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# Comment: Federalism and Two Conceptions of Rights

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## COMMENT: FEDERALISM AND TWO CONCEPTIONS OF RIGHTS

CHRISTOPHER J. PETERS<sup>†</sup>

Does the American system of federalism advance or retard the protection of individual rights? The question cannot be answered satisfactorily without determining, in advance, which rights are worth protecting.

Imagine two different conceptions of individual rights. On the first conception, which I will refer to as the *public* conception, the individual rights that matter most are rights against the *government*: rights such as freedom of speech, press, and religion, due process and equal protection of the laws, freedom from unreasonable searches and seizures, and so on. These are the rights codified in the American Bill of Rights, broadly construed to include the first eight amendments to the Constitution as well as the Fourteenth and Fifteenth.<sup>1</sup>

On the second conception of individual rights, which I will call the *private* conception, the rights that matter most are rights against *other private individuals* (or groups of private individuals, such as corporations). Such rights include the rights to be free from bodily assault, from theft of property, from forcible labor, and perhaps others. With the notable exception of the Thirteenth Amendment,<sup>2</sup> these kinds of rights seem to find no overt expression in the federal Constitution.

I want to suggest in this brief Comment that one's views on the

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1. See U.S. CONST. amends. I-VIII, XIV, XV.

2. See U.S. CONST. amend. XIII.

relationship between federalism and individual rights depend to a very great extent on which of these conceptions one prefers. The different consequences of choosing each conception over the other have been nicely demonstrated by two of the presentations made this afternoon, those of Professor Hamilton and Professor Waits.<sup>3</sup> I will focus on them, although I believe the distinction between the two conceptions also underlies much of what Professor Chemerinsky has said in his critique of the Supreme Court's federalism jurisprudence.

Let me begin with the paper presented by Professor Waits. In Professor Waits's view, the Supreme Court's decision in *United States v. Morrison*<sup>4</sup> retards individual rights by making it more difficult for women like Christy Brzonkala to redress acts of gender-based violence carried out against them. By means of the Violence Against Women Act,<sup>5</sup> Congress had sought to vindicate the rights of women to be free from such violence. In *Morrison*, however, the Court interposed federalism as an obstacle to this vindication. Norms of federalism, then—at least as interpreted by the *Morrison* Court - had the effect of hindering rather than promoting the protection of rights. (Professor Chemerinsky also takes this view of *Morrison*.)

Note that Professor Waits implicitly adopts the second, private conception of rights I described earlier. In assessing the value of federalism, her chief concern is for rights individuals have against other private parties, such as the right to be free from gender-based violence. By this standard of rights, federalism does not seem to fare very well, at least in the *Morrison* case. Far from facilitating the protection of private rights, federalism was applied in *Morrison* to actively frustrate that protection by disabling the institution most willing to provide it—the federal government. Federalism, that is, became a sword against rights rather than a shield around them.

Contrast Professor Waits's private conception of rights with

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3. Professor Kathleen Waits made a presentation at the Symposium, however she was unable to submit her article to this *Wayne Law Review* issue.

4. 529 U.S. 598 (2000).

5. See 42 U.S.C. § 13981 (2001).

Professor Hamilton's public conception. For Professor Hamilton, federalism is a safeguard, or a collection of safeguards, against the overextension of *government's* power to coerce individuals. Professor Hamilton implicitly recognizes that most legislation restricts individual freedom by its very nature; even legislation designed to protect the rights of some people risks infringing the rights of others. The classic example is the criminal law, which risks punishing innocent parties to protect the rights of the community. In the context of the Violence Against Women Act, a strict civil libertarian might worry that providing civil remedies or criminal penalties for violence "motivated by" gender goes beyond merely assigning consequences to actions and impairs the individual's rights to think and to speak, however offensive that thought or speech might be to others. The costs to individual rights imposed by such a statute might outstrip the benefits provided by it. On this view, by placing obstacles in the path of broad national legislation, a system of dual sovereignty diminishes both the risk and the cost of legislation that produces a net detriment to individual rights.

Professor Hamilton's unspoken adoption of a public conception of individual rights, and Professor Waits's adoption of a private conception, produce interesting implications for their respective methodologies. Professor Hamilton's defense of federalism is built upon a big-picture view of the relationship between the national and the state governments; for her, federalism is not so much a question of how to allocate power in particular cases, or over particular subjects, as it is a question of how to maintain an enduring *balance* of power between the two levels of government. As such, Professor Hamilton's methodology is one of institutional theory, of predicting the long-term consequences of particular decisions on the overall allocation of sovereignty and thus on the tension between sovereignty and individual rights.

