constitutional Law* for their assistance in improving this Comment, and for their encouragement and good company. Finally, I would like to thank Blake Lipsett, Christopher Lipsett, Missy Lipsett, and Katie Lozier for their help, patience, and support. All errors are my own.

1 The most frequently cited statement in support of this proposition is Justice Louis Brandeis's statement that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). The Supreme Court most recently referred to Justice Brandeis's statement with approval in *Arizona v. Evans*, 514 U.S. 1, 8 (1995), stating that states "are free to serve as experimental laboratories." Many scholarly articles also reference Brandeis's statement and its progeny. *E.g.*, Wilson Ray Huhn, *The Constitutional Jurisprudence of Sandra Day O'Connor: A Refusal to "Foreclose the Unanticipated,"* 39 AKRON L. REV. 373, 412 (2006) (discussing Justice O'Connor's approval of Brandeis's statement as a description of "one of federalism's chief virtues"); Paul E. McGreal, *Alaska Equal Protection: Constitutional Law or Common Law*, 15 ALASKA L. REV. 209, 211 (1998) ("[F]ederalism preserves state and local governments as laboratories for policy experimentation."); William H. Pryor, Jr., *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1173–74 (2002) (identifying "laboratory of the states" as a term familiar to lawyers). *But see* Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 614–16 (1980) (arguing that, beyond several weak examples, "a federal structure can encourage innovation by lower level governments only if it is self-consciously exploited by politicians in the central government who can profit by claiming credit for a successful 'innovation policy'").

2 MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 3 (1999).

ability to "vote with their feet" serves to "discipline government in the same way in which consumer choice . . . disciplines producers."[3]

While Greve's analysis focuses on economic liberty, it is equally apposite to apply the concept of "competitive federalism" to personal freedoms.[4] The Rehnquist Court's increased circumscription of Congress's role to legislate has increased the importance of this phenomenon. Theoretically, "competitive federalism" should encourage states to offer greater freedom than the minimum federal guarantees, but this has not been the case. Rather, states have sometimes limited individual freedoms in order to preserve perceived societal norms. While it could be argued that states have done so as rational actors to attract (or retain) residents, the agency problem inherent in representative government casts some doubt on this assumption.

The federal government has always been one of enumerated powers,[5] but it also enjoyed a virtually unfettered ability to enact legislation under the Commerce Clause[6] between 1937[7] and 1995.[8] The Rehnquist Court's shrinking of Congress's ability to enact legislation under the Commerce Clause[9] is the most prominent example of the

---

3 *Id.*

4 *See* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 754 (1995) ("[F]ederalism is much more important to the liberty and well being of the American people than any other structural feature of our constitutional system.").

5 *See* U.S. CONST. amend. X (reserving powers not delegated to the federal government to the states and people); *id.* art. I, § 8 (enumerating Congress's powers); *id.* art. I, § 10 (enumerating powers denied to states and therefore reserved to the federal government).

6 *Id.* art. I, § 8, cl. 3 (granting the federal government the power "[t]o regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes").

7 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 34–41 (1937) (authorizing the National Labor Relations Board to exercise jurisdiction over intrastate labor relations); *see also* Wickard v. Filburn, 317 U.S. 111, 129 (1942) (extending congressional power under the Commerce Clause to situations where no economic transaction took place). The Supreme Court significantly relied upon this holding in *Gonzales v. Raich*, 545 U.S. 1, 8 (2005), in affirming enforcement of the Federal Controlled Substances Act against California residents growing marijuana for personal or intrastate medical use, despite the legality of such activities under California law.

8 United States v. Lopez, 514 U.S. 549, 567–68 (1995) (invalidating the Gun-Free School Zones Act as beyond the scope of the commerce power).

9 *See id.*; *see also* Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 173–74 (2001) (invalidating administrative exercise of jurisdiction under the Clean Water Act over ponds formed in an abandoned sand and gravel pit, in part because allowing jurisdiction "would result in a significant impingement of the States' traditional and primary power over land and water use"); United States v. Morrison, 529 U.S. 598, 627 (2000) (invalidating the federal civil remedy for victims of gender-motivated violence provided by the Violence Against Women Act as unsustainable under the Commerce Clause).

so-called "New Federalism."[10] While limiting the ability of the federal government to enact laws in certain areas, the Court has concomitantly federalized law regarding multiple individual rights and broadly enunciated a federal standard in such areas as the right to die[11] and takings.[12] Although the Court's decision in *Lawrence v. Texas*[13] may be read narrowly as an extension of the right to privacy, it has invited federalization of the legal treatment and recognition of same-sex couples. At the same time, in *Gonzales v. Raich*,[14] the Court established limits on the ability of states to protect or create individual rights when they conflicted with federal policy. This Comment argues that as a general matter, leaving such decisions to the states, as both the Rehnquist and Roberts Courts have done, has served more to inhibit individual liberty than to advance it.

Part I examines the structural issues latent in federalism. It will take as its starting point John O. McGinnis and Ilya Somin's view that

---

10 *See, e.g.*, Printz v. United States, 521 U.S. 898, 922–23 (1997) (holding a provision of the Brady Act requiring state law enforcement officials to perform background checks on gun purchasers unconstitutional on the basis that it constituted federal commandeering of state officials); City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (holding the Religious Freedom Restoration Act unconstitutional because Congress's power to enforce the Fourteenth Amendment does not include the power to define the content of the rights that the Amendment protects); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72–73 (1996) (holding that the Indian Gaming Regulatory Act, enacted under the Indian Commerce Clause of Article I, could not abrogate the State's Eleventh Amendment sovereign immunity); New York v. United States, 505 U.S. 144, 174–77 (1992) (holding that Congress could not require states to choose between taking title to hazardous waste produced within their borders or submitting to federal regulation of it).

