

Michigan Law Review

Volume 91 | Issue 5

1993

Conflict of Constitutions? No Thanks: A Response to Professors Brilmayer and Kreimer

Gerald L. Neuman
Columbia University

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Conflict of Laws Commons](#), [Constitutional Law Commons](#), and the [Law and Gender Commons](#)

Recommended Citation

Gerald L. Neuman, *Conflict of Constitutions? No Thanks: A Response to Professors Brilmayer and Kreimer*, 91 MICH. L. REV. 939 (1993).

Available at: <https://repository.law.umich.edu/mlr/vol91/iss5/4>

This Colloquium is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

CONFLICT OF CONSTITUTIONS? NO THANKS: A RESPONSE TO PROFESSORS BRILMAYER AND KREIMER

*Gerald L. Neuman**

The role of the third participant is to disagree. While I have no desire whatever to encourage interstate regulation of abortion, the territorialist solutions that my colleagues have chosen in order to isolate state abortion regulation pose other dangers.

Both Professor Brilmayer and Professor Kreimer argue not only that a state may make abortion legal within its borders, but also that the federal Constitution requires all other states to treat as lawful any abortion performed in such a prochoice state. Kreimer's right-to-travel analysis appears to endorse the use of state borders as a means for evading relational duties. Brilmayer's analysis, grounded more in the prerogatives of territorial states than in the rights of mobile individuals, gives the state where an act occurs power to make preemptive grants of autonomy that override relational duties imposed by other states. In my view, these analyses overemphasize location and underemphasize relationship as a basis for legal obligation.

This colloquy was organized around the unpleasant hypothesis that the Supreme Court would overrule *Roe v. Wade*¹ and that Congress would not fill the resulting void with federal legislation. The abortion debate would then move to the states, where local majorities could enact their own resolutions. If the local majorities were large enough, they could even write their local resolutions into their state constitutions.² The contrasting state constitutions that could result

* Professor of Law, Columbia University. A.B. 1973, Harvard; Ph.D. 1977, M.I.T.; J.D. 1980, Harvard. — Ed. I owe particular thanks to Lea Brilmayer, Larry Kramer, Seth Kreimer, and Michael Schill.

1. 410 U.S. 113 (1973).

2. As Justice Blackmun recognized in *Roe*, 410 U.S. at 154-55, the Supreme Court's holding was preceded by state constitutional holdings that favored abortion rights in *People v. Belous*, 458 P.2d 194, 197 (Cal. 1969) (decided on both state and federal due process grounds), *cert. denied*, 397 U.S. 915 (1970), and *State v. Barquet*, 262 So. 2d 431, 435-36 (Fla. 1972) (state due process holding only). For post-*Roe* state constitutional activity on the subject of abortion, see, for example, ARK. CONST. amend. LXVIII, § 2 ("The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution."); R.I. CONST. art. I, § 2 ("Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof."); Committee To Defend Reproductive Rights v. Myers, 625 P.2d 779, 798-99 (Cal. 1981) (holding that exclusion of Medi-Cal payments for elective abortions violated state constitutional right to privacy); *Moe v. Secretary of Admin. &*

might then replicate the comparativists' current juxtaposition between the U.S. Constitution and the constitutions of Germany and Ireland. In some states, prohibition of abortion would be constitutionally required, while other states would give constitutional recognition to a woman's right to choose.

Federal preemption principles and federal rights doctrines do not ordinarily distinguish between state statutes and state constitutional provisions as objects of federal displacement. That Brilmayer and Kreimer offer no separate analysis of such a variation on their hypotheticals is therefore understandable. But I hope to show that this variation underlines some of the troubling aspects of territorialism, and particularly of Brilmayer's proposals concerning preemptive grants of autonomy.

Consider first the following, concededly strained, hypothetical: The Utah constitution recognizes a "right to life" for all fetuses conceived within the state by resident parents and requires the state to use all available means to protect them from abortion. The California constitution recognizes a woman's right to reproductive autonomy, including termination of pregnancy, and encourages (but does not require) public officials to facilitate that right. While attending an academic convention in California, the Dean of a Utah state university meets one of his professors, who tells him that she has just traveled to California to have an abortion. Rather than dissuade the professor or report the imminent abortion to other Utah authorities, the Dean accompanies the professor to the clinic and helps her to pass through a crowd of antiabortion demonstrators who are picketing there. Upon return to Utah, is the Dean subject to discipline, or is Utah required to recognize the abortion, the assistance, and the complicit silence as lawful because of California's superior authority over all persons within its territory?

