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Recommended Citation

John H. Ely, *Toward a Representation-reinforcing Mode of Judicial Review*, 37 Md. L. Rev. 451 (1978)

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Maryland Law Review

VOLUME 37

1978

NUMBER 3

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TOWARD A REPRESENTATION-REINFORCING MODE OF JUDICIAL REVIEW*

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Constitutional theory is in a quandary. An "interpretivist" approach that would confine the Constitution's meaning to the directives actually contained within its four corners proves on analysis incapable of keeping faith with the document's promise (or with its promises).¹ When we search for an external source of values with which to fill in the Constitution's open texture, however — one that will not simply end up constituting the Court as a counsel of legislative revision — we search in vain.² Despite the frequent assumption that those are the only options,³ however, they are not, for value imposition is not the only possible response to the realization that we have a Constitution that needs filling in. A quite different approach is available, and to discern its outlines we need look no further than to the Warren Court.⁴

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1. See Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978) [hereinafter cited as *Constitutional Interpretivism*].

2. See Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 1 (1978) [hereinafter cited as *Foreword*].

3. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 452-53 (1978); Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1184, 1193 (1977) [hereinafter cited as Sandalow]; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 305 n.280 (1973). The claim of Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 664 (1960) (emphasis added), that "choices that are made by judges in constitutional cases always involve value consequences, thus making value choice unavoidable" is a non sequitur.

4. "Naming" Courts after their Chief Justices is often misleading, and it can be in this case. As regards the theme under discussion here, however, which I think history will record as the dominant one, the nomer does not seem amiss. As is understandable from his earlier career, Earl Warren was a thoroughgoing democrat, who saw his role as a Justice as one of ensuring that the "in's" did not freeze others

That Court's reputation as "activist" or interventionist is certainly deserved. A lot of carping to the contrary notwithstanding, however, that is where its similarity to earlier interventionist Courts, in particular its similarity to the Court of the early twentieth century that decided *Lochner v. New York*⁵ and its progeny, ends. While the commentators of the Warren era were talking about ways of discovering fundamental values,⁶ the Court itself was marching to a different drummer. The divergence was not entirely self-conscious, and indeed, the Court occasionally lapsed into the language of fundamental values; it would be surprising if the thinking of earlier Courts and the writings of the day's preeminent commentators had not taken some toll. The toll, however, was almost entirely rhetorical, for all the important constitutional decisions of the Warren Court (indeed, virtually all its constitutional decisions, important or not⁷) suggest a deep structure significantly different from the value-oriented approach favored by the academy.

Many of the Warren Court's most controversial decisions concerned criminal procedure or other questions of what judicial or administrative process is due before serious consequences can be visited upon individuals — process-oriented decisions in the most ordinary sense. But a concern with process in a broader sense — with the process by which the laws that govern society are made — animated its other decisions as well. Its unprecedented activism in the fields of political expression and association obviously fits this broader pattern. Other Courts had recognized the connection

out of either the processes or the bounty of representative government. (It really should not surprise anybody, though it appears it often does, that Warren extended significantly less protection to pornographic "speech" than he did to political speech he also found distasteful.) See also Ely, *The Chief*, 88 HARV. L. REV. 11 (1974).

5. 198 U.S. 45 (1905).

6. See *Foreword*, *supra* note 2.

7. Of course the Warren Court, like every other, engaged in a good bit of interpretivist application of the Constitution's more directive provisions. That is as it should be: the objection to interpretivism is that it is incomplete, that there are clauses it cannot handle. See *Constitutional Interpretivism*, *supra* note 1. See also *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938), *quoted in text* accompanying note 15 *infra*. The contrast in styles to which I advert has to do with the theories by which various courts and commentators give content to the Constitution's more indeterminate phrases.

The apparent Warren Court candidate for a "fundamental value imposition" characterization is *Griswold v. Connecticut*, 381 U.S. 479 (1965), but on close examination it reveals strong interpretivist urges, struggling to relate its holding to the first, third, fourth and fifth amendments, *id.* at 484, making a special effort to connect up the fourth by speculating on the methods by which the police would likely have to enforce the law in issue. See *id.* at 485-86. This is all quite different from the "method" employed in *Roe v. Wade*, 410 U.S. 113 (1973). See Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 928-30 (1973).

between such political activity and the proper functioning of the democratic process; the Warren Court was the first seriously to act upon it. That Court was also the first to move into (and once there, seriously to occupy) the voter qualification and malapportionment areas.⁸ These were certainly interventionist decisions, but the interventionism was fueled not by a desire on the part of the Court to vindicate particular substantive values it had determined were important or fundamental,⁹ but rather by a desire to ensure that the political process (which is where such values *are* properly identified, weighed and accommodated) was open to those of all viewpoints on an equal basis.

Finally there were the important decisions insisting on equal treatment for society's habitual unequals: notably racial minorities, but also aliens, illegitimates, and poor people. But rather than announcing that good or value *X* was so important or fundamental that it simply had to be provided or protected, the Court's message here was that insofar as political officials had chosen to provide or protect *X* for some people (generally people like themselves), they had better make sure that everyone was being similarly accommodated or be prepared to explain pretty convincingly why not. Whether these two broad concerns of the Warren Court — clearing the channels of political change on the one hand so that the majority can actually rule, and correcting certain kinds of discrimination against minorities on the other — fit together to form a coherent theory of representative government, or whether, as is sometimes suggested, they are actually inconsistent impulses,¹⁰ is a question we shall take up presently. But however that may be, it seems finally to be coming into focus, as it did for few observers at the time,¹¹ that the pursuit of these "participational" goals of broadened access to the processes and the payoffs of representative government, as opposed to the more traditional and academically popular insistence upon the provision of a series of particular substantive goods or

8. See also, e.g., *Powell v. McCormack*, 395 U.S. 486 (1969) (reversing legislative refusal to seat person elected); *Williams v. Rhodes*, 393 U.S. 23 (1968) (the first of several decisions invalidating refusals to list minor party candidates on ballot); *Bond v. Floyd*, 385 U.S. 116 (1966) (reversing legislative refusal to seat person elected).

