

## COMMENTS

### DISAPPEARING TOGETHER? AMERICAN FEDERALISM AND SOCIAL CONTRACT THEORY

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#### INTRODUCTION

The United States of America was built upon a plethora of philosophical ideas and theories.<sup>1</sup> One of the most prominent of these philosophical theories, which influenced the American Revolution itself<sup>2</sup> along with the Founding of our nation<sup>3</sup> and the drafting of the U.S. Constitution,<sup>4</sup> is Social Contract Theory. It was this theory, and the concepts associated therewith, among other things, that led the revolutionary colonists to believe that they had the authority and per-

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1 See, e.g., William E. Nelson, Book Note, *Continuity and Change in Constitutional Adjudication*, 78 YALE L.J. 500, 500–07 (1969) (reviewing PAUL EIDELBERG, *THE PHILOSOPHY OF THE AMERICAN CONSTITUTION: A REINTERPRETATION OF THE INTENTIONS OF THE FOUNDING FATHERS* (1968)) (describing some of the competing philosophies of the Founders).

2 John A. Altman, *The Articles and the Constitution: Similar in Nature, Different in Design*, PA. LEGACIES, May 2003, at 20, 20 (“[S]ocial contracts . . . are based on the classical liberal principles of government used by the American founders to justify the American Revolution . . .”).

3 Joshua Foa Dienstag, *Between History and Nature: Social Contract Theory in Locke and the Founders*, 58 J. POL. 985, 992–95 (1996) (noting that Founders such as Jefferson and Adams espoused Locke’s narrative of society emerging from a state of nature and how it could revert to that state due to the King’s failure to fulfill his contractual role as a trustee).

4 Sheldon Gelman, “Life” and “Liberty”: *Their Original Meaning, Historical Antecedents, and Current Significance in the Debate Over Abortion Rights*, 78 MINN. L. REV. 585, 591 (1994) (“[T]he Framers adopted the Lockean, social contract . . .”).

sonal autonomy to rebel against what they considered to be an illegitimate (tyrannical) governing force: the King of England.<sup>5</sup>

Social Contract Theory has a long history.<sup>6</sup> It was articulated in its modern form primarily by Thomas Hobbes in his *Leviathan*<sup>7</sup> and has been expanded upon by both contemporary political philosophers, such as John Locke<sup>8</sup> and Jean-Jacques Rousseau,<sup>9</sup> and modern thinkers like John Rawls<sup>10</sup> and David Gauthier.<sup>11</sup> Like most theories, Social Contract Theory has its supporters and its dissenters.<sup>12</sup> Some argue that its tenets are applicable to some societies but not, or not as well, to others.<sup>13</sup>

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- 5 See William B. Turner, Comment, *Putting the Contract into Contractions: Reproductive Rights and the Founding of the Republic*, 2005 WIS. L. REV. 1535, 1542 n.30 (2005) (“[T]he leaders of the American Revolution initially articulated their justification for throwing off British government in distinctly Lockean terms in the Declaration of Independence.”); see also THE DECLARATION OF INDEPENDENCE para. 6 (U.S. 1776) (“We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved . . .”).
- 6 See generally David G. Ritchie, *Contributions to the History of the Social Contract Theory*, 6 POL. SCI. Q. 656 (1891) (detailing the history of the theory beginning with the Greek Sophists).
- 7 2 THOMAS HOBBS, *LEVIATHAN* 136 (G.A.J. Rogers & Karl Schuhmann eds., Thoemmes Continuum 2003) (1651) (discussing the covenant between men to give up their rights and authority to one sovereign in the interest of self-preservation and protection from each other and outside forces).
- 8 JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT: AN ESSAY CONCERNING THE TRUE ORIGINAL EXTENT AND END OF CIVIL GOVERNMENT* 83 (George Bonham ed., Dublin 1798) (1681) (“The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community . . .”).
- 9 JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (1762), reprinted in *THE SOCIAL CONTRACT AND THE FIRST AND SECOND DISCOURSES* 156–254 (Susan Dunn ed., Yale Univ. Press 2002).
- 10 JOHN RAWLS, *A THEORY OF JUSTICE* (1971).
- 11 DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986).
- 12 See, e.g., Ritchie, *supra* note 6, at 674–76. (describing the criticisms of Hume, Bentham, and others); see also Pekka Sulkunen, *Re-inventing the Social Contract*, 50 ACTA SOCIOLOGICA 325, 325 (2007) (arguing against Social Contract Theory generally because “[t]he contract is an illusion that disguises relations of domination as voluntary partnership”).
- 13 See, e.g., Peter T. Leeson, *The Calculus of Piratical Consent: The Myth of the Myth of Social Contract*, 139 PUB. CHOICE 443 (2009) (analyzing early pirate communities to debunk the notion that genuine social contracts do not exist); Ritchie, *supra* note 6, at 668 (“It has become a commonplace to speak of the social contract as ‘unhistorical’; but it must be admitted that it has more justification of fact and of historical precedent in the declaration of rights of an American state constitution than anywhere else in the world.”).

Insofar as this argument of differential applicability is true, which this Comment supposes that it is, the United States has historically enjoyed the unique distinction of being the nation in which citizens can most fully engage in social contracting.<sup>14</sup> There are several reasons for this, the most salient of which is our peculiar system of federalism—the sharing of authority and sovereignty among the People, the States, and the federal government.<sup>15</sup> Because state and local laws can vary greatly from place to place within our country, individual American citizens can, to one degree or another, choose to live in a location which has a legal and political climate which matches most closely to their preferences.<sup>16</sup>

This distinct opportunity for Americans to engage in social contracting may be diminishing or disappearing today. To the extent that social policies and the laws related thereto are becoming more nation-wide than state- or municipality-specific, they affect the lives of all Americans regardless of where within this nation they choose to live. The extent to which this is happening is debatable,<sup>17</sup> as is the degree to which it is problematic.<sup>18</sup>

This Comment aims to persuade its readers to advocate for social change on the local rather than the national level in the interest of protecting the principles of American federalism and the basic rights of the largest number of Americans possible.<sup>19</sup> This Comment is also

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14 There are several aspects of Social Contract Theory and many different ways of understanding it. Many of these aspects and understandings, while interesting on their own, are not particularly applicable to this Comment's subject. For that reason, this Comment focuses primarily on Social Contract Theory as it pertains to the agreement between citizens and their governments that the former will obey the laws of the latter in exchange for protections and other services. The term "social contracting" refers to an individual basing decisions of citizenship and residency, at least in part, on which society's government best aligns with that individual's interests and desires. *See infra* Parts I–II.