11 *See* Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (holding that the Attorney General could not use the Federal Controlled Substances Act to prosecute Oregon doctors who prescribed lethal doses of medicine in accordance with the Oregon Death With Diginity Act); *accord* Washington v. Glucksberg, 521 U.S. 702, 735 (1997) (holding that Washington State's prohibition against "causing" or "aiding" a suicide did not violate the Fourteenth Amendment). Taken together, these cases illustrate the fact that the Supreme Court has chosen to federalize the right to die issue.

12 *See* Kelo v. City of New London, 545 U.S. 469, 489–90 (2005) (holding that economic development is within the meaning of "public use" for Fifth Amendment purposes); *see also* San Remo Hotel L.P. v. City & County of San Francisco, 545 U.S. 323, 347 (2005) (holding that full faith and credit will be given to state court determinations regarding constitutional takings claims, even where claimants were required to, rather than chose to, litigate in a state forum); Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 548 (2005) (holding that parties alleging a Fifth Amendment taking must show a physical taking, a regulatory taking, or a land-use exaction taking).

13 539 U.S. 558, 578 (2003) (holding a statute criminalizing certain sexual conduct between partners of the same sex unconstitutional).

14 545 U.S. 1 (2005); *see supra* note 7.

"federalism is a classic example of a principal-agent problem"[15] that necessitates judicial review. It will briefly examine the Court's reproductive rights jurisprudence from *Roe v. Wade*, which held that women have a basic right to terminate their pregnancies under certain circumstances,[16] to *Stenberg v. Carhart*, which struck down a Nebraska law banning partial birth abortions,[17] as a case study of how even a constitutionally protected freedom may have disparate treatment between states.

Part II of the Comment examines euthanasia as an issue that may be said to be comfortably left to the states. As with abortion, the concept of assisted suicide is abhorrent to some individuals but does not fundamentally affect the lives, or rights, of those who are not involved in it. There is no question of government funding or otherwise preferential treatment of those who seek assistance in ending their lives. Likewise, as with abortions, subject to the cost of travel, citizens can theoretically move (or be moved) from one state to another to take advantage of a regime that better suits their needs and views. Consequently, the operation of states as "laboratories" in this area has not resulted in the derogation of individual rights.

Part III of the Comment examines takings as an issue where the Court has essentially, and dangerously, abandoned citizens to the states in the wake of the Court's trio of decisions in 2005.[18] As McGinnis and Somin have put it: "[s]ometimes federalism can be protected by only restricting the power of state governments, rather than strengthening it."[19] The unique circumstances relating to takings are just such a case. Although, after a significant popular reaction, there has been a welter of legislative response to *Kelo* to restrain its perceived excesses, many of the bills have provided only cosmetic changes. Although facially this appears to be a manifestation of federalism working properly, the bills' specifics often reflect the agency problem inherent in federalism. Additionally, the states are essentially inoculated from constitutional challenges by *Lingle*, while the holding of *San Remo Hotel* makes the issue exceedingly difficult to litigate within the federal courts.

---

15 John O. McGinnis & Ilya Somin, *The Rehnquist Court: Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 92 (2004).

16 410 U.S. 113, 164 (1973).

17 530 U.S. 914, 945–46 (2000).

18 *See supra* note 12.

19 McGinnis & Somin, *supra* note 15, at 89.

The adjudicative and ad-hoc nature of takings means that citizens who find themselves subject to them, by definition, cannot be aware of their circumstances in advance of the taking. This means that the competitive justification for federalism does not apply, and the agency problem is further exacerbated. States and politicians, unlike citizens, are likely to be intimately aware of the provisions involved—as is evident from the numerous exceptions contained within legislation passed since *Kelo* that simply rename, rather than change, existing policies. The Court's recent takings jurisprudence thus appears to have abandoned citizens to the states and denied them necessary recourse with respect to challenging takings in federal court.

Part IV of the Comment prospectively examines the issue of recognition of same-sex relationships. In *Lawrence*, the Court noted that "[t]he present case .... does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[20] However, since Massachusetts recognizes same-sex marriages, and several other states have recognized civil unions between two members of the same sex, the issue will clearly arise.

Unlike civil union statutes, which may be understood simply as the granting of additional rights by states to citizens within their borders, Massachusetts's statute creates a legal relationship that either must be recognized by other states under the United States Constitution's Full Faith and Credit Clause[21] or be invalid under the Defense of Marriage Act.[22] Since marriage is an ongoing relationship, as opposed to a single event such as euthanasia or the taking of property, the Court will likely be required to eventually reach the issue of recognition of same-sex relationships that it avoided in *Lawrence*.

Part V of the Comment concludes that competitive federalism should properly be understood as a limited doctrine with respect to individual rights. A federal regime may be appropriate for single events, such as euthanasia or reproductive rights, that occur within a state's borders (and for which a citizen may easily leave the state in search of a more favorable regime). A state-driven regime without federal oversight is less appropriate for takings because of the inherent agency problem. Finally, it is simply impracticable for an ongoing relationship to be cognizable under one state's law, but not an-

20 539 U.S. 558, 578 (2003).

21 U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State.").

22 28 U.S.C. § 1738C (2000) (allowing states to refuse to recognize same-sex marriages performed in other states).

other's. Consequently, with respect to individual rights, federalism should be best understood as a broad value subject to specific case-by-case application rather than as a catch-all shield for citizens or a sword for state governments.

