VOTING WITH YOUR FEET IS NO SUBSTITUTE FOR CONSTITUTIONAL RIGHTS

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I. THE DOWNSIDE OF VOTING WITH YOUR FEET

The organizers of this Symposium[1] gave each panel a brief summary of the panel's intended topic. I want to take a part of that summary as the subject of my commentary: "It is a benefit of Federalism that people can vote with their feet and migrate to communities that share their values as well as enable their liberty. But does pervasive judicial review threaten to destroy local identity by homogenizing community norms?"[2] There follows some more in that vein, some illustrative examples, and finally the provocative question whether the Constitution really requires a separation of God and football.[3] I will return to God and football, but I principally want to address this idea of voting with your feet. The idea is common in the federalism literature,[4] but it has always troubled me.[5]

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1. Program for Twenty-Seventh Annual National Federalist Society Student Symposium, Panel: Judicial Interference with Community Values (Mar. 7, 2008) (on file with Author).

2. *Id.*; *see also The Fed Soc Symposium and "voting with your feet,"* Posting of Rick Garnett to Prawfsblawg, http://prawfsblawg.blogs.com/prawfsblawg/2008/03/the-fed-soc-sym.html (Mar. 10, 2008, 10:13 EDT) ("The claims presented for the panel's consideration were, first, that 'it is a basic assumption of federalism that individual communities can be different'; second, that 'it is a benefit of federalism that free people can "vote with their feet" and migrate to communities that share their values'; and, third, that 'pervasive judicial review' can undermine this benefit, and this assumption, and 'destroy local identity by homogenizing community norms.'").

3. *See* Program, *supra* note 1; *see also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (holding that school-sponsored prayer before high school football games violates the Establishment Clause).

4. *See, e.g.*, Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 157–58 (2001) (arguing that state laws banning

The idea especially troubles me when voting with your feet is offered as an argument for less vigorous enforcement of constitutional rights.[6] At least some of the commentators who have written articles praising the right to vote with your feet have also shared my view that this right is insufficient to protect other constitutional rights. Thus, Richard Epstein argues that federalism is indispensable because it protects the right to vote with your feet, but that the protection is not enough. "[T]he institution of federalism, without the rigorous enforcement of substantive individual rights, will not be equal to the formidable task before it."[7]

There are times when voting with your feet is an acceptable second-best solution, and it is a good thing that we are always free to leave a jurisdiction if we have to.[8] But voting with your

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discrimination on the basis of sexual orientation illustrate "many of the classic arguments for federalism: people have been able to accommodate their own preferences by voting with their feet, and the states with more progressive rules have served as laboratories for assessing the benefits and costs of extending antidiscrimination laws in this way"(footnote omitted)); Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS., Winter 1992, at 147, 150 ("Federalism works best where it is possible to vote with your feet."); *see also* Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 72 (2001) ("[W]here states adopt different positions on issues of irreducible moral disagreement, the variety of local political regimes gives citizens a choice of the rules they live under that would be unavailable in a centralized system."); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1344–45 (2004) ("When information problems are taken into account, voting with your feet in a relatively decentralized federal system may lead to greater majoritarian control of government than ballot box voting in a more centralized system.").

5. *Cf.* Douglas Laycock, *Federalism as a Structural Threat to Liberty*, 22 HARV. J.L. & PUB. POL'Y 67, 80–82 (1998) ("But in an era of big government without vigorous enforcement of constitutional rights, federalism becomes a serious structural threat to liberty. . . . It is often said that local government is closer to the people and thus more politically responsive. This may be true for those who have easy access to policy makers or who can threaten to move their factory to another jurisdiction. It is sometimes true when an issue captures public attention and arouses a large segment of the populace. But it is rarely true for minority religions or small religious organizations. The only bodies that can protect constitutional liberty against each of the multiple sources of regulation are at the federal level.").

6. *See id.* at 82 ("[Y]ou cannot have limited government and a weak judiciary. The judicial power to enforce constitutional liberty is one of the essential checks on the rest of government." (footnote omitted)).

7. Epstein, *supra* note 4, at 150; *cf.* Kreimer, *supra* note 4, at 72. Kreimer argues for the benefits of voting with your feet, but also notes that "'only' crossing a border is often no mean hurdle. To the citizen who is unwilling or unable to abandon her current residence, the availability of a freer life in the next state is cold comfort." *Id.*

8. Some commentators have long argued that federal legislation is making this right illusory. Because federally imposed standards have tended to homogenize

feet is often a last resort in response to illegitimate treatment. The task is to distinguish those cases in which a person leaves the jurisdiction in response to illegitimate pressures from those cases in which a person leaves the jurisdiction in response to legitimate policy disagreements. That question reduces to a debate over which rights to constitutionalize and over the appropriate scope of each constitutional right. We have great debates about those questions. Americans disagree about which rights to interpret narrowly and which to interpret broadly. But we will do best if we debate these questions on their merits. Unless one takes Professor Lino Graglia's view that enforcing constitutional rights through judicial review is a bad idea,[9] the debate over the appropriate scope of rights cannot be resolved by references to voting with your feet.

