

2-1-2015

## Towards a Universal Field Theory of National Private Rights and Federalism

Roderick M. Hills Jr.

*New York University School of Law*, [roderick.hills@nyu.edu](mailto:roderick.hills@nyu.edu)

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### Recommended Citation

Roderick M. Hills Jr., *Towards a Universal Field Theory of National Private Rights and Federalism*, 76 *Mont. L. Rev.* 41 (2015).

Available at: <https://scholarworks.umt.edu/mlr/vol76/iss1/3>

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## TOWARDS A UNIVERSAL FIELD THEORY OF NATIONAL PRIVATE RIGHTS AND FEDERALISM

Roderick M. Hills, Jr.\*

I want to thank the *Montana Law Review* and the students at University of Montana Law School for asking me to participate in this wonderful conference. They couldn't provide for the extraordinary scenery and weather, but they could provide for extraordinary panels. And one of the things that I really love about this conference is that on every panel the law review has mixed up law professors with judges, prosecutors, and really experienced people. It was a nice combination. So thanks a lot for having me. I have had a great time.

I won't try to keep up the high standards, but I will try to make my PowerPoints colorful. I will try to say something very general, and my ambition is to say it quickly. My watch says it's 4:47, and I hope that I can do this in 35 or 40 minutes.

The general idea—which doesn't sound like a 35 or 40-minute thing—is called “Towards a Universal Field Theory of National Private Rights and Federalism.” It does not sound like a short topic. But the idea is to talk a little bit about the relationship between federalism and national private rights—that is to say fundamental rights—that the national government protects.

What I want to talk about is what I think is a misunderstood relationship between national rights that protect private organizations and private entities; and subnational governments' powers, which I will call federalism. I think there is a misunderstood relationship between national private rights and federalism. They are considered to be not only different, but opposed to each other.

Private rights and federalism are not just different things, but aimed at different ends. Private rights are enforced by courts to protect private individuals, whereas subnational governments' powers are exercised by legislatures to protect communities by burdening individuals. So the idea is that we oppose these things to each other. There is federalism on one side (and that's for communities—which are important) and they burden individual rights; and there are national individual rights (or national private rights—there's an important distinction) on the other side, and they come in to prevent those burdens and protect individuals.

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\* Roderick M. Hills, Jr. is the William T. Comfort, III Professor of Law at New York University School of Law.

I want to think of a picture. You've got your subnational government, for instance, the New York State House. The state legislature confers powers on a community. The community clobbers the individual with an anvil. Maybe that's a good thing. Maybe the anvil (which the community drops on the individual) is outweighed by the benefit to the community. You get it? Outweighed? That's the image we have in our head.

Where do national rights come in? Well, there's the Bill of Rights: it provides liberties, and the liberties stop the anvil. Right? The liberties intervene to protect the individual from the community, and we balance whether the interest to the individual is greater or less than the interest to the community. That's the picture we have, and it's mistaken in every single respect.

The idea that we should look to national private rights to protect individual liberties, and look to federalism not to protect these liberties, seems to me to be mistaken. I want to talk about why I think that's mistaken, and where I think the mistake comes from. Now, the theory that I'm describing—where liberties of individuals are protected by national private rights, and communal power and only communal power is protected by federalism—comes from a historical moment and a historical text, both classics in U.S. history.

The historical moment of course is this:

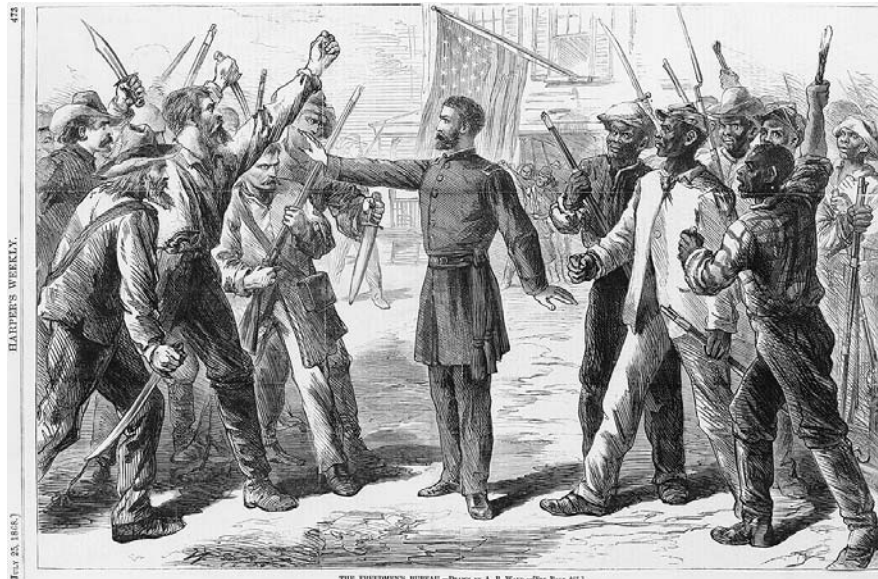


Figure 1: A. R. Waud, Drawing, "The Freedmen's Bureau" (1868), Lib. of Cong., *The Freedmen's Bureau*, <http://perma.cc/WPU2-CLTF> (<http://www.loc.gov/pictures/item/92514996/>) (accessed Mar. 9, 2015).