I. THE STRUCTURE OF FEDERALISM AND THE ROLE OF STATES AS AGENTS

The United States Supreme Court has identified the primary role of the federal system as the vindication of individual rights. Specifically, in *New York v. United States*, it identified the "fundamental purpose served by our Government's federal structure"[23] as follows:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, *the Constitution divides authority between federal and state governments for the protection of individuals.* State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." "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."[24]

The Court further noted that the plaintiff State's legislators had actually testified in favor of the federal law (which required them to adopt certain policies with respect to hazardous waste disposal) and then later challenged it with the apparent hope of being able to blame the federal government for this unpopular program.[25]

McGinnis and Somin have generalized this statement into what I will refer to as an agency conception of the role of state and federal officials:

> In our federal system, the people, to use economic terminology, are "principals" and state and federal officials merely their "agents." This allocation of roles creates the possibility that principal-agent problems will arise in the maintenance of federalism when the interests of elected officials diverge from those of ordinary citizens. The structure of federalism thus must be protected against the machinations of both federal and state officials. Often, the interests of the latter conflict with this structure no less than those of the former.[26]

---

23 505 U.S. 144, 181 (1992).

24 *Id.* (emphasis added) (citations omitted).

25 *Id.* at 181–83.

26 McGinnis & Somin, *supra* note 15, at 89 (footnote omitted).

The authors further note that the agency problems inherent in such an arrangement are exacerbated by the presence of multiple principals, in the form of the heterogeneous electorate, which they liken to the general failure by dispersed shareholders to monitor corporate managers.[27] Analogizing voters to shareholders, while useful in identifying the agency problem inherent in government, ignores the fact that voters' interests may conflict regarding equity in the corporation in which they bold stock.

As I will discuss, what one person regards as the right to terminate her pregnancy may be regarded by others as state-sanctioned murder. Both advocates[28] and opponents[29] of a woman's right to an abortion can make colorable claims that their position is the one that vindicates individual liberty. Although it likewise does not directly affect other individuals, the issue of euthanasia is similarly fraught with conflict. The recognition of same-sex relationships, which provides the partners with potentially valuable rights, and the government's eminent domain power also directly affect only the individuals in question, but nonetheless are of interest to others. Fellow citizens may object to same-sex relationships, or they may regard publicly beneficial development as a justification for the compensated taking of private land.

In these situations, voters, to varying degrees, more closely resemble competing claimants to valuable goods than shareholders with identical interests in having the value of their shares maximized. Consequently, the federal system serves not only to guarantee liberty, but also to adjudicate what constitutes liberty. Competitive federalism can also be regarded as a rough method of accounting for the heterogeneous concepts of what constitutes liberty held by the citizens and by the governments of different states as their agents.

Thus, while the federal system is intended to vindicate individual rights, the presence of the agency problem discussed above demonstrates a need for monitoring and enforcement. After examining the relative impotence of political safeguards in dealing with this problem, McGinnis and Somin conclude that the federal judiciary may be

---

27 *Id.* at 98.

28 *See, e.g.*, NARAL Pro-Choice America, Abortion, http://www.prochoiceamerica.org/issues/abortion/ (last visited Feb. 3, 2008) ("In 1973, the Supreme Court guaranteed American women the right to choose abortion . . . .").

29 *See, e.g.*, Republican National Coalition for Life, http://www.rnclife.org (last visited Feb. 3, 2008) ("The Republican Party was founded on the principle that no human being should be considered the property of another.").

the best guardian of federalism.[30] The judiciary itself has no clear interest in undermining the present distribution of powers, and it is the institution that is most likely to enforce neutral principles.[31]

The case study of abortion rights generally supports McGinnis and Somin's portrayal of the judiciary as a better guardian of individual rights, while still allowing states some latitude in making choices on behalf of their principals, the voters. After the Supreme Court first located an inherent "right to privacy" within marriage,[32] which it extended to all relationships based on a theory of individual rights,[33] it held in *Roe v. Wade* "that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation."[34] The *Wade* Court laid out a prescriptive trimester framework establishing when and to what extent states could restrict or even ban abortions.[35]

Over the following two decades, the Court clarified the nature of what constitutes valid "state interests in regulation." It struck down requirements for spousal[36] and parental notice and consent (the latter absent a judicial bypass procedure for minors to be deemed mature enough to make an independent decision)[37] on the one hand,

---

30 McGinnis & Somin, *supra* note 15, at 104–05.

31 *Id.* at 128–30.

32 Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (invalidating a state law barring the use of contraceptives on the basis that it impermissibly interfered with "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees").

33 Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

34 410 U.S. 113, 154 (1973).

35 *Id.* at 164–65 ("(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.").

36 Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69 (1976) ("[S]ince the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period.").

37 Bellotti v. Baird, 443 U.S. 622, 647–50 (1979) (plurality opinion) ("[A statute] cannot constitutionally permit judicial disregard of the abortion decision of a minor who has been determined to be mature and fully competent to assess the implications of the choice she has made.").

but held that states could disfavor the practice of abortion through budget decisions because *Wade* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds."[38] In rejecting a subsequent constitutional challenge to a bar on federal funding for even medically necessary abortions, except in cases of rape, incest, or where the mother's life was at risk, the Court explained that:

> [R]egardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.[39]

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[40] the Court largely restated its prior doctrine on abortion. While affirming *Wade* under *stare decisis*,[41] it discarded that decision's trimester framework on the basis that it was "not . . . part of the essential holding of *Roe*."[42] Perhaps most crucially, while it acknowledged the right of states to interpret a woman's right to have an abortion within certain parameters, it stressed the importance of a neutral and consistent baseline for such rights.[43]

Despite this, however, states have sought to impose restrictions well beyond those allowed. For example, the Court invalidated a Nebraska ban on partial-birth abortions,[44] while South Dakota enacted a law "to reinstate the prohibition against certain acts causing the termination of an unborn human life,"[45] which by its terms contradicts both *Wade* and *Casey*.[46] Voters subsequently rejected this change by

---

38 Maher v. Roe, 432 U.S. 464, 474 (1977).

39 Harris v. McRae, 448 U.S. 297, 316 (1980).

40 505 U.S. 833 (1992).

41 *Id.* at 846.

42 *Id.* at 873 (plurality opinion).

43 *Id.* at 844 (majority opinion) ("Liberty finds no refuge in a jurisprudence of doubt.").