Professor Waits's methodology could hardly be more different. She takes a narrative or "storytelling" approach, which she readily acknowledges is intended to focus our attention on the impact that seemingly abstract decisions of doctrine can have on real people—on the implications of federalism for particular individuals

in particular cases. Her methodology thus is particularized and experiential rather than generalized and theoretical.

This contrast in methodologies, I think, is closely connected to the contrast in substantive conceptions of rights I described a moment ago. A public conception of rights is not very well supported by a case-specific, experiential methodology, for two related reasons. First, there are so many variables affecting government's respect for individual rights that it is difficult or impossible to tell, in any given case, how particular rights are affected by a certain allocation of power between the state and federal governments. Second, in cases where individual rights clearly have been violated by government, courts find remedies in the substantive rights provisions of the Constitution rather than in its structural provisions. When the federal government burdens free speech, for instance, a court will decide the case pursuant to the First Amendment, not the Commerce Clause. Someone looking for a connection between federalism and the protection of rights, then, must focus rather abstractly on large questions of institutional structure rather than on particular cases.

A private conception of rights, however, lends itself nicely to case-specific and even emotive analysis, because it suffers from neither of these data collection problems. Usually it is relatively simple to isolate a connection between private individual rights and legislation designed to protect them. The federal Violence Against Women Act, for instance, clearly vindicated the right to be free from gender-based violence. And cases involving private rights are virtually never decided pursuant to the substantive rights provisions of the Constitution, because those provisions, with the rarely invoked exception of the Thirteenth Amendment, do not apply to private conduct. Thus it normally is not difficult to trace a particular effect on private rights to a particular allocation of federal and state power. In *Morrison*, for example, a decision upholding Congress' authority to create the Violence Against Women Act would have promoted individual rights by preserving the Act's protections against gender-based violence, while the Court's actual decision to limit Congress' authority impaired individual rights by

destroying those protections.

It therefore appears that those who prefer a private conception of rights, as Professor Waits does, can assess the connection between rights and federalism by looking to specific instances involving specific policies and specific people. Those who prefer a public conception of rights, like Professor Hamilton, must be content with more abstract arguments of theory. The result is to give the proponents of private rights something of a rhetorical advantage.<sup>6</sup>

In my view, however, neither methodology is sufficient by itself; nor is either substantive conception of individual rights complete without the other. Let me begin with the substantive conceptions. To envision federalism as primarily about protecting individual rights from public impairment is, to borrow a metaphor from Calvin Massey, to see its yin without appreciating its yang.<sup>7</sup> Federalism is about *empowering* government, not just about limiting it—a point Professor Chemerinsky makes quite effectively in his contribution to this Symposium. The Constitution was, after all, a fundamental departure from the status quo under the Articles of Confederation, in which the national government wielded almost no sovereign authority. A reading of federalism as principally a source of limitation on national sovereignty ignores the transformative impact of that departure; it elides the fact that the Constitution greatly *enlarged* the power of the national government.

To be sure, the Framers, in speaking of individual rights, often voiced the concern that individual rights would be trampled by the public. Thus Madison in *Federalist No. 10* fretted about the danger

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6. Perhaps not, however, in the legal academy, which often appears more receptive to bloodless, abstract accounts than with uncomfortable stories about real people.

7. See Calvin Massey, *The Tao of Federalism*, 20 HARV. J.L. & PUB. POL'Y 887 (1997).

to "the rights of . . . citizens"<sup>8</sup> posed by majority factions,<sup>9</sup> and Hamilton in *Federalist No. 78* justified an independent judiciary as a shield for individual and minority rights.<sup>10</sup> But the Framers also understood that protection of the individual's rights against other private parties was what justified having government in the first place. This was the import of Madison's famous dictum in *Federalist No. 51* that "[i]f men were angels, no government would be necessary."<sup>11</sup> The Framers, after all, had read Hobbes and Locke, both of whom saw in government an essential remedy for private violence.<sup>12</sup>

