The Ethics of Regulatory Competition

Steven Kelman

THE POLITICAL AIR is now filled with proposals, of which President Reagan's "New Federalism" is only the most dramatic, to turn various activities of the federal government over, or back, to the states. Among those activities is regulation: environmental regulation in particular, but other sorts as well.

Critics of these proposals often object that the states, in order to keep or attract business, would compete with each other to offer firms the lowest tax rates or the laxest regulations. Many fear that, especially in a time of low growth and plant closings, such competition among states would set in motion a dynamic that would "gut" environmental protection, spending to aid the poor, and so forth. They also note that after this competitive process reached a resting point, no state would actually turn out to have gained an advantage in attracting industry: all (or most) states would end up at the same level of lax regulations, large tax incentives, and low spending for the poor. The suggestion, often unarticulated, is that it would be "unseemly" for states to compete for business in such ways, and that these environmental and social issues should be decided "on their own merits," not subjected to an auction among states anxious to attract new jobs.

Many of those who favor devolution of federal responsibilities to the states agree that it will bring about such a competition. But they contend that there is nothing wrong with that happening—indeed, that such competition will produce optimal public policies. Part of this group, of course, favors the competition simply because it wishes to bring about less regulation and less social spending. But others, including some economists, raise two theoretical arguments that seemingly do not depend on whether one in general favors stricter or laxer regulation. The first is that devolution allows the citizens of a state to make the kinds of trade-offs between, say, environmental quality and jobs that they most prefer, rather than having to accept a grosser and less differentiated trade-off made at the federal level for the population as a whole. The second argument suggests that, even if the states (and their citizens) can make *themselves* better off by reaching an agreement not to compete with each other—in short, by federal preemption—such an agreement constitutes an undesirable "cartel" of states that, as cartels always do, reduces total social welfare.

The latter two arguments are the ones I wish to address in this paper. I will be assuming throughout that states accurately represent the preferences of their citizens. This need not, of course, be the case. If they do not, however, this creates problems different from the problem of competition among the states. Also, it should be noted, I will consider businesses not as citizens participating in the development of the preferences to which states give expression, but rather as "outsiders" with preferences

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of their own, bargaining with states and their citizens. This is obviously an oversimplification, but it is an analytically useful one.

THE FIRST ARGUMENT for the devolution of federal programs is essentially an anti-paternalist one: when goals conflict with each other, why not trust people to make their own trade-offs rather than impose a trade-off on them? To criticize states for lowering environmental standards to attract industry is to impose our preferences (for greater environmental quality instead of jobs) on them. If people place any value at all on environmental protection, they will presumably not permit their states to become simple dumping grounds for garbage.

According to this argument, a variety of trade-offs based on local preferences would lead to higher welfare than a single trade-off based on the aggregated preferences of U.S. citizens as a whole. Both voting behavior and opinion surveys suggest that people think differently in different parts of the country. If decisions were made at the state level, it might seem, there would be a better match between the preferences of each group of citizens and the policies they live under.

The problem with this argument is that competition among the states may itself dramatically worsen the trade-off between jobs and environmental protection, forcing states, at the extreme, to accept a trade-off that none would have chosen without such competition. In effect, the states may face the situation familiar to game theorists as the "prisoner's dilemma." In the classic dilemma, two confederates in crime have been arrested by the police and are being interrogated separately. If neither confesses, the warden will be unable to prove the crime and both will go free. If one confesses and the other does not, the first will not only go free but be rewarded for his cooperation with a token sum of money, while the other will get an unusually harsh sentence. If both confess, however, both get relatively harsh sentences, although not so harsh as that of the prisoner who refuses to confess while his confederate is doing so.

If the prisoners could bind each other to an agreement to both remain silent, they would both go free. But they cannot. Each knows that if he remains silent while his confederate confesses, it will lead to the worst possible outcome for him. This puts pressure on each to confess. But if both prisoners succumb to the pressure, both will get a relatively harsh sentence. Cooperation would produce an outcome preferable to competition for both prisoners. States competing for industry, then, may resemble the prisoners in the dilemma.