It is the Reconstruction. It is the Union Blue Army, and later federal judges, interceding to protect the freedmen from white racist mobs. And that sticks in our mind as the essence of what a national private right is all about. It's to intercede to stop that kind of disaster—that is the paradigm of what national private rights are about.

And the classic text, of course, is *Federalist No. 10*.<sup>1</sup> Madison says: “Look, if you extend the sphere of a stronger national government, you're taking a greater variety of parties' interests to make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens. They'll be disunited. Even if they can get a common motive, it'll just be difficult for them to act. And because it'll be difficult for a majority to coalesce in a heterogeneous republic, the national government is much more likely to protect minorities and individuals from majorities.”<sup>2</sup> It's such a classic image in constitutional law that it's been absorbed by everyone.

That text and that image constitute the foundation for what I think is a mistaken view of the relationship of federalism and national public rights. I want to say everything about this picture is wrong. In what follows, I will argue in favor of the following positions that, taken together, propose what I pretentiously call a “universal field theory of private rights and federalism.” As I say, I want to unify these things together. There are only five things I want to say. It's now 4:52.

First, I want to make a basic realist point about what national private rights often do. They often create powerful private organizations that don't help individuals but oppress them.

The second point I want to make, and I will use *Hobby Lobby*<sup>3</sup> as an example, is that federalism (or subnational government) does not simply safeguard community power but often protects individuals from these national, private rights that endanger individuals. National private rights can be oppressive.

The third thing I want to talk about is the forgotten Madison. Not the Madison of *Federalist No. 10*, but the Madison of three years later, in essays<sup>4</sup> that nobody ever reads anymore, but which were extremely important to Madison and to his conception of the Necessary and Proper Clause. Essentially, Madison had a theory of dysfunction not only of state govern-

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1. James Madison, *The Federalist No. 10*, in *Madison: Writings 1772–1836* at 160–168 (Jack N. Rakove ed., Lib. of Am. 1999) (hereinafter *Federalist No. 10*).

2. *See id.* at 166.

3. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

4. James Madison, *Public Opinion*, in *Madison: Writings 1772–1836*, *supra* n. 1, at 500–501 (hereinafter *Public Opinion*); James Madison, *Consolidation*, in *Madison: Writings 1772–1836*, *supra* n. 1, at 498–500 (hereinafter *Consolidation*).

ments—that’s *Federalist No. 10*: they’re too homogenous, they act in a majoritarian way and encourage majority factionalism<sup>5</sup>—but also a theory of the dysfunction of the national government. It’s just the mirror image. The national government is dominated by minoritarian interests, by minorities that will try to extract special rights or special protections—national private rights—and use them against individuals.<sup>6</sup>

The fourth point that I want to make is that the Rehnquist Court’s efforts to limit federal power with this funny category of non-economic affairs is an effort to revive in some ways Madison’s second period, the forgotten period. And it deserves a little more respect than it sometimes gets. Because essentially, federalism doctrine is trying to take into account the minoritarian worry and measure that against the majoritarian fear of *Federalist No. 10*.

And finally I want to talk about a case study which will involve Title IX. If I can’t talk about it because my time is up then, you know, we can talk about it in Q and A. So that’s my basic mission.

Let me start with a basic question. How do private rights create private governments that can sometimes be dangerous or oppressive? Here’s a simple picture. We have public governments—there are fifty states, but also, overlaying those public governments are private governments. And the private governments are creatures of property, contract, and tort. The fact that they are creatures of private law doesn’t make them less formidable. It’s a stale, but reliable, realist truth that the powers enjoyed under common law are not functionally different than sovereign powers, because they allow these organizations to have serious effects on their employees, their congregations, their consumers, their shareholders, their listeners.

So, if you have a sort of Robert Hale or Lewis Jaffe realist view of the world,<sup>7</sup> these are also governments. The Mormon Church is a powerful government. And if, for instance, we want to say that the Mormon Church as a private government is weaker than public governments, because after all, all these private governments are constrained by foot voting, as Ilya Somin would say,<sup>8</sup> the response might be, well, public governments are

5. *Federalist No. 10*, *supra* n. 1, at 165–166.

6. *Public Opinion*, *supra* n. 4, at 501 (“The larger a country, the less easy for its real opinion to be ascertained, and the less difficult to be counterfeited; when ascertained or presumed, the more respectable it is in the eyes of individuals.”).

7. See generally Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *Political Sci. Q.* 470 (1923); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 *Colum. L. Rev.* 603 (1943); Robert L. Hale, *Freedom through Law: Public Control of Private Governing Power* (Colum. U. Press 1952); Louis L. Jaffe, *Judicial Control of Administrative Action* (Little, Brown & Co. 1965).

