The Puzzle of Moral Federalism: Moral Factions and National Reaction
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Introduction

Americans have always been sentimental about moral localism. The colonists believed that local control over moral matters would protect them from the dictates of a distant King—and the religious errors of not so distant neighbors. The Founders (and their opponents) defended local republican norms against the claims of central power. Supreme Court opinions have contained paeans to the state "police power" since the days of John Marshall; it has become a legal truism that moral regulation, like the regulation of health and safety issues, is an exclusively local matter. Scenes of gay couples descending the steps of city halls, marriage licenses in hand, reminds that the commitment to moral localism still matters. Local officials, from San Francisco to New Paltz, have defended their authority to decide between sinful and sanctioned behavior.

Moral localism rests on more than mere sentiment. Its logic pervades the Constitution. The "partly national, partly federal" system described by Publius in *Federalist* 39 divides regulatory authority into distinct spheres: a national power, extending to "certain enumerated objects only" and a state power encompassing other objects of regulation. While no invariable line divides these spheres, this much, at least, is clear: national objects, like commerce, finance, negotiation, and war, are the responsibility of national officers. Local objects, like the "ordinary administration of criminal and civil justice," are the purview of state officials. Nothing, then, is more essentially local than morals regulation, as it involves the management of community

well being and "minute" citizen interests.[1] If the Constitution's federalism means anything, it means that moral regulation is to be handled by the state and its subdivisions.

Sentiment, principle, and reality, though, do not neatly co-exist. A cursory look at American politics suggests that moral localism is habitually thwarted: Congress governs moral issues in innumerable ways, from drug classification to on-line child protection. Supreme Court decisions of the twentieth century are a graveyard of discredited local polices. Rules governing abortion, pornography, religious activity, sexual deviancy, vagrancy, and intimate relations have been invalidated by federal action.[2] Some of this moral nationalism can be attributed to recent developments—the general expansion of Congress' commerce power after the New Deal; the fourteenth amendment's incorporation, after the First World War, and subsequent decades of rights expansion. But it would be a mistake to see the growth of national moralism as a modern phenomenon. The Founders were *not* consistent on this issue: many thought that national power should be used to promote moral standards. Nineteenth century Americans lobbied aggressively for centralized morals law, on topics such as Sabbath observance, liquor regulation, divorce, bigamy, and slavery. The Reconstruction Amendments established new means for congressional action and judicial supervision. A *national* police power was

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1 "The variety of more minute interests, which will necessarily fall under the superintendence of the local administrations…cannot be particularized, without involving a detail too tedious and uninteresting to compensate for the instruction it might afford. There is one transcendent advantage belonging to the province of the State governments…I mean the ordinary administration of criminal and civil justice." Hamilton, Federalist 17.

2 Most local moral rules have been invalidated for violating federal rights. Recent examples of local moral rules being trumped in this way include Lawrence v. Texas (2002) (a Texas law against sodomy is invalidated by a general right to liberty in the Due Process Clause) and Boy Scouts of America v. Dale, 530 U.S. 640 (2000) (New Jersey's public accommodations law, applied to the Boy Scouts, violates first amendment rights of expressive association).

discovered—and used—by Progressive Era congressmen and judges. This was the era of a national lottery act, a national prostitution act, child labor laws and liquor prohibitions.

The following pages are devoted to moral federalism, that is, the allocation of moral regulatory power among local and national actors. They focus on a puzzle in American politics: *why do Americans celebrate moral localism while continually sabotaging the system?* Clues are sought in the years between 1800 and 1920. This period provides a clear view of moral federalism—in all of its forms--because distracting modern factors are not present. The commitment to federalism is strong (at least in some contexts) and courts did not habitually use rights to invalidate moral legislation.[3] Moral federalism had the chance to grow, so to speak, without being shaped by national intervention. Further, this a period when moral rules were taken seriously by many Americans, and legislators were encouraged to pass them. It is interesting to see, when government is trusted to establish moral norms, which level of government is dominant.[4]

This dissertation's central argument is that moral factions drive moral federalism. *They continually deemphasize moral localism and encourage moral nationalism*. Moral localism was discredited, throughout the nineteenth century, because it was ideologically hollow to reformers: sin did not become less sinful—or more acceptable--when it crossed jurisdictional borders. Localism was also discredited because it worked against reform objectives. Competing moral regimes sabotaged home rule with policies that crossed state borders. The movement of immoral goods (slaves, liquor,

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[3] Americans have always questioned federalism and looked to courts to invalidate moral regulations. Before the early twentieth century, however, there were powerful and effective defenders of alternative perspectives.