44 Stenberg v. Carhart, 530 U.S. 914, 945–46 (2000).

45 2006 S.D. SESS. LAWS Ch. 119.

46 *Id.* at § 1 ("[L]ife begins at the time of conception, a conclusion confirmed by scientific advances since the 1973 decision of *Roe v. Wade*."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869–70 ("We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate. The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted. . . . We conclude that the line should be drawn at viability . . . .").

referendum.[47] *Stenberg* not only illustrates the crucial role the Court plays in vindicating individual rights against encroachment by the states, but also the tendency of state legislatures to seek to impose divergent laws, presumptively on the basis of the preferences of their citizens.

The United States Congress subsequently prohibited partial birth abortions (except where the mother's life is at risk) in 2003,[48] which the Court held constitutional in *Gonzales v. Carhart*.[49] However, like *Wade*, which the *Gonzales* court cites as settled law,[50] by enunciating a broad federal standard with respect to one aspect of reproductive rights, the decision may lead to further controversy over others.[51]

II. AN ISSUE COMFORTABLY LEFT TO THE STATES: EUTHANASIA

The Court has explicitly recognized the right of states to disagree on the subject of euthanasia. It held that a Washington State law that criminalized assisting in a suicide did not violate the Fourteenth Amendment.[52] The Court also held that the Controlled Substances Act[53] does not authorize the United States Attorney General to prevent Oregon doctors from dispensing controlled substances for assisted suicide, which Oregon law empowers doctors to do.[54]

As with *Wade*, it is useful to consider the development of the Supreme Court's doctrine regarding the so-called "right to die." In *Cruzan v. Director, Missouri Department of Health*, the Court affirmed the Supreme Court of Missouri's denial of the plaintiffs' petition to remove their daughter's feeding tube, who was in a vegetative state.[55] The Court based its determination on the fact that the daughter had not adequately made her wishes known to her parents under Missouri law.[56] In doing so, the Court declined to enunciate a general rule,

---

47 *See, e.g.*, Kirk Johnson, *New State Push to Restrict Abortions May Follow*, N.Y. TIMES, Apr. 20, 2007, at A18 ("The [South Dakota] Legislature passed a sweeping ban, only to see the public repeal it in a statewide referendum.").

48 Partial-Birth Abortion Ban Act of 2003, Pub.L. 108-105, 117 Stat. 1206 (2003) codified at 18 U.S.C. § 1531 (2006)).

49 127 S. Ct. 1610 (2007).

50 *Id.* at 1626.

51 *See* Johnson, *supra* note 47 (discussing the likelihood that the decision will encourage activists on both sides of the reproductive rights debate to push for legislation to be enacted).

52 Washington v. Glucksberg, 521 U.S. 702, 735 (1997).

53 21 U.S.C. §§ 801–971 (2000).

54 Gonzales v. Oregon, 546 U.S. 243, 267 (2006).

55 497 U.S. 261, 285 (1990).

56 *Id.*

confining its holding to the circumstances of the case. It therefore analyzed whether Missouri's limit on when a surrogate could refuse life-saving hydration and nutrition on behalf of an incompetent person violated due process and held that it did not.[57]

The *Cruzan* Court avoided the question of whether a right to die existed under the Constitution, and instead found that, as with abortion, a state could *potentially* have interests in regulating such situations:

> Whether or not Missouri's clear and convincing evidence requirement comports with the United States Constitution depends in part on what interests the State may properly seek to protect in this situation. Missouri relies on its interest in the protection and preservation of human life, and there can be no gainsaying this interest. As a general matter, the States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide. . . . But in the context presented here, a State has more particular interests at stake. The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements. It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment. . . . A State is entitled to guard against potential abuses in such situations.[58]

Thus, while the Court unequivocally supported Missouri's law, it nevertheless refused to find that the Due Process Clause *compelled* such safeguards, relying instead on the more amorphous grounds of "civilized" norms.

In *Glucksberg*, the Court held that Washington's ban on physician-assisted suicide likewise did not violate the Fourteenth Amendment's guarantee of due process on similarly broad but non-constitutional grounds. The Court uncritically noted that while Washington had enacted a prohibition on "mercy killing," Oregon had "legalized physician-assisted suicide for competent, terminally ill adults" and the Federal Assisted Suicide Funding Restoration Act of 1997 had barred the use of federal funds for physician-assisted suicide.[59] This amounted to a tacit acknowledgement that the issue was one for states to decide individually. The *Glucksberg* Court declined to locate a liberty right to euthanasia in the face of "a consistent and almost

57 *Id.* at 281–82.

58 *Id.* at 280–81.

59 Washington v. Glucksberg, 521 U.S. 702, 717–18 (1997).

universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults."[60]

Despite the apparently "almost universal tradition" of prohibiting suicide that the Court referenced, it stated only that prohibitions against assisting in suicide were justified, but *not* required.[61] The Court noted instead that "[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."[62] In the companion case, *Vacco v. Quill*, the Court unanimously held that New York's decisionting, which permitted patients to refuse life-saving medical treatment but at the same time ingprohibited assisted suicide, did not violate the Fourteenth Amendment's Equal Protection Clause.[63]

The Court's implied willingness to countenance diversity in states' euthanasia regimes in *Glucksberg* makes its decision to uphold Oregon's authorization of the practice in *Gonzales v. Oregon* somewhat understandable. What makes the case striking, however, is its procedural posture. While the decision, like the result in *Glucksberg*, affirmed a state's right to make such decision, the context was entirely different. At issue in *Oregon* was the validity of the Attorney General's claim that the prescription of lethal drugs under Oregon's Death with Dignity Act,[64] providing for euthanasia, violated a federal interpretive rule promulgated under regulations pursuant to the Federal Controlled Substances Act.[65] The relevant regulation required that for "[a] prescription for a controlled substance to be effective it must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice."[66]

The Court rejected the Attorney General's claim that the Regulation empowered him to disrupt the supply of drugs to Oregon doctors for the purpose of euthanasia:

> The Attorney General has rulemaking power to fulfill his duties under the CSA. The specific respects in which he is authorized to make rules,

60 *Id.* at 723.