15 To be sure, there are other federalist systems of government in the world, some of which are more, and others less, similar to our own. *See infra* note 70 and accompanying text.

16 This is not to say that citizens always base their choice of residency on such considerations. Many choose where to live based on where they can find work, where they have family, where the weather best suits their preferences, or even just where they happened to be born. The point, though, is that they have the opportunity—or the possibility—to allow laws and politics to influence their choices. *See, e.g.*, Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) (listing some of the reasons that people move to locations that fit their preferences).

17 *See infra* Part IV.

18 *See infra* Conclusion.

19 Social change on the national level reduces the rights of individual citizens who do not agree with or desire such change to reside in an area of the country not subject to such change. The more diversity of social policies that we have among American jurisdictions, the more freedom American citizens have to choose local government regimes that suit their needs and desires. *See* Tiebout, *supra* note 16, at 418 ("The greater the number of

aimed at increasing awareness of our great nation's unique position in the world of Social Contract Theory and the possibility that this position may one day be lost. With more knowledge and awareness regarding these points, advocates for social change may decide that it is better to advocate for local, rather than nation-wide, policies.

The first Part of this Comment introduces unfamiliar readers to Social Contract Theory. It begins with a discussion of the theory's origins, then introduces some more-modern approaches to the theory, and finally presents some of the major arguments against the theory's usefulness. Part II more-fully discusses the unique opportunity that American citizens have to engage in social contracting. Part III deals with the constitutional principles of American federalism, their political origins, and how they have changed in application and understanding throughout the history of America. Part IV deals with the question of whether and to what extent there is a trend toward nation-wide legislation and a resultant reduction in the political and legal distinctions among states and localities around the nation. Particular arguments and implications are presented in the Conclusion.

## I. WHAT IS SOCIAL CONTRACT THEORY?

Social Contract Theory has been defined as "the view that persons' moral and/or political obligations are dependent upon a contract or agreement among them to form the society in which they live."<sup>20</sup> When pondering this complicated, multi-faceted theory, many focus on the formation of society. This Comment, however, focuses instead on the agreement among the members of a society. That agreement, according to the theory, is that each individual, being naturally free, gives up certain freedoms in exchange for certain protections.<sup>21</sup>

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communities and the greater the variance among them, the closer the consumer will come to fully realizing his preference position."); *id.* at 418 n.12 ("This is also true of many non-economic variables. Not only is the consumer-voter concerned with economic patterns, but he desires, for example, to associate with 'nice' people. Again, the greater the number of communities, the closer he will come to satisfying his total preference function, which includes non-economic variables.").

<sup>20</sup> Celeste Friend, *Social Contract Theory*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY (Oct. 15, 2004), <http://www.iep.utm.edu/soc-cont>.

<sup>21</sup> See, e.g., David E. Murley, *Private Enforcement of the Social Contract: DeShaney and the Second Amendment Right to Own Firearms*, 36 DUQ. L. REV. 827, 853-54 (1998) ("By forming the social contract, we enter into a societal agreement that requires that we surrender some of our freedoms enjoyed in the state of nature. In return, we receive political rights and government services that supposedly make us safer and better able to function interdependently."). *But cf.* Rex Martin, *Hobbes and the Doctrine of Natural Rights: The Place of Con-*

### A. Foundations

Thomas Hobbes articulated this agreement in his *Leviathan*.<sup>22</sup> He posited that all people<sup>23</sup> were free in the state of nature.<sup>24</sup> The problem with absolute freedom, according to Hobbes, is that the exercise of some individuals' freedoms will harm or infringe on the freedoms of other individuals.<sup>25</sup> Conversely, Abraham Lincoln said in his debates with Senator Douglas, "I believe each individual is naturally entitled to do as he pleases with himself and the fruit of his labor, so far as it in no wise interferes with any other man's rights."<sup>26</sup> Lincoln could be seen as espousing an iteration of Social Contract Theory because he contemplated a limit on each individual's rights (or freedoms) only insofar as the exercise of those rights infringes on other individuals' ability to exercise their own rights. The sovereign (or government body) of the society is charged with enforcing this sole limitation on freedoms.<sup>27</sup> The enforcement of that limitation, according to Social Contract Theory, is what encourages free persons to enter societies wherein they must forgo some of their freedoms.<sup>28</sup> It is impossible for individuals to defend all of their rights against the rights of each other, so they join together in a community, the government of which will do the enforcing for them.

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*sent in His Political Philosophy*, 33 W. POL. Q. 380, 380 (1980) (arguing that the parties to Hobbes's social contract do not give their consent in the way that modern interpretations of his theory suppose).

<sup>22</sup> HOBBS, *supra* note 7, at 87–88.

<sup>23</sup> Hobbes technically spoke of all "men" being free in the state of nature. As such, his theory has suffered several challenges from feminist theorists who complain that the social contract among men was used to subjugate and control women. This Comment supposes that what Hobbes actually meant by "man" was mankind—or humanity—in part, to avoid this conflict entirely.

<sup>24</sup> The state of nature is what Hobbes uses to describe the human world prior to the formation of societies and governments.

<sup>25</sup> HOBBS, *supra* note 7, at 64 ("[A]s long as this naturall [sic] Right of every man to every thing endureth, there can be no security to any man, (how strong or wise soever he be) . . .").

<sup>26</sup> ABRAHAM LINCOLN, Speech in Reply to Senator Douglas (July 10, 1858), in POLITICAL DEBATES BETWEEN ABRAHAM LINCOLN AND STEPHEN A. DOUGLAS 20, 28 (1895).

<sup>27</sup> See Christine N. Cimini, *The New Contract: Welfare Reform, Devolution, and Due Process*, 61 MD. L. REV. 246, 270–72 (2002) (detailing the different concepts of Hobbes, Locke, and Rousseau regarding the sovereign's responsibilities to its citizens).

<sup>28</sup> See Murley, *supra* note 21, at 853–54.