9. But see Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 98-99 (1966).

10. E.g., Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 283 (1957).

11. See, e.g., Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971): "The man who understands the issues and nevertheless insists upon the rightness of the Warren Court's performance ought also, if he is candid, to admit that he is prepared to sacrifice democratic process to his own moral views."

values deemed fundamental, was what marked the work of the Warren Court.¹² Some condemn and others praise, but at least we are beginning to understand that something different from old-fashioned value imposition was for a time the order of the day.¹³

The Carolene Products Footnote

The Warren Court's approach was foreshadowed in a famous footnote in *United States v. Carolene Products Co.*,¹⁴ decided in 1938. Justice Stone's opinion for the Court upheld a federal statute prohibiting the interstate shipment of filled milk, on the ground that it was rational legislation, but footnote four suggested that mere rationality might not always be enough:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general

12. The most sensitive commentator here has been Paul Freund. See *Preface to P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, CONSTITUTIONAL LAW* at xlix (4th ed. 1977); Freund, *The Judicial Process in Civil Liberties Cases*, 1975 ILL. L.F. 493 [hereinafter cited as Freund]. Compare R. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 58-59 (1956) with R. DAHL, *DEMOCRACY IN THE UNITED STATES: PROMISE AND PERFORMANCE* 234-36 (3d ed. 1967).

13. Participation itself can obviously be regarded as a value, but that does not collapse the two modes of review I am describing into one. As I am using the terms, value imposition refers to the designation of certain goods (rights or whatever) as so important they must be insulated from whatever inhibition the political process might inflict, whereas a participational orientation denotes a form of review that concerns itself with how decisions effecting value choices and distributing the resultant bounty are made. I surely do not claim that the words have to be used thus — there is even doubt that "participational" deserves to be recognized as a word at all — or even that these are the meanings they would inevitably convey. I claim only that this is how I am using them, and that so used they do not mean the same thing as each other.

If the objection is not that I have not distinguished two concepts but rather that one might well "value" fair decision procedures for their own sake, of course it is right: one might. And to one who insisted on that terminology, my point would be that the "values" the Court should pursue are "participational values" of the sort I have mentioned, since those are the "values" (1) with which our Constitution has preeminently and most successfully concerned itself, (2) whose "imposition" is not incompatible with, but on the contrary supportive of, the American system of representative democracy, and (3) that courts set apart from the political process are uniquely situated to "impose."

14. 304 U.S. 144 (1938).

prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.¹⁵

Paragraph one, of course, is pure interpretivism: it says the Court should enforce the "specific" provisions of the Constitution.¹⁶ That cannot be enough, however, for there are provisions in the Constitution that call for more.¹⁷ Paragraphs two and three give us a version of what that more might be. Paragraph two suggests it is an appropriate function of the Court to keep the machinery of majoritarian democracy running as it should, to make sure the channels of political participation and communication are kept open. Paragraph three suggests that the Court should also concern itself with what majorities do to minorities, particularly mentioning invidiously motivated statutes and even the possibility that the political insularity of the disadvantaged group might call for special scrutiny.

For all its notoriety and influence, the *Carolene Products* footnote has not been adequately elaborated. Paragraph one has always seemed to some commentators not quite to go with the other two.¹⁸ Professor Lusky (who has never made a secret of the fact that as a law clerk he worked on this footnote) has recently revealed that paragraph one was added in order to secure the concurrence of Chief Justice Hughes.¹⁹ The implied substantive criticism seems misplaced: positive law has its claims, even when it does not fit some grander theory.²⁰ It is true, though, that paragraphs two and three are more interesting, and it is the relationship between those paragraphs that has not been adequately elaborated. Majoritarian-

15. *Id.* at 152-53 n.4 (citations omitted).

16. Reference to the "specific prohibitions" of the "first ten [sic] amendments" was obviously inadvertent.

17. *Constitutional Interpretivism*, *supra* note 1, at 424-45.

18. *E.g.*, Braden, *The Search for Objectivity in Constitutional Law*, 57 *YALE L.J.* 571, 580 n.28 (1948).

19. L. LUSKY, *BY WHAT RIGHT?* 110-11 (1975) [hereinafter cited as L. LUSKY].

20. The footnote purports to catalogue the occasions on which intensive judicial scrutiny is appropriate. It would therefore be incomplete without paragraph one.

ism and egalitarianism are surely both ancient American ideals; indeed, dictionary definitions of "democracy" tend to incorporate both thoughts.²¹ But frequent conjunction is not the same thing as consistency, and at least on the surface a principle of majoritarianism suggests rather directly an ability on the part of a majority simply to outvote a minority and thus deprive its members of goods they desire. Borrowing Paul Freund's word,²² I have suggested that both *Carolene Products* themes are concerned with participation: they ask us to focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted. But the fact that two concepts can fit under the same verbal umbrella is not enough to render them consistent either, and a system of equal participation in the process of government is by no means self-evidently linked to a system of presumptively equal participation in the payoffs that process generates; in many ways it seems calculated to produce just the opposite effect. To understand the ways in which these two sorts of participation join together in a coherent political theory, it is necessary to focus on the American concept of representative government.

Representative Democracy

It is a principle of general application that the exercise of granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf

We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates.