8. See Ilya Somin, *Democracy, Foot Voting, and the Case for Limiting Federal Power*, 76 *Mont. L. Rev.* 21 (2015).

constrained by foot voting too, and I dare say it is much easier to move from Missoula to Lolo than it is to leave the church of your fathers. And so if you ask me who has more power, constrained by foot voting, I have no doubt that the Mormon Church is much more powerful than Missoula. People leave Missoula every day, and they do it just because they might be miffed or because they like Butte better.

I could foot vote my way out of, say, I don't know, NYU Law School, but I can only do it if I can get University of Montana Law School to hire me; and given that there's a lot of collusion among law schools it might be difficult for me to drive certain kinds of bargains. There is foot voting among law schools—a lot of it—but there's also cartelization among law schools. Again, these private organizations have serious power. I call them "private governments." And we can go on: private corporations, some with religious points of view, some without; nonprofit organizations; and trade unions.

And all of these governments are not only competing with fifty states but three thousand counties, twenty-five thousand general purpose governments and about eighteen thousand school districts and a lot of special districts too numerous to mention. And so I want you to think about the federal system as actually two federal systems: a public one and a private one, and they compete with each other. What private rights do is empower the private federal system—that's what they do, and it could be a good thing or a bad thing.

What I want to talk about next—the second of my five points—is how subnational governments sometimes promote individual liberty and equality by limiting national rights. How could I illustrate that? Well, I want to talk about the case of *Burwell v. Hobby Lobby*. *Hobby Lobby* involved the Court's holding that the Religious Freedom Restoration Act, RFRA<sup>9</sup>—which was an effort by Congress to protect private rights, so it's a national private right—limited the scope of the employer mandate under the Affordable Care Act.<sup>10</sup> The Court held that RFRA barred Congress from requiring private corporations to pay for employees' health insurance covering medical services that were regarded as religiously objectionable by the corporation's shareholders.<sup>11</sup> So this is a case where a private national right limits the ACA's employer mandate.

Now, I think that there is a non-trivial argument that this national protection of private rights actually diminishes the total sum of true individual liberty. Is it a correct argument? No, it's rested on the intuition of female employees who now lost equal access to an important benefit. They lost

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9. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012).

10. *Hobby Lobby*, 134 S. Ct. at 2759, 2785.

11. *Id.* at 2783–2785.

some liberty and some equality. Now of course the question is controversial. One could argue that the system of private government protected by *Hobby Lobby* does a good job of protecting employees' access because employees can vote with their feet to go work for another employer. There is competition in foot voting that constrains *Hobby Lobby*. The number of corporations that will actually avail themselves of *Hobby Lobby* is trivially small, given that the collective action problems faced by religious shareholders who want to take over corporations and invest them with a religious purpose are pretty high.

Both shareholder law (or corporate law)—the law of voice—and the employment market—the law of exit—constrain *Hobby Lobby* in important ways. We shouldn't assume that *Hobby Lobby* and RFRA—this national protection of private rights—oppress individual liberty. But we should be prepared to argue it: it's plausible. Because there are a significant number of people, I dare say, in this room, who believe that labor markets are not perfect, and that labor markets give advantages to large employers (especially in a slack labor market), and some people might also think that the limits on shareholders are not ideal. So there's a question about whether private organizations are adequately constrained by the rights that define their powers.

Now, let's look at the system of federalism, which is opposite this national private right. Out of the Court's doctrine of the Fourteenth Amendment, Section V powers announced in *City of Boerne v. Flores*,<sup>12</sup> Congress is prohibited from enforcing RFRA against state laws,<sup>13</sup> which means of course that state governments can decide to impose exactly the mandate that was struck down in *Hobby Lobby* against any employer within their territory. And so if you are interested in protecting the individual liberty of female employees to get contraception at the employer's expense, if you thought that was an important liberty, federalism is the one that's protecting it, not national private rights. National private rights are endangering it. And so that's an immediately intuitive counterexample, a politically correct one, that I'm giving you to illustrate why I think sometimes national private rights are a danger to individual liberty and not a protection.

*Hobby Lobby* and *Boerne* are not the only examples of state attacks on nationally guaranteed private rights that actually promote liberty. During the 1840s and 1850s, northern states enacted various anti-kidnapping laws, designed to frustrate slave-catchers' efforts to recover fugitive slaves.<sup>14</sup> The

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12. 521 U.S. 507 (1997), *superseded*, Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5.

13. *Id.* at 519–520.

14. *E.g.* *Laws of the State of New York of a General Nature* ch. 375, §§ 1–4, 395–396 (Thomas H. Hyatt 1841).

important thing to understand is those slave catchers were enforcing a textually specific, national private right under Article IV, section II, clause 3, the Fugitive Slave Clause.<sup>15</sup> And the U.S. Supreme Court, the champion of rights, gave those private rights broad reading in *Prigg v. Pennsylvania*,<sup>16</sup> an opinion written by Justice Story, the hero and champion of the Marshall Court's idea that vested private rights should trump state power.