The identity of the parties to the contract is a source of some debate. Hobbes's articulation of the theory speaks of individual citizens contracting among themselves—i.e. each citizen is a party to the contract with all other citizens;<sup>29</sup> the sovereign<sup>30</sup> was established and created by this agreement.<sup>31</sup> John Locke thought of the contract as between the citizens and the sovereign, who existed separately from the contract.<sup>32</sup> According to both of these men and many others, though, the agreement was entered into voluntarily by the people, with the purpose of preserving their self-interests.<sup>33</sup>

According to Social Contract Theory, because the people originally entered into the agreement voluntarily (or of their own free will), the power and legitimacy of the sovereign is ultimately derived from the will of the people.<sup>34</sup> This is in contrast to theories which hold that the power of the sovereign is derived from a deity or other natural or super-natural source.<sup>35</sup> In different types of government, sovereignty can be maintained through heredity, conquest, popular election, or other means, but it is always ultimately based on popular will. It was largely this facet of Social Contract Theory which was taken by revolutionaries in several Western nations as justification for overthrowing (or attempting to overthrow) existing governments.<sup>36</sup>

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29 HOBBS, *supra* note 7, at 87 (“[The social contract is] made by covenant of every man with every man . . .”).

30 The sovereign, according to Hobbes, could consist of one person, a group of persons, or all persons in the society. 2 HOBBS, *supra* note 7, at 147 (“[E]ither One, or More, or All, must have the Sovereign [sic] Power (which I have shewn [sic] to be indivisible) entire.”).

31 See Ritchie, *supra* note 6, at 671–72 (discussing the differences between Hobbes and Rousseau on the one hand, and Locke on the other, pertaining to this question).

32 *Id.* at 671.

33 *Id.* at 671–72.

34 *Id.* at 673.

35 See, e.g., LOCKE, *supra* note 8, at 1 (“Adam had not, either by natural right of fatherhood, or by positive donation from God, any such authority over his children, or dominion over the world, as is pretended . . .”).

36 It is interesting to note that this aspect or understanding of the theory is primarily attributable to some of its seventeenth- and eighteenth-century renditions. Socrates, in Plato's *Crito*, relied on his very early version of Social Contract Theory to explain why he was bound to remain in Athens and be put to death when he could easily have fled and lived. His idea was that since he had enjoyed the fruits of the society, he was bound by reciprocal agreement to obey the law of the society. While it was easy in practice and not at all discouraged at the time to escape prison and avoid serving a death sentence (so long as the prisoner left the country never to return), it was against the law. See John Ferejohn & Pasquale Pasquino, *The Countermajoritarian Opportunity*, 13 U. PA. J. CONST. L. 353, 362 n.28 (2010) (“In the *Crito*, Socrates acknowledges that he has an obligation to the ‘laws’ because he has enjoyed the fruits of Athenian citizenship and therefore, implicitly consented to their binding force.”). Hobbes, likewise, never intended for his theory to be used to evoke revolution; this was more the influence of Locke and Rousseau, who maintained that the sovereign had revocable powers granted by the people of the community.

### B. *Modern and Local Applications of the Theory*

Modern thinkers who have expounded upon the seventeenth- and eighteenth-century version of Social Contract Theory view the contract itself in a different light.<sup>37</sup> One author describes some of the differences as follows:

For John Rawls, David Gauthier, B. J. Diggs, and Michael Lessnoff, for example, the contract is hypothetical, not historical. Their concerns are with issues of justice and fairness in the distribution of social and economic goods, with the relationship of moral obligation and self-interest, and with the nature and conditions of individual moral autonomy.<sup>38</sup>

Social contract theory found its way into American constitutional law early in the history of the United States Supreme Court.<sup>39</sup> In 1793, the first Chief Justice of the United States, John Jay, wrote, in his opinion in *Chisholm v. Georgia*, “the constitution of the United States is likewise a compact made by the people of the United States to govern themselves as to general objects, in a certain manner.”<sup>40</sup> Later, in *M’Culloch v. Maryland*, the great Chief Justice John Marshall explained that “[t]he government of the Union . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.”<sup>41</sup> Again, in the 1850 case *League v. De Young*, Justice Robert Cooper Grier articulated that “[t]he Constitution of the United States was made by, and for the

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*See* Friend, *supra* note 20 (“For Hobbes, the necessity of an absolute authority, in the form of a Sovereign, followed from the utter brutality of the State of Nature. The State of Nature was completely intolerable, and so rational men would be willing to submit themselves even to absolute authority in order to escape it. For John Locke, 1632–1704, the State of Nature is a very different type of place, and so his argument concerning the social contract and the nature of men’s relationship to authority are consequently quite different. While Locke uses Hobbes’ methodological device of the State of Nature, as do virtually all social contract theorists, he uses it to a quite different end. Locke’s arguments for the social contract, and for the right of citizens to revolt against their king were enormously influential on the democratic revolutions that followed, especially on Thomas Jefferson, and the founders of the United States.”).

<sup>37</sup> Pamela A. Mason, *Rhetorics of “the People”: The Supreme Court, the Social Contract, and the Constitution*, 61 REV. POL. 275, 302 (1999) (detailing some of these differences).

<sup>38</sup> *Id.*

<sup>39</sup> Brief for Respondent, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (No. 88-1353), 1989 WL 1127207 at \*33 (“The compact theory has deep roots in our nation’s history. The interpretation of the Constitution as a contract also has found some expression in the courts.”). *But see* Jacob T. Levy, *Not So Novus an Ordo: Constitutions Without Social Contracts*, 37 POL. THEORY 191, 192 (2009) (arguing that constitutions—including the American Constitution—are not social contracts because, inter alia, they “do not come into being against the background of a state of nature of isolated individuals . . .”).

<sup>40</sup> 2 U.S. (2 Dall.) 419, 471 (1793) (emphasis omitted), *superseded by* U.S. CONST. amend. XI.