"Voting with your feet" is a sugarcoated way to describe what happens when dissenters are driven out of the community. Runaway slaves were voting with their feet.[10] Darfurians fleeing to Chad are voting with their feet.[11] Ethnic cleansing is a way of encouraging people to vote with their feet. I assume that the people who wrote our panel description did not have in mind any of these examples. But the difference between these examples and what our organizers were likely thinking about does not turn on the definition of voting with your feet. The relevant differences are in the rights being violated and in the

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the States, they argue, a dissatisfied citizen who moves does not improve his situation. *See* Douglas W. Kmiec & Eric L. Diamond, *New Federalism is Not Enough: The Privatization of Non-Public Goods*, 7 HARV. J.L. & PUB. POL'Y 321, 350 (1984) ("A strong federal presence tends to cartelize the 'market for government' leading to homogeneity among potential competitors. As state and local taxpayers have their tax/service options reduced they remain unable to vote with their feet."). Moreover, the right to leave a jurisdiction was repealed by federal law at least once. *See* Baker & Young, *supra* note 4, at 121–24 (discussing how the Fugitive Slave Clause eliminated the right of exit for slaves in the antebellum South).

9. *See, e.g.*, Lino A. Graglia, *Judicial Review: Wrong in Principle, A Disaster in Practice*, 21 MISS. C. L. REV. 243 (2002).

10. *See, e.g.*, R.J.M. Blackett, *"Freemen to the Rescue!": Resistance to the Fugitive Slave Law of 1850*, *in* PASSAGES TO FREEDOM: THE UNDERGROUND RAILROAD IN HISTORY AND MEMORY 133, 133 (David W. Blight ed., 2004) (discussing how large numbers of fugitive slaves were successfully integrated into northern communities of free blacks).

11. *See, e.g.*, Jérôme Tubiano, *Darfur: A Conflict for Land?*, *in* WAR IN DARFUR: AND THE SEARCH FOR PEACE 68, 69 (Alex de Waal ed., 2007) (estimating 200,000 Darfurian refugees in Chad); Dawit Toga, *The African Union Mediation and the Abuja Peace Talks*, *in* WAR IN DARFUR, *supra*, at 214, 214–15 (estimating "[o]ver 100,000" Darfurian refugees in Chad).

magnitude of the deprivations that led people to vote with their feet. To distinguish between acceptable and unacceptable pressure to vote with your feet, we have to consider specific rights and the range of possible deprivations.

Federalism is a prominent feature of our Constitution.[12] Federalism means that there will be differences from state to state.[13] Within states, we rely heavily on local government, and that reliance means that there will be differences from town to town or between rural and urban areas.[14]

But countervailing ideas are also prominent in our Constitution. We teach our children that we are "one Nation . . . indivisible,"[15] and the idea of indivisibility also appears in the Supreme Court's interpretation of the Constitution.[16] An American is free to go anywhere in this country as a visitor or as a new permanent resident.[17] More immediately to the point, a person born in the United States is a citizen of the state where he resides.[18] And he may reside in any state he chooses. When I moved from Texas to Michigan, Michigan could not reject me. Potential employers had a choice; no one had to hire me. But the state did not have a choice. Michigan had to accept me as a citizen, and it could not discriminate against me because I was new to the state.[19]

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12. *See, e.g.*, Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343, 364 (1981) (book review) (collecting constitutional provisions that assume or protect the continued existence of states as governing entities).

13. *See, e.g.*, Richard W. Garnett, *Judicial Review, Local Values, and Pluralism*, 32 HARV. J.L. & PUB. POL'Y 7, 7 (2008) ("Notwithstanding *American Idol*, Starbucks, *USA Today*, and chain restaurants, individual communities not only *can be* different, they *are* different.").

14. *See id.*

15. *See* 4 U.S.C. § 4 (2000) (the Pledge of Allegiance).

16. *See* Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868) ("The Constitution, in all its provisions, looks to an indestructible union of indestructible states."); *see also* Grutter v. Bollinger, 539 U.S. 306, 332 (2003) ("Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.").

