

TIME FOR THE FEDERAL COURTS TO ENFORCE THE GUARANTEE CLAUSE? A RESPONSE TO PROFESSOR CHEMERINSKY

Ann Althouse*

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Professor Chemerinsky wants us to see the Guarantee Clause as a protection for individual rights. This perspective accords with his position that the “preeminent ... mission” of the federal courts is to enforce individual rights.¹ His theory of the political question doctrine follows accordingly: a presumption of justiciability attaches to individual rights, rebuttable only when there is reason to believe that the judiciary is substantially less able than other branches of the federal government to interpret and enforce a constitutional provision.² Thus, if the Guarantee Clause really does exist to protect individual rights, then, given no basis to rebut the presumption in favor of federal court enforcement, the political question doctrine should not apply. In syllogism form: federal courts should enforce individual rights; the Guarantee Clause embodies individual rights; therefore the federal courts should enforce the Guarantee Clause.

Professor Chemerinsky must work hard to coax the Guarantee Clause out of the category of constitutional provisions relating to the structure of government and into the individual rights category, in order to harmonize judicial enforcement of the Clause with his view of the role of the federal courts. Yet he concedes that the distinction between rights and governmental structure “is questionable” because the Constitution sets up the structures of government to “prevent tyranny and safeguard individual rights.”³ In recent Tenth Amendment case law, Justice O’Connor has made a point of conceptualizing federalism, a matter of governmental structure, in terms of its purpose of benefiting individuals.⁴ She has embraced the position *882 that any deference to the states in the name of federalism derives from the states’ capacity to protect individuals from potential governmental abuse.⁵ Nevertheless, her federalism decisions for the Court have moved in the direction of respecting the states’ separate spheres, with the aspiration that they will

* Professor, University of Wisconsin Law School.

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¹ Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 851(1994) (this issue).

² *Id.* at 858-59.

³ *Id.* at 866.

⁴ See, e.g., *New York v. United States*, 112 S. Ct. 2408, 2431 (1992); *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991); see also Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979 (1993) (tracing the development of O’Connor’s theory of federalism in relation to Justice Blackmun’s more strongly individual-rights-based theory).

⁵ See *Gregory v. Ashcroft*, 111 S. Ct. at 2400 (quoting THE FEDERALIST NO. 51 (James Madison)):

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

in turn serve the interests of individuals. Despite the individual rights twist on federalism, the Court has, if anything, rebuffed individual rights claimants who seek federal court intervention with state government.⁶ That is, even though state governmental structures exist for the ultimate benefit of individual human beings, these individuals will have to hope that their invigorated and deferred-to state government will respond to their needs. I therefore doubt that the Court would make the transition from structural provisions to individual rights that Professor Chemerinsky makes – particularly since the constitutional text explicitly names the states as the recipients of the guarantee.

Even if it did decide to view the Clause as a guarantee of individual rights, the current Court seems unlikely to find this particular label as activism-inspiring as does Professor Chemerinsky. I doubt if it would call the protection of individual rights “the preeminent federal judicial mission.”⁷ It would seem to be far more likely to defer to democratic processes, to mistrust the capacity of courts, and to give credence to structural safeguards, such as federalism. Indeed for the Court’s current majority, a structural reading of the Clause may present the stronger argument for judicial intervention.⁸ *883 Just as it has returned to enforcing the structural protection of federalism in *New York v. United States*,⁹ it might begin to enforce the Guarantee Clause, not because there is an individual right to a republican form of government, and not because the central role of the federal courts is the enforcement of individual rights, but because the Court now sees itself as having an important role to play in protecting the structure of state governments and because the Guarantee Clause is what the majority of scholars have taken it to be, a structural safeguard.

Thus, even supposing that the Court felt moved to abandon precedent and find the Guarantee Clause justiciable, I question whether it would see the concept of individual rights as a more satisfying basis for decision than the concept of structural safeguards. But on a pragmatic level, I question how much power to activate the Court either concept has. In *Baker v. Carr*,¹⁰ the Court escaped from the precedent of *Colegrove v. Green*¹¹ by distinguishing the “well-developed and familiar” Fourteenth Amendment and the mysteriously unknowable Guarantee Clause.¹² But one must doubt whether this distinction, which Professor Chemerinsky aptly calls “fatuous,”¹³ had the power to move the Court out of its established position of restraint. Is it not apparent that the problem of entrenched and politically unassailable malapportionment motivated the Court? Urgent need provoked the fatuous distinction, preferred perhaps because it did not require the overruling of recent precedent, perhaps because it seemed more narrowly directed at the

⁶ See, e.g., *Gregory v. Ashcroft*, 111 S. Ct. 2395 (denying claim of individual litigants asserting that the state has violated their federal rights and setting up a clear rule to determine whether federal statutes impose duties in the area of traditional state functions); *Coleman v. Thompson*, 111 S. Ct. 2546, 2552 (1991) (declaring “This is a case about federalism,” and adopting harsh rules limiting federal habeas corpus for individual federal rights claimant against state government).

⁷ Chemerinsky, *supra* note 1, at 851.

⁸ See Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988) (offering a theory of Guarantee Clause justiciability premised on a structural reading).

⁹ 112 S. Ct. 2408 (1992).

¹⁰ 369 U.S. 186 (1962).

¹¹ 328 U.S. 549 (1946).

¹² 369 U.S. at 226.

¹³ Chemerinsky, *supra* note 1, at 871.

racial issues at the core of malapportionment. *Baker v. Carr* inspires Professor Chemerinsky to contend that if the Fourteenth Amendment is justiciable in the area of voting rights, then so is the Guarantee Clause. But for me, *Baker v. Carr* teaches a different lesson: when the Court feels sufficient pressure to deal with a problem, it can find a way.