— United States Supreme Court (1944)²³

Rhetoric prevalent before the Revolution stressed the continuing conflict between the interests of "the rulers" on the one hand, and the interests of "the ruled" or "the people" on the other.²⁴ The

21. See, e.g., WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 375 (2d College ed. 1976).

22. Freund, *supra* note 12, at 494.

23. *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 202 (1944).

24. See, e.g., G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 18, 58-63, 447 (1969) [hereinafter cited as G. WOOD]; Buel, *Democracy and the*

concept of "representation," indicating an association of the interests of the rulers and ruled, was thought to contain an answer. Thus the representatives in the new government were visualized as "citizens"²⁵ — ideally persons of unusual ability and character, but nonetheless "of" the people. Upon conclusion of their service, the vision continued, they would return to the body of the people and thus to the body of the ruled. In addition, even while in office, the idea was that they would live under the regime of the laws they passed and not exempt themselves from their operation; this obligation to include themselves among the ruled would ensure a community of interest and guard against oppressive legislation.²⁶ The framers realized that even visions need enforcement mechanisms: "some force to oppose the insidious tendency of power to separate . . . the rulers from the ruled" was obviously required.²⁷ The principal force they envisioned was the ballot: the people in their self-interest would choose representatives whose interests intertwined with theirs and by the critical reelection decision ensure that they stayed that way, in particular that they did not exempt themselves from the law's demands.²⁸

In fact, as our history has borne out, that is not a bad way at all of protecting the interests of most citizens (though of course it is not perfect either). If a majority of us feel we are being subjected to unreasonable treatment by our representatives, we can turn them

American Revolution: A Frame of Reference, 21 WM. & MARY Q. 165, 168 (3d ser. 1964) [hereinafter cited as Buel]; Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. PA. L. REV. 1166, 1172, 1177 (1972) [hereinafter cited as Nelson].

25. See, e.g., THE FEDERALIST No. 10 (J. Madison) 133 (B. Wright ed. 1961) ("The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest . . .").

26. See, e.g., A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 233 (Anchor ed. 1969); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 29 (1969) (quoting John Locke); JAMES MILL, AN ESSAY ON GOVERNMENT, ch. VI I (1825), reprinted in *Essays on Government, Jurisprudence, Liberty of the Press, & Law of Nations* in REPRINTS OF ECONOMICS CLASSICS 17-20 (1967); J. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 283 (1978) [hereinafter cited as J. POLE]; G. WOOD, *supra* note 24, at 25, 28, 56, 231, 379. See also VA. BILL OF RIGHTS OF 1776, § 5:

That the legislative and executive powers of the state should be separate and distinct from the judiciary; and that the members of the two first may be restrained from oppression, by feeling and participating [in] the burthens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken

27. Buel, *supra* note 24, at 184.

28. See *id.* at 183-85; G. WOOD, *supra* note 24, at 447.

out of office.²⁹ What the system, at least as described thus far, does *not* ensure is the effective protection of minorities whose interests differ from the interests of most of the rest of us. For if it is not the "many" who are being treated unreasonably but rather only some minority, that obviously will not be so comfortably amenable to political correction. Quite the contrary, there may be political pressures to *encourage* our representatives to pass laws that treat the majority coalition on whose continued support they depend in one way, and one or more minorities they feel they do not need in a less favorable way; the fact that the representatives personally must be treated as the majority is treated is obviously no guarantee against that.

There are those who argue that that is precisely the way democracy is supposed to work, that minorities that do not like what is being done to them should simply get busy bargaining, and combine with other groups into what amount to mutual defense pacts.³⁰ It would probably be a mistake, however, to attribute that view to the founders of our nation. The "republic" they sought to create was not one in which the government pursued the interests of a privileged few or even only the interests of those groups that could work themselves into some majority coalition, but rather one in which *the majority would govern in the interest of the whole people*.³¹ Thus every citizen was entitled to equivalent respect, and equality was an oft-mentioned republican concern. (To cite the most prominent example, its place in the Declaration of Independence could hardly be more prominent.³²) When it came to describing the actual mechanics of republican government in the Constitution, however, this concern for equality got what in retrospect must seem comparatively short shrift. This was probably because of an assumption of "pure" republican political and social theory that we

29. Actually, whether or not our representatives treat themselves as they treat us is probably not the critical point. If most of us are being treated in what we regard as reasonable ways, we probably will not become overly exercised about the special privileges of office (though it is comforting to know we can do something about them if they grow excessive). If, on the other hand, most of us are being subjected to regulation we find objectionable, we retain the ability — entirely irrespective of whether our representatives are formally or informally insulating themselves — to vote them out.

30. See, e.g., text accompanying note 62 *infra*.

31. See THE FEDERALIST No. 39 (J. Madison) 280-81 (B. Wright ed. 1961); ARISTOTLE'S POLITICS 139 (Modern Library ed. 1943); J. POLE, *supra* note 26, at 36.

32. See also 2 Del. Laws, ch. 53 (S. & J. Adams 1797); 1 N.C. Public Acts, ch. 22 (J. Iredell ed., F.X. Martin reviser 1804); J. POLE, *supra* note 26, chs. 2-3; G. WOOD, *supra* note 24, at vii, 70; Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 14-15 (1977) [hereinafter cited as Katz].

have brushed but not yet stressed, the assumption that “the people” were an essentially homogeneous group whose interests did not vary significantly.³³ Though most often articulated as if it were an existing reality, this plainly was at best an ideal, and the fact that wealth redistribution of some form — ranging from fairly extreme to fairly modest proposals — figured in so much early republican theorizing,³⁴ while doubtless partly explainable simply in terms of the perceived desirability of such a change, also was quite clearly related to republicanism’s political theory. To the extent that existing heterogeneity of interest was a function of wealth disparity, redistribution would reduce it. To the extent the ideal of homogeneity could be achieved, it would follow that legislation in the interest of most (or in the interest of any, for that matter) would necessarily be legislation in the interest of all, and no serious further attention to equality of treatment would be necessary.

