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THE CADUCEUS IN COURT

Federalism for Bioethics?

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Abstract

In the wake of the *Dobbs* decision withdrawing federal constitutional protection for reproductive rights, the United States is in the throes of federalist conflicts. Some states are enacting draconian prohibitions of abortion or gender-affirming care, whereas other states are attempting to shield providers and their patients seeking care. This article explores standard arguments supporting federalism, including that it allows for cultural differences to remain along with a structure that provides for the advantages of common security and commerce, that it provides a laboratory for confined experiments, that it is government closer to the people and thus more informed about local needs and preferences, and that it creates layers of government that can constrain one another and thus doubly protect rights. We contend that these arguments do not justify significant differences among states with respect to the recognition of important aspects of well-being; significant injustices among subnational units cannot be justified by federalism. However, as nonideal theorists, we also observe that federalism presents the possibility of some states protecting rights that others do not. Assuming that movement among subnational units is protected, those who are fortunate enough to be able to travel will be able to access rights they cannot access at home. Nonetheless, movement may not be readily available to minors, people without documentation, people with disabilities, people who lack economic resources, or people who have responsibilities that preclude travel. Only rights protection at the federal level will suffice in such cases.

Keywords: abortion; *Dobbs*; federalism; gender-affirming care; laboratory of the states; natural experiment; nonideal theory; rights to movement

The United States Supreme Court's *Dobbs*[1] decision in 2022 withdrew protection for rights to reproductive choice that had been granted federal constitutional protection for nearly 50 years. In the wake of *Dobbs*, the United States is in the throes of federalist controversy. Some states are rushing to outdo each other in the stringency of their abortion restrictions, whereas others are strengthening their protections for the procedure. Twenty states have now enacted statutes prohibiting forms of gender-affirming care. Other states are erecting what they hope will prove to be effective protections for providers and patients they serve. The speculation of Justice Alito's majority opinion that *Dobbs* would put the abortion controversy to rest has proved unfounded. Instead, many legal issues remain unsettled. These range from whether states may prohibit advertising of abortions available elsewhere, prohibit shipment of medication for abortion into the state, or restrict travel outside of their boundaries for abortions, to whether states may execute search warrants, create damage remedies, or impose criminal penalties for actions taking place beyond their territory.

Writings in bioethics do not, for the most part, address federalist political structures or the problems they may raise for bioethics. What discussions there have been occurred well before *Dobbs* was anticipated and celebrated the possibilities of experimentation and difference that federalism presents.[2]

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Clearly, the situation in the United States has changed in one important way: the decision in *Dobbs*. But less clear is whether this change is sufficient to throw into question the desirability of federalist political structures for bioethics. In a nation in which rights cannot be universally guaranteed, some states may remain havens for protection while others refuse to grant rights recognition—but this is at best a half loaf, in which rights recognition is uneven within a single country.[3] For bioethics, the problems thus generated may be significant: Some may have protected rights to forms of care that are critical to their well-being, whereas others may not receive these protections.

This exploratory article argues that the problems with federalism for bioethics may range beyond the immediate stark differences emerging after *Dobbs* and reach to difficulties with justifications for federalism as an institutional structure. We begin by describing federalist institutional theory briefly, calling attention to several features of the U.S. federal system that may be unique. We then present the most standard arguments for federalism: that it allows for cultural differences to remain within a structure that provides for the advantages of common security and commerce, that it provides a laboratory for confined experiments, that it is government closer to the people and thus more informed about local needs and preferences, and that it creates layers of government that can constrain one another and thus provide double protection for the rights of citizens. We should emphasize that our discussion is primarily about federalism's manifestation in the United States; as nonideal theorists—that is, as theorists who think about issues of justice in a nonideal world—we recognize that our claims may be limited to this context. Nonetheless, we hope they prove informative for thinking about federal systems more generally.