[4] When government is not trusted with moral norms, it is clear what level predominates. National (read: judicial) rules are favored in a laissez faire morals environment because they work against local claims and regulations.

Sunday mails) and the advertising of immoral services (divorce laws, abortion) made local regulations seem irrelevant. A flexible mix of local and national rules were seen as the key to reform, that is, a supple moral federalism. This ideal had a profound influence on American politics, particularly after the Civil War, influencing legislative activity and judicial opinions. James Madison's famous prediction in *Federalist* 10—competing factions will check each others' power in the enlarged sphere of national politics—did not prove effective. Madison underestimated the collaborative tendencies among reformers and the attraction national officers would feel for sweeping moral directives.

The puzzle of moral federalism is not an easy thing to solve, and this summary does little service to the story's fits, starts, and complications. The extended version is as follows: chapter one considers the Founders' views of moral federalism, and the ambiguity about moral regulations in the Constitution (Publius' comments in the *Federalist*, it seems, are not the last word on this issue.) Chapter two, distributed with this introduction, considers reformers' assumptions about moral federalism in the antebellum era. Moral factions set the groundwork for moral nationalism before national laws were actually implemented. Chapter three considers legislative and judicial action in the decades after the Civil War, a period that one historian has helpfully called "moral reconstruction."[5] Chapter four is devoted to the progressives, and their confident program of moral nationalism and intergovernmental cooperation. Here, the nationalist aims of nineteenth century reformers are brought to their fruition.

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[5] Foster, Gaines. Moral Reconstruction: Christian Lobbyists and the Federal Legislation of Morality, 1865-1920. Chapel Hill: University of North Carolina Press, 2002.

There are at many reasons to examine the history of moral federalism. A striking one is the lack of scholarship on the issue. Despite the many political effects of unstable moral localism, there is an absence of political science literature on the topic. Federalism research abounds, and there is a considerable corpus on moral reform, but the discipline has shown little interest in these things in combination.[6] Even students of social movements, who have been particularly attentive to the connection between reformers and the political process in recent years, have paid slight attention to federalist arrangements.[7] This neglect has left the meaning of moral federalism largely to judges and lawyers—not an inappropriate fate for something based on constitutional law, but one with serious limitations.

What lessons does the legal community teach about moral federalism? Precisely the story that this dissertation rejects: the switch from moral localism to moral nationalism is a twentieth century development. Law review articles, published in the last few decades, tell a similar story: the Founders left moral authority to localities and states, which they enjoyed until the early or mid-twentieth century. After the expansion of the

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[6] While political scientists have not taken up moral federalism directly, they have considered related issues. John Dinan, for example, in "The State Constitutional Tradition and the Formation of Virtuous Citizens" (72 Temple Law Review, Fall 1999) suggests that moral regulation often follows a curve shaped trajectory: a lack of regulation is followed by state regulation, than national regulation, than no regulation again (at 671). Morton Keller, in Affairs of State: Public Life in Late Nineteenth Century America (Cambridge: Belknap Press, 1977) suggests that moral movements encourage the growth of national power in general. Samuel P. Huntington's theory of "creedal passion," described in American Politics and the Promise of Disharmony (Cambridge: Belknap Press, 1981), describes factors that encourage national agitation.