Like the warden, businesses would be in a very good negotiating position. In any negotiation, if one party cannot secure a minimally acceptable set of terms, he will prefer not to make a deal at all. How much (if anything) a party gets over and above this minimum acceptable set of terms depends in large measure on how anxious the other party is to make the deal. A person standing alone with a buoy on a dock might get a drowning man to promise to hand over most, perhaps all, of his wealth in exchange for throwing him the buoy, although the buoy holder's *minimum* acceptable terms might be extremely modest. Similarly, businesses making location or expansion decisions may be more than happy to take the benefits of reduced regulations, but might be willing to invest anyway even if nobody offered them.

To the extent that competition among states leads states to offer all companies greater inducements than they would be willing to settle for, federal preemption allows states (and their citizens) to have their cake and eat it too: they can attain strict environmental standards without sacrificing industrial investment. Since the failure to offer businesses lax regulations does bring some of them under the minimum terms they require to make the investment in question, there is still a trade-off, and some jobs are still sacrificed for improved environmental quality. But it is a more favorable trade-off for the states, because their bargaining position with respect to businesses is strengthened. They need to make less of a sacrifice in environmental quality to achieve a given level of investment and jobs.

How much the environment/investment trade-off will improve depends on how much competition there is among the *sellers* of business investment, the businesses that make location decisions. In economic terms, the buoy holder received monopoly profits because the drowning man had no alternative source of buoys. But what if there were many sources? Then competition among buoy purveyors

would cause the price of rescue to decline dramatically toward the level minimally acceptable to the buoy holder who was willing to sell for the lowest price. In a competitive world of many sellers, as opposed to a bargaining world of few sellers, firms at the margin do not attain terms in excess of their minimum acceptable ones. If the "market" for business investment is competitive, federal preemption therefore reduces, to some extent at least, the total quantity of business investment.

Even in a competitive world, however, benefits that indeed "make the difference" for decisions on projects at the margin also end up being granted to projects that would be profitable even without these benefits. Such projects receive benefits that are not required in order to call forth the projects. (The only way for governments to avoid paying such benefits would be to discriminate among firms or investment projects in fixing tax levels or regulations, which is difficult.) These investments will still go forward. Economic theory can demonstrate that states, by not competing, can, even given a competitive market for business investment, attain a better mix of jobs and environmental protection than if they competed.

And, furthermore, considering the relatively small number of major plant expansion decisions pending at any given moment, the market seems very imperfectly competitive. (Certainly there appears to be a fair amount of lengthy, face-to-face bargaining that would hardly typify a competitive market.) This suggests that many firms may be receiving more than their minimum acceptable terms, which would allow some leeway for states to strengthen environmental regulation without sacrificing a lot of investment.

In sum, the view that "if states prefer more jobs to more environmental protection, we should accept that choice" seems much too simplistic. If they agree not to compete, states can attain a greater sum total of jobs and environmental protection.

A Regulators' Cartel?

But, someone might ask, why are we looking at the results of an agreement not to compete only from the point of view of the states themselves? It is, one might continue, hardly surprising to learn that economic actors can improve their situation by reaching a cartel agreement. That story is as venerable as conspiracies in restraint of trade and as modern as OPEC. Cartels may benefit those who agree not to compete, but they hurt those with whom they deal—in this case, companies considering investments.

Scholars working in the area of "public choice theory," applying economics to the analysis of political institutions, sometimes treat governments as service-producing "firms" and citizens (or businesses) as "consumers." As Milton and Rose Friedman state with characteristic pithiness in *Free to Choose:*

> You may decide to live in one community rather than another partly on the basis of the kind of services its government offers. If it engages in activities you object to or are unwilling to pay for, and these more than balance the activities you favor and are willing to pay for, you can vote with your feet by moving elsewhere. There is competition, limited but real, so long as there are available alternatives.

Under federal preemption, businesses will not be able to "switch brands"—to "vote with their feet"—by moving to a state with policies more attractive to them, because the different "sellers" will all be offering the same "product."