Federalism in the United States

Federalism is a political structure under which subnational units have independent, constitutionally recognized political authority. This constitutional recognition for subnational units is the critical difference between a federal system and a devolutionary system. Under the latter, subnational units hold their political authority by grant from the national government. Such grants of authority may be longstanding but remain subject to limitation or even reversal should the national government so desire. With thus independently grounded recognition, the levels of government in a federal system are supposed to serve as checks on one another. In the description of the *Federalist Papers*, U.S. federalism is a "compound republic," doubly protective of rights.[4] How the division of powers works in practice in federal systems varies immensely across the globe; what all federal systems share is constitutional recognition for that division.

The United States is judged to be the longest-standing federal system in continuous operation today. Its basic constitutional framework was laid out almost 250 years ago, in a world far different—not least with respect to the understanding of health and what healthcare could achieve. At the time, states were zealously protective of their status, and in many cases of the institution of slavery they supported. The Constitution thus baked in protections for states. Most importantly, the Constitution assured equal representation for the states in the Senate, regardless of population, and replicated this equality to some extent in the allocation of votes for President in the Electoral College. The Constitution also provided that no state may, without its consent, be deprived of equal representation in the Senate.[5] The result is that the four states with the largest populations—combined they represent just under a third of the U.S. population—have only 8% of the representation in the U.S. Senate. At the time the Constitution was adopted, some states were significantly smaller than others by a factor of about 1 to 12, but today the difference is far larger: The ratio of the population of California to the population of Wyoming is 670:1.

Changing the U.S. Constitution by amendment is onerous, moreover. Of the more than 10,000 amendments that have been proposed, only 27 have been successful, the last in 1992 restricting the effect of changes in compensation for Senators and Representatives until after a further election.[6] The Equal Rights Amendment, proposed to guarantee equality of law regardless of sex, has languished unapproved for decades. Amendments may be proposed either by two-thirds majorities of both houses of Congress or by the application of the legislatures of two-thirds of the states for a convention. Amendments must then be ratified by the legislatures or by conventions in three-quarters of the states. The result of these super-

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majoritarian provisions is that smaller states are effectively able to stop the amendment process with comparative ease. Historian Jill Lapore characterizes the Constitution of today as "brittle"; she is engaged in a project to analyze why amendments have become even more difficult in the past 50 years.[7] She argues that the current era of party polarization, not imagined by the drafters of the Constitution, has played a major role in the United States being the country with one of the lowest rates of constitutional amendment in the world.

Nevertheless, constitutional change in the United States does occur through decisions of the U.S. Supreme Court. That is how constitutional protection for contraception, abortion, and same-sex marriage became law. But it is also how constitutional protection for abortion crumbled in *Dobbs* and how the rights of same-sex couples to employ website creators for their weddings became limited by the First Amendment rights of these designers.[8] "Originalism"—the idea that legal texts should be interpreted in terms of what they meant at the time they were enacted—is the judicial philosophy dominant on the Court today. Feminist legal scholar Reva Siegel has argued that this originalism "locate [s] constitutional authority in imagined communities of the past—entrenching norms, traditions, and modes of life associated with old status hierarchies."[9] Constitutional courts play major roles in many federal systems, but the difficulty of amendment places particular stress on the role of the Supreme Court in the United States.

Federal systems grant different kinds of authority to subnational units, and in different ways. The U.S. structure limits federal authority to enumerated powers. Of relevance to healthcare, the most important of these are the power to tax and spend and the power to regulate interstate commerce. These powers are not unique to the federal government, however; states also may tax, spend for the general welfare, and regulate commerce so long as their actions do not discriminate against interstate commerce or engage in unwarranted protectionism.[10] Moreover, states have the general "police power"—that is, the authority to regulate for the general welfare, including for public health. During the coronavirus disease (COVID-19) pandemic, states were at the forefront of implementing policies such as business closures, public event cancellations, mask mandates, and vaccine distribution. States went very different ways, with some such as Florida opening up to welcome vacationers who then returned home spreading infection. On the other hand, although the courts were initially sympathetic to emergency measures, the U.S. Supreme Court stepped in within a few months to restrict states' abilities to enact public health measures that impacted the exercise of religion.[11]

