

William & Mary Law Review

Volume 46 (2004-2005)
Issue 4 Symposium: *Dual Enforcement of
Constitutional Norms*

Article 8

February 2005

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Lawrence G. Sager, *Cool Federalism and the Life-Cycle of Moral Progress*, 46 Wm. & Mary L. Rev. 1385 (2005), <https://scholarship.law.wm.edu/wmlr/vol46/iss4/8>

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COOL FEDERALISM AND THE LIFE-CYCLE OF MORAL PROGRESS

LAWRENCE G. SAGER*

INTRODUCTION: HOT AND COOL FEDERALISM

We can divide justifications for federalism-based structures of governance into *hot* federalism and *cool* federalism, with the distinction keyed to the reasons for resorting to a federal structure. By hot federalism, I mean the use of federal structures of governance to solve a type of problem that can arise when relatively settled and coherent social groups seek to create common structures of governance with other groups. Each group, we can imagine, is relatively homogeneous, with sufficient commonalities of experience, belief, commitment, language, and so on, to permit its members to enjoy a fair amount of trust and comfort with each other as members of a political community. But between or among the groups in question, there is substantially less commonality and substantially less trust and comfort with the prospect of becoming members of a single political community. The groups in question, nevertheless, wish to create or perpetuate some form of a trans-group union. This creates a problem in governance of the form: How can such groups work together in the face of the reluctance to concede full and ultimate authority to a trans-group governing entity?

Hot federalism is very important in the contemporary world, and the prospects for its success in various modern contexts are remarkable and exciting. There are reasons, however, to be a bit wary of the capacity of federal structures to overcome problems of the hot federalism variety. In the United States, we certainly began with hot federalism concerns, driven substantially by the issue of slavery. But our federal structure in this regard was a great failure,

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giving on to the tragedy of the Civil War. Recently, we have seen Canada nearly come apart, and the success of the federal structure there still seems a close question. Europe is moving rapidly to the embrace of a trans-national, federal structure of governance—far more rapidly than many would have imagined remotely possible; but it is still too early to assess the ultimate success of this extraordinary transition. The miracle of South Africa's constitutionalized revolution has made important use of a federal structure to permit wary groups to join under a national rule of law; but here too, it is a bit early to draw conclusive lessons. And Switzerland has always seemed too small and quirky to offer lessons for the rest of the world.

In any event, I mention hot federalism only to set it aside. It is cool federalism that interests me here. Cool federalism is substantially less ambitious. It aims not at making it possible for groups to coexist in governance structures that would otherwise be intolerably threatening, but at the more modest goal of making it possible for a political community to govern itself better—to get better, cheaper, or more widely accepted results than would otherwise be possible. The distinction is crude, but the rough idea is that cool federalism supports federal structures of governance in situations where it would be perfectly possible for a unitary structure to operate, but with the hope that a federal structure will improve governance in some salient way.

In this rough dichotomy, it seems reasonable to think in general of functional arguments for federal arrangements in the contemporary United States as claims in the domain of cool federalism. Indeed, I am inclined to the view that the only interesting arguments available to those who want to promote one or another view of contemporary federal arrangements in the United States are functional arguments of the cool federalism variety.

Here, the more precise question I want to reflect upon is the connection between the shape of the overlapping authority of state and federal governments to enforce civil rights and the virtues of cool federalism.

I. THE LIFE CYCLE OF MORAL PROGRESS IN AMERICAN POLITICS

Let us begin with this speculation: It frequently will be the case that moral progress in the project of securing political justice in the United States will follow a common course with regard to the interplay between state and federal sensibilities and consensus. Things will go roughly like this:

* *Invention*. Initially, the ideas that we eventually come to see as representing moral progress will take hold in a small number of states; other states will be less moved by these ideas, or even stridently opposed to these ideas. The concrete form assumed by these maverick ideas in the states where they take hold may be that of state legislation, state constitutional revision, or judicial decision—quite possibly in the name of the state constitution or the United States Constitution. We have some obvious contemporary examples of this phase, the most prominent being the moves toward the normalization and acceptance of gay marital union in Vermont¹ and gay marriage in Massachusetts.² Oregon's path-breaking concern with the right of the terminally ill to die with dignity³ and California's experiment with the medical use of marijuana⁴ are other examples.