The proponents of this argument take on the advocates of federal preemption at the most fundamental possible level. They accept the empirical prediction that turning programs over to the states will produce a competition for business investment that will tend to lower taxes and regulatory standards. But they regard such competition as desirable rather than pernicious. And not, it is important to note, because competition leads to certain substantive results (low taxes or lax regulations) that they might regard as desirable, but rather because competition is better than cartelization at maximizing the sum total of economic welfare in society. Economic theory demonstrates that while cartels or monopolies can increase the welfare of those who undertake them, those benefits are smaller than the losses consumers suffer. Similarly, these critics even agree that all states will end up providing similar inducements and thus that no state, at the end of the process, will gain any locational advantage over other states. But they interpret this outcome

differently, as the normal way the competitive process works to promote the welfare of consumers. In any competitive market, producers will constantly undercut each other's prices to attract more business, but all producers will end up charging similar prices and none will gain any advantage, compared with his competitors. The only gainers are consumers.

The argument comparing federal preemption with a cartel among "producing" governments is an arresting one. It is also, I believe, mistaken. But I am glad it has been made, because it forces us to think about issues that are better treated from the perspective of philosophical than of economic theory and that otherwise tend to be obscured in discussions of devolution of federal programs.

Taking Preferences As They Are

Up until now, the various arguments I have discussed have all involved simply the interests or preferences of states and their citizens on the one hand and of businesses on the other. States and their citizens wanted environmental protection and businesses did not (or at least did not want to pay for it). In the prisoner's dilemma analysis, the states and their citizens were simply trying to maximize their welfare, given their preferences for both job-producing business investments and environmental protection. In the public choice analysis, the assumption was also that "all preferences are created equal," and that the welfare of businesses ought to be taken into account in calculating the sum total of overall welfare. The notion that we simply take preferences as they are—that we not judge among them for purposes of deciding what social arrangements are right—grows naturally out of the tradition of economic analysis. It has a tolerant, democratic ring to it as well.

But what if it should turn out that, for purposes of judging what social arrangements are right, the preferences of various actors should not simply be accepted? What if the desire of states for strict environmental regulation or welfare measures for the poor should not simply be thrown in together with the desire of businesses to avoid regulations or taxes? This is the argument I wish to develop in the remainder of this essay.

Let's start by examining the interactions between producers and consumers in an ordinary market for goods, say, oranges. Assuming away for the purposes of the discussion external effects on third parties, producers are doing nothing ethically wrong in growing and offering oranges for sale, and consumers are doing nothing ethically wrong in wishing to buy them. Producers have a right to produce, and consumers have a right to buy. It is within such a context of rights enjoyed by both parties that producer cartels are criticized. A producer cartel raises prices and restricts output for consumers. Adam Smith himself said in *The Wealth of Nations* that "the interest of the producer should be attended to only so far as it may be necessary for promoting that of the consumer"; and even if we look at the combined welfare of consumers and producers, we can demonstrate that cartels reduce the welfare of consumers more than they increase that of producers.

Does Business Have a Right to Buy Lax Rules?

Like any analogy, the analogy between federal preemption and a producer cartel gains its force from the assumption that there are no relevant differences between the two situations. There may, however, be an important difference: those who want to "buy" regulatory laxity may not be acting within their rights in the way those who buy oranges are. If not, then we have grounds for condemning the producer cartel but not the "federal cartel."

Imagine a situation where the people who possessed some skill that others valued extremely highly—say, that of inventing useful products—also had the desire, perhaps through some genetic linkage, to murder and devour small infants at periodic intervals. In deciding where to locate their businesses, one thing these inventors would take into consideration was whether the jurisdiction in question allowed them to satisfy this want by granting them an exemption from laws against murder and cannibalism. If states were competing among each other for the services of these inventors, one can surely imagine a situation where one state might decide, reluctantly, to allow the inventors to indulge their desires.

And once that one state did so, that state might attract all the inventors, which in turn might force other states to allow the practice as well or else lose the services of these valuable people. (Alternatively, other states might compete by offering other advantages that the inventors might value at least as much as the freedom to engage in their vice.)