I. PRELIMINARY OBSERVATIONS

Federal constitutional arguments in a post-*Roe* world would be affected by the particular reasons that the Supreme Court gave for overruling *Roe*. If the Court concluded that states had a compelling interest in potential life from the moment of conception,³ then this

Fin., 417 N.E.2d 387, 397 (Mass. 1981) (holding that exclusion of medically necessary abortions from Medicaid coverage violated state due process guarantee); *Right to Choose v. Byrne*, 450 A.2d 925, 928, 933-37 (N.J. 1982) (holding that exclusion of medically necessary abortions from Medicaid coverage violated state equal protection guarantee in conjunction with state constitutional right to privacy).

3. See, e.g., *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 519 (1989) (opinion of Rehnquist, C.J.).

interest could outweigh other constitutional rights like the right to travel. If the Court recognized fetuses as "persons" for some or all purposes, then a post-*Roe* analysis would vary accordingly. On the other hand, if the reversal rested solely on positivist arguments from "original intent" or history that circumscribed a right to abortion as outside the scope of the Fourteenth Amendment,⁴ but said no more, then the federalism implications of abortion regulation would require closer examination.

Without *Roe v. Wade*, a positivist would likely find nothing in the Constitution to preclude a state from recognizing a fetus present within its borders as the object of legal duties. To speak of the fetus' domicile, and make the common domicile a basis for regulation of the woman's relationship with the fetus, might then make sense. Similarly, without *Roe*, a state would have greater discretion to confer legal rights on the biological father in his relationship with the woman and the fetus. The Court's condemnation of a spousal veto in *Planned Parenthood v. Danforth*⁵ might not survive once the Court had withdrawn recognition from the woman's right to choose to terminate her pregnancy.

I will not stress the *criminalization* of abortion, which Kreimer emphasizes, but rather civil regulation. I will look to situations where, for example, the biological father of the fetus might sue in the state of common domicile to enjoin the woman from leaving the state for the purpose of having an abortion or to enjoin the imminent abortion once she has left the state.⁶ The biological father might be suing to enforce his own state-conferred rights, or on behalf of the fetus, which shares the common domicile. Questions of legality in the civil sense are more common in conflicts between state constitutions. Kreimer's arguments draw on a tradition of distinctive concern with extraterritorial criminal laws in the interstate context. If the Federal Constitution places stricter limits on state criminal jurisdiction than on civil regulation, this may result from the history of criminal procedure at common law rather than from generally valid principles about the regulatory structure of federalism.⁷

4. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2874 (1992) (Scalia, J., dissenting).

5. 428 U.S. 52, 67-72 (1976). Compare *Casey*, 112 S. Ct. at 2830-31 (invalidating spousal notification requirement) with 112 S. Ct. at 2871-72 (Rehnquist, C.J., dissenting) (justifying spousal notification requirement).

6. Cf. *Doe v. Doe*, 314 N.E.2d 128 (Mass. 1974) (rejecting estranged husband's effort to enjoin abortion).

7. Thus, Kreimer's attempt to limit the implications of *Jones v. Helms*, 452 U.S. 412 (1981), by arguing that the domicile state cannot forbid its citizens to travel interstate for the purpose of committing an act that it cannot make an extraterritorial crime, are weakened to the extent that

Brilmayer's phrasing of the alternatives as a choice between prescriptive jurisdiction based on residence and prescriptive jurisdiction based on territory seems ill-suited to describe the subject of this colloquy. Jurisdiction based on residence also encompasses questions like whether a New York resident who becomes pregnant while attending law school in Palo Alto is subject to New York or California law. As Kreimer emphasizes, however, the socially important phenomenon is interstate travel *for the purpose of* abortion. We are talking about what the Germans call *abortion tourism*,⁸ a brief departure from the state for the sole purpose of enjoying a less restrictive legal regime.

