Stop, Look and Lament: Jeremy Bentham Explains the Texture of the Bill of Rights

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Abstract.

Words, phrases and sentences devoted to if … then … or provided that or but or as will not cue restraints, which enhance or diminish the force of commands and permissions, on the one hand, and, on the other hand, prohibitions, in the Early Constitution. Bentham and Madison are surveyed to mine an explanation for variance in texture of the Bill of Rights (1789) as opposed to the Philadelphia Constitution (1787) and the two amendments (1795, 1804) which complete the Corrective Constitution.

Key Words: rules-in-inventory, rules-made-just-in-time


Color Me ‘Not’: Cool and Hot Adverbs in the Early Constitution, 2 OCL 491, discusses the ‘adverbial’ not and its rich count in the Corrective Constitution, that is, text adopted from 1789 through 1804.

Most pertinent to this study is Supplemental Restraints Anyone? Restraining Officials and Entities in the Early Constitution, 2 OCL 283. Thus, the reader will find that in the Bill of Rights, for example, official action is not restrained; it is prohibited. On the other hand, when the text-crafters in Congress return to the subject of the botched Article II procedures for Presidential elections – in time for the Presidential election of 1804) – English grammar yields more restraints. Apparently, the subject matter area demands no less.

The final score? Fifty-five of fifty-seven cued restraints are not in the Bill of Rights. An explanation is hereby tendered.

B. Bentham’s Colours. On Bentham’s account (individual) rights and (government) powers are different; indeed irreconcilable. Bentham Mocks the Declarations: ‘Every Law … is Void,’ 2 OCL 282. Since there must be nothing but underlying antagonism between lists of government powers and lists of individual rights, Bentham is the first to assert – or to be fairly credited with – the notion that the colouring of texts, compared one with another, will be found incompatible. To say the least.

OCL substitutes ‘responsibilities’ (coming up later on, the even more correct ‘service missions’) for government powers; OCL also substitutes ‘disabilities’ for the ‘endowed’ or ‘inalienable rights’ that so irked Jeremy Bentham.

OCL is not surprised. It expects the vocabulary by which a constitution commands and permits government fulfillment of responsibilities to differ from the constitutional prohibitions by which individual rights are secured from official interference.

It was this latter notion, that constitutions should trouble themselves with the beliefs of those who imagine ‘every law [which offends them] is void,’ that so offended Bentham.

C. So What Was Bentham Right About? Listing of ‘certain natural rights,” one of the points about ‘inalienable’ rights that put him over the top, inspired this taunt: “Not to dwell on the oversight of confining to posterity the benefit of the rights thus declared … .”

How posterity learns its gratitude assumes, Bentham argues and correctly so, a writing which serves as a listing of “certain … rights.”

Was Bentham right about rights?
Was Madison wrong about rights?
Is there a problem listing rights?
Rights considered as disabilities of officials and their actions invoke the listing paradox just as much as rights considered as faculties of government officials. What Lewis Carroll noticed – ‘What the Tortoise Said to Achilles,’ 4 Mind 278 (1895) – is that sovereign lardings and lashings (of additional instructions) will not make existing fixed-in-one-place text less defective.

So score that: one for Bentham (listing of rights is stupid because it is sovereign will that’s the end-all and be-all of writings on government) and one for Carroll (listing of any instructions is stupid because it only leads to more (useless) writings). Bentham Carroll love, you will.

That dismal scoring didn’t stop James Madison from trying to do what Jeremy Bentham told him not to do.

“The exceptions here or elsewhere in the constitution, made in favor of particular rights – ” this is Madison in the House on June 8, 1789, proposing twelve articles of amendment – “shall not be so construed as to diminish the just importance of other rights retained by the people … ” The Table Annexed to Mr. Madison Renumbers the Constitution, 2 OCL 385, contains the pertinent text.

Madison proceeded to offer corrective amendments, that is, a defective list of rights (as Bentham warned and Carroll would warn) and amendments as additional-(logical)-instructions (the Ninth and Tenth Amendments) as to which Lewis Carroll and (later) Bertrand Russell would sound the warning.

D. RULES-IN-INVENTORY AND RULES-MADE-JUST-IN-TIME. There are rules in inventory. Some of these rules are procedures. Take the “elementary logic of propositions,” explored in Nagel and Newman’s Gödel’s Proof (rev. ed. 2001), which include, at the third step of construction of such a language, “ ‘Transformation Rules’ [which] describe the precise structure of formulas from which other formulas of given structure are derivable. These rules are, in effect the rules of inference.”

Madison believed that there existed procedure/s to be followed when teasing government responsibilities from text. In Madison’s speech opposing the bank bill in the House of Representatives (February 2, 1791), Madison argued that all the instructions government needed could be found in one place.

“Had the power of making treaties, for example, been omitted, however necessary it might have been,” Madison argued, “the defect could only have been lamented, or supplied by an amendment of the constitution.” 1 Annals of Congress 1944-52 (1st Congress, 3rd Session).

Madison’s notion was that a triple fork in the road obliges future actors (here Congress) to: stop look and lament, or stop, look, and amend, or (most rarely) stop, look and act.

Hence an instance of a Transformation Rule-in-Inventory. If Madison’s gambit had worked, the Tenth Amendment would not be (as Madison conceded on February 2, 1791) dead on arrival.

E. BE TRUE TO YOUR SCHOOL. Bentham never believed that listing rights was a matter for constitution crafters; he remained true to this course for the rest of his (long) professional life.

Madison remained true to Hamilton’s philosophy; just-in-time rules could be developed, mid-wifing via exigencies or needs being all the transformation equipment required for this birthing.

Hence, Madison signed legislation promoting a national program of smallpox vaccination and signed the charter for the Second Bank of the United States.

After the War of 1812 James Madison spurned Jeremy Bentham’s offer of a (free) code of laws, but this may be taken as a brainiac-to-brainiac disconnect. After all, Beethoven and Goethe met at Teplitz to take the waters and discuss Faust: The Opera which never came about and for much the same reason. Too many egos spoil the soup.

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