The Constitution, then, is aimed both at limiting government and at empowering it; it is aimed both at preserving public rights and at protecting private ones. The federalism provisions of that Constitution, as *parts* of the Constitution, must be read in this spirit. The sovereignty granted the national government by the Constitution is not infinitely broad, but it is (nearly) infinitely deep; as the Court held in *McCulloch v. Maryland*,<sup>13</sup> Congress has the power to employ "all means which are appropriate" to the limited ends that are set for it.<sup>14</sup> And one of the ends of federal power, one of the most important ones, must be the defense—and indeed the advancement—of individual rights. This truism arises from the very fact of the Constitution itself, which transformed an alliance of independent states into a unified nation under the head

8. THE FEDERALIST NO. 10, at 123 (James Madison) (Isaac Kramnick ed., 1987).

9. See *id.* at 122-28.

10. See THE FEDERALIST NO. 78, at 436-42 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

11. See THE FEDERALIST NO. 51, at 319 (James Madison) (Isaac Kramnick ed., 1987).

12. See, e.g., THOMAS HOBBS, LEVIATHAN 223-28 (C.B. Macpherson ed., Penguin Books 1968) (1651); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 305, 323, 366-69, 374-77, 395-99, 401-09 (Peter Laslett ed., Cambridge Univ. Press 1963) (1690).

13. 17 U.S. 316 (1819).

14. *Id.* at 420 (emphasis added). Violation of specific rights guaranteed in the Constitution, of course, would not be an "appropriate" means.

of a powerful and potentially energetic central government.<sup>15</sup> The truism is confirmed by the Reconstruction Amendments, particularly by the clause of each amendment that allows Congress to enforce its commands "by appropriate legislation."<sup>16</sup> To interpret federalism norms solely according to a public conception of rights is to undervalue or ignore the extent to which the private conception is deeply embedded in the fabric of our constitutional structure.

Now to methodology. Which approach is most appropriate to assessing the relationship between federalism and individual rights: Professor Hamilton's broad structural approach, animated by rather abstract theory, or Professor Waits's case-specific approach, animated by experience and even emotion? The answer in my view is that each approach is best when played against the other.

On the one hand, assessing federalism on a case-by-case basis, with the focus solely on the effects of the particular regulation being challenged, is penny-wise but pound-foolish. Concern for integrity of process must on occasion trump anxiety about particular results, even horrible ones. This is because process can itself protect individual rights, a fact we implicitly acknowledge when, for instance, we require prosecutors to prove guilt beyond a reasonable doubt and plaintiffs to prove liability by a preponderance of the evidence. Federalism belongs to this same family of procedural safeguards; and so, as Professor Hamilton demonstrates, its very point is lost when we weaken or ignore its requirements for the sake of achieving satisfying results in particular cases.

At the same time, we must continually reassess whether the

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15. Cf. *THE FEDERALIST* NO. 26, at 196 (Alexander Hamilton) (Isaac Kramnick ed. 1987), in which Hamilton, defends the proposed grant of power to Congress to appropriate money "[t]o raise and support armies," see U.S. CONST. art. I, § 8, cl. 12, notes the failure of the Articles of Confederation to "stop at that happy mean which marks the salutary boundary between POWER and PRIVILEGE, and combines the energy of government with the security of private rights."

16. See U.S. CONST. amends. XIII, § 2, XIV, § 5, XV, § 2.

supposed safeguards of federalism really work as promised. This is where Professor Waits's evocative technique of storytelling becomes especially valuable: it reminds us that the connection between federalism and individual rights cannot be taken for granted. The case of Christy Brzonkala suggests that dual sovereignty sometimes harms individual rights more than it helps them, because it sometimes gets in the way of innovative federal legislation designed to protect rights from private encroachment. If we begin to see enough examples like this, we might conclude that the costs to individual rights imposed by the Court's heightened enforcement of federalism outweigh its benefits. Indeed, one could make a respectable case that we have seen plenty of examples like this already—that since the Civil War, federalism has served far more often as an obstacle to the protection of rights than as a facilitator of that protection. (Professor Chemerinsky's contribution here goes a long way toward making precisely this case.)

Perhaps, then, courts should use the drama of particular cases like *United States v. Morrison*<sup>17</sup> not as a reason to override the safeguards of federalism, but as a reason to question the efficacy, or at least the application, of those safeguards. And perhaps that process of questioning should proceed on the assumption that private rights—those we have with respect to our fellow citizens—are as worthy of protection as the rights we have with respect to our government.

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17. 529 U.S. 598 (2000).