

Individual Rights and Collective Governance

Author : Charles Shanor

Date : August 9, 2017

Ozan O. Varol, [Structural Rights](#), 105 *Geo. L. J.* 1001 (2017).

Ozan O. Varol's article *Structural Rights* usefully mixes two aspects of constitutional law that teachers and authors, at least for pedagogical purposes, separate when organizing coverage of their subject. My casebook, for example, covers "structural" features of the United States Constitution, such as separation of powers and federalism, then proceeds to "rights" chapters dealing with, for example, due process and equal protection. Students typically find structural features more difficult and non-intuitive, while they are very comfortable with rights protections for individuals.

Of course, separation of powers and federalism are fairly commonly viewed as liberty-enhancing. The Framers initially thought a Bill of Rights unnecessary: governmental structural restrictions and competing government power centers, they thought, would prevent government oppression. Today, perhaps in part due to the "rights revolution" of the Warren Court, my generation typically views the Bill of Rights and section 1 of the Fourteenth Amendment as bulwarks of individual freedom, central and indispensable to our constitutional order. But the point of the Constitution *as a whole* was to enhance governance by "We the People." The rights provisions, as Varol's article elucidates powerfully, empower rather than merely protect "the People." They frame and drive our governance structure.

This empowerment works two ways. First, rights empower governmental actors to act on behalf of the people. Congress may protect (but not restrict) free speech and freedom of religion, may grant (but not deny) due process, may enhance (but not undermine) equal protection. The President can enhance freedoms by exercising prosecutorial discretion, and can issue executive orders to expand rights (if those orders are consistent with Congress' laws and/or have some basis in presidential powers). Further, executive agency interpretations of laws can expand the people's rights. Lastly, judicial power is enormously enhanced by the existence of rights, for judges interpret the reach and enforcement mechanisms of those rights, sometimes overriding majoritarian decisions by Congress, the President, or the States.

Second, rights are structural bulwarks of our constitutional system of government by the people. Free speech and free press enhance vigorous debate over policy directions, voting protections allow the people to choose and fire their leaders, and equal protection helps avoid marginalization of minority groups in electoral and other processes. Jury trials, by guaranteeing ordinary citizens decision-making authority in criminal trials prosecuted by executive officers, keep government officials from having free rein to punish political enemies or attack those who claim corruption by government officials. Due process takes over as a catch-all even where specific constitutional provisions do not apply.

How about the Second Amendment? Varol argues that:

The "well regulated Militia" in the Second Amendment, characterized as "being necessary to the security of a free State," invokes the idea of justified resistance against a tyrannical government. The reference to a "free State" is expressly structural and is considered "necessary" to protect popular sovereignty. Framed as such, the Second Amendment right to bear arms is closely connected to the First Amendment freedoms of assembly and petition. If a tyrannical government remains unresponsive to the people's demands, expressed through petition and assembly, the people have the collective right to alter or abolish their government.

But the Supreme Court's focus in [Heller](#) was not on the militia, and the purpose it stressed was "individual self-

defense.” Perhaps Varol could have assessed the individual right to bear arms as contrasted with arms-bearing militias as a structural bulwark of our system. But what structure does that right support? If the right is to defend against oppression, it fits well into Varol’s framework, but if it is the “right of revolution,” it could destabilize order in our republic. Perhaps this structural observation would support the legality of limiting firearm ownership to “small arms,” in keeping with *Heller’s* interpretation of the scope of the Second Amendment.

In addition to observing and organizing a wide range of examples of rights which serve structural governing purposes, the article weaves in a bit of economic and political theory. Rights tend to align the agendas of officials with outcomes desired by their constituents and allow voters to “fire” ineffective or dishonest elected officials. Minority rights create constituencies who leverage rights affecting them disproportionately. This leverage in turn may move the broader polity to adopt policies the minorities desire. Examples include racial groups (the Civil Rights Act, the Voting Rights Act, and the Fair Housing Act), women (the Civil Rights Act again, the Violence Against Women Act, and the Fair Credit Reporting Act), and people with disabilities (the Americans with Disabilities Act). Such endowment effects are particularly difficult to dislodge, so these rights and the resulting political culture become self-reinforcing and stable, even if initially contested and contentious.

In short, Varol’s article is a welcome reminder that what we often think of as pure personal rights in fact suffuse not merely our popular culture but also our political institutions. The incentives of those who hold the levers of power in the United States are, through these rights, more closely aligned with the wishes of the people. These rights are structural features for maintaining and stabilizing our republic. They are critical components in maintaining the opening pledge of the Constitution’s commitment to “We the People.”

Cite as: Charles Shanor, *Individual Rights and Collective Governance*, JOTWELL (August 9, 2017) (reviewing Ozan O. Varol, *Structural Rights*, 105 *Geo. L. J.* 1001 (2017)), <http://conlaw.jotwell.com/individual-rights-and-collective-governance/>.