Over the course of U.S. history, interrelationships between the federal government and the states over shared areas of authority have been understood in different ways.[12] These have ranged from insistence on separate roles and spheres reflecting these roles to cooperation in achieving joint goals. As healthcare has become increasingly sophisticated and critical to human well-being, the participation of government in providing care has become increasingly complex. In the United States, Medicare coverage for older adults who have paid into the Social Security system is fully federal; Medicaid coverage for people in poverty is a federal-state partnership. The Affordable Care Act offered states significant incentives to expand their Medicaid programs beyond the "categorically needy" poor—aging people, blind, disabled, or pregnant—to cover everyone eligible below income and asset limitations. However, the U.S. Supreme Court held that the requirement that states expand to continue participation in the Medicaid program impermissibly coerced the states.[13] As of 2023, 10 states including two of the largest population-wise, Texas and Florida, had not expanded Medicaid. The result is significant variation in the proportion of the population lacking health insurance, with Texas leading the way at 18% of the population uninsured. In general, states that have not expanded Medicaid are among those most likely to have high rates of uninsurance, high rates of maternal and infant mortality, low rates of independent licensure for advanced practice nurses—and very restrictive abortion laws.

Four arguments for federalism have predominated: cultural difference with common security, a laboratory for confined experimentation, proximity to the people, and double protection for the rights of citizens. In what follows, we argue that, although these considerations might in the abstract support federalism, they fail in the context of contemporary U.S. federalism. Moreover, they fail in ways that suggest trouble for federalism more generally.

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Cultural Difference

Historically, a primary explanation for the emergence of federal systems was the desire of smaller units to band together to achieve advantages of greater security while preserving their differences. The United States of the 1780s arguably did feature recognized cultural differences. Some of the colonies had been founded by adherents of different religious faiths: Massachusetts by Puritans, Pennsylvania by Quakers, and Maryland by Catholics. But by far the most important cultural difference should not under any circumstance be a justification worthy of respect in support of subnational differences: the fact that slavery was a dominant economic institution in Georgia, Maryland, North Carolina, South Carolina, and Virginia. Parenthetically, although slavery existed in other colonies, it was the southern states that were insistent on constitutional protection for the institution.[14]

Cultural differences do remain among the U.S. states. Rates of religiosity vary significantly among states, as do percentages of Evangelical Christians. However, U.S. states contain significant internal variation. Even in the most religious states, only about 50% of the population are Evangelicals.[15] The opposition of conservative Christian groups to abortion or to gender-affirming healthcare has been very influential on state policies, but these policies are not reflective of the views of significant proportions of state populations. Gerrymandering has diluted the voting power of minority populations by dividing them or crowding them into districts where they are overrepresented and has exacerbated disparities between population preferences and legislative enactments. For example, in Mississippi, the state from which *Dobbs* arose, about 41% of the population are Evangelical Protestants. Although about 59% of the population and 75% of Evangelicals believe that abortion should be illegal in most or all cases, 36% of the population believe that it should be legal in most or all cases.[16] Mississippi now prohibits abortions at all times except to save the mother's life or where the pregnancy was caused by a reported rape.[17] This means that if pregnant patients fall within the over a third of the Mississippi population who believe that abortion should be legal in most or all cases, as far as the state is concerned they would be required to continue pregnancies that cause serious damage to their health, so long as the damage falls short of death and even if the pregnancy is diagnosed at the earliest possible moment. It is hard to see how support for the religious views of some can justify such serious imposition on the well-being of others—especially where pregnant patients would not experience the same fate elsewhere in the same country.

Beyond accounting for minority views, cultural difference has other problems as a justification for federalism. One is the lack of alignment between cultural preservation and cultural difference; while there may be arguments for preserving endangered groups or languages, these arguments surely do not apply to cultural difference generally or to the majorities dominating in some U.S. states today. Another is the presence of irresolvable moral differences. For deep divides over bioethics issues such as abortion or medical aid in dying, allowing one religious or cultural view to prevail as policy may reflect the imposition of one group's moral views on others, contrary to assumptions of political liberalism. In short, the cultural difference argument may be at least a partial historical explanation for the emergence of subnational units, but it does not follow that it is a justification for them. When rights cannot be achieved universally, federalism may be a partial justification, enabling protection for some—but it does not provide protection for all.