If we must make ascriptions of territorial situs, then we may best regard the reproductive autonomy of a New York resident attending school in California as, for the moment, situated in California. In contrast, when a woman spends her entire life in Pennsylvania except for one day spent in New Jersey for the sake of terminating a pregnancy, to regard her reproductive autonomy as situated in New Jersey may make less sense. The activities that cause us to place so high a value on reproductive autonomy, and the burdens that will result if reproductive autonomy is denied, including the resulting relationship with an unwanted child, are overwhelmingly situated in Pennsylvania. Nonetheless, let me concede *arguendo* that the territorial situs of a right to terminate pregnancy should always be identified with the state where the procedure is performed.

As Brilmayer emphasizes, we are living in the modern world, where federal constitutional law does not aspire to identify a unique state with the right to govern each transaction, and frequently different rules would apply in the courts of different states if the litigation were to occur there.⁹ Congress could choose to adopt national conflicts rules, and it could indeed resolve the issue of interstate regulation of abortion by enforcing Brilmayer's proposal and compelling other states to respect "preemptive" laws of a situs state. The Supremacy Clause makes valid federal statutes prevail over state constitutions.¹⁰ I

limits on extraterritorial crimes are a relic of the vicinage requirement. See Seth Kreimer, *The Law of Choice and the Choice of Law*, 67 N.Y.U. L. REV. 451 (1992).

8. See, e.g., Judgment of Feb. 25, 1975, 39 BVerfGE 1, 88 (dissenting opinion) ("*Abtreibungstourismus*"); Michael G. Mattern, Comment, *German Abortion Law: The Unwanted Child of Reunification*, 13 LOY. L.A. INTL. & COMP. L.J. 643, 686-87 (1991).

9. Lea Brilmayer, *Interstate Preemption: The Right to Travel, the Right to Life, and the Right to Die*, 91 MICH. L. REV. 873, 882-83 (1993). Brilmayer expressly argues that the residence state can forbid activities that are merely lawful in the situs state when the situs state does not seek to grant a preemptive right to engage in those activities. *Id.* at 897-98. The modern retreat from constitutional supervision of interstate conflicts is generally traced to *Alaska Packers Assn. v. Industrial Accident Commn.*, 294 U.S. 532 (1935). See, e.g., ALBERT A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 13-15 (1962).

10. U.S. CONST. art. VI, cl. 2.

do not believe, however, that the Constitution itself imposes Brilmayer's territorialist preemption rule.

A due process complaint based on uncertainty rings particularly hollow in the case of individuals who travel interstate for the *sole* purpose of avoiding duties to others arising under home state law. Various analogies come to mind, and teachers of Conflicts can no doubt think of others.¹¹ Some involve removal of children;¹² another involves a trustee who removes a trust asset in order to dispose of it in a state whose law of fiduciary duty is weaker;¹³ and a more melodramatic example involves a custodian who removes a prisoner overseas for the purpose of defeating habeas corpus jurisdiction.¹⁴

II. AN INTERNATIONAL ANALOGY, DISTINGUISHED

Professor Kreimer notes some European examples of international travel for the purpose of escaping national restrictions on abortion. The German response, attempting enforcement against extraterritorial acts, reflects the concern that the state should not abdicate its constitutional responsibility to restrict abortion by overlooking such travel. An American state might similarly view its constitution as requiring its officials to prevent its citizens from traveling out of state to obtain abortions.

One method for confining the state's law to its own borders would be to deny that the state constitution can impose duties on its officials outside the state. This method recalls the arguments often made by federal officials in recent years that their actions outside U.S. borders were not controlled by the U.S. Constitution. The trend was accelerated by the Supreme Court's holding in *United States v. Verdugo-Urquidez*¹⁵ that the Fourth Amendment did not constrain federal officials' search of a nonresident alien's home outside the United States. The government has also sent the Coast Guard onto the high seas to intercept Haitian refugees before they reach U.S. waters and argued that it could then process them outside the constraints of U.S. statutory and constitutional law.¹⁶

11. *E.g.*, C. Steven Bradford, *What Happens if Roe is Overruled? Extra-Territorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. (forthcoming 1993).

