The Individual Liberties Within the Body of the Constitution: A Symposium - Introduction

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INTRODUCTION

Melvyn R. Durchslag*

This symposium was conceived in 1987, the bi-centennial year of our Constitution. It has been a year which has seen printed versions of the Constitution on backs of cereal boxes, feature writers’ accounts of constitutional history in local newspapers, and three minute blurbs of our greatest moments sandwiched between prime time television shows. It has also been a year in which academic journals have explored in detail, not only the marvels of our constitution and our resultant progress in political and human rights, but also its darker side.\(^1\) This symposium, however, is unique in that it adds a dimension to the study of our Constitution which tends to be largely ignored by current legal scholarship. This symposium concentrates on individual liberties which are guaranteed outside the Bill of Rights and the Civil War amendments; liberties which are guaranteed in the text of the original, unamended document.

Why devote a symposium to rights such as those found in the contract clause or the privileges and immunities clause of article IV; provisions not often the current focal point of either constitutional litigation or scholarship? If asked to respond to the appropriate bi-centennial question, “whether the Constitution measures up to our political and moral aspirations,” more than likely most Constitutional scholars would begin searching the experiences under the Bill of Rights and, later, the fourteenth amendment.\(^2\) Yet substantively,
the Bill of Rights and the fourteenth amendment give us little by way of insight into the structural relationship between the federal government and the states and the impact of that relationship on protecting fundamental human values. So while undoubtedly we can learn more of the relationship between our moral values and the rights we accord individuals from the values implicit in the fifth and fourteenth amendments, we are better able to evaluate Madison's thesis that diffusion of power protects individual liberties by looking at the subjects which these five scholars have studied.

High school civics informs us of the general structure of the Constitution: (1) it diffuses power among three branches of the federal government and also between the federal government and the states, and (2) it presupposes a republican, representative form of government. In addition however, the original document contains no less than thirteen specific protections of individual liberties. For example, the federal government may not suspend the writ of habeas corpus except in cases of rebellion or invasion, require religious tests as a condition for holding public office, or deny a criminal defendant's right to a jury trial. The states may not impair the obligation of contracts nor may they discriminate against citizens of other states by denying them the privileges and immunities afforded their own citizens. Neither the federal government nor the states may enact bills of attainder and ex post facto laws. This symposium concentrates on four of those provisions—the habeas corpus, privileges and immunities, contract, and religious test clause. The first three are, to one degree or another, grist for current litigation. The fourth, by contrast, has never been used to invalidate a federal oath and has received hardly a judicial mention in thirty-seven years. Yet, as Professor Gerard Bradley persuasively argues, the history of the religious test clause sheds new light upon the important but enigmatic religion clause of the first amendment.

The variety of issues discussed in this symposium is apparent from the title page. Other than the fact that all four clauses appear in the same document one might wonder why these five scholarly efforts appear under the same masthead. One reason is historical; each gives a peek into the same period of our constitutional history. Of greater importance I think, and the theme which binds the collective work, is the insight which the authors give us about the relationship between the locus of governmental power and individual liberties.

There is a singular ambiguity to these four provisions. Each reads like it could have fit just as easily in the Bill of Rights.
Habeas corpus would be as comfortable in the fifth amendment as in article I, section 9. The religious test clause certainly seems to be comprehended either by the establishment clause or the free exercise clause of the first amendment, maybe both.\(^3\) The contract clause, particularly after the Court in *Fletcher v. Peck*\(^4\) interpreted it to apply to property interests, could have been understood (albeit not until after 1868) in terms of the due process clause of the fourteenth amendment. Even the privileges and immunities clause (again after 1868) could have been comprehended by substantive due process if one were to accept Chester Antieu’s argument that article IV, section 2, clause 1 invested all citizens with natural (“certain inalienable”) rights. But that misses the point. Reading all five articles together, one is left with the question whether these limitations on governmental authority were imposed primarily out of concern for the individual or, like the rest of the document, were included because of structural concerns. As a comparison of Professors Thomas Merrill and Robert Palmer’s papers on the contract clause plainly demonstrates, how one comes out on that issue *may* determine whether any particular contract will be protected from state interference by article I, section 10; it *will* determine the rationale for protection.

Professor Merrill focuses on the Court’s current position that obligees under public contracts are afforded greater protection by the contract clause than obligees under private contracts. This he says, “turn[s] the contract clause of both the framers and the post-

Charles River Bridge era on its head.” Merrill argues that underlying the Court’s present contract clause analysis is a “sweeping [generalization] about the superiority of public ordering relative to private ordering” which has “no place under the contract clause.” He argues, instead, for a system of analyzing contract clause cases which undertakes a “serious comparative analysis of the merits of markets versus regulation in different institutional settings.”