<sup>41</sup> 17 U.S. (4 Wheat.) 316, 404–05 (1819).

protection of, the people of the United States.”<sup>42</sup> Far more recently, Social Contract Theory has been employed to determine the constitutional rights of foreign persons while in their home country but under criminal investigation by the United States.<sup>43</sup>

### C. Arguments Against Social Contract Theory

There are, of course, many arguments against Social Contract Theory.<sup>44</sup> These arguments take many forms.<sup>45</sup> Some argue generally that it is a proper understanding neither of how society was formed nor of how it is maintained.<sup>46</sup> Others believe that it works for one, but not the other, of those concepts.<sup>47</sup> Still others claim that whether the social contract is historically or theoretically accurate in terms of how Western societies were formed, it is, for one reason or another, a harmful understanding of society today.<sup>48</sup>

Some of the arguments against the theory are aimed at particular theorists’ understandings of the nuances of the theory. One example is that some commentators have challenged Hobbes’s explanation of the theory because he claims that the agreement was made among free persons in the “state of nature.” Thus, the contract would not be enforceable by the laws of society but only by the laws of nature (which would allow breach of the contract).<sup>49</sup>

Perhaps the most pertinent arguments against Social Contract Theory, for the purposes of this Comment, are those which posit that it can be (or is) used to subjugate, control, or deprive the rights of groups of people. This is particularly salient when speaking about American law and policy because we strive in this country to promote

<sup>42</sup> 52 U.S. (11 How.) 185, 203 (1850).

<sup>43</sup> See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); see also Mason, *supra* note 37. Absent from this list, but also important, is the use of contract language to determine the constitutional status of enslaved persons of African descent. *Id.* at 286 (“[T]he last time social contract theory had been used to deny constitutional rights to any category of persons was in *Dred Scott v. Sandford* (60 U.S. 393 (1856)), which found that persons of African descent, whether slave or free, could not be included among the American ‘people.’”).

<sup>44</sup> See David Boucher & Paul Kelly, *The Social Contract and its Critics: An Overview*, in *THE SOCIAL CONTRACT FROM HOBBS TO RAWLS* 1–29 (David Boucher & Paul Kelly eds., 1994).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See, e.g., Leeson, *supra* note 13, at 443 (“Everyone knows that a genuine social contract . . . is myth.”).

<sup>48</sup> See, e.g., CAROLE PATEMAN, *THE SEXUAL CONTRACT* 1–2 (1988) (providing a feminist-perspective critique of Social Contract Theory).

<sup>49</sup> See Ritchie, *supra* note 6, at 670–71 (describing Spinoza’s contemporary criticism of Hobbes and a hypothetical response that Hobbes might have given).



the freedom and equality of all persons. It would be very difficult to argue against the claim that when this nation was founded, upper-class White men held nearly (if not entirely) all of the political power. This is evident if one looks at the history of the vote.<sup>50</sup> It began when almost exclusively men who held property could vote.<sup>51</sup> Only white men were free to hold property, and only the upper-classes had the means to do so.<sup>52</sup> This situation was not unique to the United States; early democracies in Greece and Rome operated in the same way.<sup>53</sup>

Later, through political and social reforms reducing the number of states with either property-holding or tax-paying requirements, the power to vote was gradually extended to all free men age twenty-one or older;<sup>54</sup> the age was later reduced to eighteen.<sup>55</sup> After the Civil War, African Americans gained voting privileges.<sup>56</sup> Women, too, gained the right to participate in the democratic process through voting later in our nation's history.<sup>57</sup> However, there are still persons in our country today who are not permitted to voice their preferences in elections. These are children, resident aliens, and those with prior felony convictions.<sup>58</sup> It would seem that one who is not permitted to vote is not a participatory party to the social contract—though these people are still required to abide by its laws.<sup>59</sup>

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50 It is important to note that voting is not a requirement of social contract theory generally. The theory posits that free men give their consent to be governed by the sovereign regardless of the type of government system created and of whether voting is allowed at all. The history of the vote is included here only as a demonstration of the changing landscape of American political power and influence generally and also as an illustration of one of the many ways in which Americans may engage in the process of social contracting.

51 ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 4–8 (2000) (explaining the origins of American voting which, left to the discretion of state governments, almost exclusively extended to property-owning male citizens).

52 *Id.*

53 See Louis J. Sirico, Jr., *The Federalist and the Lessons of Rome*, 75 *MISS. L.J.* 431, 471 (2006) (explaining that only the wealthiest of Romans had any meaningful right to vote in the assembly).

54 KEYSSAR, *supra* note 51, at 26–52, 277 (detailing this gradual shift among the states).

55 U.S. CONST. amend. XXVI.

56 *Id.* at amend. XV.

57 *Id.* at amend. XIX.

58 See Afi S. Johnson-Parris, Note, *Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 *VA. L. REV.* 109 (2003) (detailing different state laws regarding disenfranchisement of prior felons and arguing for a much broader ability for prior felons to participate in voting).

59 This view, however, falls apart to some extent when we look at a different aspect of the Social Contract Theory. If we define the contract only as an agreement between members of society and the government thereof, that the former give up rights (agree to abide by laws) in exchange for protections (and other services) from the latter, it could well be

As the arguments go, Social Contract Theory has been used to maintain a relationship of power over groups of people by other groups. The balance of power among members of the society can be manipulated by redefining what it means to be a party to the social contract.<sup>60</sup> Thus, the *Dred Scott* opinion of the Supreme Court held that African Americans were not party to the contract because they were not anticipated by the Framers of our Constitution as part of “We the People.”<sup>61</sup> Similarly, arguments have been made that the social contract is among men—as against women. Feminist theorists have written extensively about this throughout the years.<sup>62</sup>

It is important, for the purposes of this Comment, to recognize these arguments and their validity. They can be overcome to some extent, however, by pointing out that they refer to historical conditions and that, with few exceptions (such as disenfranchised prior-felons<sup>63</sup> and the ongoing debate regarding alien rights), all members of American society are fairly free to engage with the social contract. One notable exception to that statement might be the highly impoverished.<sup>64</sup> To the extent that this Comment’s proposition is that citizens are free to move throughout the country to the location which most fits their needs and desires, it applies less to those without means to move at all. Unclear, however, is the extent to which this is

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argued that participation in the vote is ancillary to participation in the contract. Though children are not allowed to vote, they are still protected by policemen, fire-fighters, and various other laws and agencies. On the other hand, they are also required to obey certain rules and laws (interesting in the case of children, though, that they are held to a different standard of criminal culpability—a topic which is beyond the scope of this Comment).

<sup>60</sup> Mason, *supra* note 37, at 298.