12. *See, e.g.*, *Alfieri v. Alfieri*, 733 P.2d 4 (N.M. Ct. App. 1987) (making award of custody to mother, whose move to California was motivated by desire to impair visitation rights of father, contingent on her return to New Mexico).

13. *Cf.* ROBERT A. LEFLAR, *AMERICAN CONFLICTS LAW* 390-92 (3d ed. 1977) (noting that administration of trust is governed by law of place of administration).

14. *See* ROBERT J. SHARPE, *THE LAW OF HABEAS CORPUS* 17-18, 192 (1976).

15. 494 U.S. 259 (1990).

16. *See, e.g.*, Barbara Crossette, *U.S. Expanding Refugee Center as More Haitians Flee*

Neither Kreimer nor Brilmayer, however, argues that the Constitution imposes a territorialist solution to international conflicts.¹⁷ Kreimer bases his argument on a morally pluralist federal union, with a stress on national unity.¹⁸ Brilmayer argues that the Constitution gives priority to the state of territorial situs as a matter of interstate accommodation within federalism, but not that the Constitution compels a similar international comity.¹⁹ Indeed, in the international context, there is a name (even mentioned in the Constitution) for giving the claims of territorial situs absolute priority over the claims of citizenship. The name is "treason."²⁰

My colleagues' analyses do not make the formal error of giving conflicts rules hierarchical priority over constitutional law, nor do they support the claim that the U.S. Constitution is restricted to U.S. soil. Both of them seek homes *within* the federal Constitution for a mandatory rule resolving conflicts between the laws of two states in certain cases differently than international conflicts are resolved. Nonetheless, we should not lose sight of *Verdugo-Urquidez* and the dangerous claim that constitutions do not oblige a government's officials outside its borders. If we take state constitutionalism seriously, then it would be puzzling to conclude that the U.S. Constitution forbids extraterritorial effect for state constitutional rights while requiring extraterritorial effect for federal constitutional rights.

III. INTERSTATE SEARCH AND SEIZURE

While interstate abortion conflicts are novel, a considerable body of case law and literature has addressed the state constitutional analogue to *Verdugo-Urquidez*, a search by state officials outside their own borders that would violate the state's own standards but might be lawful where performed.²¹ Suppose, for example, that Oregon police pursue into California a burglar suspected of a series of crimes on both

Homeland, N.Y. TIMES, Dec. 3, 1991, at A6 ("In a rare appearance before a district court the Solicitor General of the United States, Kenneth Starr, told Judge C. Clyde Atkins that Haitians stopped at sea while trying to flee to the United States have no rights under American laws.").

17. Indeed, Brilmayer is on record to the contrary. See, e.g., Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992).

18. Seth Kreimer, "But Whoever Treasures Freedom . . .": *The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907, 917-21 (1993).

19. Brilmayer, *supra* note 9, at 877-78.

20. U.S. CONST. art. III, § 3.

21. The validity of the search of Verdugo-Urquidez's residence in Mexico under Mexican law was not resolved. See *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1229 (9th Cir. 1988), *rev'd.*, 494 U.S. 259 (1990). A fully specified analogy would also require that the person being searched was not a resident or citizen of the state whose officials conducted the search.

sides of the border and conduct a search that is legal under California and federal law but violates the Oregon Constitution.

Much of the case law and literature on interstate search-and-seizure conflicts focuses on the remedial question of the exclusionary consequences,²² which the manipulability of deterrence analysis has unduly complicated.²³ Instead, let us focus directly on the substantive question of the legality of the search: Does the federal Constitution prohibit Oregon courts from regarding the search as a violation of their state constitution because it was legal under California law?

For the Oregon court, the first question is one of constitutionalism, not conflict of laws — whether the Oregon constitution limits the powers of state officials even when they act extraterritorially. Absent explicit language or “legislative history” of the state constitution, answering this question requires the court to examine some of the fundamental assumptions of constitutionalism as viewed in Oregon. The state constitution may, for example, rest on a natural rights philosophy that regards state constitutional rights as reflecting universal moral rights that may overlap with the federal constitutional rights.²⁴ It may hinge on a social contract theory that treats constitutional limitations as the preconditions for all exercises of the sovereign power granted to the state by its people in its constitution.²⁵ Either of these alternatives could make state constitutional rights presumptively applicable to Oregon officials when they exercise sovereign power outside Oregon’s borders.²⁶ Both theories have deep roots in American constitutionalism.