17. *See* Zobel v. Williams, 457 U.S. 55, 76–77 (1982) (O'Connor, J., concurring) ("It is difficult to imagine a right more essential to the Nation as a whole than the right to establish residence in a new State."); Aptheker v. Sec'y of State, 378 U.S. 500, 517 (1964) ("[F]reedom of travel is a constitutional liberty closely related to the rights of free speech and association . . . ."); *see also Zobel*, 457 U.S. at 67 (Brennan, J., concurring) (noting the "unquestioned historic recognition of the principle of free interstate migration, and . . . its role in the development of the Nation").

18. *See* U.S. CONST. amend XIV, § 1.

19. *See* Saenz v. Roe, 526 U.S. 489 (1999) (holding it unconstitutional to limit new residents to the level of welfare benefits that would have been payable in the state

Even before I established residence in Michigan, when I was just visiting and exploring opportunities, Michigan could not discriminate against me. During my visits, Michigan owed me all the privileges and immunities of a citizen of Michigan.[20] That guarantee is more nuanced than it appears and requires some interpretation, but it is nevertheless a sweeping guarantee of interstate equality.[21]

Once in Michigan, I obviously cannot insist that the state do everything to my liking, so that I will feel no pressure to leave. I have no more rights than any other citizen in Michigan, which is why on most issues, we vote.[22] On some issues, we create and enforce individual rights,[23] and the argument is about which issues should be the subject of individual rights and which issues should be left up to votes.[24]

The individual rights that we have created are important, and some of their applications are controversial, but they are not especially numerous.[25] It is absurd to suggest that judicial review

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from which they came); *Zobel*, 457 U.S. at 55 (holding it unconstitutional to pay citizen dividends from state's oil revenue in proportion to the number of years each citizen had resided in the state); Shapiro v. Thompson, 394 U.S. 618 (1969) (holding it unconstitutional to make new residents wait one year before becoming eligible for welfare benefits). These are not the decisions of thin liberal majorities clinging to old precedents. With respect to the results, these decisions were rendered by votes of 7-2, 8-1, and 6-3 respectively.

20. *See* U.S. CONST. art. IV, § 2, cl. 1.

21. *See* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 261–73 (1992).

22. *See* MICH. CONST. art. II (providing for the manner of elections); MICH. CONST. art. IV (vesting the legislative power and specifying the organization and basic operation of the legislative branch); MICH. CONST. art. XII (specifying the methods of amending or revising the Michigan Constitution, with each method culminating in a vote of the people).

23. *See* U.S. CONST. art. I, §§ 9–10; amends. I–IX, XIII–XV, XIX, XXIV, XXVI (protecting individual rights); MICH. CONST. art. I (protecting individual rights).

24. For example, see the recent political debate and litigation over affirmative action in Michigan. *See* MICH. CONST. art. I, § 26 (banning affirmative action by constitutional amendment); Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding affirmative action policies at the University of Michigan Law School against claim that they violated the Federal Constitution); Coal. to Defend Affirmative Action v. Granholm, 501 F.3d 775 (6th Cir. 2007) (denying motions to intervene in continuing litigation over federal constitutionality of state's ban on affirmative action); Coal. to Defend Affirmative Action v. Granholm, 473 F.3d 237 (6th Cir. 2006) (vacating preliminary injunction that would have delayed enforcement of state's ban on affirmative action).

25. *See* provisions cited *supra* note 23.

is as pervasive as the panel description implied.[26] Every state has thousands of statutes; even small towns have hundreds. Most of these statutes have never been challenged, and most of them would be upheld without serious argument if they were. Vast areas of social, economic, and regulatory policy are left to the political process with little or no serious judicial review.

Individual rights are concentrated in a few areas that tend to be unusually important to individuals—speech, religion, fair procedure, equality of treatment, and the core of property ownership.[27] These rights give each individual an essential, if limited, sphere of autonomous control over his life. Most of these rights are also important to the functioning of a democratic government.[28] Ownership of guns,[29] to take a currently controversial example, fits in at least the first of these categories; it is undoubtedly a right that is intensely important to many Americans, however abhorrent it may be to many other Americans. With respect to these individual rights, the Constitution carries the strategy of decentralization beyond federalism. It decentralizes choice beyond states or localities and down to individuals.

By protecting individuals with respect to the things that they are likely to feel most strongly about, we reduce the occasions on which they have to vote with their feet. That is a good thing. Voting with your feet is expensive.[30] People move in this country for many reasons—for education, for jobs, for family, for climate—and they should not have these choices limited simply because some towns are hostile or discriminatory towards their religion, political views, race, speech, sexual orientation, or lack of citizenship. There are many reasons why people choose a place of residence, and it can be costly, both to indi-

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26. *See supra* note 2 and accompanying text.