1. In 1999, the Supreme Court of Vermont interpreted the Common Benefits Clause of the Vermont Constitution as requiring the state to make the benefits of marriage equally available to same sex couples, and directed the state legislature to enact legislation that would secure those benefits. *Baker v. State*, 744 A.2d 864 (Vt. 1999). The Vermont legislature responded by endorsing "civil unions" between committed partners of the same sex. The civil union statute is at pains (1) to insist that such unions are not "marriages," and (2) to establish that a partner to such a union enjoys all the legal benefits available to a spouse in a marriage. VT. STAT. ANN. tit. 15, §§ 1201-1207 (2002).

2. In 2003, the Supreme Judicial Court of Massachusetts went one step further than had the high court in Vermont, and ruled that same sex couples were entitled to the benefits and the dignity of civil marriage. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). The *Goodridge* decision indicates the complexity of federal-state interaction. Although the Massachusetts court cites the Vermont *Baker* decision in passing, it attaches considerably more importance to the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), which held that the Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause.

3. Oregon has provided a statutory mechanism whereby terminally ill patients can secure prescription medication that will bring the end of life. Oregon Death with Dignity Act, OR. REV. STAT. §§ 127.800-127.897 (2003).

4. Under California law, patients with certain ailments can apply to and enter into a medicinal marijuana program. CAL. HEALTH & SAFETY CODE §§ 11362.7-11362.9 (West 2004). The program members carry identification cards and are allowed to use, possess, and grow

* *Propagation.* Over time, as these minority states begin to act on their commitments, some of these commitments will begin to have wider appeal. Perhaps experiment and experience will aid their cause; perhaps the political success of what was previously a minority view in the cutting edge states will encourage the spread of political activity elsewhere; perhaps the confluence of related but external events (scientific discoveries, geopolitical trends, governmental steps or missteps, etc.) will extend their influence beyond the boundaries of the cutting edge states; or, perhaps it will simply be a matter of better moral insights coming to prevail. This is merely a short, suggestive list of possibilities. It is not intended to approach an exhaustive rendition. The bottom line is that gradually support for these maverick projects grows even in the face of what may be active opposition.

* *Consolidation.* Eventually, after these once-maverick moral insights have come to occupy a place within mainstream national thought, the federal government may impose those insights on the remaining—now in some salient sense, *outlying*—states. This imposition may assume one of several recognized forms: federal legislation, federal judicial judgment in the name of the Constitution, or constitutional amendment.

This proposed life-cycle of moral progress may seem a figment of my (admittedly liberal) imagination, fueled by events that occupy a very thin slice of the historical experience of the United States. I willingly admit that it is our recent experience with the rights of gays and lesbians to marry that has drawn my attention to this structure of moral development. I am, nevertheless, tempted to think that something like this cycle of events has been characteristic of our most important moral progress. Consider, for example, the abolition of slavery and the much delayed second abolition of Jim Crow segregation; the recognition of the right of women to vote, and the long delayed extension of rights to women in other domains; and the protection of children from workplace abuse. It seems not just plausible but likely that we will find recurring instances of the pattern I have sketched from the best historical accounts of each of these progressions away from injustice: early commitments in a

minority of states, growing national acceptance, and finally, imposition on the remaining, increasingly outlying, states.

This should not surprise us, of course, for there are simple and obvious features of federalized governance that make it quite natural for change of all kinds to originate in a minority of states, and if successful, to propagate throughout the nation.⁵ The states, by their sheer number and lingering diversity, are going to include some that develop projects and sensibilities not widely shared in the nation at large. Consider contemporary state ventures: gay marriage (and the constitutional prohibition of gay marriage); the opportunity to die with dignity, even if that requires the assistance of others; and the legalization of the medical use of marijuana. Naturally, we would expect deviations from the status quo on any of these issues to occur in a handful of states before any substantial national support for change was in place. The states have smaller political bases, greater vulnerability to focused political mobilization, a wider range of governing mechanisms (such as legislative initiatives), and somewhat more homogeneous moral sensibilities, religious commitments, cultural predilections and commercial bases. The blunt consequences of a federal system like ours include breadth of moral imagination and variance in moral judgment.