And so I guess if you believe that national private rights stand for individual liberty, and federalism stands for communities limiting individual liberty, then this picture makes sense to you. The Massachusetts citizens that enact these protections of fugitive slaves are a majoritarian faction limiting fundamental national rights; and Joseph Story, who wrote *Prigg v. Pennsylvania*, is a judicial protector of fundamental national rights. And that's true as far as it goes. Story is protecting national private rights: constitutional rights, specific rights, rights that absolutely are guaranteed by the Constitution. Here's a flyer that was handed out by Massachusetts advocates of liberty:

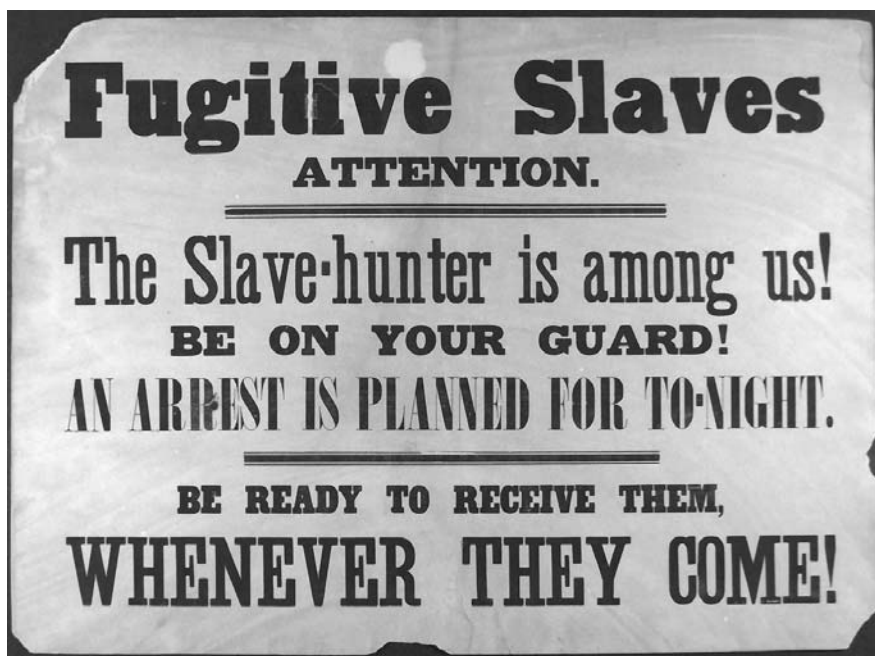


Figure 2. History.com, *Fugitive Slave Acts*, <http://perma.cc/8HTE-Q664> (<http://www.history.com/topics/black-history/fugitive-slave-acts>) (accessed Mar. 9, 2015).

15. U.S. Const. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

16. 41 U.S. 539 (1842).



The Massachusetts citizens were urging fugitive slaves not simply to hide but to avail themselves of state law. They were certainly acting as a mob—limiting, lawlessly, perhaps, national private rights. I say they were advancing individual liberty.

And so, do not think that federalism is a limit on individual liberty and national law is the defining source of individual liberty. It is naive to believe that national protection of individual rights is identical to the safeguarding of individual freedom.

Now, third point. What was Madison's theory that would make this more than just an occasional mistake? I mean, we all make mistakes. Just because Justice Story and the framers of the U.S. Constitution made perhaps excessive concessions to slave owners to get them to join the Union, does not mean that the national government is systematically likely to enforce national private rights that are oppressive, right? Well, Madison had a theory that nicely complements *Federalist No. 10*. It was a theory that he announced in pamphlets in the *National Gazette*<sup>17</sup> shortly after the Constitution was ratified and the First Bank of the United States was proposed.

And that theory, just to set the historical record straight, was essentially a theory that said the national government is uniquely prone to minoritarian capture. Madison argued a continental-scale democracy, the kind of democracy that he said prevented a majoritarian faction in *Federalist No. 10*, made it extremely difficult for members of Congress to know what their constituents really wanted. Here are his words: "The larger a country, the less easy for its real opinion to be ascertained, and the less difficult to be counterfeited."<sup>18</sup> And those lines, I think, are the critical ones from *Public Opinion*: "[T]he more insignificant [also in a larger country] is each individual in his own eyes."<sup>19</sup> So individuals just don't mobilize effectively in a continental-scale democracy, he says. But that's not inconsistent with *Federalist No. 10*, that's exactly what he said in *Federalist No. 10*, except in *Federalist No. 10* he said: "High five! That's awesome!"<sup>20</sup> In *Public Opinion* he said: "This is a disaster. This is a problem."<sup>21</sup> Why did he change his mind without changing the political theory?