States as Laboratories

A quintessential American justification for federalism is the laboratory of the states. This justification has been identified with Justice Louis Brandeis in dissenting from a decision holding that Fourteenth Amendment due process was violated by a state requirement that ice sellers be licensed.[18] The justification sees states as vehicles for natural experiments. Social policies may be tried out on a limited basis in a single state; if they succeed, they may be followed elsewhere; if they fail, the damage will be constrained. Even natural experiments are subject to ethical evaluation, however. Natural experiments subject people to interventions that may be politically enacted but otherwise affect individuals without their consent—and may do so in ways that cause them significant harm. One of us has argued that natural experiments should be subject to at least some limitations including those related to evidence.[19]

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They should be constructed to minimize harmful effects that can be anticipated based on currently available evidence and they should be evaluated as they unfold.

The rescission of federal protection for reproductive rights has opened the door to natural experiments regarding reproduction in the United States. These experiments should not be viewed as only occurring in abortion-restrictive states; abortion-protective states are also changing policies to solidify abortion rights or to try to protect people coming from other states for care. It will be possible to observe whether changes in access to abortion are correlated with changes in rates of pregnancy, miscarriage, maternal morbidity and mortality, infant morbidity and mortality, distribution of substantiated reports of child abuse, childhood poverty, women in the workforce, and many other social measures. It will thus be possible to see at least suggestive evidence of success or failure and to decide whether to change course because of the levels of harm that are occurring.

The changes occurring in the United States today, however, fail to meet an idealized version of the laboratory of the states. Instead of policy changes in one or a few states that can be observed and evaluated, what is occurring is a rush to enact highly restrictive laws. Within a year after *Dobbs*, over half of the states had enacted these laws, although some were still on hold due to court decisions. These laws were not passed after consideration of evidence about their possible impacts on health or healthcare. For example, Mississippi Governor Tate Reeves, in signing both abortion prohibitions and bills about adoption and foster care, has consistently made statements such as "Mississippi will always protect life. Our state will continue to be a beacon on the hill, a symbol of hope for the country, and a model for the nation. Mississippi will be relentless in its commitment to life."[20] Indeed, state laws have been criticized for not being clear and for using language such as "medical emergency" or "irreversible damage" that may be difficult for healthcare providers to interpret.[21] Some states have already made clarificatory changes in their laws, but others have not as of yet.[22] These battles are ongoing and resolutions cannot be expected soon.

To the best of our knowledge, moreover, it is questionable whether efforts to evaluate these experiments are occurring in any systematic ways by either the states conducting them or the federal government. The Centers for Disease Control and Prevention (CDC) conducts an abortion surveillance system, but reporting by states is voluntary.[23] Data may not be available, either, as both providers and patients realistically fear reprisals if abortion care becomes known. Medication abortion is now the method used in the majority of early abortions in the United States, and the company AidAccess reports a sharp increase in the daily rate of requests for medication abortion.[24] Self-managed abortions are unlikely to be included in reported data unless complications occur. Some private organizations are seeking to collect data about abortion rates, such as the Society of Family Planning, but these efforts rely on voluntary participation so also may not be comprehensive.[25]

States as Proximate to the People

A further argument for federalism is that it places government closer to the people and thus may be more reflective of local circumstances, needs, and preferences. We have already noted that states are not uniform and that the situations of substantial minorities within states may not be reflected by state-level policies. In this section, we discuss a further feature of U.S. federalism at least that raises questions for the proximity argument: constitutional protection extends only to the level of the state.

Under U.S. federalism, states are constitutionally recognized but governmental units within them have no comparable recognition. It is up to individual states whether to allow any internal variation or to devolve authority to counties, cities, or other substate levels of government. In many states, within-state variations, particularly between cities and rural areas, have become pronounced. From Nashville to San Antonio, cities have enacted ordinances protecting rights that are rejected at the state level. State legislatures have responded by removing authority from these substate units. For example, in Texas, cities may no longer enact regulations regarding matters ranging from employment to clean water.[26] State legislatures have, in addition, passed laws making it more difficult for urban residents to vote; in Georgia, for example, voting districts can have no more than one dropbox per 100,000 voters.[27] States have formed voting districts that divide urban areas and thus make it more difficult for residents to elect