Perhaps, a reader might suggest, no state would ever agree to such a thing. No valued skills are *that* valuable; no state would permit a practice like *that*. But that is not the point. The point is that the inventors want to do something unethical, something they have no right to do; whether they succeed in getting away with their brazen effort does not affect how we evaluate their attempt. If just any old citizen requested permission of his state government to kill and consume small infants, the request would not be given a moment's consideration. Surely the morality of a practice is not contingent on whether people who may want to behave that way happen to possess certain other skills. Yet a process of competition that sets no limits on the wants that the parties may satisfy would, by its dynamics, make morality exactly that. There is thus no presumption at all in favor of competition taking place in such cases. Indeed, there is the opposite. Any arrangement that prevented people from using the skills they have to wrest permission to kill and consume small infants, thus defeating such grossly unethical plans, would garner our hearty endorsement. Agreements among states not to compete constitute such an arrangement, and they are therefore to be applauded. It is thus impossible to decide whether an instance of competition among the states is justified until one has ethically examined the specific policy at issue. If businesses are asking permission to behave unethically in exchange for deciding to invest or locate in a particular place, there is no ethical need to give their desires weight.

Economic theory may demonstrate that a competitive regime would maximize net benefits, but philosophers have argued that other concepts—which they call duties—often outweigh such considerations. One such duty is the duty to respect people's rights, either by not interfering with something they do (negative rights) or by taking some action they are entitled to have you take (positive rights). Another is the duty to do justice, that is, to treat people as they deserve. This in turn implies treating people alike unless there is a relevant difference, under their control, between them. Within this framework, one may then debate questions such as: Do people especially sensitive to air pollution (the elderly or asthmatics, for example) have a right to air clean enough to protect their health? Do the poor have a right to a certain minimum standard of living? Do workers have a right to a safe and healthy workplace? Is it unjust that old people receive a lower level of services because they live in one area, where there are lots of old people and providing the service costs more, rather than another area, where there are few old people and providing the service costs less?

In any of these cases, if the determination is made that considerations of rights or justice require a certain public policy, then all citizens, including businesses, have a corresponding duty to act to achieve these policies. The desires of businesses to save money by spewing poisons into the environment or to avoid spending money to aid the poor then become analytically similar to the desire to kill and consume small infants. There is no moral obligation to take these desires into consideration—indeed, it is right to try to frustrate them—because the individuals concerned are asking to behave in ways they have no right to behave. (Which does not, of course, mean they have no right to *argue* that they have the right to behave that way.)

CLEARLY, TO STATE QUESTIONS of this nature is not to answer them. They will be subject to debate, and the political system is a proper arbiter of that debate. But I suspect that it is intuitive reactions somewhat along the lines I have been developing here that underlie much of the gut hostility to devolution of federal responsibilities that people express and much of the "unseemliness" that they perceive in competition among the states.

It was noted earlier that while the states could make themselves better off on balance by agreeing not to compete, there would likely be some costs in investment and jobs. That people with certain skills do desire to behave in unethical ways is a fact whose effects can unfortunately only be obviated, not eliminated, by a decision to do one's best (through an agree-

ment not to compete) to get around the fact of their desires. We could eliminate the effects of those desires only if there were a duty by firms to invest, with a corresponding government right to require investment. Such a duty would be very difficult to justify. Even then, it probably would not eliminate the effects of these desires completely, because forced investment would doubtless not be as productive, and therefore as job- or welfare-enhancing, as investment undertaken voluntarily.

The key question, then, is whether businesses have a right in any particular instance to behave as they like. If they do not, the simple fact that they happen to possess certain skills that might lead others reluctantly to let them realize their desires is irrelevant; it does not make the desires any more ethically acceptable. The proper method for determining what acts are right is debate and argument. It is not negotiation. To resolve these arguments—and thus to determine when competition among the states is desirable or reprehensible—the tools of ethical theory that philosophers use are the most appropriate ones. Economic theory is not enough. ■

Competition among the States

A Response

Walter Olson

STEVEN KELMAN BELONGS to the honorable tradition of writers who are eager to convince, but even more eager not to convince for the wrong reasons. He spends most of his article knocking down, after first setting up, one of the leading arguments for his own position. Having cleared the decks, as it were, of the specious reasons for agreeing with him, he unveils what he thinks are the true and good reasons.