27. *See* provisions cited *supra* note 23.

28. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73–183 (1981) (arguing for a "representation-reinforcing" theory of constitutional rights).

29. *See* U.S. CONST. amend. II.

30. *See* Epstein, *supra* note 4, at 154–58 (arguing that the inability to remove immobile assets within a jurisdiction imposes significant costs on voting with one's feet); Kreimer, *supra* note 4, at 72 ("For the citizen who lacks access to information, funds, or transportation, the legal possibility of liberty in a neighboring state may provide no succor."); Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings after* Kelo, 15 SUP. CT. ECON. REV. 183, 222 (2007) ("'Voting with your feet' does not protect anything you can't take with you when you flee.").

viduals and to society, to subordinate all those reasons to the question whether some jurisdiction will respect the basic rights that people care about most. Requiring people to move to preserve their basic rights can separate families. It can require people to leave jobs. It is an obstacle to trade. Forcing people to choose their residence on grounds of political acceptability is bad for the economy, if nothing else.

But this is what is implicitly required when the option to vote with your feet is offered as a reason not to enforce constitutional rights. The argument is that we do not have to enforce rights judicially, because if people think a right that is really important to them is being violated, they can just leave. The argument assumes that people can, or should, focus on just one reason for choosing a place of residence and subordinate all other reasons to that one reason. It is that argument that I reject.

Enforceable federal rights take basic questions of fair treatment out of the decision about where to live so that people can act on all of their many other reasons for deciding where to live. Federal constitutional rights protect individuals from pressure to move in search of fair treatment. Constitutional rights enforceable everywhere are essential to the right to travel and to live throughout the country[31] and are therefore essential to national unity. Abolitionists and Republicans could not safely travel in the South in the 1850s.[32] They could vote with their feet and stay out of the South,[33] and most of them did, but that was not a good thing.

Constitutional rights, including the controversial ones, are equally essential to mobility today. Professor Alan Brownstein, who is an observant Jew teaching at the University of California at Davis School of Law, has said that the school prayer decisions made it possible for families like his to leave the Jewish community in Brooklyn and move anywhere they wanted, in-

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31. For the right to travel or to change one's residence, see sources cited *supra* notes 17–20.

32. *See* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 31 (1986) (describing inability of Republicans to conduct meetings or spread their views in the South); RUSSEL B. NYE, FETTERED FREEDOM: CIVIL RIGHTS AND THE SLAVERY CONTROVERSY 1830–1860, at 174–93 (1963) (describing mob violence and vigilance committees directed at anyone who, while in the South, opposed slavery).

33. *See* CURTIS, *supra* note 32, at 31 (noting Abraham Lincoln's concession that Republicans could not speak in the South).

cluding to relatively small and relatively rural communities like Davis.[34] And the examples could be multiplied. A generation of African-Americans left the South before the civil rights movement in search of equal treatment in the North and West.[35] It is good that they were free to do that, but they should never have had to do that.

The vote-with-your-feet ideology undermines national unity in another way as well: It encourages Americans to separate themselves physically along ideological lines. All the conservative Republicans go here; all the really, really conservative Republicans go over there; all the Democrats go somewhere else; and all the really, really, liberal Democrats go yet elsewhere. That is the logic of voting with your feet, and the more that happens, the more politically segregated we become. Carried to its logical conclusion, voting with your feet sorts people into separate states that have little in common, thus renewing the risk of separation. It is good that most states are not really red or blue, but various shades of purple.[36]

Our politics feels polarized today. We talk about red states and blue states, but it could be a lot worse, and at times in our history it has been a lot worse. In Utah, the reddest of the red states, Democrat John Kerry received twenty-six percent of the vote without campaigning.[37] In Massachusetts, the bluest of blue states, Republican George W. Bush received roughly thirty-seven percent, also without campaigning.[38] In thirty-two of the fifty states, the loser received more than forty percent of the votes in the 2004 election,[39] and in all these states, most of the voters who supported the loser were contentedly living

34. He does not appear to have said this in print, but it made a permanent impression on me when he said it very eloquently at a conference.

35. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 100–02 (2004) (describing the "Great Migration" of Southern blacks beginning at the time of World War I).

36. Professor Robert Vanderbei at Princeton has produced a great set of maps that graphically illustrate the nation's persistent political purpleness. *See* Robert J. Vanderbei, The Changing Colors of America (1960–2004), http://www.princeton.edu/~rvdb/JAVA/election2004 (last visited July 29, 2008).

37. *See* FEC, FEDERAL ELECTIONS 2004: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE, AND THE U.S. HOUSE OF REPRESENTATIVES 38 (2005), http://www.fec.gov/pubrec/fe2004/federalelections2004.pdf.