This position is 180 degrees from that of Professor Robert Palmer who argues that in cases like *Blaisdell*, the contract clause must be read as an absolute bar to state regulation. He comes to this position from reading the history of the contract clause in a far different way than does Professor Merrill. Taking what he describes as a contextual approach, Palmer concludes that article I,

\(^3\) Torcaso v. Watkins, 367 U.S. 488 (1961) (relied on the free exercise clause, but cited establishment clause cases, to strike down a Maryland statute which required an oath affirming a belief in God as a condition of becoming a notary public).

\(^4\) 10 U.S. (6 Cranch) 87 (1810).
section 10 was not intended to vindicate individual rights but rather was intended to keep the states from interfering with Congress' power to regulate interstate and foreign commerce. He reasons that in the same way article I, section 9 was included to restrict federal powers "that were the most dangerous ways the federal government would undermine the states as independent policy centers... article I, section 10 is that set of restrictions on state government necessary to insure that the federal government was a vigorous center of independent policy." As he later notes, the contract clause is "an exception to state power to preserve federal power." This leads Palmer to conclude that contract clause protections should be extended only to those contracts in which the federal government has some interstate or foreign commerce interest. He thus believes that Fletcher v. Peck’s holding that vested property interests are protected by the contract clause is wrong.

Professor Merrill agrees that the current misinterpretation of the contract clause stems from Fletcher v. Peck. But for Merrill the mistake was in holding that the contract clause applied to public as well as private contracts. They agree on another point as well, although apparently disagree on its significance. While Professor Merrill’s arguments presuppose that the purpose of the contract clause was to vindicate, as Madison put it in the Federalist No. 44, "the first principles of the social compact," he does admit to a significant federalism value as well: "The framers were realistic about the need for a strong government but also the dangers of a strong government. The jurisprudence of the contract clause should reflect the same degree of realism."

It may appear to be a strange leap from two differing views of the contract clause to Professor Gerard Bradley’s discussion of the “No Religious Test Clause.” But the dual nature of the original document as a structural outline of a federal republic and an articulation of fundamental individual freedoms makes this not so. Professor Bradley describes article VI, clause 3’s ambivalence of purpose. On its face, the no religious test clause appears to be a narrow free exercise clause. However, tracing the history of religious oaths as a condition for public office in the states, Professor Bradley asks how it could be that those who gathered in Philadelphia could be so determined to rid religion from the federal government at the same time they displayed an equal determination to retain religion as part of their respective state governments. The

answer he finds is not in any commitment to principles of individual religious liberty but rather in a fear of federal power. He points out the irony of article VI, clause 3: "[b]y their exaggerated ‘worst case’ scenarios, antifederalist rhetoricians instilled that sense of potential minority status in the ordinary Protestant essential to seeing article VI as a self-protective devise. . . . They suggested a federal establishment of Presbyterianism or Anglicanism. They repeatedly demanded a general prohibition of sect privileges." Concluding, he observed: "They [the framers not the anti-federalists] undervalued the bitter which they served to the people—a ‘secular’ Constitution with no taste of religiosity to it—with the ‘sweet’: religious liberty assertedly secured by the federal disability on the subject." By preventing the federal government from requiring a religious test, article VI disabled federal establishment, thus helping ensure the ability of the states to continue their existing religious practices.

Applying this reasoning to the first amendment, Bradley argues that current establishment clause doctrine, or as he calls it post-1947 [Everson] doctrine, is incorrect for two reasons, both based on Madison’s Federalist No. 10. First, current establishment doctrine ignores the fact that our pluralistic political process will not long tolerate governmental endorsement of particular religious views or even sectarian views at all. Indeed, Professor Bradley opines that “it has been the political process which has yielded the most important victory for religious freedom in our day—the statutory prohibition on religious discrimination in the workplace.” Second, current establishment doctrine is off the mark because it assumes that political divisiveness over religion is an evil which cannot be tolerated under the establishment clause. Quite the contrary according to Professor Bradley; divisiveness should be looked on as a positive good, something which assures religious freedom by ensuring that no one religious view will win out over another.