61 *Id.* at 735 n.24 (explaining that the opinion "does not absolutely foreclose" claims to be able to end one's life with a physician's assistance).

62 *Id.* at 735.

63 521 U.S. 793, 797 (1997).

64 OR. REV. STAT. §§ 127.800–.897 (2005).

65 21 U.S.C. §§ 801–971 (2000).

66 21 C.F.R. § 1306.04(a) (2007).

> however, instruct us that he is not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law.[67]

The Court thus implicitly found the standard for care (that is, for euthanasia) valid under federal law. As Justice Scalia made evident in his dissent, the Court's "decision . . . [was] perhaps driven by a feeling that the subject of assisted suicide is none of the Federal Government's business."[68]

The question thus arises as to whether this is a case in which "the Constitution divides authority between federal and state governments for the protection of individuals."[69] I believe that it is. One of the major arguments advanced in favor of competitive federalism is that it enables citizens to act as consumers of government by choosing the regime that best suits their needs and views.[70] A circumstance where two adjacent states have differing regimes with respect to allowing or prohibiting euthanasia seems to illustrate perfectly the multiplicity of perspectives enabled by competitive federalism.

Euthanasia, however, is a relatively facile case. As with reproductive rights, only the individual exercising the right in question is directly affected. Likewise, an individual can only die or have an abortion in a single state. It should be noted that even here the federal courts, especially the Supreme Court, still have an important role to play in ensuring states do not engage in a race to the bottom in derogation of constitutional guarantees. More difficult cases arise when conflicting claims exist. The issue of takings represents a clear conflict between the needs and rights of individuals and society as a whole. The recognition of same-sex unions in some states but not in others raises the question of whether competitive federalism can extend to contradictory regimes within states continuing relationships are at issue.

III. AN ISSUE UNCOMFORTABLY LEFT TO THE STATES: TAKINGS

In *Kelo v. City of New London*, the Supreme Court held that a taking of private property to facilitate economic development by a private

---

67 Gonzales v. Oregon, 546 U.S. 243, 258 (2006).

68 *Id.* at 298 (Scalia, J., dissenting).

69 New York v. United States, 505 U.S. 144, 181 (1992).

70 *See* GREVE, *supra* note 2, at 2–3 (arguing that "citizen choice among competing jurisdictions" is the hallmark of "real" federalism).

actor was valid under the Fifth Amendment's Takings Clause.[71] It characterized its decision in terms of federalist concerns:

> Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the Nation, just as they have evolved over time in response to changed circumstances. Our earliest cases in particular embodied a strong theme of federalism, emphasizing the "great respect" that we owe to state legislatures and state courts in discerning local public needs. For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.[72]

This holding seems relatively intuitive when takings are, as in *Kelo*, regarded as responses to local circumstances. Since *Kelo* was decided, thirty-four states have enacted or amended laws restricting takings, and the decision continues to inspire calls to do the same elsewhere.[73] Facially, this appears to be competitive federalism at work, with state-agents responding to pressure from citizen-principals to provide additional guarantees that their property rights are protected.[74]

There are, however, significant differences between takings and the right to die. First, the fact-specific nature of takings means that they are relatively unpredictable. Second, because takings involve real property, rather than personal physical liberty, while citizens could move to a state with a regime that better suits their preferences,[75] they would still be obliged to pursue their claim under the regime of the state in which the property in question was located.

Laws governing abortion, euthanasia, and (as will be discussed in the next Part) same-sex unions establish bright-line rules for general application rather than standards. They establish whether a woman

---

71 545 U.S. 469, 484 (2005).

72 *Id.* at 482–83 (citation and footnote omitted).

73 *See, e.g.*, Kevin Wingert, *State's Eminent Domain Law Questioned*, WYO. TRIBUNE-EAGLE, Jan. 10, 2007, at A10 (discussing public pressure for revision of Wyoming's eminent domain laws).

74 It should be noted that laws limiting eminent domain contain exceptions that significantly limit their applicability, thereby making them little different from their pre-*Kelo* counterparts. *See, e.g.*, 26 PA. CONS. STAT. ANN. § 204 (2006) (allowing the use of eminent domain for private enterpise in a variety of circumstances, including blight, despite its title, "Eminent domain for private business prohibited"). For a survey of eminent domain laws since *Kelo*, see Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709. Sandefur concludes that "[s]o far, the backlash [against *Kelo*] has produced mixed results." *Id.* at 712.

75 *See, e.g.*, Saenz v. Roe, 526 U.S. 489, 504 (1999) (affirming that states must treat all their citizens equally regardless of their length of residency); United States v. Guest, 383 U.S. 745, 757–59 (1966) (recognizing and reaffirming a constitutional right of citizens to travel between the states).

may have an abortion, whether a doctor may prescribe lethal drugs, and what (if any) legal recognition same-sex partnerships may be accorded. Certainly, there may be disagreements as to the facts of the case, but each of these laws either permits or prohibits the behavior in question in certain situations. As a result, to the extent their personal circumstances allow, citizens can choose the regime that best suits their preferences and needs. By contrast, because state laws relating to eminent domain only establish standards, and because takings occur on a case-by-case basis, their application is significantly less predictable.

Even if the circumstances in which a state (or, more likely, a municipality) would apply eminent domain were predictable, the fixed nature of real property would create a uniquely problematic situation. While citizens may freely move between states, they cannot move their real property. Their only recourse would be to sell it, the very choice that takings compel. The acts of marriage formation and abortion are essentially the same in different states, while real property is by definition both unique and immobile. Even if citizens knew precisely whether and when their property would be subject to a taking, they would not be presented with a choice between holding the same property in different states, but rather would have to choose whether they could hold it at all. Considering the fact that eminent domain is by its nature unpredictable, this argument is purely academic.