Alternatively, Oregon might view its constitution in a skeptical, positivist light, as an organic statute for one territorial subunit among many in a federal system. An Oregon court might then conclude that rights outside its borders, even against actions of its own officials, are remitted for their protection to federal law and the laws of sister states, plus any extraterritorial legislation the Oregon legislature might

22. See, e.g., 1 WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 1.5(c) (2d ed. 1987); John B. Corr, *Criminal Procedure and the Conflict of Laws*, 73 GEO. L.J. 1217 (1985); Mary J. Morrison, *Choice of Law for Unlawful Searches*, 41 OKLA. L. REV. 579 (1988); William H. Theis, *Choice of Law and the Administration of the Exclusionary Rule in Criminal Cases*, 44 TENN. L. REV. 1043 (1977); Richard Tullis & Linda Ludlow, *Admissibility of Evidence Seized in Another Jurisdiction: Choice of Law and the Exclusionary Rule*, 10 U.S.F. L. REV. 67 (1975).

23. See Morrison, *supra* note 22, at 579.

24. See, e.g., Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 408-09 (1979).

25. See *id.* at 408-09; Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 976-78 (1991).

26. Neuman, *supra* note 25, at 916, 979-80.

choose to enact from time to time. Moreover, different portions of a constitution may reflect different constitutional visions because of historical accretion or contemporaneous compromise. Unremitting positivism seems to me an impoverished form of constitutionalism,²⁷ but this is a matter for Oregonians to decide.²⁸

The identification of the constitutional vision informing rights provisions, however, is a question of fundamental local law. *If the court determines that state constitutional rights by their rationale apply extra-territorially, then there is no room for applying state conflicts law.* Constitutional analysis trumps interest analysis (among other methodologies), and a state supreme court that is confident of the theory of rights underlying its constitution may have access to a binding source of insight on the reach of state law that is absent in most conflicts cases.²⁹

The Oregon court may still have to consider the question raised by Brilmayer's "preemption" analysis, however: Does a *federal* conflicts rule oust the Oregon constitution in this case? In other words, does territoriality trump the governance relationship established by Oregon between its own police and individuals subject to their authority, so that California may give the Oregon police powers, enforceable in the courts of their own state, that the Oregon constitution forbids?

Now, the California law permitting the search may not yet "pre-empt" according to Brilmayer's standard, because it does not express an affirmative policy in favor of the police's autonomy to search. If the hypothetical requires supplementation, then let me add the assumption that the legality of the search under California law results from an amendment to the California Constitution that expressly trims back search-and-seizure rights in California to be no greater than federal search-and-seizure rights.³⁰

27. See *id.* at 984-87 (stressing need for rights to legitimate state's exercise of power).

28. As I will emphasize, the Federal Constitution imposes some limits on a state's choice among models of constitutionalism. These derive from such sources as the Due Process Clause of the Fourteenth Amendment and the Republican Form of Government Clause. I believe that the models discussed in the text are within the range of permissible choices.

29. See Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 393 (1980).

30. Such an amendment was part of Proposition 115, the "Crime Victims Justice Reform Act" package adopted by initiative in 1990. However, the California Supreme Court invalidated this package of amendments on the ground that it amounted to a wholesale revision of the California Constitution, which could not be accomplished by initiative. See *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990). A similar amendment to the Florida Constitution, limited to search and seizure, was adopted in 1982. See FLA. CONST. art. I, § 12.

Proposition 115 was preceded in 1982 by a successful amendment by initiative that prohibited the California courts from suppressing evidence except where required by federal law or by a state statute enacted by a supermajority in the legislature. CAL. CONST. art. I, § 28(d); see *In re Lance W.*, 694 P.2d 744 (Cal. 1985); cf. *California v. Greenwood*, 486 U.S. 35 (1988) (holding

One might still object that California constitutional policy does not really address searches by Oregon police, even searches that occur in California. I could embellish the hypothetical further in response, but this seems the appropriate place to observe that a similar ambiguity occurs within Brilmayer's analysis of "Roe-like" state abortion rights. State laws that legalize abortion, or provisions that enshrine a state constitutional right to abortion, recognize a woman's autonomy, but autonomy vis-à-vis whom?