At least that was the theory. The key assumption here, however, that everyone’s interests are essentially identical, is obviously a hard one for us to swallow, and in fact we know perfectly well that many of the Founding Fathers — the name of James Madison is one that has to come to mind — did not swallow it either.³⁵ Thus the document of 1789 and 1791, though at no point directly invoking the concept of equality, did strive by at least two strategies to protect the interests of minorities from the potentially destructive will of some majority coalition. The more obvious one may be the “list” strategy employed by the Bill of Rights, itemizing things that cannot be done to anyone, at least by the federal government (though even here the safeguards turn out to be mainly procedural³⁶). The original Constitution’s more pervasive strategy, however, can be loosely styled a strategy of pluralism, one of structuring the government, and to an extent society generally, so that a variety of voices would be guaranteed their say and in theory no single interest group could dominate. As Madison — pointedly eschewing the approach of setting up an undemocratic body to keep watch over the majority’s values — put it in *The Federalist* No. 51:

It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . . If a majority be united by a common interest, the rights of the

33. See generally note 24 *supra*.

34. See, e.g., J. POLE, *supra* note 26, at 117-29; Katz, *supra* note 32.

35. See, e.g., G. WOOD, *supra* note 24, at 606-07.

36. See text accompanying note 104 *infra*.

minority will be insecure. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority . . . the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States.³⁷

Though we tend to forget it, the crucial move from a confederation to a system with a significantly stronger central government was so conceived. Madison has been conspicuously attacked for not understanding pluralist political theory,³⁸ but in fact there is reason to suppose he understood it rather well. His theory, derived from David Hume and spelled out at eloquent length in *The Federalist*, was that although at a local level one "faction" might well have sufficient clout to be able to tyrannize others, in the national government no faction or interest group would constitute a majority capable of exercising control.³⁹ The Constitution's various moves to break up and counterpoise decision and enforcement authority, not only between the national government and the states but among the three departments of the national government as well, were of similar design.

This "separation of powers" was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given power can be

37. THE FEDERALIST No. 51 (J. Madison) 357-58 (B. Wright ed. 1961). See generally THE FEDERALIST No. 9 (A. Hamilton) 125 (B. Wright ed. 1961); A. LOVEJOY, REFLECTIONS ON HUMAN NATURE 37-65 (1961); H. ARENDT, ON REVOLUTION 148-51 (1963) [hereinafter cited as H. ARENDT]; G. WOOD, *supra* note 24, at 430-67; Adair, "That Politics May be Reduced to a Science": David Hume, James Madison, and the Tenth Federalist, 20 HUNTINGTON LIB. Q. 343 (1957); Diamond, *Democracy and The Federalist: A Reconsideration of the Framers' Intents*, 53 AM. POL. SCI. REV. 52 (1959).

38. R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956) [hereinafter cited as R. DAHL].

39. THE FEDERALIST No. 10 (J. Madison) 133-36 (B. Wright ed. 1961). See also Morgan, *The American Revolution Considered as an Intellectual Movement*, in PATHS OF AMERICAN THOUGHT 11 (A. Schlesinger, Jr. & M. White eds. 1963).

implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will.⁴⁰

Nongovernmental power centers were protected as well, at least partially in pursuance of the same strategy. The press and the church were guaranteed a substantial degree of autonomy, and while the protections extended to private property and contract were on the face of the document significantly less stringent,⁴¹ those institutions at least came in for special mention.

It is a rightly renowned system, but it did not take long for us to come to understand that from the standpoint of protecting minorities it was not enough. For one thing, whatever genuine faith had existed at the beginning — and we have seen it was never very deep — that everyone's interests either were identical, or were about to be rendered so, had plainly run its course as the republic approached its fiftieth birthday. The early idea of significant economic redistribution had long since passed into the realm of pipedreams past. Significant economic differences remained a reality, and the fear of legislation hostile to the interests of the propertied and creditor classes — which of course had materialized earlier, during the regime of the Articles of Confederation,⁴² and thus had importantly inspired the constitutional devices to which we have alluded — surely did not abate during the Jacksonian era, as the “many” began genuinely to exercise political power.⁴³ The Pennsylvania Supreme Court summed it up thus in 1851:

[W]hen, in the exercise of proper legislative powers, general laws are enacted, which bear or may bear on the whole community, if they are unjust and against the spirit of the constitution, the whole community will be interested to procure their repeal by a voice potential. And that is the great security for just and fair legislation.

40. *United States v. Brown*, 381 U.S. 437, 443 (1965). See also THE FEDERALIST Nos. 47, 48 & 51 (J. Madison). There is a curious dispute in the literature over whether Madison really meant to rely on the move to a central government on the one hand, or the checks and balances within that government on the other, to check tyranny. See Morgan, *Madison's Theory of Representation in the Tenth Federalist*, 36 J. POL. 852 (1974) and sources cited therein. Madison himself seems to have been under the impression he was relying on both.

41. But see text accompanying note 87 *infra*.

42. See generally C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1936). See also, e.g., Horwitz, *The Legacy of 1776 in Legal and Economic Thought*, 19 J. LAW & ECON. 621, 622 (1976).