Now, *Public Opinion* was also associated with *Consolidation*, another essay, and here's where he says: "[T]he same space of country that would produce an undue growth of the executive power, would prevent that control on the Legislative body, which is essential to a faithful discharge of its

17. *Public Opinion*, *supra* n. 4; *Consolidation*, *supra* n. 4.

18. *Public Opinion*, *supra* n. 4, at 501.

19. *Id.*

20. See *Federalist No. 10*, *supra* n. 1, at 163.

21. See *Public Opinion*, *supra* n. 4, at 501 ("This may be unfavorable to liberty.").

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trust.”<sup>22</sup> He wants to say the following, which is a *Federalist No. 10* sentiment, but with a negative sign rather than a positive sign next to it: “[N]either the voice nor the sense of ten or twenty millions of people, spread through so many latitudes as are comprehended within the United States, could ever be combined or called into effect.”<sup>23</sup> He wants to say that mobilization—popular mobilization—in the United States at the national level is extremely difficult. And that could be a problem if the national government ignores the local ordinance, and by local ordinance I mean states’ governance. And the main problem he saw was actually the undue growth of the executive power—of course the Federalist Party, this time of Washington, later of John Adams. Madison’s idea is that the reason why the Federalists have power is because we can’t mobilize against them because we face mobilization problems and collective action costs.

Madison’s idea in *Consolidation* and in *Public Opinion*, which were called the *National Gazette* essays, has a paradigm just as our Fourteenth Amendment and *Federalist No. 10* have paradigms. For the Fourteenth Amendment, it’s Reconstruction; for Madison, it’s the First Bank of the United States. That’s the First Bank of the United States down there, I actually took a little photograph of it, when I was on Chestnut Street, and here’s the speech he made against it. This is a speech that Ilya Somin mentions.<sup>24</sup> Madison says, “Look, the powers that were conferred upon the bank in 1791 were powers that created national private rights—vested rights, designed to protect shareholders—but they were powers that created monopoly; they deprived Congress of the ability to supervise this monster, tied up the hands of elected officials, and so, deprived citizens of equal rights. These aren’t private rights, they’re national private rights and they’re bad.” This is from his speech on the floor that he made in 1791.<sup>25</sup> He gets to the Bank of the United States that Ilya Somin mentioned earlier, and in that speech, Madison offers a canon of construction of the Necessary and Proper Clause. He says, “Here is my way of protecting us against these national private rights that are created by shareholders in Philadelphia who—taking advantage of the fact that the majorities can’t mobilize against them—cap-

22. *Consolidation*, *supra* n. 4, at 498.

23. *Id.* at 498–499.

24. Ilya Somin, *The Impact of Judicial Review on American Federalism: Promoting Centralization More Than State Autonomy*, in *Courts in Federal Countries: Federalists or Unitarists?* (Nicholas Aroney & John Kincaid eds., Oxford U. Press, forthcoming) (ms. at 10–11, available at Geo. Mason U. Law & Econ. Research Paper No. 13-45, 2013, <http://perma.cc/8X4D-M4ME> ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2311400](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2311400))).

25. James Madison, *Speech in Congress Opposing the National Bank*, in *Madison: Writings 1772–1836*, *supra* n. 1, at 487–488 (hereinafter *Opposing the National Bank*) (“It takes from our successors . . . an opportunity of exercising that right, for an immoderate term. . . . It involves a monopoly, which affects the equal rights of every citizen.”).

ture Congress and extract benefits that they couldn't have extracted at a more accountable level of government."<sup>26</sup>

Here's the canon. He says: "In admitting or rejecting a constructive authority"—that means, an interpretation of a vague constitutional phrase—"not only the degree of its incidentality to an express authority, is to be regarded, but the degree of its importance also; since on this will depend the probability or improbability of its being left to construction."<sup>27</sup> What the heck does Madison mean by that? He's saying, look, the powers being conferred on the First Bank of the United States are really important—they're big, they're dangerous, they're scary, they cannot be left to implication.<sup>28</sup>

Normally, we would defer to Congress about whether a power is sufficiently close to an express power to be justified, but these kinds of powers fall into a different category. I say it is a suspect classification. And therefore the powers need to be scrutinized more carefully. Now, Madison's suspect classification was not action versus inaction, which I am on record as thinking a silly suspect classification. Randy Barnett's an old friend of mine, I like him very much, but I don't see the point of this suspect classification in *Sebelius*.<sup>29</sup> Madison had a different one; his suspect classification is: do not delegate powers to private corporations, especially financial corporations, especially powers that are monopolistic in nature or give them exclusive rights for long periods of time. If you do that, then all deference is off; we are going to watch you through a microscope. And that was his argument for why the First Bank of the United States was unconstitutional.