Brilmayer's preemption analysis appears to neglect the relational character that rights usually have in U.S. constitutional law. In U.S. constitutionalism, most (though not all) constitutional rights operate as rights against state action. More specifically, rights within a constitution usually run against the government structured by that constitution.³¹ U.S. constitutional rights do not generally run against Germany,³² and California constitutional rights do not generally run against Oregon. There are exceptions; both federal and state constitutional rights can run against the world generally, including private and governmental parties.³³ But the federal constitutional right to choose under *Roe* and *Casey* has been, like other due process rights, a right against state (and federal) action only.³⁴ A state law autonomy right

that elimination of state suppression remedy for state constitutional violations did not violate federal due process).

31. Cf. *Talton v. Mayes*, 163 U.S. 376, 382-84 (1896) (holding that Bill of Rights does not bind tribal government); *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833) (holding that Bill of Rights, not expressed as binding on states, bound only federal government). This phrasing requires acceptance of a characterization of the U.S. Constitution as partly restructuring the governments of the states.

32. Brilmayer's discussion of the *Rushdie* affair seems to imply that, so long as *Roe* stands, for Germany to punish a German woman for having an abortion in the United States would "offend American constitutional law." Brilmayer, *supra* note 9, at 890-91. Certainly we would not extradite (because of the principle of double criminality), and we would not enforce German law ourselves, but I do not see how *Roe* would preclude Germany from punishing the woman if she returned voluntarily.

33. See, e.g., ARK. CONST. art. XIX, § 13 (setting maximum lawful rates of interest); KY. CONST. § 241 ("Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same."); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (finding no federal barrier to state court's recognition of state constitutional right of access to private shopping center for free speech and petition purposes); *United States v. Guest*, 383 U.S. 745, 760 (1966) (holding federal right to interstate travel secured against private interference). State constitutional rights that ran against the federal government would inherently raise federal preemption problems.

34. This is now explicitly stated in *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993). I should not cite this case without adding that a footnote in one of the dissents endorses the result for which my colleagues argue. See 113 S. Ct. at 792 n.31 (Stevens, J., dissenting) (arguing that, if *Roe* were to be overruled, then "a woman's right to enter another State to obtain an abortion would deserve strong protection . . . [T]he diversity among the States in their regulation of abortion procedures would magnify the importance of unimpeded access to out-of-state facilities.").

would not be "Roe-like" if it ran against the world generally (including the woman's husband, her parents, her church, and her employer) and prohibited all retaliation against a woman who has an abortion.

Perhaps I am mistaken in this respect. As a Fourteenth Amendment holding, *Roe v. Wade* ran against all the states. Would a "Roe-like" state law right run against the granting state *and* all its sister states? A recent search-and-seizure case from the *actual* state of Oregon gives equivocal support for this possibility. In *State v. Davis*,³⁵ the Supreme Court of Oregon expressed the view that, if the defendant's arrest by Mississippi police in Mississippi had violated the standards applicable under the Oregon equivalent of the Fourth Amendment,³⁶ then evidence resulting from the arrest could not be introduced in an Oregon prosecution.³⁷ The court insisted that "the government cannot obtain a criminal conviction through the use of evidence obtained in violation of a defendant's rights under that provision."³⁸ Furthermore, "[i]t does not matter *where* that evidence was obtained (in-state or out-of-state), or *what* governmental entity (local, state, federal, or out-of-state) obtained it; the constitutionally significant fact is that the Oregon government seeks to use the evidence in an Oregon criminal prosecution."³⁹ The last-quoted clause, however, suggests that the Oregon constitution did not really contain a legal "right" binding on Mississippi police, but rather that Oregon treats the exclusionary rule as a constitutional right at trial, like the right against introduction of coerced confessions.⁴⁰ The court's primary focus on the exclusionary rule has distracted it from being precise in its legal characterization of the conduct of the Mississippi police. The Oregon search-and-seizure clause might "secure" a preexisting moral right, but it legally secures that right against the Oregon government. The court's casual mention of federally obtained evidence strengthens this impression — under the Supremacy Clause, Oregon cannot impose more stringent regulation of arrests on federal officers over federal objection, although it

35. 834 P.2d 1008 (Or. 1992).