<sup>61</sup> *Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1857) (“We think [descendants of enslaved Africans in America] are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.”).

<sup>62</sup> See Boucher & Kelly, *supra* note 44, at 27–29 (detailing the feminist objections to Social Contract Theory).

<sup>63</sup> This, however, is only an exception to one particular facet of American social contract engagement—voting in elections. Felons are still able to engage in other aspects of social contracting such as choosing where to live and paying taxes (in this way, they can still do what Tiebout calls “voting with their feet”). See Tiebout, *supra* note 16; See, e.g., Stephen L. Percy et. al., *Revisiting Tiebout: Moving Rationales and Interjurisdictional Relocation*, 25 *PUBLIUS* 1, 2 & n.5 (1995).

<sup>64</sup> While the impoverished have the same rights as the rich in our country, they certainly have less physical (or financial) ability to move about the country in order to maximize their preferences. They are still a part of the social contract, however, because they enjoy benefits provided by their governments in exchange for abiding by the rules of those bodies.

the case. People of low or no means have moved throughout this country since it began. Even homeless people are relatively mobile when they choose to be—through hitch-hiking or other methods. Arguments about this detail, however, are beyond the scope of this Comment and may be interesting for a follow-up. Instead, this Comment speaks only of the legal *right* held by all Americans to move from place to place,<sup>65</sup> as opposed to the physical and financial ability or opportunity to do so.<sup>66</sup>

One point that is highly supported by the literature is that Americans are generally a highly mobile people.<sup>67</sup> In other words, Americans tend to exercise their fundamental right of mobility.<sup>68</sup>

## II. THE UNIQUE SOCIAL CONTRACT OPPORTUNITY IN THE UNITED STATES

This Part deals with the opportunities that Americans have to engage in social contracting. This Comment defines “social contract-

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<sup>65</sup> Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (“[I]n moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.”), *overruled in part on other grounds* by Edelman v. Jordan, 415 U.S. 651 (1974); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting) (“[E]very citizen’s right to travel interstate, although nowhere expressly mentioned in the Constitution, has long been recognized as implicit in the premises underlying that document: the right ‘was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.’” (quoting United States v. Guest, 383 U.S. 745, 758 (1966))).

<sup>66</sup> Another potentially relevant argument against Social Contract Theory is the one which supposes that even if society was formed by the proposed agreement among the people, those people have been dead for generations. People in the society today were born into it and into the agreement of their ancestors. Indeed, Hobbes anticipated this argument and deals with it in his *Leviathan*. For the purposes of this Comment, however, Hobbes’s points are not necessary. The position posited herein is that American citizens can choose to leave the society into which they were born. Unlike some other nations’ citizens, America’s citizens are not legally bound to remain in the country, with a few exceptions such as people with certain criminal records or tax debts which prevent the issuance of a passport. Many citizens of America emigrate to Mexico, Canada, and very many nations overseas. Likewise, many members of our society today were born elsewhere and immigrated to America. These persons, then, certainly chose to abide by her rules and to become party to her social contract.

<sup>67</sup> Nestor M. Davidson & Sheila R. Foster, *The Mobility Case for Regionalism*, 47 U.C. DAVIS L. REV. 63, 66 n.6 (2013) (“By some estimates, roughly 16 percent of the U.S. population has moved across metropolitan area boundaries in the last five years, despite this being a period of relatively low overall mobility as a result of the current economic downturn.”); Percy et. al, *supra* note 63, at 1 n.3 (“[O]n average, about 20 percent of the United States population at a given date lives at a different address than they did the year before.” (citing PETER H. ROSSI, WHY FAMILIES MOVE 28–29 (2d ed. 1980))).

<sup>68</sup> *Shapiro*, 394 U.S. at 634.

ing” as an individual’s right and opportunity to base residency decisions on personal preferences related to many things including political, moral, and religious values.<sup>69</sup> These opportunities are provided by America’s federalist system and the resultant diversity of policies in jurisdictions within the country.

Federal systems of government exist in places outside of the United States, including Germany, Australia, Canada, the European Union, and other entities.<sup>70</sup> The United States of America is different, however, in part because of its multi-tiered government system and its size.<sup>71</sup>

The Constitution of the United States divides power in several ways. First, it divides federal power among the three branches of government.<sup>72</sup> Then, it allows the States to retain their sovereignty and a share of the power not delegated to the federal system.<sup>73</sup> Lastly, the People themselves hold certain powers and rights against all government.<sup>74</sup> Some provisions, like the Equal Protection Clause and the Full Faith and Credit Clause, ensure that citizens can expect some rights and protections regardless of which state they are in within the country.<sup>75</sup>

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69 American citizens engage in social contracting with both the federal and state governments. It is important to understand that the states themselves also engage in social contracting with the national government. See Timothy Zick, *Statehood and the New Personhood: The Discovery of Fundamental “State” Rights*, 46 WM. & MARY L. REV. 213, 230–31 (2004).

70 See CONSTITUTIONAL ORIGINS, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES (John Kincaid & G. Alan Tarr eds., 2005).

71 See John Kincaid, *Comparative Observations*, in CONSTITUTIONAL ORIGINS, STRUCTURE, AND CHANGE IN FEDERAL COUNTRIES, *supra* note 70, at 409 (discussing the unique features of different federal systems).

72 U.S. CONST. art. 1, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”); *id.* at art. 2, § 1 (“The executive Power shall be vested in a President of the United States of America.”); *id.* at art. 3, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

73 *Id.* at amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

74 See, e.g., *id.* at amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); *id.* at amend. X; *id.* at art. IV, § 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”); see also Thomas B. McAfee, *The Federal System as Bill of Rights: Original Understandings, Modern Misreadings*, 43 VILL. L. REV. 17, 17 (1998) (“[T]he Framers’ voices refer[] to rights held by the people in their collective capacity, including the rights of the people within each of the sovereign states to be free from undue federal intrusion on their power of self-governance.”).

