LIBERTY AND CONSTITUTIONAL ARCHITECTURE: THE RIGHTS-STRUCTURE PARADIGM

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Until quite recently, constitutional law and constitutional theory have focused nearly exclusive attention on questions of rights. Certain rights have received special constitutional favor, including rights of free speech and equal protection. Others, most significantly property rights, have been relegated to the back of the constitutional bus. Regardless of the variations in popularity of particular types of rights over the past decades, the field of constitutional law as a whole has been dominated by a paradigm of rights.

As natural as the rights paradigm may seem to those of us schooled in recent ways of thinking, it is not the only way to conceptualize constitutional law. Indeed, the Framers of the Constitution were most deeply concerned not with rights but with questions of constitutional architecture—separation of powers and federalism. The dominant paradigm of the framing period was the paradigm of structure, not the paradigm of rights.

Today, as the rights paradigm breaks down, constitutional theory is returning to questions of structure. The focus is not, as it was at the time the Constitution was written, one of structure per se. Rather, the post-rights paradigm of constitutional law will be one that seeks to unify rights and structure—one that works toward a broader constitutional theory of which rights and structure are parts.[1] At issue is the basic question:

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1. My own thoughts on this relationship are contained in Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 SOC. PHIL. & POL'Y 196 (1991), *reprinted in* REASSESSING CIVIL RIGHTS 196 (Ellen Frankel Paul et al. eds., 1991). Other contributors to this new debate include: Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155 (1992); Mary Ann Glendon, *The Common Law and the Written Law*, *in* THE SUPREME COURT AND THE CONSTITUTION (Terry O. Eastland ed., forthcoming 1993); Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional*

What is the proper relationship in modern constitutional law and constitutional theory between the two great systems of fundamental law, the system of rights (including individual rights and economic liberties), and the system of structure (including separation of powers and federalism)?

I. THE RIGHTS-STRUCTURE PARADIGM: CROSS-FERTILIZATION

The system of rights and the system of structure do not operate independently. To be fully satisfactory, any theory of constitutional law must articulate the relationship between structure and rights. The challenge to modern constitutional law scholars is to develop a unified theory that explains both the system of rights and that of structure in terms of deeper underlying principles.

An essential element that must be included in such a paradigm is the concept of cross-fertilization. Principles derived under the system of rights ought to have some impact on questions that arise under the system of structure; conversely, principles derived from the system of structure ought to inform our understanding of rights.

A. *Cross-Fertilization: The Impact of Rights on Structure*

Consider *Morrison v. Olson*,[2] in which the Supreme Court upheld the independent counsel statute[3] against the challenge that it violated the principle of separation of powers.[4] The Court's decision was articulated in terms of structure, without much consideration given to the impact it would have on individual rights.[5]

Structure, 76 CAL. L. REV. 267 (1988); Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449 (1991).

2. 487 U.S. 654 (1988).

3. Ethics in Government Act, 28 U.S.C. §§ 49, 591-99 (1992)(expired and not reauthorized 1992).

4. 487 U.S. at 694 ("[T]his case simply does not pose a 'dange[r] of congressional usurpation of Executive Branch functions.' " (quoting Bowsher v. Synar, 478 U.S. 714, 727 (1986))).

5. The *Morrison* Court held that

> [I]t does not violate the Appointments Clause for Congress to vest the appointment of independent counsel in the Special Division; that the powers exercised by the Special Division under the Act do not violate Article III; and that the Act does not violate the separation of powers principle by impermissibly interfering with the functions of the Executive Branch.

487 U.S. at 696-97.

If, instead, a rights-structure approach had been applied in the case, the Court would have considered the bearing that the structural features of the statute might have upon the fundamental value directly served by the system of rights—individual liberty. The result would be to address issues not considered by the Supreme Court in *Morrison*.

The Court might have applied a rights-structure approach in *Morrison* as follows. Initially, one would inquire whether independent prosecutors are more likely than prosecutors appointed and controlled by the executive branch to intrude upon individual liberty interests. One could argue that independent prosecutors are in fact more likely to intrude on liberty, because their sole mandate is to investigate and prosecute one targeted government official. The singularity of the mandate may operate to deprive the independent counsel of the perspective of comparison across a range of cases that comprises the essence of prosecutorial discretion. Such discretion serves as an important protection of individual liberty against abusive use of governmental powers.

Perhaps even more significantly, a special prosecutor might be more likely to intrude on individual liberty interests because his or her own prestige is tied up in the inevitable conflict between the target of the investigation and the success of the prosecution. The special prosecutor may perceive that a failure to obtain an indictment, or to obtain a conviction after indictment, would constitute a defeat and thus would damage his or her reputation, even if under the circumstances the facts do not warrant indictment or conviction. As a result, the special prosecutor has an incentive to pursue the case beyond the point where sound principles of administration would call for its abandonment, to the possible detriment of the liberty of the person targeted for investigation.