38. *See id.* at 32.

39. *See id.* at 27–39. The details but not the pattern differed in 2008; the losing major-party candidate in every state had substantial minority support. *See* Election Results 2008, http://elections.nytimes.com/2008/results/president/map.html.

with their neighbors who supported the winner. This is a very different time from 1860 when Lincoln got no votes—zero, literally—in ten of the eleven states that would secede after he was elected,[40] and trivial numbers of votes in the eleventh.[41]

II. SOME EXAMPLES

Consider some specific examples. In particular, what about separating prayer and football? In the Supreme Court, I represented the parents who objected to prayer at high school football games in Texas.[42] The case involved two forms of religious zeal: evangelical Christianity and Texas high school football.[43] The plaintiffs were a Catholic family and a Mormon family,[44] both fed up with the school's frequent imposition of Protestant evangelicalism.

It is widely agreed that religious liberty entails at least a prohibition of mandatory church attendance. The state could not pass a law that says everyone must attend a weekly worship service on pain of criminal penalty, let alone a particular service chosen by a local majority.[45] Yet in towns where every

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40. Elting Morison, *Election of 1860*, *in* 2 HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 1789–1968, at 1097, 1152 (Arthur M. Schlesinger, Jr. ed., 1971). In the four slave states that did not secede, Lincoln received a cumulative 5.8 percent of the vote. *See id.* In most of the seceding states, Lincoln did not appear on the ballot. *See* MELVIN L. HAYES, MR. LINCOLN RUNS FOR PRESIDENT 213 (1960).

41. Lincoln received about 1900 votes in Virginia; reported figures vary from 1877 to 1929 votes. About 94% of these votes came from the counties that later became West Virginia; about 92% came from counties bordering Ohio or Pennsylvania; about 73% came from Brooke, Hancock, Mason, and Ohio counties, the four counties in the northern panhandle, just west of Pittsburgh and closer to Detroit than to Richmond. These numbers were calculated from slightly different county-by-county returns in two sources: W. DEAN BURNHAM, PRESIDENTIAL BALLOTS 1836–1892, at 816–43, 852–64, 948–52 (1955); MICHAEL J. DUBIN, UNITED STATES PRESIDENTIAL ELECTIONS 1788–1860, at 184–86 & 188 n.12 (2002). Burnham credits Lincoln with 125 votes in what is now Virginia; Dubin says 100. These were the only votes that Lincoln got anywhere in the seceding South. For further analysis of the sectionalized nature of this election, see BURNHAM, *supra*, at 71–87.

42. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 293–95 (2000).

43. *See generally* H.G. BISSINGER, FRIDAY NIGHT LIGHTS: A TOWN, A TEAM, AND A DREAM (2000) (illustrating the social significance of Texas high school football with a case study of one team).

44. *See Santa Fe*, 530 U.S. at 294.

45. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 52 (2004) (Thomas, J., concurring in the judgment) (noting that "'[t]ypically, attendance at the state church was required'" in the "traditional 'establishments of religion' to which the

governmental event begins with a prayer, we get a limited version of that. The time commitment is much shorter, and the penalty for not attending is generally smaller, but people are in effect forced to attend someone else's religious observance as a price of participating in public business.[46] To avoid the short prayer service, they have to skip the event or arrive late and leave early, often drawing attention to their religious dissent in the process. The penalty for not attending the prayer is forfeiture of one's equal right to participate in a secular public event. As the Supreme Court said in its most succinct explanation of the problem with government-sponsored prayer, "the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice."[47]

Reasonable people can disagree with that principle, and in fact the Court has not applied it to the full limit of its logic.[48] We can argue about whether religious dissenters should just accept the imposition of religious observance at secular events, whether they should view it as *de minimis*, whether the community interest outweighs the individual interest, or whether the dissenters should have constitutional protection. But however you weigh the conflicting interests, you cannot make a serious argument that simply disregards the individual's side of the balance. The sense of violation of individual conscience in these cases can be very strong for some believers of minority faiths and for some nonbelievers. Whatever we do in these cases, we need to think them through on their own facts. We should not flippantly say that the community can do what it wants, and if the dissenters do not like it, they can vote with their feet.

It is also the case that a majority's strong desire to impose its religion is often associated with other kinds of intolerance. Take Santa Fe, Texas, where the football-prayer case arose. In the event that principally motivated one of the plaintiff families to sue, a teacher passed out fliers in his class for a Baptist revival meeting. One of his students asked if non-Baptists could attend.

Establishment Clause is addressed" (quoting Lee v. Weisman, 505 U.S. 577, 640–41 (1992) (Scalia, J., dissenting))).