WHEN HE DESCRIBES the usual case against competition between the states, Kelman is unflinching in facing its necessary underlying assumption: that businesses should be treated as "outsiders," whose welfare need not be taken into account in toting up the (mythical) general welfare. Even the most zealous advocates of anti-business measures, although they might regard stockholders as virtual non-persons, might hesitate before putting it that baldly, especially since it is so widely agreed nowadays that businesses pass most regulatory costs forward to consumers or back to workers. Whether for this or other reasons, Kelman is uncomfortable with this assumption, and eventually abandons it in favor of the view that only the immoral wishes of business ought to be ignored.

Once the proponents of the usual case for preemptive federal regulation have accomplished the spiritual task of achieving complete disregard for the interests of business, they turn to the highly practical task of depriving business of as much of the gains from trade as possible. Kelman acknowledges that everyone agrees business should continue to invest in new plants; the really irritating problem is that many investors receive more than would be absolutely necessary to keep them from giving up the game altogether. As Kelman describes it, the states' effort to nab every bit of the gains from trade for themselves, and thus deny it to the investor, takes on an ennobling and solemn tone of high moral purpose. That is curious, since so many ethical systems hold that the gains from trade should be shared between

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both traders, and since many, including Marxism, hold one side's denial of all gains from trade to the other side to be a virtual definition of exploitation.

Kelman's example of the drowning man and the buoy-thrower is designed to enlist our sympathy for just such exploitation. Most readers will sympathize with the drowner and say that the buoy-thrower deserves at most a token reward, perhaps a little plaque or newspaper citation, for his extremely valuable service. But several aspects of this hypothetical example are stacked: the unseemliness of haggling over price during an emergency, the ease of throwing a buoy, the presumed innocence of drowners. Changing just a few of these aspects also changes our intuition about denying any of the gains from trade to the buoy-thrower. What if the standard beach rules specified a five-dollar reward for rescues, but the drowner himself held up the rescue to haggle the price down to twenty-five cents? What if the buoy-thrower had crossed the Sahara Desert to reach the drowner's beach, although, having already sunk the effort into coming this far, he would settle for a twenty-five cent reward for actually throwing the buoy? What if the drowner had gotten into the water for some foolish or nasty reason? What if—to drop the drowner example—an inventor had spent long and weary decades perfecting a device that would bring untold benefit to the world, and all the potential buyers conspired to pay him only so much as would barely compensate him for not having pursued the next most advantageous possible career—say, as a day-laborer?

In his buoy-thrower example, and later with his example of talented baby-killers, Kelman makes it clear that the real adversaries from whom the gains from trade must be squeezed and whose interests are to be excluded from the social welfare calculus are not businesses but talented individuals—in a word, producers. This, too, is refreshingly candid. The instant we put producers' interests on a par with everyone else's, it becomes apparent that state governments can benefit from an agreement not to compete only by exploiting their monopoly power over some groups of citizens, whether their own or someone else's. Once we re-import the interests of the pariah producer class into the overall calculus of social welfare, in other words, the states' agreement not to compete does, indeed, begin to look something like a cartel.

Confiscating business's gains from trade would look less disreputable if it turned out that businesses themselves exercised monopoly power in plant location decisions, and Kelman goes on to suggest that this is the case. There might be something to this view if there were only fifty employers and thousands of states, rather than the reverse, and if those employers had some method (like federal preemption) by which they could bind themselves not to deal with recalcitrant states. But as it is, the only piece of evidence Kelman offers—the extensive face-to-face bargaining between states and businesses over new plant location decisions—can much more plausibly be seen as an example of the *states'* monopoly power, specifically of the states' successful use of the techniques of price discrimination that Kelman says are "difficult" for them.