Now, I want to emphasize this canon of construction can be phrased more generally in the following way. Basically, he's saying the national government is prone to capture by minority factions. When the national government confers "important" powers—his word—on private groups in ways that do not reflect majority consensus, there's a danger of oppression. So you need to look very carefully at whether those private organizations, created by these national private rights, are constrained by exit and by voice. Is the First Bank of the United States constrained by voice? No—the President only appoints twenty percent of its directors, and they meet in secret. Is it constrained by exit? No—because the law that created it banned any other private banks from competing with it. It had an exclusive franchise for twenty years. And so, Madison reasons, you've created an entity that is unconstrained. And therefore we are going to scrutinize it very carefully. That's his suspect classification. I find it so much more persua-

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26. *See id.* at 484, 487.

27. *Id.* at 482.

28. *See id.* at 481.

29. Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J. L. & Liberty 581, 604–605 (2010).

sive than the *Sebelius* suspect classification, but that's an offhand editorial that's neither here nor there.

The important point is that Ilya Somin is absolutely right: the Necessary and Proper Clause is not just one clause.<sup>30</sup> Sometimes it's applied with extraordinary deference, because you don't trigger one of these suspect classifications with a national law; sometimes the deference should be suspended because you've passed a national law that triggers the very danger to which national governments are prone—minoritarian tyranny—and there are symptoms of such laws. The First Bank of the United States epitomizes such symptoms.

Okay, fourth point. I think I'm going to make my time. Modern jurisprudence has generally focused almost obsessively and solely on the idea of *Federalist No. 10*, that idea that subnational governments are prone to majoritarian factionalism, especially on issues that divide citizens on cultural or religious lines—which is also an inheritance from Madison, who is a defender of religious liberty—and fear of religious majoritarianism. By strictly scrutinizing state laws that impose burdens for reasons of cultural or religious bias, therefore, the U.S. Constitution can avert the acrimony and non-deliberative oppression that such majoritarian factionalism breeds.

And so you can see immediately from *Federalist No. 10* springs the theory of suspect classifications with state laws. What is the category of the state laws? Well, you know, because in first-year Con Law you start with *Griswold v. Connecticut*,<sup>31</sup> then you go to *Eisenstadt v. Baird*,<sup>32</sup> you move your way up to *Roe v. Wade*,<sup>33</sup> and the category in all the casebooks—from Kathleen Sullivan<sup>34</sup> to Akhil Amar<sup>35</sup> and Cass Sunstein<sup>36</sup>—is non-economic. If the state law deals with non-economic affairs, then it's suddenly suspect.

Now, why is that? Is it because non-economic matters—which they typically define to concern marriage, childbirth, sex, sexual morality, and maybe the raising of children in *Moore v. City of East Cleveland*<sup>37</sup>—are subject to so much more suspicion than, say, state wage regulation or state

30. See Br. of the Wash. Leg. Found. & Const. L. Scholars in Support of Respts. (Individual Mandate Issue), *U.S. Dep't of Health & Human Servs. v. Florida*, 2012 WL 1680857 at \*\*7–8 (U.S. 2012) (No. 11-398) (where Somin was Counsel of Record).

31. 381 U.S. 479 (1965).

32. 405 U.S. 438 (1972).

33. 410 U.S. 113 (1973).

34. Kathleen M. Sullivan & Noah Feldman, *Constitutional Law*, at xiv, xv, 501 (18th ed., LEG, Inc. 2013).

35. Paul Brest et al., *Processes of Constitutional Decisionmaking: Cases and Materials*, at xxv (5th ed., Aspen Publishers 2006).

36. Geoffrey R. Stone et al., *Constitutional Law*, at xxiii, 852 (7th ed., Wolters Kluwer L. & Bus. 2013).

37. 431 U.S. 494 (1977).

hours regulation? We are cartelizing state rules on economic matters. After all, the power to earn a wage or to run a firm can be much more important to someone than the power to get laid. John Hart Ely famously said this,<sup>38</sup> and David Bernstein<sup>39</sup> my classmate, and Ilya Somin<sup>40</sup> says this.

I don't think it's because of the importance of the rights. It's the risk of an improper motive. The theory is that when states regulate in these areas, we should be very suspicious that the majoritarian passions are triggered, because we know that in America sex, drugs, and morality brings out the most passionate and zealous in us. And therefore we worry that the signature fault of subnational governments, brought about by homogeneity and unity—namely, majoritarian factionalism—is being triggered. We don't have that worry when some special interest group creates a license for opticians or for beauticians. That's bad, but that's not the signature fault of state governments. Madison thought that was the signature fault of the national government. State governments are majoritarian. They'll work those kinds of problems out for themselves. They'll get rid of those archaic licensing requirements. So we can leave that to the political process, but where we can't trust state governments is where they're regulating the Freedmen, or the Catholics, or the gays. And that's why the non-economic category, I would argue, is especially supervised. When you're dealing with democracy, disagreement, decentralization, and substantive due process, you end up with a state that is dominated by one faction. For instance, Texas, and boy is it red. It enacts laws that seem to tread in an area where majoritarian factionalism is at high risk.