[7] Leading lights of the modern social movement school—such as Sidney Tarrow and Charles Tilly—are more interested in the relationship between reformers and the political process at large than the specific relationship between reformers and federalist arrangements. Jack A. Goldstone, in States, Parties, and Social Movements (Cambridge University Press, 2003) provides a useful introductory essay on developments in this field.

commerce clause in the 1930's, or the *Carolene Products* footnote in 1938, or the Civil Rights Act of 1964 (take your pick), the national government began to pass laws or enforce constitutional rules that took moral authority from local governments.[8] This switch in time narrative has impressive *bona fides*; one can find a similar argument in Rehnquist Court opinions.[9] Even legal commentators that object to the federalist five's scrutiny of Congress accept their description of a robust local police powers tradition.[10]

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[8] An enormous legal literature on the nationalization of local regulations--and the wisdom of returning authority to local governments--was prompted by the 1995 Lopez decision (*see below*). Two pre-Lopez articles that consider the modern shift to moral nationalism are Richard A. Epstein's "The Proper Scope of the Commerce Power" (73 Virginia Law Review 1987) (esp. at 1421-33) and Kathleen Brickey's "Criminal Mischief: the Federalization of American Criminal Law" (46 Hastings Law Journal 1995). For a treatment of the federal courts' role in limiting state moral regulation, *see* Glenn Reynolds and David Kopel's "The Evolving Police Power: Some Observations for a New Century" 27 Hastings Constitutional Law Quarterly (2000). The legal communities' consideration of moral federalism is not, of course, restricted to law reviews; some of the most forceful—and depressing--considerations of the switch from local to national moral regulation are discussed in book form. *See* Robert Bork's Tempting of America (New York: Free Press, 1990) (arguing that the modern rights regime has eviscerated local moral authority), William Novak's The People's Welfare (Chapel Hill: University of North Carolina Press, 1996) (arguing that the growth of individual rights and centralized power, between 1877 and 1937, changed our habits of local regulation), and Robert Nagel's The Implosion of American Federalism (New York: Oxford University Press, 2001) (arguing that our twentieth century views of government render us incapable of local regulation).

[9] The Supreme Court announced a commercial/noncommercial test for congressional commerce clause legislation United States v. Lopez, 514 U.S. 549 (1995). According to the Court, Congress may regulate many economic transactions under its commerce power, but matters of health, safety, and morality (noneconomic matters) should be left largely to the states—where it always has resided. The test was repeated, and elaborated, in United States v. Morrison, 529 U.S. 598 (2000). For individual Justices' objections to moral nationalism, see Chicago v. Morales, 527 US 41 (1999) (Justice Thomas defends a city's right to enact loitering laws without federal interference) and Romer v. Evans, 517 U.S. 620 (1996) (Justice Scalia defends a state's right to pass a constitutional amendment denying special legal status for homosexuals).

[10] *See* Justice Souter's dissent in Lopez and his discussion of the Court's "backward glace" at "old pitfalls" (*ibid* at 608).

This dissertation seeks to debunk the myth of nineteenth century moral localism: its charms are habitually overstated. In the process, it hopes to encourage a more careful consideration of the forces that continually work against sharp local/national morals distinctions. Moral factions have profoundly affected the nature of American federalism. They will continue to do so in the future. An appreciation of this tendency is necessary if one hopes to check moral nationalism in contemporary politics. Then again, past reformers may convince us than moral localism is not worth protecting. An examination of nineteenth and early twentieth century arguments against moral localism may cure us of our sentimentality toward the topic.

An explanatory note about terminology: "Moral federalism" is used as a broad term throughout the chapters. A "moral federalist," unlike a "moral nationalist" or a "moral localist" believes that morality is best regulated by a combination of national and local legislation. The localist or the nationalist, alternatively, thinks morality is an exclusive object of (state or national) regulation. Chapter one argues that the Constitution sets up a system of moral federalism that welcomes innovation—that is, it permits both local and national moral rules, depending on the topic and situation. Later chapters will argue that this partly national, partly federal regulatory system was replaced by one emphasizing national regulation once opposition to moral factions faded away.

"Moral law" or "moral regulation" are difficult terms of art, and I do not pretend to airtight definitions. As a basic rule, a moral law has the primary aim of improving the character of citizens. This may be achieved through restricting behavior (laws prohibiting drinking, or swearing, or adultery) or laws that promote liberation from oppressive conditions (prohibitions against slavery or women's property regulations). Any definition

that relies on intent, of course, invites mischaracterizations. For the sake of consistency, reformers and legislators will be taken at their word. If they justify their measures in moral terms, I will consider them moral regulations.