State courts themselves are promising sources of variation. State constitutions are notably prolix, and state courts have the broad resources of the common law and statutory construction rather than the comparatively narrow substantive portfolio offered by the United States Constitution. Even when they are enforcing the Federal Constitution, state courts may be encouraged to defect from the leadership of the Supreme Court. State courts are typically much closer to and involved in the state institutions they superintend; with familiarity comes sympathy, skepticism and a willingness to meddle.⁶ When state courts want to insulate their dual enforce-

5. Because the focus of these brief remarks is minority state invention and experimentation, there is a temptation (to which I unfortunately succumb) to refer to the migration of maverick ideas into national mainstream thought as though it were a matter of conquering other states one-by-one. Geographic propagation will sometimes characterize this migration, to be sure. But there might well be other patterns as well, as when concrete experimentation in a small number of states supports broad national acceptance that, in effect, bypasses state-by-state development.

6. See Lawrence G. Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules Of Constitutional Law*, 63 TEXAS L. REV. 959 (1985).

ment of the Constitution from federal judicial review, the adequate state grounds doctrine will easily serve that end.

Are there reasons to be optimistic that from variance will come consensus, and further, that from consensus will come progress? Arguably, yes. The experience of pioneer states can spur moral change in a variety of ways. First, there is the simple fact that the maverick states, by example, make the benefits of their moral imagination available to the nation. Second, there are the benefits of experience. Consider the contemporary issues of gay marriage, the right to die with dignity, and the medical use of marijuana. It is particularly true of the right to die perhaps, but all three of these initiatives are fraught with empirical questions about whether they can work without spawning problems or abuses. The actual experience of states in working with particular regimes of law with regard to physician assisted suicide, medically prescribed marijuana, or same sex marital unions is sure to influence the course of events in other states. Third, in those situations where state invention is driven by judicial decision, state court judges are considerably closer to the political and regulatory implications of their justice-driven impulses, and are thereby sometimes more willing than a federal court to undertake and able to succeed at radical change.

The complex remedial posture of the Supreme Court of Vermont with regard to the rights of gay and lesbian couples⁷ and the forthright and tough-minded stance of the Supreme Judicial Court of Massachusetts with regard to the same question⁸ are both far more imaginable as state court ventures. Having first served the vital function of thinking and acting upon the heretofore unthinkable, states on the moral frontier then perform the second valuable function of living out the experiments to which their moral lights have led. Justice Brandeis said it famously and well: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."⁹

7. *See supra* note 1.

8. *See supra* note 2.

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

II. WHAT REGIME OF FEDERAL AUTHORITY FOLLOWS?

Suppose we are moved by this picture of our federal structure as an engine for moral progress and want to protect its benefits. What sort of division of authority between state and federal governments follows?

This is a difficult question, and one that ultimately is an invitation to replay most if not all of the debates that surround questions of federalism, including the overarching question of the degree to which the judiciary ought to rely upon the federal political process to police itself with regard to federalism-based restraints. We can, however, make some speculative gestures toward the ideal shape of federal authority in light of this picture.

Generally speaking, we should seek to restrain premature federal interference during the experimentation stage, but facilitate robust federal enforcement once maverick ideas have worked their way into mainstream judgment. At first blush, this may seem like a contradictory job description for federalism doctrine. But such an elastic approach may not be entirely out of conceptual or doctrinal reach.

Consider Congress's authority under Section 5 of the Fourteenth Amendment.¹⁰ One way of slowing federal intervention in the name of Section 5 authority during the early stages of moral experimentation, but facilitating such intervention later would be to conceive of Section 5 authority as *narrow* but *deep*. Roughly, the idea is this: We would begin with the basic structure of *City of Boerne v. Flores*;¹¹ that is, with the Court's view in *Flores* that Congress's Section 5 authority must be targeted at preventing or remedying violations of what the Court would agree were principles of constitutional justice.¹² That would be the narrow part; but once principles of constitutional justice become sufficiently mainstream as to enjoy the allegiance of the Court, Congress should have remedial authority equal to the fordable enterprise of ameliorating the entrenched harms of major constitutional deficits. That would be the deep part.

10. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

11. 521 U.S. 507 (1997).

12. *Id.* at 519-20.

Once the Court has embraced an underlying, basal precept of constitutional justice, Congress's civil rights remedial authority should run deep. Three cases illustrate my view. The first is *Jones v. Alfred Mayer Co.*,¹³ which held that Congress has authority under Section 2 of the Thirteenth Amendment¹⁴ to enact legislation prohibiting various forms of private racial discrimination.¹⁵ *Jones* is a radical and important decision that we now take rather too much for granted. The conceptual challenge of *Jones* involves the gap between what the Court sees Section 1 of the Thirteenth Amendment¹⁶ as prohibiting¹⁷—which is slavery itself, and which emphatically does not include simple private discrimination, however pernicious that may be—and that which the Court sees Section 2 of the Amendment as empowering Congress to prohibit,¹⁸ which just as emphatically includes simple private discrimination on grounds of race. The disjuncture is bridged by the Court's view that Congress has authority under Section 2 of the Thirteenth Amendment to eradicate not just slavery, but the pernicious residue that slavery leaves behind: its awful cultural relics of distrust and disadvantage.¹⁹ *Jones*, on this view, is fully consistent with *Flores* in that *Flores* restricts Congress to the remediation of recognized constitutional wrongs, while *Jones* speaks to the depth of congressional authority to remedy well-recognized constitutional wrongs.

Two more recent cases bracket the applicability of *Jones* to gender discrimination and Congress's authority under Section 5 of the Fourteenth Amendment. In *United States v. Morrison*,²⁰ the majority breezily dismissed the argument that Congress had authority to enact the substantive provisions of the Violence Against

13. 392 U.S. 409 (1968).

14. U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation.").

15. *Jones*, 392 U.S. at 439-40.

16. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

17. *Jones*, 392 U.S. at 439 ("By its own unaided force and effect,' the Thirteenth Amendment 'abolished slavery, and established universal freedom.'") (quoting *The Civil Rights Cases*, 109 U.S. 3, 20 (1883)).

18. *Id.* at 439-40.

19. *Id.* at 441-43.

20. 529 U.S. 598 (2000).

Women Act,²¹ which made private gender-based violence federally actionable.²² The Court could find no *contemporary* behavior by state or local governments that raised equal protection problems in this regard, and so could find no constitutional peg upon which Congress could hang its remedial hat.²³

Neither the Court nor the parties, however, considered the argument offered by simple analogy to *Jones*. The argument turns on three propositions. First, there is a long history of state and federal discrimination against women, comprising, *inter alia*, exclusion from the franchise, elite public schools, various professional opportunities, and even independent ownership of property when married; and, more pointedly, immunizing husbands from legal oversight of some physical and sexual predations of their wives. Second, this unhappy history, like slavery, has left behind a pernicious cultural residue, which includes the vulnerability of women to violence, particularly at the hands of their husbands. Third, the substantive provisions of the Violence Against Women Act are reasonably directed to the remediation of this vulnerability. On this account, there is no problem of state action. The relevant constitutional wrongs are part of the historic congeries of federal, state, and local laws that disadvantaged and disabled women in the ways we have just catalogued. If the logic of *Jones* is taken seriously, it would make no sense to demand that state actors be the addressees of a remedy addressed to the residue of these unconstitutional acts, just as it made no sense in *Jones* to insist that the addressees of the anti-discrimination legislation at issue be persons or entities that had held persons as slaves.²⁴

More recently, the Court decided a Section 5 gender discrimination case that depends arguably, albeit tacitly, on the *Jones* rationale. In *Nevada Department of Human Resources v. Hibbs*,²⁵ the Court upheld the federal Family and Medical Leave Act of 1993

21. *Id.* at 627.

22. 42 U.S.C. § 13981 (2000).

23. See *Morrison*, 529 U.S. at 626.

24. For a more expansive account of this argument, see LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 109-14 (2004).

25. 538 U.S. 721 (2003).