75 U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State . . . .”); *Id.* at amend. XIV, § 1 (“No state shall make or enforce any law which shall abridge the privileges or immunities

With many individual rights protected in this way against the state governments, mobility (or travel) is a fundamental, constitutional right in this country.<sup>76</sup> Further, each citizen of the United States can be understood to have dual citizenship due to the Fourteenth Amendment's language: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."<sup>77</sup> Both of these citizenships are relatively easily transferrable. A citizen born or naturalized in Texas, for example, is legally free to leave Texas, and the United States, at will.<sup>78</sup> This person can instead move to Pennsylvania if that state is more attractive, or a bit further north into Canada.<sup>79</sup> The point does not end here. Beyond choice of nation and of state within the nation, American citizens can choose their residency based on county-, municipality-, and even neighborhood-level concerns.<sup>80</sup>

It is obvious that all American citizens are subject to federal laws and jurisdiction. Thus, there is a set of rules by which one must agree to live in order to remain free in this country. Secondly, each state has its own set of laws. State laws vary drastically in some areas—capital punishment, gay rights, etc.—and are fairly uniform in others—for example, minimum drinking age.<sup>81</sup>

Within states, the differences between smaller subdivisions varies. For example, some states fund (and thereby control) certain aspects of community on the state level, making them uniform throughout the state, while other states may take a more localized approach to the same issues. An example of this is public education. States like

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of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>76</sup> *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974) (“[I]n moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.”).

<sup>77</sup> U.S. CONST. amend. XIV, § 1.

<sup>78</sup> *See Davidson & Foster*, *supra* note 67, at 66 (“College graduates, entrepreneurs starting new companies, employees in technology or finance, and other people who have the resources to relocate are no longer limited to one metro region. Instead, they are as likely to weigh moving to greater New York versus the San Francisco Bay Area, or even London or Beijing, as they are to be deciding whether to live in Denver versus Boulder or Cass Corridor in downtown Detroit versus Grosse Pointe.”).

<sup>79</sup> This supposes, of course, that Canada does not forbid the individual's immigration. The point here is that the United States will not forbid the individual's emigration.

<sup>80</sup> *See generally* Tiebout, *supra* note 16.

<sup>81</sup> The minimum drinking age is discussed in more detail in Part IV, *infra*.

Texas are set up in such a way that local and county property taxes are the primary funding source for schools.<sup>82</sup> This results in vast disparity among different school districts within the state in terms of both funding amount and district operations and policies.<sup>83</sup> Hawaii, on the other hand, funds its public school system at the state-wide level and thus has more state-wide control and uniformity of funding level and policy decisions.<sup>84</sup> Thus, in Texas, quality of schools (or level of property taxes) may be a larger factor influencing a person's decision of where to live than it would be in Hawaii.

There are several other factors of community which may influence a person's residency choice. Many of these, for some individuals, are a product of the criminal justice system. Policing is a power left to states by the Constitution.<sup>85</sup> Thus, many crime-control policies and decisions about what should be included in and excluded from the penal codes are decided at the level of state government. To this degree, residency choices based on criminal concerns may be state-specific. However, policing is largely implemented at a more-local level. There may be various important differences between counties within a state and between cities within each county. Thus, an informed citizen can choose residency based on these more-local-level concerns.

Relatedly, certain cities have highly restrictive ordinances which govern, for example, the aesthetic features of the homes therein or the number and type of vehicles permitted in each driveway. Another entity with such controls may be a home-owners association. Thus, a citizen who does not wish to comply with such restrictions may choose not to live in these areas. In fact, one may choose to avoid city ordinances altogether by residing in a rural area which is outside of

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82 See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (adjudicating an unsuccessful challenge to the Texas education system on Equal Protection grounds).

83 See Laurel Brubaker Calkins, *Texas School-Finance System Unconstitutional, Judge Rules*, BLOOMBERG (Feb. 5, 2013), <http://www.bloomberg.com/news/2013-02-04/texas-school-districts-challenge-funding-as-unfair.html> (describing the disparities among neighboring school districts and a state court's decision which held the system inadequate under the Texas Constitution).

84 JOHN A. THOMPSON & STACEY E. MARLOW, HAWAII (2000), available at [nces.ed.gov/edfin/pdf/StFinance/Hawaii.pdf](http://nces.ed.gov/edfin/pdf/StFinance/Hawaii.pdf) ("Hawaii has a unique governance structure for education. It is the only state with a single, statewide school district. Likewise, the system of financing public education is different from any other state.").

85 U.S. CONST. amend. X; see Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745 (2007) (detailing the history of the constitutionally protected right of the states to "provide for the public health, safety, and morals" of their citizens, beginning with Chief Justice Marshall's opinion in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827)).

city limits. Residents in these areas are often free to do a great many things which are not permitted in most cities. These activities might include burning, shooting guns, shooting fireworks, having loud music late at night, and many others. The other side of the contract comes in here, though. While rural residents enjoy more freedoms, generally, than their city-based counterparts, they also have fewer government-provided protections. A city resident has available much more police, closer firefighting facilities, and many other of the services and protections provided by government. Also, while the rural resident is not bound to abide by the rules of a city, neither are the other area residents. This can cause a problem if a citizen wishes to live in peace and quiet, because there are no laws, rules, and ordinances preventing the other residents of the area from making noise and (to some reasonable extents) disturbing the peace.

Charles M. Tiebout wrote an oft cited and debated article articulating his theory about certain factors which influence the residency choices of Americans.<sup>86</sup> He contends that people choose their residence location, in part, based on their preferred bundle of government benefits and the relation of that to the amount of taxes they will be required to pay.<sup>87</sup> His article is geared toward economic considerations of locality choice (and competition of municipalities for tax-paying residents) within a single metropolitan area.<sup>88</sup> Thus, his findings are only partially informative of the argument put forth in this Comment, but the idea behind them—that citizens choose where they live based on factors including which packages of duties and benefits *viz-a-viz* local governments they prefer—is directly supportive.

Apart from the considerations listed above, citizens may base residency choices on larger political and philosophical ideals. For instance, a staunch conservative may feel a lack of political influence in a state which is predominantly liberal, and vice-versa. Thus, citizens can choose to live in a state with more politically like-minded co-residents from a standpoint of political-strength in numbers. Alternatively, a liberal citizen may have the idea that living in a predominantly conservative area will provide more opportunities for advocacy—as

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<sup>86</sup> Tiebout, *supra* note 16.

<sup>87</sup> *Id.* at 421–22.