43. See generally Nelson, *supra* note 24.

But when individuals are selected from the mass, and laws are enacted affecting their property, . . . who is to stand up for them, thus isolated from the mass, in injury and injustice, or where are they to seek relief from such acts of despotic power?⁴⁴

Also relevant, though to our shame it probably seemed less so, was the persistence of the institution of slavery. So long as blacks could conveniently be regarded as subhuman, they provided no proof that some people were tyrannizing others. Once that assumption began to totter — as of course it did in a significant (if belated and insufficient) way during the period in question — another reason for doubting that the protection of the many was necessarily the protection of all came into focus.

Simultaneously — and obviously partly as a result — we came to recognize that the existing constitutional devices for protecting minorities were simply not sufficient. No finite list of entitlements can possibly cover all the ways majorities can tyrannize minorities, and the informal and more formal mechanisms of pluralism cannot always be counted on either. The fact that effective majorities can usually be described as clusters of cooperating minorities will not be much help when the cluster in question has sufficient power and perceived community of interest to advantage itself at the expense of a minority (or group of minorities) it is inclined to regard as different, and in such situations the fact that a number of agencies must concur, and others retain the right to squawk, is not going to help much either.⁴⁵ If, therefore, the republican ideal of government in the interest of the whole people was to be maintained, in an age when faith in the republican tenet that the people and their interests were essentially homogeneous was all but dead, a frontal assault on the problem of majority tyranny was needed. The existing theory of representation had to be extended so as not simply to ensure that the representative would not sever his interests from those of a majority of his constituency, but also to ensure that he would not sever a majority coalition's interests from those of various minorities. Naturally that cannot mean that groups that comprise minorities of

44. *Ervine's Appeal*, 16 Pa. 256, 268 (1851). (The court's answer to its own question was that refuge should be found "in the courts.") See also *De Chastellux v. Fairchild*, 15 Pa. 18, 20 (1850); text accompanying notes 64-67 *infra*.

45. How often such situations arise, when the assurances of pluralist theory cannot be made to ring true, is the subject of controversy and will be pursued later in the book (in progress) of which this article is a part. (The question is at least potentially relevant to the question when intensive judicial scrutiny is appropriate.) The point sufficient for the present occasion, however, is that they do arise from time to time: the single example of the plight of the black minority throughout our history is enough to prove that.

the population can never be treated less favorably than the rest, but it does preclude a refusal to *represent* them, the denial to minorities of what Professor Dworkin has called "equal concern and respect in the design and administration of the political institutions that govern them."⁴⁶

Of course there is an ethical ideal at work here, that it is morally wrong to leave the welfare of certain people out of account in formulating public policy, or to treat them worse than others without sufficient reason for making a distinction.⁴⁷ But the ideal also serves to ensure that representatives will represent all the people they are elected to represent, and not simply those whose support is needed to return them to office. Concurring in *Railway Express Agency, Inc. v. New York*,⁴⁸ Justice Jackson put it well:

I regard it as salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.⁴⁹

Jackson was expounding on the fourteenth amendment's Equal Protection Clause,⁵⁰ which is obviously our Constitution's most dramatic embodiment of the frontal assault strategy. Long before that amendment was ratified, however, the theory related by Jackson was understood at least murkily, and functioned as a

46. R. DWORIN, *TAKING RIGHTS SERIOUSLY* 180 (1977) (Dworkin does not suggest, nor do I, that the specific implications of the concept for particular cases are likely to be clear.) See also J. POLE, *supra* note 26, at 5.

47. "The question is not whether I treat you rudely, but whether you have ever heard me treat anyone else better." G. SHAW, *PYGMALION*, Act V (1913), reprinted in G. SHAW, *PYGMALION AND OTHER PLAYS* 99 (1967).

48. 336 U.S. 106 (1949).

49. *Id.* at 112-13 (Jackson, J., concurring).

50. You will note that he mentioned the federal government, though.

component — at times even as a judicially enforceable component⁵¹ — of the concept of representative democracy that had been at the core of our Constitution from the beginning.⁵²

It is ironic, but the old concept of “virtual representation” is very close to the point here. Of course the actual term was anathema to our forefathers,⁵³ since it was invoked to answer their claim of “taxation without representation.” But the concept contained an important insight that has survived in American political theory and in fact has informed our constitutional thinking from the beginning. The colonists’ argument that it was wrong, even “unconstitutional,” to tax us when we lacked the privilege of sending representatives to Parliament was answered on the British side by the argument that although the colonies did not actually elect anyone, they were “virtually represented” in Parliament. Manchester was taxed, it was pointed out, without the privilege of sending representatives to Parliament; yet surely, the argument concluded, no one could deny that Manchester was represented. The colonists’ answer, at least their principal one, took the form of a denial not of the concept’s general sense, but rather of its applicability to our case. Thus Daniel Dulany, of Maryland, responded:

The security of the non-electors [of Manchester] against oppression is that their oppression will fall also upon the electors and the representatives. . . . The electors, who are inseparably connected in their interests with the non-electors, may be justly deemed to be the representatives of the non-electors . . . and the members chosen, therefore, the representatives of both.⁵⁴

However,

there is not that intimate and inseparable relation between the electors of Great Britain and the inhabitants of the colonies, which must inevitably involve both in the same taxation. On the contrary, not a single actual elector in England might be

51. See also Nelson, *supra* note 24, at 1180-85.

52. A huge percentage of the original document, of course, is devoted to ensuring a republican form for the federal government. See also U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”). On the contemporary meaning of republican form, see THE FEDERALIST No. 39 (J. Madison) 280-81 (B. Wright ed. 1961), quoted in *Constitutional Interpretivism*, *supra* note 1, at 409.