How do we solve this problem? Simple: we decentralize. Now, we don't decentralize the public governments; we decentralize the private entities. Because the whole theory of *Griswold* and *Roe* is that they create a system of private government: women and their doctors; husbands and their wives; couples. They are capable of governing these things. And because they represent both the minority and the majority, if we have a constitutional doctrine that delegates to these private governments the questions that are the subject of the hot culture war at issue, we can have blue families and red families. Catholics can avoid contraception. Seculars can use contraception. Think of it as a federal system. A federal system that avoids the signature vice of majoritarian governments. That is I think the political the-

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38. John Hart Ely, *On Constitutional Ground* 290–303 (Princeton U. Press 1996).

39. See generally David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* (U. of Chi. Press 2011).

40. See generally Ilya Somin, *The Volokh Conspiracy*, *Gonzales v. Raich and the Individual Mandate*, <http://perma.cc/9L82-BXQL> (<http://volokh.com/2010/10/05/gonzales-v-raich-and-the-individual-mandate/>) (Oct. 5, 2010, 1:10 a.m. ET); Ilya Somin, *Jurist.org*, *Why the Individual Health Care Mandate is Unconstitutional*, <http://perma.cc/V8AU-UFWL> (<http://jurist.org/forum/2011/05/ilya-somin-mandate-is-unconstitutional.php>) (May 4, 2011, 8:00 a.m. ET).

ory behind *Griswold*, which is the political theory behind *Federalist No. 10*. Decentralization can cure majority factionalism.

Okay, what I love about *United States v. Lopez*,<sup>41</sup> and it's the next point to which I want to turn, is that *Lopez* uses the exact same category of the non-economic.<sup>42</sup> Everybody ridicules this category. Neil Siegel says it's functionally useless, it has no point.<sup>43</sup> Why would you say that non-economic matters should be distinctly outside of Congress's control? That's not really related to any functional theory of federalism.<sup>44</sup> And I say Neil, you're wrong. Because in the category of non-economic here, Rehnquist is quite self-consciously drawing upon *Griswold* and upon *Roe*. The non-economic in *Lopez* is "family law (including marriage, divorce, and child custody)."<sup>45</sup> Aren't those the subjects of associational privacy under substantive due process in *Griswold*?<sup>46</sup> Yes indeed they are.<sup>47</sup> So Rehnquist is just taking exactly the same category; but if you think this is functionally useless in federalism, you must think it's functionally useless in *Griswold*. But I say it serves exactly the same function in both areas of doctrine. This is why I called this a unified field theory of federalism and individual rights. This is what you see also, by the way, in *United States v. Morrison*.<sup>48</sup> Rehnquist repeats it again. What is non-economic? It's family law: marriage, divorce, and childrearing.<sup>49</sup> He's serious about that.

So what functional point does the non-economic serve in federalism? Well, here's my pitch. Now, I'm putting words into Rehnquist's mouth, but he wasn't a man known for filling his opinions with elaborate reasoning, and I say that with no disrespect to the late Chief Justice. I suggest that the Rehnquist Court's Commerce Clause doctrine in *Lopez* and *Morrison*—subjecting to strict scrutiny federal statutes dealing with non-economic affairs, really defined to mean substantive due process-y culture wars affairs—is based upon that neglected Madisonian worry about national minoritarian faction.

Here's how it works. We the people are often deeply divided about matters of fundamental cultural importance. We're divided by sex, the education of children, marriage, abortion—religious matters, really. These are issues of intrinsic rather than instrumental importance—good and evil—for

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41. 514 U.S. 549 (1995).

42. *Id.* at 567.

43. Neil S. Siegel, *Distinguishing the "Truly National" from the "Truly Local": Customary Allocation, Commercial Activity, and Collective Action*, 62 *Duke L.J.* 797, 818–820 (2012).

44. *Id.* at 822–823.

45. *Lopez*, 514 U.S. at 564.

46. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

47. *Id.* at 485–486.

48. 529 U.S. 598 (2000).

49. *Id.* at 615–616.

which compromise and negotiation are psychologically painful, and the risk of dogmatic insistence on your point of view is unusually high. And if you live in that world, of hot red and bright blue divisions, a rational Congress would leave such matters to state governments. Because they would realize they cannot possibly resolve these kinds of issues at the national level. Again, Ilya Somin said this quite nicely, that nationalizing these issues is highly polarizing, it leads to pointless fights that will never end.<sup>50</sup>

So you would think this is precisely the area where federalism should govern. However, Congress, the federal bureaucracy, and the federal judiciary, may be prone, as Madison says, to minority capture. Tight-knit zealous groups—in the old days they'd be the Puritans or the Evangelicals, nowadays they might be just zealots who have an agenda—push their culture war agendas through the national lawmaking process and the bureaucratic and administrative process on culturally-sensitive issues. So we get unnecessary nationalization of the culture wars. What I think Rehnquist is trying to do is suppress that. He's a very practical guy, and he says we need to have a special doctrine that says when the national government intrudes into this area, the courts will step in and do something to push the government out of it.<sup>51</sup> Because we think something's wrong—they're not acting like a rational federal regime. By preserving exclusive state jurisdiction over such topics, the national government can save the national government from itself. Avoiding either gridlock—in case the government gets tied up with same-sex marriage—or resentful acrimony, in case they actually pass a law on same-sex marriage. Right? And really piss off one-half of the country.