(FMLA)²⁶ as an exercise of Section 5 authority.²⁷ The FMLA requires employers who fall under its aegis to grant employees twelve weeks of unpaid leave each year to attend to family-related exigencies such as the birth of a child or the serious health needs of a child, spouse, or parent.²⁸ The Court was willing to see the FMLA—at least insofar as it addresses the behavior of state and local government employers—as reasonable legislation addressing discrimination against women in the workplace.²⁹ Its rationale for so doing ran something like this: First, many employers grant women caregiving leaves but withhold them from men,³⁰ second, this perpetuates discrimination against women twice over, because it both sustains stereotypes about women as the appropriate caregivers and discourages employers from hiring women,³¹ third, merely prohibiting states and other employers from discriminating in this way will not solve the problem, for employers could respond by giving no leave at all, thus excluding women—who in fact do far more of the caregiving—from the workplace.³²

Prime among the several puzzles that surround the *Hibbs* decision is this: How could the Court—which recently and emphatically insisted that states are not responsible for the mere disproportionate impact of their rational acts as employers³³—permit Congress to rely on the third proposition, which depends on the disproportionate impact of even-handed state employment practices?

The most straightforward answer takes us back to *Jones v. Alfred Mayer Co.* If the disproportionate impact of otherwise constitutional state behavior is due to a cultural assignment of roles by gender, which in turn is part of the legacy of the historic legal disadvantaging of women, then Congress can attack that impact as part of its

26. 29 U.S.C. §§ 2601-2654 (2000).

27. *Hibbs*, 538 U.S. at 735.

28. 29 U.S.C. § 2612(a)(1).

29. *See Hibbs*, 538 U.S. at 735.

30. *Id.* at 736.

31. *Id.*

32. *Id.* at 738.

33. *See Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-68 (2001); *see also* SAGER, *supra* note 24, at 117-21 (discussing *Garrett* in these terms).

authority to provide a remedy for this structural legacy of historic constitutional wrongs.³⁴

In any event, by now the reader has undoubtedly gotten the gist of what I mean by the narrow but deep authority of Congress under Section 5 of the Fourteenth Amendment after *Flores*. What other suggestions for the shape of federal authority are encouraged by our reflections on the life cycle of moral progress?

Obviously, Congress's broad and more-or-less untamable authority under the Commerce Clause is somewhat problematic in this context. Here my suggestions are more skeletal and tentative. It seems both late in the day and improvident in the extreme to seek barriers to congressional regulation of labor and the workplace, and disastrous to ignore the ambient externalities of self-regarding state behavior in matters concerning environmental regulation. More generally, the extended lesson of our experience with the Commerce Clause is one that disfavors ongoing judicial oversight of Commerce Clause authority. But two possible changes in course are suggested by my life cycle analysis.

The first of these is conditioned on the existence of the deep authority of Congress to remediate entrenched constitutional injustice that I have already sketched above. When such deep authority is firmly in place, it may make sense in extreme cases, far removed from the substantive heartland of Commerce Clause concerns, to apply some form of pretextual analysis to legislation that is fundamentally moral rather than commercial in its aims.

Second, and more interesting, is the possibility that the Court should presume away from the conclusion that federal legislation preempts state legislation in the same domain.³⁵ An interpretive canon that required a plain statement of preemptive intent from Congress would have two advantages. Given that such a canon would have bite only when a competitive state regulation was at risk, it would select those situations where states were actively working on the problem at hand and make space for state experimentation. Further, such a canon, by making preemptive intent

34. See SAGER, *supra* note 24, at 124-26.

35. See Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 41-51, 115-34 (2004); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1377-84 (2001).

explicit, would give us some reason to suppose that Congress's willingness to preempt state activity reflected national judgment on the question at hand.

Thus far, I have discussed the implications of the life cycle of moral progress hypothesis for the shape of federal legislative authority. There are implications for direct exercises of federal judicial authority as well. Here, we do well to attend to Justice Brandeis's reminder that the states are valuable laboratories of social experimentation.³⁶ His point was that some constitutional judgments depend on facts that we can learn only by social experiment, and that the Court should avoid curtailing useful legislative experiments prematurely. Justice Brandeis was concerned with the interruption of state economic regulations in the *Lochner* era.³⁷ Comparable claims for judicial behavior, however, may be apt to modern experiments in social justice.