<sup>88</sup> *But see* H. Spencer Banzhaf & Randall P. Walsh, *Do People Vote with Their Feet? An Empirical Test of Tiebout's Mechanism*, 98 AM. ECON. REV. 843, 843 (2008) (applying Tiebout's theory to a different circumstance and finding "strong empirical support for the notion that households 'vote with their feet' for environmental quality").

opposed to preaching to the proverbial choir. Thus, political affiliations can influence choice of state or even area within a state.<sup>89</sup>

Certainly, more-specific legal concerns may drive a person's decision of where to reside. Many Americans have strong but opposing thoughts about many social and legal issues today. These include, but are by no means limited to, abortion, capital punishment, LGBT rights, marijuana use, and gun control. It is important to note that there is no clear division among these issues which can create a dichotomy of groups, one pro and the other anti some or all of them.<sup>90</sup> In other words, one person may be opposed to policies A, B, and C, but be a supporter of policies D, E, and F. Another person may oppose or support them all, and still another will have a different combination than the first. These individuals have the right to choose where they live based on which area's policies and laws align most closely to their own preferences.<sup>91</sup> This is not to say that these are the only considerations to be made in such decisions. Obviously, people choose residency for many reasons: jobs, health, finances, family, weather, etc. The point here is that they have the opportunity—the right—to factor these political, social, and legal concerns into their equations.

### III. PRINCIPLES OF AMERICAN FEDERALISM

This Part deals with American federalism directly. “Federalism” refers to the balance of powers between the federal government and the governments of the states.<sup>92</sup> It also refers to the balance of power among the several, equally sovereign states.<sup>93</sup> These balances are ar-

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89 For an example of the latter, consider Austin, TX, which is known as a “liberal safe-haven” in an otherwise highly conservative state. Sunshine Flint, *Living In: Austin, TX*, TRAVEL, BBC (Feb. 8, 2012), <http://www.bbc.com/travel/feature/20120206-living-in-austin-texas>. (“Overall, Austin’s reputation as an unconventional, liberal-minded city in the conservative state of Texas entices many people from around the state and the country to move here.”)

90 It is not the case that one’s preferences on these issues can be predicted based solely on one’s religious or political affiliations, or any other factors; they are independent and particularly salient issues.

91 See *supra* note 65 and accompanying text.

92 *Younger v. Harris*, 401 U.S. 37, 44 (1971) (“[T]he notion of ‘comity,’ that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways . . . is referred to by many as ‘Our Federalism[]’ . . .”).

93 Heather Scribner, *Protecting Federalism Interests After the Class Action Fairness Act of 2005: A Response to Professor Vairo*, 51 WAYNE L. REV. 1417, 1418 (2005) (“Federalism, which is con-



ticated originally by the Constitution itself. The Tenth Amendment mandates that those powers not enumerated in the Constitution are not the proper purview of the federal government.<sup>94</sup> These are instead reserved to the states and to the people themselves.<sup>95</sup>

Through statutes and constitutional caselaw, our understanding of certain “enumerated” federal powers has grown dramatically from where it began in 1789.<sup>96</sup> The clearest example is the Commerce Clause, which now extends almost unrecognizably beyond what the text of the Constitution states clearly.<sup>97</sup>

The Tenth Amendment clarifies and expands certain aspects of federalism.<sup>98</sup> The *Federalist Papers*, particularly many written by John Adams, also provide further understanding of and historical support for the ideals of American federalism.<sup>99</sup>

Throughout the history of America, the clear separation of powers articulated by our concept of federalism has faded somewhat. Many concerns which were once in the wheelhouse of the states are now controlled in part or in whole on the national level.<sup>100</sup> Even the police power, one of the most clearly reserved powers to the states, has been somewhat reduced, arguably, by the Court’s decision in *Raich*.<sup>101</sup>

The expansion of federal power has not been limited to Congress. The judicial branch has also grown in both size and power over the years.<sup>102</sup> Certainly, as our nation has grown in size, population, and

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cerned with the proper allocation of political power among the various sovereigns in our unique federal system of government, has two distinct aspects: the division of power among the several states (‘horizontal federalism’) and the division of power between the federal and state governments (‘vertical federalism’).”).

94 See U.S. CONST. amend. X.

95 See *id.*

96 Todd F. Gaziano & Elizabeth Slattery, *Expansion of National Power at Expense of Individual Liberty*, HERITAGE FOUND. (May 10, 2011), <http://www.heritage.org/research/commentary/2011/05/expansion-of-national-power-at-expense-of-individual-liberty> (detailing the history of the expansion of federal (congressional) power).

97 See, e.g., Craig L. Jackson, *FDR and Obama: Are There Constitutional Law Lessons from the New Deal for the Obama Administration?*, 15 U. PA. J. CONST. L. 1, 3–4 (2012) (describing the expansion of congressional power through the Commerce Clause since 1937).

98 U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

99 See ANTHONY A. PEACOCK, *HOW TO READ THE FEDERALIST PAPERS 69–75* (2010) (detailing which parts of the Federalist Papers pertain to federalism and how to understand them).

100 Examples are too numerous to list but include education (No Child Left Behind), welfare, medical care (including Medicare), and environmental concerns.

101 *Gonzales v. Raich*, 545 U.S. 1 (2005) (expanding federal Commerce Clause power to include the power to prohibit the local cultivation and use of marijuana).

102 Lee Edwards, *The First Thirty Years*, in BRINGING JUSTICE TO THE PEOPLE: THE STORY OF THE FREEDOM-BASED PUBLIC INTEREST LAW MOVEMENT 3 (Lee Edwards ed., 2004) (“The

complexity, and as the federal law has also grown in both breadth and complexity, a larger system of federal courts is necessary. The federalism concern grows stronger, however, when we consider federal courts making state-law decisions under diversity jurisdiction.<sup>103</sup>

In some cases, the Court and Congress are fairly straightforward in assuming powers to the federal government which were not understood to be properly in that division originally. One example of this is the bold move toward nationalization in Commerce Clause jurisprudence. In other situations, the national government takes endroads around federalism principals in order to achieve its goals.<sup>104</sup> An example of this is the federal minimum drinking age. Drinking age minimums are technically state laws. However, all fifty states have the same minimum. This is because the federal government threatened states with removal of highway funding if they refused to comply.<sup>105</sup>

The growth of the national government in America certainly has implications on the freedom of citizens to engage in social contracting. This is in part because there are fewer differences between jurisdictions when they are all uniformly controlled by the national government. Also, as states are required to spend their funds on particular programs and initiatives because of federal mandates, they have less money to use in other ways which they (and perhaps their citizens) deem more important or more appropriate.