A court or constitutional theorist might also want to inquire whether the funding provisions for special prosecutors provide incentives to delay the process of investigation and prosecution.[6] A special prosecutor might take advantage of this system in order to continue to draw paychecks for himself and his staff. Such delay necessarily prolongs the inconvenience and intrusion on the liberty of the target.

6. *See* 12 U.S.C. § 594(b)(1992)(providing for compensation of independent counsel); *id.* § 594(c)(1992)(providing for compensation of staff).

This illustration highlights the concern initially raised: that a singular approach to constitutional theory, whether it is rights-based or structure-based, may miss important factors in the equation. Special prosecutors have significant incentives to act in ways that intrude on individual liberty. The rights-structure perspective thus suggests ways to question the constitutionality of the independent counsel statute that look beyond those merely structural reasons considered and rejected by the Supreme Court in *Morrison*.[7] In sum, the rights-structure perspective provides support for the proposition that *Morrison* may have been wrongly decided.

B. *Cross-Fertilization: The Impact of Structure on Rights*

If the dominant principle of the system of rights is that of liberty, its counterpart in the system of structure is that of checks and balances. Here, the *Federalist Papers* provide some guidance. The authors of the *Federalist Papers*—Madison in particular—were suspicious of "parchment barriers,"[8] those mere assurances on paper that individual rights would be protected. It is this distrust of parchment barriers that led Madison in *Federalist 51* to argue in favor of a structural system of checks and balances, power countering power, ambition countering ambition.[9] Madison believed that only countervailing power itself, and not abstract principles, could provide the necessary guarantee that the persons entrusted with the authority of the government would not abuse that authority.

Yet, this view appears to be in marked tension with the existence of the Bill of Rights, a document enacted so close to the founding period as to be part of the same constitutional moment. In essence, the Bill of Rights is nothing more than a set of parchment barriers. Thus, we face an original document whose authoritative justification denigrates parchment barriers as futile, and a nearly contemporaneous set of amendments that appear to erect exactly the same type of barriers condemned by the authors of *The Federalist Papers*.

This problem is not insurmountable. The Bill of Rights can

7. To completely forsake questions of structure in the interests of rights is equally dangerous. In the context of *Morrison*, a structureless battle over the need to have potential crimes investigated versus the rights of the accused is at root a political dispute, not a legally justiciable issue.

8. THE FEDERALIST No. 48, at 308 (James Madison)(Clinton Rossiter ed., 1961).

9. THE FEDERALIST No. 51, at 320-25 (James Madison)(Clinton Rossiter ed., 1961).

be substantially reconciled with the structural theory of the Constitution by importing the principle of checks and balances into the Bill of Rights. To do this is to engage in another form of cross-fertilization under the rights-structure paradigm.

When the principle of checks and balances is applied to the Bill of Rights, it becomes apparent that the first ten amendments can and should be viewed not so much as a *restriction* on the power of the federal government, although they are that, but rather as a *grant* of power to the Supreme Court vis-à-vis other agencies of government. The Court was, after all, the only institution of government equipped to enforce these rights reliably.

In this respect, the Bill of Rights can be seen as rectifying a structural defect in the original Constitution. The original Constitution established two relatively strong branches of the government, the legislature and the executive.[10] It failed to give equal powers to the judiciary.[11] The Bill of Rights increases the powers of the judiciary, consonant with its position of equal dignity within the constitutional structure.[12] Thus, the rights-structure perspective provides a somewhat subtle argument for the legitimacy and authoritativeness of judicial review.

II. Toward a Unified Theory

The rights-structure paradigm brings both rights and structure together under several overarching and unifying concepts. To unite rights and structure, as opposed to merely importing concepts from one domain of fundamental law to the other, it is useful to reconsider *The Federalist Papers*, which pose the problem of government in terms of two costs. The first cost is that of *private* expropriation, violence, and oppression.[13] This cost necessitates the creation of government in the first place: if men were angels, *The Federalist Papers* tell us, there would be no

10. U.S. Const. arts. I-II.

11. U.S. Const. art. III.

12. U.S. Const. amends. I-X.

13. By "private" expropriation and violence, I mean to include not only acts of domestic expropriation and violence, *see, e.g.*, The Federalist No. 6, at 54 (Alexander Hamilton)(Clinton Rossiter ed., 1961)("dissensions between the States themselves, and from domestic factions and convulsions"), but also depredations committed by citizens or governments of one territory against the residents of another, *see, e.g.*, The Federalist No. 4, at 46 (John Jay)(Clinton Rossiter ed., 1961)("nations in general will make war whenever they have a prospect of getting anything by it.").

need for government coordination and control.[14] The existence of government itself, then, is an admission that people are not angels, and are likely to oppress one another if given half the chance.