Consider the physician-assisted suicide cases in the Supreme Court.³⁸ For at least four of the justices in those cases, there was some significant appeal to the claim on behalf of a right to die with dignity.³⁹ There were, however, substantial practical concerns about protecting the infirm from the mendacious pressures of those who would benefit from their demise.⁴⁰ Hence the advantages, to which we have already alluded, of state experimentation in this realm. Constitutional questions of this sort, wrapped as they are with practical concerns that can only be addressed by experience, should encourage the Court to find ways of temporizing with regard to bottom-line constitutional judgments, rather than foreclosing or inhibiting future judgments informed by the experience in frontier states like Oregon. This is what we might call the passive case, where the Court confronts practical barriers to what might otherwise be an attractive constitutional mandate, and where the virtues of experimentation should lead to a conditional rather than a final refusal to impose such a mandate.

36. See *supra* note 9 and accompanying text.

37. See *supra* note 9 and accompanying text.

38. *E.g.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997).

39. See *Glucksberg*, 521 U.S. at 737 (O'Connor, J., concurring); *id.* at 752 (Stevens, J., concurring); *id.* at 789 (Souter, J., concurring); *id.* at 792 (Breyer, J., concurring).

40. *Id.* at 785-87 (Souter, J., concurring).

There is an active case as well, more directly analogous to Justice Brandeis's position in *New State Ice Co. v. Liebmann*. Suppose the Court confronts the constitutionality of the Young Women's Leadership School of East Harlem, the name of which more or less tells us what we need to know.⁴¹ Where good faith experiments of this sort are launched under circumstances of considerable empirical uncertainty, the Court should be hesitant to embrace sweeping constitutional prohibitions that would close down experiments in areas of vital social interest.⁴²

CONCLUSION: BREATHING ROOM

During the last half of the twentieth century, we witnessed a massive and desperately important national effort to bring our political community more into conformity with fundamental principles of political justice, particularly with regard to the historic fault line of race. That effort often arrayed the Supreme Court,

41. This from a partisan but persuasive source:

Beaconing in an educational system notorious for its overstuffed classrooms and understuffed budget, The Young Women's Leadership School in East Harlem is a prime example of what it is to be victorious. From its very origin in 1996, the middle through high YWLS (Young Women's Leadership School) has incited controversy and adversarial protest from its mere concept: a nurturing, single sexed *public school* for inner-city young women.

Organizations like NYC-NOW ... and the ACLU ... have, from day one, vigorously fought for the demise of a school with bragging rights of a 100% graduation/college acceptance rate....

This past June, YWLS was delighted to present to the world its first ever graduating class, a grand tally of 32 girls—every single one accepted and enrolled into a four-year college, with only a course deviation of one girl, who opted to go into the Air Force instead. Eighteen of them have received full-tuition scholarships. Of the graduating class, 90 percent are the first generation in their families to have ever enlisted into a university, 25 percent are immigrants, and almost three quarters live below the poverty line. "*Despite disadvantages like poverty, the girls at the Young Women's Leadership School of East Harlem have amassed an impressive record,*" says the New York Times,[] as New York City school chancellor Harold Levy has said that YWLS "*outshone everyone's expectations.*"

Danya Steele, *They Can't Do That!!! ... Can They?*, HARLEM LIVE (2001), at <http://www.harlemlive.org/community/Education/TrioSchool/YWLS/ywls1.html>.

42. The claim on behalf of a constitutional jurisprudence that accommodates governmental experimentation has been pressed effectively and explored engagingly in Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

Congress, and other federal entities against recalcitrant state and local actors. For those of us who lived through those events directly or who have had occasion to revisit it as a matter of modern history, it is easy to lose sight of an important and obvious feature of American political life: State experimentation on the frontiers of political justice is often an important first step in moral progress.

These brief thoughts have been aimed at remembering this virtue of our federal political structure, to the end of finding breathing room for maverick and majestic state efforts to continue in the pursuit of justice.