The Court did not decide *Kelo* in isolation. In the same Term it decided two other takings cases that, taken together, made the issue squarely a matter for the states.[76] In *Lingle v. Chevron U.S.A., Inc.*, the Court unanimously reversed the Ninth Circuit's decision that a Hawaii statute limiting the rent that oil companies could charge dealers who leased their service stations constituted an uncompensated taking.[77] In doing so, the Court explained that plaintiffs could only challenge government regulations as uncompensated takings of private property by alleging a physical taking, a total regulatory taking, or a land-use exaction sufficiently onerous as to be deemed a *per se* physical taking.[78] In *San Remo Hotel*,[79] the Court affirmed the Ninth Cir-

76 *See* William A. Fletcher, Kelo, Lingle, *and* San Remo Hotel: *Takings Law Now Belongs to the States*, 46 SANTA CLARA L. REV. 767, 776–78 (2006) (arguing that this trio of land-use cases entirely relegated eminent domain decisions to the states).

77 544 U.S. 528, 548 (2005).

78 *Id.*

79 San Remo Hotel L.P. v. City & County of San Francisco, 545 U.S. 323, 347 (2005).

cuit's holding that federal courts could not create an exception to the full faith and credit statute[80] to provide a federal forum for plaintiffs to relitigate federal takings claims that were required to be brought in a state forum in the first instance in order to ripen.[81] "Taken together, these three decisions represent a substantial change—entirely in the direction of relegating takings issues to the political and legal judgments of the states."[82]

Notwithstanding the notoriety of *Kelo, San Remo Hotel* is the most significant of the three cases. *Kelo* and *Lingle* serve to define what constitutes an actionable taking, but *San Remo Hotel* narrows the recourse available to plaintiffs for challenging such takings. "[T]he combination of *Williamson County* (in its current form) and § 1738 effectively relegates all litigation regarding federal takings challenges to state and local land use regulations to the state courts."[83] As a result, the only federal input into such decisions will be grants of certiorari by the United States Supreme Court, "but an occasional policy-setting decision by the Supreme Court is far different from retail, case-by-case litigation in federal district court."[84] As one commentator put it:

> Williamson County v. Hamilton Bank was a mistake from the start. Although that decision said 'go to state court first, but if you lose, you are welcome in federal courts,' it did not explain how that rule interacted with a federal preclusion doctrine that said 'if you've been in state court, you must stay there.'[85]

There are two inherent problems with this state of affairs. First, state courts seeking to apply federal takings law in such cases will do so without the circuit in which they are located overseeing them and establishing its own takings jurisprudence. As *San Remo Hotel* illustrates, misapplying doctrines that were intended to cover an entirely different subject can be problematic.[86] Second, and more importantly, takings is an area in which the inherent agency problem dis-

---

80 28 U.S.C. § 1738 (2006).

81 The Court's holding in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985), mandates this result.

82 Fletcher, *supra* note 76, at 776.

83 *Id.*

84 *Id.*

85 J. David Breemer, *You Can Check Out But You Can Never Leave: The Story of* San Remo Hotel—*The Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended to Ripen the Claims for Federal Review*, 33 B.C. ENVTL. AFF. L. REV. 247, 305 (2006).

86 Strikingly, the Supreme Court took issue with this very phenomenon in *Lingle*, explaining that the "substantially advances" test applied by the Ninth Circuit was intended to relate to due process rather than takings inquiries. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 542–44 (2005).

cussed above is particularly strong. Government actors have a significant informational advantage and have a strong self-interest in achieving outcomes that reallocate scarce resources away from the current property holders to others whom they favor for political or economic reasons. Consequently, this seems like the sort of situation, where, in the words of McGinnis and Somin, "federalism can be protected by only restricting the power of state governments, rather than strengthening it."[87]

IV. AN INTERMEDIATE ISSUE: SAME-SEX MARRIAGE[88]

In *Lawrence v. Texas*, the Supreme Court stated that "[t]he present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[89] As such, the decision did not disturb the federal Defense of Marriage Act of 1996 (DOMA).[90] As enacted, DOMA established that, for the purpose of the federal government, "the word 'marriage' means only a legal union between one man and one woman as husband and wife."[91] It further provides that states are not "required to give effect to any public act . . . of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or claim arising from such relationship."[92] The Act thus not only denies same-sex marriages federal recognition but also denies such marriages recognition by other states under the Constitution's Full Faith and Credit Clause.[93]

The Supreme Judicial Court of Massachusetts, recognizing that the *Lawrence* Court had declined to assess whether same-sex marriages would have to be granted as a matter of federal law,[94] held (among other things) that, in view of the significant economic[95] and social[96] benefits of marriage, its denial to same-sex couples "violates

87 McGinnis & Somin, *supra* note 15, at 89.

88 This Part will not examine same-sex civil unions, except insofar as courts have required some form of recognition for same-sex couples. The reason for this is that these unions constitute an additional right for a state's citizens, valid only within the state's boundaries, while legally contracted marriages have traditionally been recognized everywhere.

89 539 U.S. 558, 578 (2003).

90 Defense of Marriage Act of 1996, Pub. L. No. 104-199, § 2, 110 Stat. 2419 (codified at 28 U.S.C. § 1738C (2000)).

91 1 U.S.C. § 7 (2006).

92 28 U.S.C. § 1738C.

93 *See supra* note 21.

94 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

95 *Id.* at 955–58.