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representatives that align with their preferences.[28] States have even ejected representatives from the legislature for expressing unpopular views.[29]

States as Rights Protectors

In the United States, the Bill of Rights originally applied only to the federal government. It took the Civil War to create guarantees of Due Process and Equal Protection that applied to the states. And it has taken well over a century to interpret these clauses to incorporate Bill of Rights guarantees in a way that makes them applicable to the states. *Roe v. Wade* was based on such incorporationist reasoning, holding that rights to privacy should be applied to states through the Fourteenth Amendment.[30]

Under U.S. federalism, states may themselves be sources of constitutional rights, so long as these are consistent with the federal constitution. After *Dobbs*, some state courts have interpreted their constitutions to protect abortion rights.[31] Other states have rejected state law theories as protective of abortion rights. [32] Some cases were still pending in state courts as of July 2023. Many state supreme courts are elected, however, and the fate of abortion rights in these states may hinge on partisan election results[33]; in 2022, Republicans took a majority on the state supreme court in North Carolina, whereas in 2023, the abortion supporter Janet Protasiewicz won a seat on the Wisconsin Supreme Court.[34]

State constitutions also may be amended through public voting processes. In Kansas, voters supported an earlier state supreme court decision protecting reproductive rights.[35] Anticipating such grassroots efforts, however, other states are pursuing measures to increase the threshold for their passage.[36]

Without federal intervention, therefore, states may vary in the extent to which they protect rights. The U.S. Supreme Court in *Dobbs* declined protection for reproductive liberty rights. The U.S. Congress also appears unlikely to act. Abortion thus illustrates a policy area in which neither a state nor the federal government appears inclined to offer protection. Access to healthcare is another illustrative area. Apart from prisoners,[37] people in the United States do not have a federal constitutional right to healthcare, and, as described above, the U.S. Supreme Court has held that the federal government cannot impose a statutory right through the Medicaid program as currently constructed. One recent commentary has cast doubt, moreover, on whether the decision holding that it is cruel and unusual punishment to fail to provide incarcerated people with minimal healthcare can withstand the originalist jurisprudence of the current Supreme Court.[38]

To be sure, the United States is beset by controversy over whether the rights in question should be given constitutional support. Our only point is that if what justifies federalism is that it will result in improved rights protection, the justification does not hold in the case of these healthcare rights. Federalism at best carves out space for states to act on their own—and of course may not even do this if the national government acts to constrain states' actions. Indeed, the Court has interpreted the federal Constitution to impose some such constraints, for example holding that it violates the First Amendment to require anti-abortion pregnancy sites to inform prospective patients about other services that may be available to them[39] or restricting states' ability to limit religious gatherings in a pandemic.[40] Nationwide legislation is also possible that the states cannot constitutionally restrict if it falls within an enumerated federal power. The Republican National Committee has stated its committed opposition to abortion and "urged Republican lawmakers in state legislatures and in Congress to pass the strongest pro-life legislation possible…"[41] The federal spending power is available to further such legislation; for example, constraints could be imposed on any providers taking Medicare or Medicaid. While such federal-level legislation is unlikely to pass, and many Republican leaders disfavor such action,[42] nonetheless its possibility does exist as a reminder of the limits of states as rights protectors in the U.S. federal system.

Conclusion

By assigning constitutionally protected authority to subnational units, federalism presents the possibility for significant variation in the well-being of people who live in these various units. In this commentary,

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we have explored whether justifications for federalism can support these differences, at least as they exist in the United States today. We have argued that these justifications are seriously problematic. Injustices among subnational units cannot be justified by federalism.

In the contemporary United States, some of the most significant injustices concern health and access to healthcare. Federalism does present the possibility of some states protecting rights that others do not. Assuming that movement among states is protected—an assumption asserted only by Justice Kavanaugh in *Dobbs*[43]—those who are fortunate enough to be able to travel will be able to access rights they cannot access at home. Nonetheless, movement may not be readily available to minors, people without documentation, people with disabilities, people who lack economic resources, or people who have responsibilities that preclude travel. Only rights protection at the federal level will suffice in such cases.

Competing interest. The authors declare none.

Notes

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