Article I, section 9’s prohibition of suspending the Writ of Habeas Corpus, textually, has two things in common with the no religious test clause of article VI; it applies only against the federal government and it appears to be a vindication of fundamental human liberty. Indeed, Professor Erwin Chemerinsky, quoting Blackstone, describes it as “‘the most celebrated writ in the English law’”. Dating back to the Magna Carta, the “Great Writ” is the procedural device whereby the fundamental human liberty, the right not to be held against one’s will without just cause, can be

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vindicated. What then does this have to do with structural concerns? Everything according to Professor Chemerinsky. As he points out, the right to habeas corpus was given by common law in some states before the Constitution and in others it was granted "constitutionally" in colonial charters. But, "Parliament frequently suspended the writ . . . during the seventeenth and eighteenth centuries" and the "[f]ramers feared that Congress might suspend the states' ability to grant habeas corpus, in the same way that Parliament had suspended habeas in the colonies." Such a suspension by Congress would "prevent state courts from releasing individuals wrongfully imprisoned." This explains why, despite how central to normative concepts of justice the writ was, the states were not similarly restricted by including the same provision in article I, section 10.

The brief review of the previous three papers establishes, I think, that provisions even partially conceived out of structural concerns can never shake loose from those moorings. So it is with Professor Chemerinsky's analysis of the Writ of Habeas Corpus. As he says: "Decisions regarding habeas corpus turn on the most basic and difficult questions in American society: how should power be allocated between the federal and state governments? What is the appropriate division of powers between Congress and the federal judiciary in Constitutional cases?" With respect to the federalism question, Professor Chemerinsky, implicitly agreeing with Professor Bradley, argues that friction between state and federal courts is not a federalism "bad" but rather a federalism "good." The "very existence of federal courts, and of most federal jurisdiction, is based on a distrust of state courts." However, Chemerinsky ultimately parts philosophic company with Bradley (and probably Merrill as well). Even if a legitimate federalism concern exists, Chemerinsky would resolve the structural/individual liberties conflict in favor of the latter: "Even if federal courts create friction . . . protecting a wrongfully incarcerated individual is more important than maintaining harmony between levels of government."

Finally, Professor David Bogen analyzes the privileges and immunities clause of article IV, section 2, clause 1. Of the four clauses discussed in this symposium, this most clearly seems to be born out of structural rather than individual liberties concerns. But, like the other provisions, this too is ambiguous. As noted above, Professor Chester Antieu argued that the privileges and immunities clause was a means of conferring "natural rights" on citizens. Even Professor Bogen, who ultimately rejects Antieu's position, at least gar-
ners historical support for the proposition that the privileges and immunities clause has substantive content. As Bogen demonstrates, both the concept and language of privileges and immunities can be traced to colonial charters which granted rights of Englishmen to colonists. The Continental Congress in 1774 expanded those rights to include "rights by the law of nature as well as under the principle of the English Constitution and the colonial charters." Bogen concludes, however, that the weight of the evidence supports a structural approach to article IV, section 2, clause 1. The rights granted in colonial charters generally prohibited one colonist from being treated as an alien in another colony. The single bond recognized uniformly in all colonial charters was that the colonist were all English citizens owing fealty to the English king. The period of confederation left somewhat of a hiatus because the revolution did not replace the king with a similar, and singular, national sovereign. Thus it was natural to read substantive content into the privileges and immunities clause of the Articles of Confederation in order to give it any meaning at all. As Bogen suggests however, a (the?) major change brought about by the Constitution was the establishment of a direct link between the individual and a national government, strangely reminiscent of the colonial period. "The role once played by the king in uniting the colonies under a single citizenship was now taken over by the national government." It was the privileges and immunities clause which gave "content to citizenship in the United States."

Bogen thus comes out the same way on the privileges and immunities clause as Professor Palmer comes out on the contract clause—structural concerns predominate over concerns for individual liberty. Similar to Professor Palmer's reading of the contract clause, acceptance of Professor Bogen's reading of the privileges and immunities clause would certainly change the analysis of certain issues and perhaps the result as well. For example, he agrees with Justice O'Connor that Zobel v. Williams\(^7\) should have been decided under the privileges and immunities clause. He would similarly analyze Shapiro v. Thompson.\(^8\) Thus Professor Bogen would at least prefer, if not strictly adhere to, a structural approach in deciding cases raising rights of travel and settlement, those which most closely resemble the framers' concerns with privileges and im-

\(^8\) 394 U.S. 618 (1969).
munities. He would avoid the more normative equal protection analysis which the Court has used in those cases.

Only Professor Chemerinsky seems to prefer an individual liberties approach to a clause which is founded in structural concerns. But the prohibition on suspending habeas corpus is unique. First, its historical importance far exceeds its function as an instrumental device by which substantive rights are protected; it has a life, certainly a symbolic life, of its own. And second, habeas issues most often arise in contexts which make compromise between structural and individual liberties concerns difficult. Sometimes one simply has to make the hard choice.