The establishment of government as a way of coping with this first cost is itself simultaneously accompanied by a second cost: that of *governmental* expropriation, violence, and oppression. Placing a monopoly on the use of force in the hands of government officials invites abuse by those in power. The authors of *The Federalist Papers* were well aware of the sorry testimony of human history that those in charge of government had often abused those whom they were charged with protecting.[15] *The Federalist Papers* thus view the optimal governmental design as that which minimizes the sum of these two costs: the cost of private expropriation, violence, and oppression, on the one hand, and the cost of governmental expropriation, violence, and oppression, on the other hand.[16]

The Federalist Papers calculate these costs through the use of two key concepts: energy and factionalism. Madison and Hamilton repeatedly stress that the government established by the Constitution must be energetic[17] in order to cope with the first cost of private abuses. Only an energetic government, *The Federalist Papers* tell us, can suppress insurrection and private violence and resist foreign invasions.[18]

The second key factor in *The Federalist Papers*' calculus that bears on rights-structure theory is that of avoiding factionalism: government should be designed to minimize the impact of faction.[19] Factions can affect governments in two different ways. First, a minority faction can oppress a majority—as happened in the countries of Eastern Europe over the course of

14. Madison concluded that

> It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.

THE FEDERALIST No. 51, *supra* note 9, at 322.

15. *See id.* at 324.

16. *Id.*

17. "Among the difficulties encountered by the convention, a very important one must have lain in combining the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form." THE FEDERALIST No. 37, at 226 (James Madison)(Clinton Rossiter ed., 1961).

18. *See* THE FEDERALIST No. 41, at 255 (James Madison)(Clinton Rossiter ed., 1961).

19. *See* THE FEDERALIST No. 51, *supra* note 9.

the past half-century. Second, a majority faction can oppress a minority—as, unfortunately, threatens to happen now in some of the very Eastern European countries newly freed from the oppression of their former rulers. *The Federalist Papers* have nothing good to say about faction and make quite clear that avoidance of factionalism is an important desideratum for any effective system of government.[20]

These two concepts, that of energy in government on the one hand, and avoidance of factionalism on the other, are stated at a very high level of generality. One might think that they add little of substance to the analysis of particular constitutional issues. This may be true. The concepts are important, however, because they frame the analysis of particular questions in a way that might provide insights into actual cases.

For an example of how the concepts of energy in government and avoidance of factionalism might inform constitutional analysis, consider briefly the area of constitutional criminal procedure. During the Warren Court years, the Supreme Court esentially construed the rights of criminal suspects as presenting a trade-off between the suspect's constitutionally protected interest in liberty, on the one hand, and the practical interest of criminal law enforcement on the other.[21] When a problem is phrased in this way, it becomes very easy to make the trade-off in marginal cases in favor of the constitutionally-protected rights of the accused. When a constitutional right is balanced against a mere state interest, the right usually prevails. This may explain, at least in part, the Warren Court's record of leniency toward defendants in criminal procedure cases.[22]

Consider, however, what happens under the perspective that unites rights and structure in the context of constitutional analysis. It is clear that the concept of an energetic government has a constitutional dimension. The Framers of the Constitution expected that the government would be active enough to stop

20. *See* THE FEDERALIST No. 6, at 56-57 (Alexander Hamilton)(Clinton Rossiter ed., 1961).

21. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961)(holding that all evidence obtained by searches and seizures in violation of the Bill of Rights is inadmissible in state criminal trials).

22. *See, e.g.*, Spinelli v. United States, 393 U.S. 410 (1969)(setting strict standards for the existence of probable cause sufficient to support a warrant); Miranda v. Arizona, 384 U.S. 436 (1966)(requiring procedural safeguards for official interrogations of persons in police custody).

private expropriation and violence.[23] Thus, it is not the case that a constitutional right of the accused is balanced against a non-constitutional interest of the government in law enforcement. Rather, the governmental function of criminal law enforcement is itself an expression of energy in government—a constitutional interest.

When both the rights of the accused and the rights of the state in criminal law enforcement have a constitutional dimension, the outcomes might be quite different from those in which the only party presumed to have rights is the defendant. The Supreme Court has implicitly adopted such a perspective in some of its more recent criminal law opinions,[24] but it has yet to expressly employ the conceptual framework suggested here to justify its results.

III. Conclusion

Many interesting yet unexplored implications of the rights-structure approach to constitutional law remain. The development of a unified theory of constitutional law ought to be a major concern for constitutional thinkers in the coming years. It is only through this type of rethinking of the fundamental basis of our legal system that we can keep the mirror of ourselves as a political society polished and dust-free and still maintain the lived reality of ordered liberty to pass on as a priceless heritage to the next generation.

23. *See, e.g.*, The Federalist No. 9, at 71 (Alexander Hamilton)(Clinton Rossiter ed., 1961)("A firm Union will be of the utmost moment . . . as a barrier against domestic faction and insurrection.").

24. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984)(recognizing a good-faith exception to the exclusionary rule); Schneckcloth v. Bustamonte, 412 U.S. 218 (1973)(holding that, in order to prove the voluntariness of a search, the state need not establish that the person giving permission to search knew that he had the right to withhold consent); Kirby v. Illinois, 406 U.S. 682 (1972)(plurality opinion)(holding that a show-up after arrest, but before the initiation of adversarial criminal proceedings, is not a criminal prosecution at which the accused has an absolute right to counsel).