53. See B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 169-70 (1967) [hereinafter cited as B. BAILYN].

54. C. BECKER, THE DECLARATION OF INDEPENDENCE 88-89 (1922) [hereinafter cited as C. BECKER].

immediately affected by a taxation in America. . . . Even acts oppressive and injurious to an extreme degree, might become popular in England, from the promise or expectation that the very measures which depressed the colonies, would give ease to the inhabitants of Great Britain.⁵⁵

Although the term understandably has not been revived, the protective device of guarantying "virtual representation," by tying the interests of those without political power to the interests of those with it, was one that importantly influenced both the terms of our original Constitution and its subsequent interpretation. Article IV's Privileges and Immunities Clause was intended, and generally interpreted, to mean that state legislatures could not by their various regulations treat out-of-staters less favorably than they treated locals. "It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."⁵⁶ Justice Washington's aberrational construction in *Corfield v. Coryell*⁵⁷ notwithstanding, article IV conveyed no set of substantive entitlements, but "simply" the guaranty that whatever entitlements those living in a state saw fit to vote themselves would be extended to visitors.⁵⁸ An ethical ideal of equality is doubtless working here, but the reason inequalities against nonresidents were singled out for prohibition in the original Constitution is obvious: nonresidents are a paradigmatically powerless class politically. How then were they to be protected? Not by a set of substantive entitlements but rather by what amounts to a system of virtual representation: by constitutionally tying the fate of outsiders to the fate of those who did possess political power, the framers insured that their interests would be well looked after. The Commerce Clause of article I, section 8 provides simply that Congress shall have the power to regulate commerce among the several states. But early on the Supreme Court gave this provision a self-operating dimension as well, one growing out of an obvious need to protect the politically powerless and proceeding by essentially the same device of

55. *Id.* at 88-89. See also B. BAILYN, *supra* note 53, at 166-68.

56. *Toomer v. Witsell*, 334 U.S. 385, 395 (1948) (footnote omitted).

57. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). See generally *Constitutional Interpretivism*, *supra* note 1, at 433-34.

58. See U.S. ARTS. OF CONFED. art. IV; 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 112 (M. Farrand rev. ed. 1966) (Pinckney, observations on plan of government) [hereinafter cited as RECORDS]; see also 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §1806 (T. Cooley ed. 1873). The provision has generally been so interpreted and is to the present day. See, e.g., *Doe v. Bolton*, 410 U.S. 179, 200 (1973).

guarantied virtual representation. Thus, for example, early in the nineteenth century the Court indicated that a state could not subject goods produced out of state to taxes it did not impose on goods produced locally.⁵⁹ Any tax on out-of-state goods will obviously burden interstate commerce to a degree, but the Court did not outlaw all such taxes or even set a ceiling on them. Instead, by constitutionally tying the interests of out-of-state manufacturers to those of local manufacturers represented in the legislature, it provided political insurance that the taxes would not rise to a prohibitive or even unreasonable level.⁶⁰

The examples discussed so far involve the protection of geographical outsiders, the literally voteless. But even the technically represented can find themselves functionally powerless and thus in need of a sort of "virtual representation" by those more powerful than they. Thus a need for protection akin to that of literal outsiders can arise for groups that are not that, but find nonetheless, with respect to one or a cluster of issues, that they are habitually outvoted and as a result subjected to regulation or other deprivation more onerous than that to which those who habitually prevail have proved willing to subject themselves.⁶¹ From one perspective the claim of such groups to protection from the ruling majority is even more compelling than that of the out-of-stater: they are, after all, members of the community that is doing them in. From another, however, their claim seems weaker: they do have the vote, and it may not in the abstract seem unreasonable to expect them to wheel and deal as the rest of us (theoretically) do, yielding on issues about which they are comparatively indifferent and "scratching the other guy's back" in order to get him to scratch theirs. "[N]o group that is prepared to enter into the process and combine with others need remain permanently and completely out of power."⁶² Perhaps not "permanently and completely" if by that we mean forever, but certain groups that are technically enfranchised *have* found themselves for long stretches in our society in a state of persistent inability to protect themselves, by the usual "pluralistic" give-and-take, from pervasive forms of discriminatory treatment. Such groups might just as well be disenfranchised.

59. See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827).

60. See also *Raymond Motor Transp., Inc. v. Rice*, 98 S. Ct. 787, 795 n.18 (1978); *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45-46 n.2 (1940).

61. Compare *South Carolina State Highway Dept. v. Barnwell Bros. Inc.*, 303 U.S. 177, 184-85 n.2 (1938) with *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

62. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 37 (1970).

Obviously the issues adumbrated here — relating to the conditions under which it is appropriate constitutionally to bind the interests of the majority to those of some minority with which no felt community of interests has naturally developed — need a good deal more attention.⁶³ The point that is relevant here is that long before the enactment of the Equal Protection Clause, the Supreme Court was prepared at least under certain conditions to protect the interests of minorities that were not literally voteless by constitutionally tying their interests to those of groups that did possess political power — and (what is the same thing) intervening specially to protect such interests when it appeared such a guaranty of “virtual representation” was not being provided. In the landmark case of *McCulloch v. Maryland*,⁶⁴ decided in 1819, the Court invalidated a state tax on the operations of all banks (preeminently including the Bank of the United States) not chartered by the state legislature. Toward the end of Chief Justice Marshall’s Court opinion, there appears a passage that seems invariably to baffle students:

This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State.⁶⁵

What ever did he have in mind? It cannot have been that he knew the real estate and income taxes were in fact less burdensome, for nothing in his opinion had indicated that the tax the Court was invalidating was in fact disabling or even burdensome. In fact it was at the heart of his argument that no such showing was necessary: “the power to tax involves the power to destroy,” and a little tax on bank operations is as impermissible as a big one. Well, what about a tax on the land on which the local branch of the Bank of the United States sat? That too had the potential to destroy, and surely there can be no magic in the incantation that that is not a tax on “operations.” Either tax, if it got out of hand (and there was no indication that either had), could destroy the Bank. By now we are in

63. They shall receive it in Chapter VI of the book (in progress) of which this article is a part. See also Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 728-35 (1974).