46. *See Santa Fe*, 530 U.S. at 311–12.

47. *Lee*, 505 U.S. at 596.

48. *Cf.* Marsh v. Chambers, 463 U.S. 783 (1983) (upholding practice of opening daily meetings of legislature with prayer).

The teacher asked the student what her religion was; after she said she was Mormon, the teacher spent the next ten minutes denouncing Mormonism as an evil cult.[49] Bibles were distributed every year in the Santa Fe schools, and there was uncontradicted evidence of verbal harassment of students who declined to accept Bibles or who objected to prayers and religious observances in school.[50] One parent—not one of the plaintiffs—began homeschooling her youngest daughter to avoid persistent verbal and physical harassment over issues of religion in the public school.[51] Withdrawing from public school to home school is, on a local scale, a form of voting with your feet.

The trial judge permitted the *Santa Fe* plaintiffs to litigate anonymously and felt obliged to threaten "contempt sanctions" and "criminal liability" to deter continuing investigations to learn their identity and to deter "intimidation or harassment."[52] The judge closed the courtroom for the testimony of the minor plaintiffs because of "'the possibility of social ostracization and violence because of militant religious attitudes.'"[53]

Santa Fe has had other such incidents over the years. As an opinion piece in the *Houston Chronicle* summarized:

> What's striking is the diversity. Not in the city of Santa Fe's population . . . but in the variety of its prejudice. For three decades Santa Fe has made national headlines for spasms of bigotry, racism and religious exclusion and persecution involving a truly impressive range of minorities.
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> In 1981, the KKK chose Santa Fe as the site for its Valentine's Day anti-Asian rally; the crowd of 150 reportedly included small children draped in white robes. In the 1990s, Mormon and Catholic students complained of harassment in the town's public schools. And in 2000, Santa Fe school officials in the overwhelmingly Protestant city went to the U.S. Supreme Court to defend public prayer before football games.

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49. *See* Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 810 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000).

50. *See* Brief for Respondents at 2, *Santa Fe*, 530 U.S. 290 (No. 99-62) (citing Transcript of Hearing at 98–99, 197, 208–09 (July 25, 1996)).

51. *See id.* (citing Transcript of Hearing, *supra* note 50, at 82–83).

52. *Santa Fe*, 530 U.S. at 294 & n.1.

53. Brief for Respondents, *supra* note 50, at 2 (quoting an Order of the district court, docket entry 39 (July 22, 1996)).

> That was also the year that Santa Fe's lone Jewish student, Phillip Nevelow, alleged that classmates had bullied him and threatened to hang him. School authorities called his complaints overblown; Nevelow's parents contended the mistreatment flowed naturally from the current of bigotry coursing through the debate and litigation over public prayer.
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> Last week Santa Fe erupted again. Four boys from 13 to 16 were charged with painting swastikas and burning a cross at the house of a black woman, Margaret Lewis, and her two grandchildren.[54]

A similar column in the *Fort Worth Star-Telegram* mentioned the Jewish student, the anti-Mormon tirade, and two other incidents. In 2000, an African-American man who asked how to file a complaint was arrested for walking on the wrong side of the street.[55] In 1997, following a junior high basketball game, the visiting team's African-American players were subjected to racial slurs, and a school police officer from the visiting team was beaten up.[56] Of course, there were residents of Santa Fe who resisted such incidents and tried to help the victims, but they were not able to change the pattern of continued intolerance.[57]

The family of the Jewish student mentioned in both stories ultimately chose to vote with their feet. Their son was repeatedly bullied, harassed with anti-Semitic jibes and epithets, threatened with hanging, and physically assaulted.[58] The school variously claimed that it did not know about the problems, that it had already addressed them, that the reason the victim got an "F" on an essay describing these problems was that he had not followed the rules for the assignment, and that the victim initiated at least one of the incidents.[59] Four students were eventually arrested on charges of assault or terrorist

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54. Editorial, *What's with Santa Fe? This Small Town in Galveston County Is Sullied by Another Outburst of Hate*, HOUS. CHRON., May 1, 2005, at 2.

55. *See* Bud Kennedy, *Santa Fe Yet to Display Standard for Tolerance*, FORT WORTH STAR-TELEGRAM, June 3, 2000, at Metro 1.

56. *See id.*

57. *See* Editorial, *supra* note 54, at 2.

58. *See* Deborah Tedford, *Santa Fe ISD Officials Say Jewish Boy Never Told of Threats*, HOUS. CHRON., Oct. 26, 2000, at A29; Kevin Moran, *Teen Charged in Attack on Jewish Boy*, HOUS. CHRON., July 4, 2000, at A27.