36. OR. CONST. art. I, § 9 ("No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.").

37. See 834 P.2d at 1011-13. The court deemed it necessary to decide whether Oregon constitutional standards applied before evaluating the constitutionality of the arrest.

38. 834 P.2d at 1012.

39. 834 P.2d at 1012-13.

40. The Oregon Supreme Court also rejects the U.S. Supreme Court's current view that the exclusionary rule is justified solely by its deterrent effects. See *Davis*, 834 P.2d at 1012; *State v. Davis*, 666 P.2d 802, 807 (Or. 1983) (different defendant).

need not accept the evidence they proffer.⁴¹ Thus, at second glance, the analysis returns to the proposition that the Oregon constitution binds Oregon courts and prosecutors, giving the search-and-seizure provision unusually broad scope but remaining consistent with the phenomenon that states normally constitute themselves.

Let us assume, however, that Californians are so upset by crime that they want to permit police agents of any government to be free to search and seize on California soil to the maximum degree permitted by the federal Constitution. Do federalism principles prevent Oregon from imposing stricter standards on its own police, even when they operate in California? Do the structural assumptions of U.S. federalism give such priority to territoriality that they require that California law can free Oregon officials from all state constitutional constraints when they travel into California on official business?

Surely not. The federal Constitution makes only one reference to state constitutions, in the Supremacy Clause, which expresses the assumption that states will *have* constitutions and that the judges of the states will apply them.⁴² The Constitution also assumes that states will have their own citizens. Article I assumes that states have elected legislatures, and Article IV requires that each state have a republican form of government. Popular sovereignty at the state level means that the people of the state confer powers on their own government. Although the supremacy of federal law sometimes enables the larger populace of the nation to augment those powers, the federal Constitution evidences no intention to give sister states equal authority to augment the powers of a state in a manner binding in its own courts. As the Supreme Court explained in *Nevada v. Hall*,⁴³ upholding California's power to make Nevada subject to damage liability in California courts for torts committed in California:

In this Nation each sovereign governs only with the consent of the governed. The people of Nevada have consented to a system in which

41. See, e.g., *State v. Mollica*, 554 A.2d 1315, 1324-30 (N.J. 1989) (holding records seized by federal officials in manner prohibited under New Jersey constitution admissible unless federal officials acted in cooperation with state officials). See generally Jill E. Fisch, *Turf Wars: Federal-State Cooperation and the Reverse Silver Platter Doctrine*, 23 CRIM. L. BULL. 509 (1987) (arguing that, by inducing federal law enforcement agents to comply with state search-and-seizure rules, state courts may be exceeding their authority under the Supremacy Clause).

42. U.S. CONST. art. VI, cl. 2; see also THE FEDERALIST NO. 44 (James Madison) (Roy P. Fairfield ed., 2d ed. 1981):

[Absent the Supremacy Clause,] as the constitutions of the States differ much from each other, it might happen that a treaty or national law of great and equal importance to the States would interfere with some and not with other constitutions, and would consequently be valid in some of the States at the same time that it would have no effect in others. *Id.* at 132.

43. 440 U.S. 410 (1979).

their State is subject only to limited liability in tort. But the people of California, who have had no voice in Nevada's decision, have adopted a different system. *Each of these decisions is equally entitled to our respect.*⁴⁴

Thus, the fundamental assumption of U.S. federalism that the states are territorial units⁴⁵ must be limited by the fundamental assumption of U.S. federalism that states are themselves constitutional systems. The latter assumption prevents a state from making effective grants of "autonomy" to officials of another state, enforceable in the courts of their own state, despite the territorial "preemption" analysis that Brilmayer suggests.⁴⁶

To return to the abortion hypothetical with which I began, the "preemption" analysis would equally fail to override the Utah right to life. The federal Constitution would not require Utah to respect California's effort to confer on the Utah Dean autonomy to facilitate an abortion for a Utah employee while they were both in California. The presence of the Dean, the professor, and the fetus in California does not empower California to "preempt" the Dean's duties toward the fetus under Utah law.