Diverse States Make Bad Cartels

Although Kelman makes no sustained effort to refute the cartel analysis of federal preemption on its own terms, preferring instead to dismiss it as irrelevant to his real concerns, he does take a shot at another argument against federal preemption, the one that cites differing state tastes. States, he admits, do have differing preferences as to the mix of jobs and environmental protection. These "preferences" only in part reflect actual citizen preferences; in part they reflect physical factors like a potential polluter's proximity to vulnerable populations or scenic vistas, or whether the prevailing winds blow pollution out to sea. Still, he says, a cartel agreement among states can give all the states a better deal.

This is not so economically provable as he hopes, if all the states must adopt the *same* standard; it depends, in fact, on just how much their tastes differ. Like OPEC and other cartels, the cartel of states will find that the pricing strategies that suit its high-cost producers do not suit its low-cost producers, and vice versa. In this case, a "high-cost producer" of regulatory laxity, the equivalent of Algeria in OPEC, might be Oregon, which suffers intense trauma at the very thought of a smokestack, while a "low-cost producer," the equivalent of Saudi

Arabia, might be New Jersey. If Oregon and New Jersey must accept the same level of "cartel output," or national air quality standard, it will be either too lax for Oregon or too strict for New Jersey. The gains from the cartel's monopoly power will then have to be very great to compensate the discontented cartel members for what they see as the "wrong" choice of output level. Otherwise the cartel will not be able to make all its members better off, and it will fly apart. (The cartel among the states, however, can, unlike OPEC, invoke federal power to prevent its members from defecting.)

Cartels whose members have widely varying costs of production can best hold together if they bow to economic reality and have their low-cost producers pay their high-cost producers to shut down. This would mean abandoning the effort to hold Oregon and New Jersey to the same standard, letting industry flow to or stay in the areas where it does the least perceived damage (perhaps the Northeast), and having the latter states pay the rest of the states for their agreement not to compete. The Clean Air Act already maintains such a split standard through its "prevention of significant deterioration" provisions, which keep Oregon from allowing its air to get anywhere near as dirty as New Jersey's. Of course, New Jersey does not pay Oregon to stay out of the competition for industry; that is where the coercive power of the federal government comes in.

Environmentalists are quite willing to maintain a split standard in practice, as embodied in "prevention of significant deterioration," but highly reluctant to admit it in theory. They believe, as Kelman puts it in his introduction, that pollution questions should be decided "on their own merits," but that these "merits" do not include the ways the actual effects of pollution vary according to location. Since states would take those questions into account, on this view, they should not be entrusted with the decisions. It is as if the law were to hold that the location of blasting quarries ought to be decided "on its own merits," that the proximity of music schools was not among those merits, and then that all blasting quarries should have to be quiet enough not to disturb any music schools they might happen to adjoin.

It is not clear whether Kelman considers locational effects, as expressed in states' preferences, to be "merits" of the case. If they are not, the merits on which he wants us to decide had better be good. It turns out that he wants us to ignore material merits entirely, as being things corruptible and of this world, and focus our minds solely on ethical truths.

Oranges Sí, Cigarettes No?

At this point the hypothetical examples get even less cheery, as Kelman begins to talk about baby-killers, whom he uses as prototypical rights violators. Kelman's formulation of rights takes in practically no rights to be left alone by the government, but all sorts of rights to the cooperation of one's neighbors. You are a rights violator, it seems, if you contribute to the pollution problem by igniting combustible material, probably even a cigarette. Nor will it help if you have the consent of those upwind at the next desk, since their "right to a safe and healthy workplace" in practice means that they may not agree to work in any other kind. Nor will it even help for you to give up social intercourse of any kind, since you are also violating rights if you are reluctant to shell out your money to equalize the funding levels for old-people's services from here to Katmandu.

Kelman ingenuously declares that he has not demonstrated the existence of these rights, that they are all subject to future debate. They certainly are. At least he does not fudge the question of who is to pay for them: citizens and businesses, he announces, will have a "duty" to do so.