59. Tedford, *supra* note 58.

threats,[60] and the school eventually settled with the Nevelows for $325,000.[61] The family gave up on hoping for a solution and moved to Galveston.[62] All these problems in one town may be an extreme example and not entirely representative, but the differences are matters of degree. Each of these problems is connected to a worldview that tells people to conform or leave. Vote with your feet.

Some towns routinely impose religion on others at public events. Other towns treat religion like pornography, not to be seen in public. At the other end of the political and theological spectrum from *Santa Fe* is a case dragging on in New York City, *Bronx Household of Faith v. New York City Board of Education*.[63] That litigation is now in its fifteenth year. It has been to the Second Circuit four times;[64] the parties are again awaiting an oral argument date as I write this in 2008.[65] There have been three Supreme Court decisions on point—one of them unanimous, another eight to one—all going against the school board's position.[66] The school board is still litigating, claiming that those Supreme Court cases are somehow all distinguishable.[67]

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60. *See* Bud Kennedy, *Prayers Do Young Jew Little Good*, FORT WORTH STAR-TELEGRAM, June 20, 2000, at Metro 1 (three charged with terroristic threats); Moran, *supra* note 58 (one charged with assault).

61. *See* Kevin Moran, *Papers Show Santa Fe ISD Paid $325,000 to Settle Suit*, HOUS. CHRON., Mar. 22, 2002, at A34.

62. I know this from discussions at the time with the family's attorney, Anthony Griffin of Galveston. It can also be inferred from press coverage. *Compare id.* ("The family lives in Galveston."), *with* Kennedy, *supra* note 60 (reporting that victim's parents had lived in Santa Fe for fifteen years). It would appear that Jewish adults and Jewish small children could safely live in Santa Fe, but that Jewish middle school and high school students could not. *See id.*

63. 492 F.3d 89, 92–95 (2d Cir. 2007) (reviewing the background of the conflict, which began in 1994).

64. *See* Bronx Household of Faith v. Bd. of Educ., 492 F.3d 89 (2d Cir. 2007); Bronx Household of Faith v. Bd. of Educ., 331 F.3d 342 (2d Cir. 2003); Bronx Household of Faith v. Cmty. Sch. Dist. No. 10, 127 F.3d 207 (2d Cir. 1997). The fourth is a pending appeal in *Bronx Household of Faith v. Board of Education*, No. 07-5291 (2d Cir.).

65. E-mail from Jordan Lorence, Counsel for Plaintiff, to Douglas Laycock (July 29, 2008) (on file with Author).

66. *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (5-4 when elementary school children are at issue); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (unanimous when adults on the weekend are at issue); Bd. of Educ. v. Mergens, 496 U.S. 226 (1990) (8-1 when high school students are at issue). Justice Breyer concurred in part in *Good News Club*, making it 6-3 for reversal, but he held out the possibility that the school might yet win on remand. *See Good News Club*, 533 U.S. at 128–30 (Breyer, J., concurring in part). So for pur-

The issue in *Bronx Household* is that the school board rents its facilities to community groups on weekends.[68] The Bronx Household of Faith is a church group that wants to rent one of these school facilities over the weekend, but the school has refused the group's request because the school prohibits religious worship anywhere on its premises, even among consenting adults on weekends.[69] Keeping religious speech out of school buildings is a community value to which the New York Board of Education is very committed, but that value is fundamentally at odds with more basic American values. The school board is discriminating on the basis of something that is a core constitutional right. It is suppressing freedom of speech: it is making viewpoint distinctions within speech.[70] The Bronx Household of Faith and its members should not have to move to Alabama or Texas to find a place where they can exercise their right to speak about religion in a public forum. They should not have to vote with their feet. I am glad we have a constitutional right to free speech, and sooner or later, it will be honored even in New York.

The examples I know best involve religious liberty. Of course, there are many other civil liberties examples on both the Left and the Right. Americans tend to applaud the protection of rights they value for themselves and to see judicial interference in the protection of rights they do not especially value or would prefer to violate. The people who think judges violated community values with respect to football prayer and that there should be *less* judicial review of government-sponsored religious ceremonies probably overlap substantially with the people who think that *Kelo v. City of New London*[71] ignored community values with respect to property ownership and that there

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poses of assessing the school's argument in *Bronx Household of Faith, Good News Club* is better characterized as a 5-4 decision.

67. *See Bronx Household*, 492 F.3d at 92–95 (summarizing arguments of each side after *Good News Club*).

68. *See id.* at 92.

69. *See id.* at 94 (quoting the most recent revision of the school's rule restricting religious speech).