#### IV. TREND TOWARD NATION-WIDE ADVOCACY OF SOCIAL CHANGE AND PUBLIC POLICY?

This point brings this Comment to a discussion of whether and to what extent there is a trend toward nation-wide scope of legal and so-

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courts have also become more powerful as government has come to play a larger and more permanent role in our lives. . . . Government, Roosevelt said flatly, now 'has a final responsibility for the well-being of its citizens.'")

<sup>103</sup> David Marcus, *Erie, the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1250–55 (2007) (introducing the discussion of the federalism implications of federal diversity jurisdiction, how *Erie* helped to quell those concerns to some degree, and how the CAFA may present new problems).

<sup>104</sup> Some commentators argue that this is the only logical explanation of the Court's decision in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 1 (2012), upholding the individual mandate portion of the Affordable Care Act under the Congress's taxing power when it was too dangerous to uphold it under the Commerce Clause. *See, e.g.*, Jackson, *supra* note 97, at 3–4.

<sup>105</sup> *South Dakota v. Dole*, 483 U.S. 203, 205 (1987) ("In 1984 Congress enacted 23 U. S. C. § 158 (1982 ed., Supp. III), which directs the Secretary of Transportation to withhold a percentage of federal highway funds otherwise allocable from States 'in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful.'")

cial-policy advocacy. Advocates for social policy tend to firmly believe in their causes. They have moral, philosophical, and religious bases for their advocacy. Thus, in many cases, they honestly believe that the reform they seek is not only good for themselves or for a small group of interested people, but for all Americans. Thus, they advocate for change on the national level—often hoping for federal legislation mandating such changes. In fact, “change” of this sort was a large part of the rhetoric used by President Barack Obama in his campaign.<sup>106</sup>

Certainly, not all advocacy is carried on nationally, but some has both local and national components. For example, persons who oppose abortion protest at the local abortion clinic and petition state governments to enact laws preventing legal abortions, but they also seek (and likely would prefer) federal reform. They petition to Congress and the Supreme Court in hopes to overturn *Roe v. Wade*.<sup>107</sup> Similarly, those who support women’s “choice” in this matter advocate at all levels.

Gun-control activists on both sides of the debate also advocate in all available fora. Supporters of and those who oppose LGBT rights, such as same-sex marriage, advocate at the state and national level seeking one change or another. One of the most publicized nationally advocated issues in recent history is that of universal healthcare. This national debate came to a bit of a head in the Supreme Court’s decision, in *National Federation of Independent Business v. Sebelius*, regarding the constitutionality of certain portions of the Affordable Care Act (“ACA”). Importantly, the federalism concern in *NFIB* pertained more to the portion of the ACA which expanded Medicaid coverage at the expense of the states.<sup>108</sup> The Court overruled that portion of the Act because it overreached Congress’s power to control state activity through its taxing and spending power.<sup>109</sup>

Regardless of the mechanism at work in the ACA or in other legislation and Court cases, the trend certainly seems to be toward advocacy on the national level for social policies that are uniform across

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106 See Adam J. Gaffey, *Obama’s Change: Republicanism, Remembrance, and Rhetorical Leadership in the 2007 Presidential Announcement Speech*, 79 S. COMM. J. 407, 407 (2014), available at <http://www.tandfonline.com/doi/full/10.1080/1041794X.2014.928900#tabModule> (“No other term was more essential to the Obama campaign than ‘change.’”).

107 410 U.S. 113 (1973).

108 Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 1, 51 (2012) (“In this case, the financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement’—it is a gun to the head [for the states].”).

109 *Id.*

the country. In some cases, it is stopped; in others, it is successful. In the case of the ACA, it seems to have been a bit of both.

#### CONCLUSION

As was set out above, Americans have a unique opportunity to choose where they live in order to maximize their political, social, moral, and religious alignment with their community, along with other concerns. The greater the diversity among the different jurisdictions available, the greater the opportunity to make these decisions in meaningful ways, and the greater the chance that each individual will find a home to match that person's preferences.

American citizens have other rights as well, which are part of what makes this country so great. Among those rights are the freedom of speech and to petition the government for grievances. Advocacy for social change implicates these important rights, and such advocacy should be encouraged, not curtailed. The purpose of this Comment is in no way to discourage advocacy or even social change. The purpose is to redirect the aims and objects thereof.

Based on the fact that there are at least two sides to every debate, it is obvious that one answer is not good for (or in the opinion of) all parties. The most good, then, can be obtained only if we allow persons with different preferences to reside in areas where those preferences can be realized. This can only be facilitated by advocating for social reform primarily at the local level. If person X strongly opposes gun ownership and gay marriage, but lives in a jurisdiction with very loose gun laws and state-sanctioned marriage for homosexuals, then person X can and should begin to attempt to change those policies. Person X, however, should not begin to do so by making a national campaign for uniform change throughout the country. Instead, the change should be advocated on the state level in the case of marriage laws and perhaps on the local level in terms of gun control. If person X is successful, great; if not, person X is free to move to a city or state which is comprised of more people with similar preferences, leaving to the former location the preferences of the people who remain there.

It may be argued that moving may be a hardship to person X due to employment, family matters, or other factors. These factors must be weighed in the analysis which each person undergoes when deciding where to live. They each have a relative weight, and it may be the case that the social policy issues are less important to some people. In that case, those people must live with their displeasure socially in

order to reap whatever other benefits they gain from living where they have chosen.

Some critics will argue that there are certainly some issues so necessary to humanity that they should be forced upon all Americans (if not all humans on Earth). Historically, one such issue may have been the abolition of slavery. Based on an analysis of “natural human rights,” there is no basis for the argument that slavery is a good thing. However, there are no such clearly one-sided issues today. Both sides of all of the major issues have at least some degree of merit.

Thus, out of respect for those on the other side of the issues and their rights, and in the interest of preserving American Federalism and the social contract, policy advocates should work more-locally and less-nationally.