96 *Id.* at 955.

the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution."[97]

At present, Massachusetts is the only state to recognize same-sex marriage, while four states (and the District of Columbia) have no explicit prohibition against the practice.[98] Nineteen states have statutes that define marriage as only between opposite-sex partners. The remaining twenty-six states have constitutional provisions prohibiting the contracting or recognition of same-sex marriages.[99]

Same-sex marriages contracted in Massachusetts are thus unlikely to be recognized anywhere else besides New York. It is entirely possible, however, that other states may recognize non-marital rights of same-sex couples. Both Vermont[100] and New Jersey's[101] highest courts have found that as a matter of equal protection, same-sex couples are entitled to similar benefits as those that opposite-sex married couples enjoy, leading those states to adopt statutes providing for civil unions for same-sex couples.[102] In *Alaska Civil Liberties Union v. Alaska*, the Supreme Court of Alaska held that even though Alaska's Constitution restricts marriage to opposite-sex couples, the State's policy of limiting benefits to the spouses (as opposed to same-sex partners) of employees violated the equal protection clause of the Alaska Constitution.[103] There the *Alaska Civil Liberties* court reasoned that in the wake of *Lawrence*'s holding that homosexuality could not be criminalized,[104] same-sex couples could not be deprived of benefits simply on the basis that they could not be married.[105]

---

97 *Id.* at 968.

98 An intermediate appellate court in New York, one of the four states in question, recently held that a marriage contracted between two women in Ontario, Canada, was valid in that state. Martinez v. County of Monroe, 1562 CA 06-02591, 2008 WL 275138, at *2 (N.Y. App. Div. Feb. 1, 2008).

99 *See* Human Rights Campaign, Statewide Marriage Prohibitions, http://www.hrc.org/documents/marriage_prohibit_20070919.pdf (last visited February 11, 2008).

100 Baker v. State, 744 A.2d 864, 886 (Vt. 1999) (holding that excluding same-sex couples from the benefits of marriage could not be reconciled with the values in Vermont's Constitution).

101 Lewis v. Harris, 908 A.2d 196, 224 (N.J. 2006) (holding that the equal protection clause of the New Jersey Constitution requires the New Jersey legislature to either amend the Constitution to allow same-sex couples to marry or to create a "parallel statutory structure," such as a civil union statute).

102 *See* N.J. STAT. ANN. §§ 37:1-28 to -36 (West 2007); VT. STAT. ANN. tit. 15, §§ 1201–1207 (2002).

103 122 P.3d 781, 795 (Alaska 2005) (holding that the spousal limitations of benefits provided to public employees violated the equal protection clause in Alaska's Constitution).

104 *See supra* note 13.

105 122 P.3d at 793.

Considering the novelty of this issue, any prediction of what the United States Supreme Court would decide is purely speculative, particularly because the states themselves are in the process of working out whether, and how, to recognize relationships that are only contractable elsewhere.[106] One critic has noted that courts have tended to side-step equal protection-based challenges (as well as *Lawrence*'s implication that policies discriminating on the basis of sexual orientation are subject to something greater than a rational basis standard of review) because public opinion tends to oppose same-sex unions.[107] On the other hand, federal law, such as the Uniform Parentage Act, and general choice of law principles may serve to guarantee rights such as parental rights for a non-biological parent of a child of a same-sex relationship.[108]

The disparities between these approaches illustrate the extent to which this issue is in flux. Legal institutions and precedents based on the presence of marriage in its traditional form are not necessarily adaptable to legal regimes that establish a continuum of non-marital relationships or where the recognition of such relationships varies with geography. Like euthanasia and abortion, marriage occurs in a single location, but unlike euthanasia and abortion, marriage is ongoing. The analogy to real property for same-sex marriage is compelling insofar as both are associated (at least for the moment in the case of same-sex marriage) with a single location. But because a marriage is theoretically as mobile as its constituent parties, this analogy breaks down as well.

Returning to the question of whether federalism serves to protect individual rights, it appears that with respect to same-sex marriage, the division of authority between federal and state governments does not serve to protect individuals. Rather, same-sex married couples

---

106 *See* William C. Duncan, *Survey of Interstate Recognition of Quasi-Marital Statuses*, 3 AVE MARIA L. REV. 617, 635 (2005) ("It is particularly difficult when some states outpace others in accepting novel arrangements. At these times conflict between the laws of different jurisdictions is inevitable.").

107 C. Brett Miller, Comment, *Same Sex Marriage: An Examination of the Issues of Due Process and Equal Protection*, 59 ARK. L. REV. 471, 509 (2006) ("If one considers past cases, there are currently many protected rights and groups of people that would never have achieved such status if past courts had interpreted the Due Process and Equal Protection Clauses in as limited a way as some courts are doing now with respect to same-sex marriage.").

108 *See* Deborah L. Forman, *Interstate Recognition of Same-Sex Parents in the Wake of Gay Marriage, Civil Unions, and Domestic Partnerships*, 46 B.C. L. REV. 1, 26–65 (2004) (arguing that existing federal statutes and case law may secure certain parental rights for the non-biological parents of the child of a same-sex partnership, even in states that have enacted a Defense of Marriage Act).

find that, under the Federal Defense of Marriage Act, their marriages cease to be recognized as such as soon as they move from Massachusetts[109] unless they are moving to New York.[110] On the other hand, as *Alaska Civil Liberties Union* indicates, they may still have access to certain benefits, although by dint of their commitment to one another, rather than because of their marriage.[111] This situation is further exacerbated by the fact that it seems difficult to discern a broad trend either toward greater recognition of same-sex marriage or away from it—the movements toward each outcome seem in large part to be inspired by the movements toward the other. At present Vermont,[112] Connecticut,[113] New Jersey,[114] Oregon,[115] and New Hampshire[116] have adopted civil unions, which essentially provide same-sex couples with the rights a state can confer on married couples. Washington,[117] California,[118] and Maine[119] currently recognize same-sex domestic partnerships, which provide more limited rights. Hawaii allows same-sex partners to designate one another as "reciprocal beneficiaries," primarily for purposes of insurance and decisionmaking.[120]

V. CONCLUSION

It is thus by no means self-evident that the Supreme Court's jurisprudence is entirely consistent with its statement that "the Constitution divides authority between federal and state governments for the protection of individuals."[121] This lack of clarity reflects the fact that the protection of individuals and federalism are not always consistent values. By providing states the opportunity to adopt different regimes, the Supreme Court has created a situation in which states can

109 *See supra* text accompanying notes 92–93.