So, I think that's the function of *Lopez*: to cure what Rehnquist takes to be a minoritarian faction of cultural zealots launching, essentially, an anti-federalism coup.

Okay, so we have two theories here. If you have that first theory, you'll have an image of a nation that's actually closely divided between red and blue. And why would they pass gridlocked or acrimony-inducing culture wars laws? Not because of the majoritarian reasons but because of minoritarian reasons. Here's Rehnquist's antidote: not red and blue families, but red and blue states. That'll pacify the conflict.<sup>52</sup> Now I'm not saying he's right on this but it's exactly the same antidote that Madison proposed for the National Bank of the United States. Strictly scrutinize laws where you think that there's a high chance of a minority coup.

Okay, my clock says it's 5:17, which means I should shut up soon. Fortunately I'm on my last point.

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50. See generally Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government Is Smarter* (Stanford U. Press 2013).

51. *Lopez*, 514 U.S. at 567–568; *Morrison*, 529 U.S. at 620.

52. See *Lopez*, 514 U.S. at 567–568; *Morrison*, 529 U.S. at 617–618.

We have a problem here. We have two Madisonian theories. We have the well-known Madison in *Federalist No. 10*: “State governments are prone to majority factionalism.” We also have Madisonian theory that nobody ever hears about which is that national government is prone to minoritarian factionalism. How can we reconcile the two? Well, it’s interesting. Every once in awhile, for Rehnquist, for modern left opponents of expansive federal reach in RFRA, maybe from far right opponents of certain federal policies, I sometimes think that, for instance, right wingers have this idea—and I say right wingers in a nice way because I am myself one of them, registered Republican and all that—but I sometimes think that the opposition to *Roe* is based upon the same image as the opposition to the First Bank of the United States in the following sense: it’s a national public right that anti-*Roe* people associate with a minoritarian faction—you know, radical feminists. Whether it’s true or not, this is the image I think they have in their head. And this national private right delegates extraordinary power on an unbelievably untrustworthy institution: the abortion clinic. One that is captured and is not subject to voice or exit. Because the voice is shoddy and poor, and the exit, well, it’s not adequately policed through medical information. Is that accurate? I don’t know. But I think that’s the image that opponents of *Roe* have. And I want you to see that it’s the same image that I think opponents of *Hobby Lobby* have, just translate everything we’re taught as I talk to you. Right? So, the national government is captured by a bunch of Evangelicals who push through RFRA, nobody knows what the hell it means, it’s completely vague but it’s a feel-good piece of legislation. Once it gets in there, they start enforcing all kinds of bizarre rights to be exempt from generally-applicable laws that seem to a lot of people like special identity pork. And therefore, *Hobby Lobby* gets a sudden entitlement—that nobody else has—to be exempt from generally applicable rules. Now some people nod to that. I want you to see that’s exactly the same kind of story that the right-wingers say about *Roe* and that Madison is saying about the First Bank of the United States. I’m not trying to judge any of these stories yet; I just want you to have a picture of the second Madisonian theory of minoritarian capture. Now the big question is—we end everything here, at 5:20—was Madison a hopeless schizophrenic? Was he crazy? Because how do we reconcile these two theories? It’s a really difficult task.

I think you can, and this is what I would call a unified field theory of federalism and individual rights. Here’s a checklist. Ask first who was acting: a state legislature, or Congress? Dealing with a topic within their competence? And by that I mean, was Congress creating private rights that were beyond the state capacity to regulate? Or was Congress trying to fix a non-deliberative state institution, some state institution that seemed to be acting as the southern governments in 1868? Did the state legislature, or Congress,



deliberate in a manner suggesting that their signature flaws were not activated? In other words, do we see Congress inviting a lot of people in in an open and public way and having an open majoritarian debate rather than a minoritarian debate? Or do you see them hustling through a law without really considering the ramifications? And finally, ask whether the state legislature or Congress exercised such competence to create a framework for decision-making properly constrained by exit and voice. What kind of thing did they finally create? Did Congress create a sensible way of balancing religious liberty against other liberties? Did the states create a system whereby, when they enacted the *Comstock* Law in Texas,<sup>53</sup> they sensitively balanced the interests of women and the other interests? Or did they seem to enact a law that only took into account one interest? If the instrument that they created seemed to have weak constraints of exit and voice, in either a majoritarian or a minoritarian way, that might be a signal that one of the other flaws was triggered.

Now, I'm not going to talk any more. Actually I haven't kept track of time because it's been so enjoyable talking to you all. So I have no idea how much time we have left. But I'm done now.

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53. See *Roe v. Wade*, 410 U.S. 113, 119 (1973).