IV. PUBLIC AND PRIVATE

All the foregoing might be dismissed on the ground that state officials are not private citizens and that the priority of territoriality over residence of private citizens is consistent with a more deferential accommodation of territoriality and state constitutionalism.⁴⁷ True. But my point is that the "preemption" analysis gives excessive attention to the power of territorial states based on the location of particu-

44. 440 U.S. at 426 (emphasis added). The dissenters would have gone further and required California, as a matter of constitutionally required interstate comity, to accept Nevada's assertion of sovereign immunity in California courts. See 440 U.S. at 431 (Blackmun, J., dissenting); 440 U.S. at 432-33 (Rehnquist, J., dissenting).

45. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 315-20 (1992). Professor Laycock, however, interprets territoriality as giving presumptive preference in cases of "longstanding relationships" to "the law of the place where that relationship is principally located." *Id.* at 319.

46. For clarity, I should perhaps point out that I am not arguing in favor of a formalistic federal rule permitting a forum court to give absolute priority to its own constitution over the law of any other state in all cases. Formally, the people of a state are free to put anything they want into their constitution, but not everything is entitled to equal federal respect. A state cannot impose damage liability on the officials of sister states whenever they search its citizens in the other states, because due process limits the authority of the state to impose duties on unsuspecting nonresidents in other states. Nor can a state declare all fetuses in the country to be its citizens and protect them against abortions everywhere, for the same reason and also because federal law determines who counts as a citizen of the state for federal constitutional purposes.

47. See Brilmayer, *supra* note 9, at 885-86 & n.49 (accepting internal affairs doctrine for corporations).

lar acts while neglecting the jurisdictional implications of the relationships among those involved in the acts.

The impression of neglect of relationships is reinforced by Professor Brilmayer's suggestions concerning guardians and the right to die. She concludes that, even in the absence of a federal right to die, a state cannot appoint a guardian for an incompetent patient and empower the guardian to move the patient from one hospital to another without also empowering the guardian to remove the patient to another state for the purpose of terminating the patient's life under the laws of that state. The preemptive effect of the other state's law makes the home state's limitations on the guardianship relation created under its laws a violation of the right to travel and an unconstitutional intrusion on the authority of the other state. Under this "preemption" analysis, the Constitution would not permit the home state to effectuate its concern that a guardian may abuse such ultimate powers over one of its citizens,⁴⁸ so long as the guardian could find some other state that was more trusting.

The use of geographical mobility to evade responsibilities that result from a relationship by leaving the jurisdiction where the relationship arose produces opportunities for some at the expense of damage to others. The federal government does not always accept such evasions in international conflicts, and the federal Constitution does not require the states simply to accept them in interstate conflicts.

To apply this reasoning to prohibition of abortion, one would have to characterize abortion as violating a relational responsibility. The relationship may be to the father of the fetus or to the fetus itself as a future citizen of the state. One need not go so far as to endorse extra-territorial regulation based on the *state's* relationship with the woman as one of its citizens. I agree with Professor Kreimer that, after the Fourteenth Amendment, the U.S. Constitution leaves even less room for a Rousseauian conception of citizenship at the state level than at the federal level. Kreimer writes, however, as if regulation of abortion were a matter of the state's imposing regulation of morals in the absence of tangible harm, and a woman's subjection to such regulation were based on a generalized duty of obedience to law. In a post-*Roe* world, an antichoice state would justify its legislation as prevention of harm to persons or almost-persons who were entitled to its protection

48. *But cf.* *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 281-82 (1990) (recognizing legitimacy of this concern, in intrastate context). I am assuming *arguendo* the correctness of this decision for the purpose of discussing its interaction with federalism, not taking a position on the decision itself.

and who had not consented to travel to another jurisdiction for moral experimentation at their expense.

Insisting on a relational context for abortion, and characterizing a woman's termination of her pregnancy as an infliction of harm, may sound like subordination of the woman. But that is a reason for retaining *Roe v. Wade*, as I hope we will. This colloquy is struggling with the implications of a world without *Roe*.