70. *See Good News Club*, 533 U.S. at 107–12 (holding, and reviewing other cases holding, that discrimination against religious speech is impermissible viewpoint discrimination).

71. 545 U.S. 469 (2005) (holding that taking of private property is for public use even when city consolidates parcels and transfers them to private developer pursuant to a redevelopment plan).

should be *more* judicial review of how some communities exercise eminent domain power.[72]

The recent Second Amendment case[73] is another example in which both individual and community values differ sharply. At least one town in America requires all heads of households to own a gun;[74] another wants to ban all handguns and require any other guns to be rendered unusable while in the city.[75] There is a certain appeal to saying that each town should be able to decide for itself, but the cost of such local autonomy would be that some jurisdictions would reach extreme solutions and that some Americans—those who feel strongly about their right to own a gun (or about their presumed right to refrain from owning one)—would effectively be barred from living in those jurisdictions. They could vote with their feet, but they could not exercise the right of American citizens to live anywhere in the country while also exercising their claimed right to decide for themselves whether to own a gun.

The rhetoric and reality of voting with your feet also arise with respect to taxes and regulation, contexts that are important in their own right but that raise a different set of issues beyond the scope of this short Essay. Economic and regulatory treatment is generally in the realm of legitimate policy disagreements rather than arguable constitutional rights.

Competing for business with generally applicable choices about tax and regulation is an inherent feature of federalism or national sovereignty or any other system with separate jurisdic-

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72. *Compare* Douglas W. Kmiec, *The Human Nature of Freedom and Identity—We Hold More Than Random Thoughts*, 29 HARV. J.L. & PUB. POL'Y 33, 45 (2005) (condemning "the unfortunate *Kelo* result" for "disregard[ing] the original meaning of the Public Use Clause[,] . . . ignor[ing] the words of the Fifth Amendment[,] and approv[ing] a regrettable result in favor of faction") *with* Douglas W. Kmiec, *Young Mr. Rehnquist's Theory of Moral Rights—Mostly Observed*, 58 STAN. L. REV. 1827, 1865–66 (2006) (praising Chief Justice Rehnquist's dissent in *Santa Fe* as seeking "to vindicate freedom of worship and speech, two negative liberties of profound importance to individuals that impose minimal burdens on the public").

73. District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (holding that the Second Amendment guarantees, against the United States and its instrumentalities, an individual right to own firearms traditionally owned by individuals, subject to traditional forms of regulation, and more specifically, that District of Columbia's ban on possession of handguns is unconstitutional).

74. *See* Doug Payne, *Police Chief: Kennesaw on Right Path with Gun Law*, ATLANTA J.-CONST., July 13, 1995, at J1; *Follow-Up on the News: Where Residents Must Own a Gun*, N.Y. TIMES, July 31, 1988, at 138.

75. *See Heller*, 128 S. Ct. at 2788 (summarizing the gun laws of Washington, D.C.).

tions. Forcing people to vote with their feet in this context can raise issues of harsh treatment and injustice at the extremes, but in this context, the most important issues involve pressures on government more than pressures on individuals. Voting with your feet in response to economic regulation certainly produces rent seeking and probably has reverse redistributive consequences. Larger businesses are probably more able to move than small businesses—more able to afford the capital costs of the move and less dependent on local name recognition—and larger businesses are much more able to extract government subsidies in exchange for moving to a new location or in exchange for threatening to move and then deciding to stay put. Competition to attract businesses becomes a source of steady pressure against regulation and against taxes and for individualized subsidies.

Reducing regulation and taxes may be a good idea or a bad idea, depending on which side of the political spectrum you are on and, less ideologically, depending on how far the political pendulum has swung in one direction or the other. But subsidies to rent-seeking individual businesses are generally a bad thing no matter what your politics. One negative effect of competition between jurisdictions is to empower businesses to extort such subsidies. Congress could presumably ban such individualized subsidies pursuant to its power to regulate interstate commerce.[76] But such legislation is not on anyone's political radar and appears to be completely impossible politically. These applications of voting with your feet are important in their own right, but they are distinct from the judicial review issues that are the focus here.

CONCLUSION

Judicially enforceable individual rights serve a purpose. I know that hardly anyone in the Federalist Society really disagrees with that basic proposition, but the vote-with-your-feet rhetoric tends to imply disagreement with it. The question is not whether communities should always win and dissenters should vote with their feet and leave for friendlier communities. The question is what should be the scope of each of our constitutional rights.

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76. *See, e.g.*, Garcia v. San Antonio Metro Transit Auth., 469 U.S. 528, 555–57 (1984) (holding that state governmental functions are not immune from federal regulation of interstate commerce).