Right about here you may begin to suspect that Kelman, like certain medieval monks, believes there is no action so trivial as not to be super-charged with ethical content. In practice, this belief tends to abet the politicization, and resulting government control, of everything whatsoever; society gets barnacled with ersatz "rights," and eventually sinks of their weight. Hence it is not reassuring when, searching for an example of what *is* to escape politicization, what producers *will* be allowed to distribute on the market, Kelman selects the humble orange. What step of the process of bringing oranges to market, exactly, does he intend to leave free of political interference? Hiring migrant workers to pick them? Spraying them for medflies? In order to posit that "producers are doing nothing ethically wrong in growing and offer-

ing oranges for sale," he has to start by "[a]ssuming away for the purposes of the discussion external effects on third parties"—which assumes away practically everything anyway. But if he does not mind disrupting other consenting economic relations, such as the relation between employers and employee, it is hard to see why he sticks at disrupting that between buyer and seller. Why this unwonted concession to voluntary trade?

Federalism and Government Failure

Yet it is not his statist objectives, but his choice of the level of government to carry them out, that is at issue here. When Kelman sees something he thinks is bad, he wants to fling the nearest and biggest government at it, for fear it will go unpunished otherwise. This is not the common view. Generally we entrust the punishment of those crimes that we fear most to state government, in the evident belief that it does a better job of punishing them than the federal government would. There are no overall federal statutes against murder or mayhem, for example, only statutes covering some special cases like political assassinations. (This may also indicate that the questions on which there is a great moral consensus are *less* likely to be federally preempted than those on which there are differences of opinion; in other words, that federal preemption is resorted to mostly by those who do *not* have a societal consensus behind them.)

Kelman has only partly escaped the old "barking cat" fallacy—the belief that we can make government do any particular set of things we see fit, just as if we could have cats that barked if we really wanted them. The whole theory of "government failure," explored with such great success by scholars these last two decades, is devoted to exploding this fallacy. In fact governments, like domestic animals, have an internal logic of their own, not to be defied by mere force of will. Kelman has overcome the fallacy with respect to state governments: he is not sure he can prevail on Massachusetts to do the right thing, even when it is something as basic as banning baby-killing. But he does believe he can shape the *federal* government to his exact wishes—that he can make it use its power of overriding the states to do good, without setting in motion forces that will also lead it to do bad. Someday Kelman may encounter a case where he thinks most of the states are trying to do the right thing, but where the federal government is using its preemptive powers, acquired in earlier controversies, on what he considers the wrong side. At that point he may cease to identify so strongly with the federal government's point of view, and may even regret the eagerness with which he helped build up its power.

It could also be, of course, that he does not find it very satisfying to stamp out some practice merely in Massachusetts if it continues elsewhere; the thought that it is going on elsewhere bothers him so much that he is willing, by supporting federal preemption, to risk losing his right to stamp it out even in Massachusetts. (Much of this sort of urge to stamp out faraway practices seems to be at the heart of a lot of support for regulation by international bodies like the United Nations, and many of the arguments Kelman uses will recur in the upcoming battles on those issues.) Most curious, in this respect, is his worry that the baby-eaters will leave his state to abide in another one, even if all the other state is offering is some innocent inducement, rather than the chance to indulge their vice. Shouldn't he bid them good riddance? Wouldn't Massachusetts be better off without them? Or is he less concerned about their vices than he is about his right to go on profiting from the fruits of their labors?

RIGHTS OF EMIGRATION—of persons and, especially, of property—are low down on the list of "human rights" nowadays, when they are acknowledged at all. And probably it is those who favor substantively free and non-coercive arrangements who are most likely to prize the opportunity to "choose laws" by moving from one jurisdiction to another. But emigration rights are the miner's canary of rights in general; they are the first to go when the atmosphere becomes suffocating, and conversely if they are in good health the other rights are probably not in mortal danger. Competition between the states provides content and substance to our right to move ourselves and our property from one state to another. That is why it should be praised as much for its moral as for its practical virtues. ■