64. 17 U.S. (4 Wheat.) 316 (1819).

65. *Id.* at 436.

a position to spot the trick right away; it lies in Marshall's notation that the real estate tax would have to be "in common with the other real property within the State," the tax on any interest held by citizens "in common with other property of the same description throughout the State." The unity of interest with all Maryland property owners thus assured by this insistence on equal treatment would protect the Bank from that sort of destruction. Of course the power to tax real estate or income is also potentially the power to destroy. But people are not lemmings, and while they may agree to disadvantage themselves somewhat in the service of some overriding social good, they are not in the habit of *destroying* themselves en masse.⁶⁶

The tax in issue, on the operations of banks not chartered by the state, presented a different problem. Of course the Bank of the United States did not have a vote in the Maryland legislature, but no corporation did. The interests of organizations generally have to be protected by people whose interests are tied up with theirs — officers, employees, stockholders — and in these respects there is no reason to suppose the Bank of the United States was more impoverished than any other organization. Thus the Bank was not voteless, at least not voteless in any sense that other corporations are not. Yet the tax on bank operations was invalidated, and the reason it was is quite obvious: this was a tax exclusively on banks, indeed exclusively on banks not chartered by the state. The Bank of the United States may have had a "vote" as effective as that of any other single corporation, but it was clear nonetheless that with regard to a tax on the operations of non-state-chartered banks it would find itself in a perpetually losing situation politically, since at best — though it appears even this was lacking — its only allies in the Maryland legislature on this issue would be a couple of wildcat banks. Here too there is reason to suppose that constitutional salvation would have been found only in a genuine guaranty of virtual representation, if, for example, the Bank's operations were taxed only as part of a tax equally affecting all business operations in Maryland.⁶⁷

66. See *id.* at 428 ("In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation."). See also *United States v. Fresno County*, 429 U.S. 452, 459-60 (1977).

67. The point of the *McCulloch* discussion seems to have been lost in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which invalidated the extension of the Fair Labor Standards Act (FLSA) to state employees. It may be that the interests of the states *qua* states will not be sufficiently protected by their congressional delegations. See *id.* at 841-42 n.12. But see *Massachusetts v. United States*, 98 S. Ct. 1153, 1161-62 (1978). It is nonetheless true, as regards issues relating to how strenuous the demands of the Act are to be permitted to become, that the interests of

I certainly do not mean to suggest that *McCulloch* was a direct precursor of the *Carolene Products* footnote, generally heralding the special judicial protection of discrete and insular minorities; it is most unlikely the Bank would have received this special solicitude had it not been a federal instrumentality. The Court's discussion is instructive nonetheless. It suggests by its treatment of the real estate and income taxes the clear assumption of even that early day that representatives could be expected to represent the entirety of their constituencies without arbitrarily severing disfavored minorities for comparatively unfavorable treatment. And it suggests by its invalidation of the bank operations tax its further assumption that at least in some situations judicial intervention becomes appropriate when this expectation appears to have been betrayed and the existing processes of representation seem inadequately fitted to the protection of deserving minority interests, even minority interests that are not voteless.

It appears more generally that as early as the early nineteenth century, at least for some theorists and judges — I surely do not suggest that the theme was a dominant one — developing notions of representation were understood to include a duty on the part of representatives “virtually” to represent the politically powerless, and even a sometime duty on the part of constitutional courts to compel such virtual representation by insisting that the majority tie its interests to those of the powerless and by intervening specially when it had not done so. The extent to which this is good history is unimportant to my main theme, however, for whatever may have been the case before, the fourteenth amendment quite plainly imposes both those duties. My main point in using the examples has been to suggest a way in which what are often characterized as two conflicting American ideals — the protection of majority rule on the one hand, and the protection of minorities from denials of equal concern and respect on the other — in fact can be understood as arising from a common set of impulses.

* * * * *

The remainder of the article will comprise three arguments in favor of a participation-oriented, representation-reinforcing ap-

states as employers would be well represented by Senators and Congressmen responsive to the wishes of the myriad other enterprises, generally large and medium-sized corporations, covered. In no sense did the FLSA single out state governmental entities for especially onerous regulation, and thus there was no practical danger it would be permitted politically to achieve a degree of onerousness that would seriously disable state government operations, let alone threaten their “separate and independent existence.” 426 U.S. at 845.

proach to judicial review. The first will take longer than the others since it will necessitate a tour, albeit brisk, of the Constitution itself. What we will learn, contrary to the standard characterization of the Constitution as "an enduring but evolving statement of general values,"⁶⁸ is that in fact the selection and accommodation of substantive values is left almost entirely to the political process and that instead the document is overwhelmingly concerned, on the one hand with procedural fairness in the resolution of individual disputes (process writ small), and on the other with what might capaciously be designated process writ large⁶⁹ — with ensuring broad participation in the processes and benefits of government. An argument by way of *ejusdem generis* seems particularly justified in this case, since the constitutional provisions with respect to which we are attempting to identify modes of supplying content, such as the ninth amendment and the fourteenth amendment's Privileges or Immunities Clause, seem to have been included out of a "we must have missed something here, so let's trust the future to add what we missed" spirit.⁷⁰ On my more expansive days, therefore, I am tempted to claim that the sort of participation-oriented mode of review suggested here represents the ultimate interpretivism.⁷¹

68. D. Wright, *The Role of the Judiciary: From Marbury to Anderson*, 60 CALIF. L. REV. 1262, 1268 (1972). See also, e.g., Sandalow, *supra* note 3, at 1178, 1180; J.S. Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 784 (1971).