Professor Chemerinsky's theory shows the Court a way to become an activist in a new area, but ignores the real problem: where *884 is the pressing need for the Court to act? With respect to the problem of malapportionment, the Fourteenth Amendment has already relieved the pressure. With respect to monarchies and anarchies, the problems, purely hypothetical and entirely remote, exert no pressure. (Moreover, as Professor Chemerinsky recognizes, it is in such "egregious cases" that we can rely on Congress to enforce the Clause.)¹⁴ The problem of legislation by referendum simply does not excite the same sense of urgency as racial malapportionment. To the extent that a particular referendum produces a law that injures a politically powerless or unpopular minority, the easier path to remedy, if the Court seeks one, remains the same as the remedy for the same law passed through representative channels: it can simply find that the law violates equal protection or some other individual right.

Professor Chemerinsky nevertheless states that "it is time" for the courts to take on the work of enforcing the Guarantee Clause.¹⁵ But why? Are we now experiencing a political breakdown in which a minority that could make itself heard through representatives in the state legislatures suffers the imposition of crude, oppressive laws adopted by referendum? And are these laws both hateful and not violative of substantive rights? It is not enough to say that the laws are hateful and *ought* to be seen as unconstitutional, but that the Court has been so stingy in articulating constitutional rights that we need to cultivate a different line of attack. For example, if the Supreme Court has refused to recognize the constitutional rights of homosexual persons,¹⁶ it is unlikely to view a law prohibiting state legislatures from creating similar rights as a matter of such urgency that it ought to abandon established case law, declare the Guarantee Clause justiciable, and hold the referendum procedure a denial of a republican form of government.

I personally find it appealing to argue that the inability of a traditionally hated group to have its interests embodied as rights suggests an important need for whatever protections the political process may offer, including the benefits of the supposedly deliberative representative legislature. But this is the crucial mindset that a successful argument would need to instill in the Court – the very Court that has declined to extend the desired substantive rights. I would suggest in this vein that the notion of tradition offers some leverage. *885 While "tradition" operated in *Bowers v. Hardwick* to keep the Court from expanding recent case law on the right of privacy to include homosexual behavior, "tradition" may add clout to Professor Chemerinsky's use of *The Federalist*

¹⁴ Id. at 876.

¹⁵ Id. at 879.

¹⁶ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

Papers and other early constitutional theory to overcome the force of later case law excluding the Clause from judicial purview.

Let us suppose that I am wrong and that the Court might simply yield to the logic of Professor Chemerinsky's syllogism. That is, let us assume that the Court would look at the question of justiciability wholly apart from the social context and from the merits of the substantive issues in any given case and would adopt the position that the Guarantee Clause is justiciable. Would this produce a good result? Professor Chemerinsky discusses reasons why the courts as opposed to the political branches are well-suited to the work of expounding the meaning of a republican form of government and shaping appropriate remedies. He refrains from discussing the actual content of the law that would emerge. He simply invites the process of judicial exposition of the clause. Should we simply embrace the benefits of the judicial voice in the ongoing dialogue about the meaning of the Guarantee Clause? The judicial voice carries the power to end the dialogue by ascribing a narrow, minimal meaning to the Clause, for example, by saying that it does no more than prohibit monarchy.¹⁷ In this event, one might prefer the Clause's present day dormancy, since it at least allows us to continue to postulate meaning for the admittedly unenforceable Clause, to view it as a repository of some aspirational ideal capable of exerting some moral pull.

The strongest argument Professor Chemerinsky raises for judicial enforcement is the extreme unlikelihood that Congress (or the President) would divert its attention from the national agenda and *886 focus on the problems of a single state.¹⁸ A court case offers process to the minority and the ability to force consideration of an issue. Yet it also empowers a small group of individuals, perhaps those with unusual special interests, an extreme or zealous subgroup of the electorate, and those with the resources to litigate, to structure the issues and the request for relief and to articulate the arguments that they deem relevant. A court case requires that the matter be formulated in terms of legal rights and duties, and excludes a frank confrontation with policy and interests not enshrined as rights. A court case may yield a dismaying announcement that there is no right or may announce a right and then disappoint with the failure to produce a satisfying remedy. Indeed, anticipation of the inability of the court to produce a satisfying remedy can influence the court to announce that there is no right. Is it perhaps better to use the rubric of "political question" to avoid this state of affairs? If judicial elaboration would only reveal the virtual emptiness of the Guarantee Clause, perhaps it holds more meaning if the court remains silent, thus allowing the Clause to inspire the states – or even Congress – to contemplate the meaning of "a republican form of government" and to exercise some degree of circumspection in structuring the procedures of government.

¹⁷ See, e.g., *United States v. Nixon*, 113 S. Ct. 732 (1993), in which the majority of the Court viewed the meaning of the word "try" in an impeachment proceeding as nonjusticiable. Justice White, in a concurring opinion, found justiciability, but nevertheless approved of the challenged procedure as within the meaning of "try." *Id.* at 740-41 (White, J., concurring). Though the outcome for the rights claimant is the same, the basis for decision matters, and it is hard to say which approach is better. Judicial approval seems more direct and makes a demonstration of checking Congress, thus solidifying the appearance of nonabusive government. Yet withholding the judicial stamp of approval may give Congress greater incentive to structure its proceedings with greater circumspection and susceptible to greater public criticism.

¹⁸ It must be noted, however, that if one were to adopt Professor Merritt's approach to the Clause, viewing it as a protection for the states against intrusion by Congress, that Congress would then most certainly be involved. See Merritt, *supra* note 8, at 1. The argument for justiciability would not tap this argument of Professor Chemerinsky, but new arguments for not accepting congressional determination of the Clause, premised on a need to check Congress, would arise.