110 *See supra* note 98 and accompanying text.

111 *See* 122 P.3d 781, 793–94 (Alaska 2005) (opining that, although it may he reasonable for the State to distinguish between heterosexual employees for the purpose of providing benefits based on marital status, it is unreasonable for the State to distinguish between heterosexual and homosexual employees on the same basis when it is not possible for homosexual employees to marry).

112 VT. STAT. ANN. tit. 15, §§ 1201–1207 (2002).

113 CONN. GEN. STAT. §§ 46b-38aa to -38pp (2006).

114 N.J. STAT. ANN. §§ 37:1-28 to -36 (West 2007).

115 Oregon Family Fairness Act, 99 Or. Laws 2007 (2007).

116 N.H. REV. STAT. ANN. § 457-A:1 (2008).

117 WASH. REV. CODE ANN. § 26.60.010 to .070 (West 2008).

118 CAL. FAM. CODE § 297 (West 2007).

119 ME. REV. STAT. ANN. tit. 22, § 2710 (2007).

120 HAW. REV. STAT. ANN. § 572C-3 (LexisNexis 2007).

121 New York v. United States, 505 U.S. 144, 181 (1992).

offer differing (as is inherent in federalism) but not necessarily competing regimes. The economic arguments used to support competitive federalism do not relate to individual rights, and, as a result, states lack an incentive to innovate.

Among individual liberties, the arguments justifying leaving the right to die to individual states are closest to those underlying economic competitive federalism. Assisted suicide by definition takes place only once and only in one place, and the citizen of a state that prohibits it is free to move to another which allows it. States making the choice to allow (or prevent) people from engaging in behavior not within the purview of federal law are the perfect embodiment of Justice Brandeis's famous suggestion that states can operate as laboratories for national governmental policy.[122] In cases such as these, the Supreme Court seeks only to answer the threshold question of whether state laws comport with the Federal Constitution. As Justice Rehnquist stated in his opinion in *Casey*: "Our task is, as always, to decide only whether the challenged provisions of a law comport with the United States Constitution. If, as we believe, these do, their wisdom as a matter of public policy is for the people of [the state] to decide."[123] Although some scholars believe even this constitutes excessive federal intrusion,[124] this statement may be understood as an orthodox endorsement of federalism with respect to individual rights.

As the example of takings illustrates, leaving matters to the states does not necessarily ensure the protection of individual liberty. Taken in isolation, *Kelo* could be understood as being analogous to *Casey*; both establish the rough borders of a substantive right granted by the United States Constitution and the extent to which states may vary it. However, taken together with *Lingle* and *San Remo Hotel*, which were decided during the same Term, *Kelo* becomes an invitation for states to behave essentially as they please with respect to takings with only the comparatively weak threat of the Supreme Court

---

122 New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see supra* note 1.

123 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979 (1992) (Rehnquist, J., concurring in part and dissenting in part).

124 *See, e.g.*, Richard A. Epstein, *The Federalism Decisions of Justices Rehnquist and O'Connor: Is Half a Loaf Enough?*, 58 STAN. L. REV. 1793, 1794 (2006) ("I take the view that on many key questions of federalism [the Justices] should have pushed harder and moved farther than they ultimately did."); John Tuskey, *Do as We Say and Not (Necessarily) as We Do: The Constitution, Federalism, and the Supreme Court's Exercise of Judicial Power*, 34 CAP. U. L. REV. 153, 157–58 (2005) (arguing that even after the advent of the New Federalism, the Supreme Court has "remained committed to judicially-created doctrines that allow the Court to order states around in the supposed name of the Constitution").

granting certiorari to keep them in check. This problem is particularly acute because citizens cannot ascertain in advance the likelihood that they will be subjected to a taking, thus giving states an incentive, if anything, to engage in a race to the bottom in this area to attract businesses (although even this would require some clever maneuvering).

The disparate responses of states to the issue of recognizing same-sex marriages suggests that one state's "novel social and economic experiments"[125] may indeed create risks for the rest of the country. A same-sex couple married in Massachusetts sthat seekseeking to settle elsewhere would, by definition, extend that state's "experiment." With the Federal Defense of Marriage Act specifying that marriages may only be contracted between opposite-sex partners for purposes of federal law[126] and many state constitutions defining marriage in similar terms,[127] a state that does not recognize same-sex marriages would seek to claim that the Massachusetts law creates a right cognizable only in that state[128] and New York.[129] Far from protecting the couple in question, this would in effect force them to choose between their marriage and their constitutionally guaranteed right to travel. As this example demonstrates, federalism does not necessarily serve to "protect" individuals.

The concept of states operating as laboratories in competition with one another makes significantly more sense with respect to economics than individual liberties. In cases in which citizens realistically can go to a state that offers their preferred policy, such as assisted suicide, the arguments in favor of federalism hold. These arguments fail in the case of takings, where state policy is unpredictable and a direct comparison between states is impossible. The disparity of state recognition of same-sex marriage, forcing same-sex couples to choose between the rights they enjoy as a unit and their right to travel, further illustrates the inapplicability of federalism to issues of individual rights. Thus, federalism does not necessarily serve to protect individual rights, making increased federal judicial oversight of state governments in these areas particularly desirable.

---

125 *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

126 *See supra* Part IV.

127 *See* Human Rights Campaign, *supra* note 99.

128 *See supra* text accompanying notes 92–93.

129 *See supra* note 98 and accompanying text.