69. The approach I shall end up recommending in fact is more thoroughlygoing process-oriented than might be supposed even from the discussion thus far. A concern with fairness in the distribution of governmentally generated costs and benefits might be implemented, and indeed attempts along this line are the more common, by attending to the resultant pattern of impact: "Who has ended up with how much of what?" is widely assumed to be the constitutionally critical question. I shall be arguing later in the book (in progress) of which this article is a part, however, that such distributional questions can be intelligibly approached only via a process-oriented, or what Professor Nozick has called an "historical," approach, as opposed to what he calls a "current time slice" approach. See R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 153 (1974). I shall thus be suggesting that "By what process did we arrive at this distribution?" is the relevant question in this (though only this) context. See also Ely, *The Centrality and Limits of Motivation Analysis*, 5 SAN DIEGO L. REV. 1155, 1160-61 (1978).

70. See *Constitutional Interpretivism*, *supra* note 1.

71. One might argue that the Constitution's overwhelming stress on process and participation does not actually prove anything, that the reason so few values are singled out by the document for special substantive protection is that the various framers were assuming that that was unnecessary because they were assuming that identifying fundamental values for protection was a function the Supreme Court could be counted on to perform. This argument seems plainly fallacious. Judicial review was not even a clearly contemplated feature of the original Constitution (although it is certainly a bona fide feature of today's). The other critical Constitution-making period was the Reconstruction era, and surely no one would argue that at any time prior to

Our review will tell us something else that may be even more relevant to the issue before us, however — that the few attempts the various framers *have* made to freeze values by designating them for special protection in the document have been ill-fated, resulting in repeal, either officially or by interpretative pretense. Obviously this suggests a conclusion with important implications for whether *the Court* should attempt constitutionally to preserve what it takes to be fundamental values, that that is not an appropriate *constitutional* task. This, we shall see, is a point the various framers of our Constitution throughout our history have generally appreciated.

The other two arguments are susceptible to briefer statement but are not for that reason less important. The first is that a participation-oriented, representation-reinforcing approach to judicial review, unlike its rival value-protecting approach, is not inconsistent with, but on the contrary (and quite by design) entirely supportive of, the underlying premises of the American system of representative democracy. The second is that such an approach, again in contradistinction to its rival, involves tasks that courts, as experts on process and (more importantly) as political outsiders, can sensibly claim to be better qualified and situated to perform than political officials.

The Nature of the United States Constitution

In the United States the basic charter of the law-making process is found in a written constitution. . . . [W]e should resist the temptation to clutter up that document with amendments relating to substantive matters. . . . [Such attempts] involve the obvious unwisdom of trying to solve tomorrow's problems today. But their more insidious danger lies in the weakening effect they would have on the moral force of the Constitution itself.

—Lon Fuller⁷²

Many of our colonial forebears' complaints against British rule were phrased in "constitutional" terms. That such claims generally encountered logical problems is understandable, since by and large they were uneasy way stations en route to what it gradually became apparent was the real point, a desire for independence.⁷³ But even

Reconstruction the Court had gotten into the business of value definition long or clearly enough to suppose the framers were framing against the assumption that that was its job. See *Constitutional Interpretivism*, *supra* note 1, at 417-18, 447-48.

72. Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL EDUC. 457, 457, 463-64 (1954).

73. See R. PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION: The Challenge*, 160-61 (1959) [hereinafter cited as R. PALMER]. See generally Greene, *The Role of the*

the interim "constitutional" arguments tended to be phrased in process terms. Seldom was the claim one of deprivation of some treasured good or substantive right; the American colonists (at least the white males) were among the freest and best off people in the history of the world, and by and large they knew it.⁷⁴ "Constitutional" claims thus tended to be jurisdictional⁷⁵ — that Parliament lacked authority, say, to regulate the colonies' "internal commerce" — or perhaps arguments of inequality. (Claims of entitlement to "the rights of Englishmen" had an occasional natural law flavor, but the more common meaning was that suggested by the words, a claim for equality of treatment with those living in England.⁷⁶) Thus the colonists' "constitutional" arguments drew on the two participational themes we have been considering — that their input into the process by which they were governed was insufficient, and (as a consequence) they were being denied what others were receiving. The American version of revolution, wrote Hannah Arendt, "actually proclaims no more than the necessity of civilized government for all mankind; the French version . . . proclaims the existence of rights independent of and outside the body public"⁷⁷

This theme, that justice and happiness are best assured not by trying to define them for all time but rather by attending to the governmental processes by which their dimensions would be specified over time, carried over into our critical constitutional documents. Even our foremost "natural law" statement, the Declaration of Independence, after adverting to some admirable but assuredly open-ended goals — made more so by substituting "the pursuit of happiness" for the already broad Lockean reference to

Lower Houses of Assembly in Eighteenth-Century Politics, 27 J. S. HIST. 451 (1961); Morgan, *Colonial Ideas of Parliamentary Power 1764-1766*, 5 WM. & MARY Q. 311 (3d ser. 1948).

74. See G. WOOD, *supra* note 24, at 3; R. PALMER, *supra* note 73, at 189-93, 235; J. POLE, *supra* note 26, at 27. To the extent the colonists believed there was a "conspiracy" on the part of British officials to subvert the British constitution both in England and America and thus to reduce existing liberties, see generally B. BAILYN, *supra* note 51, that was coupled with a faith in the virtue of the American experiment, and thus importantly buttressed the "jurisdictional" argument for American independence.

75. See G. WOOD, *supra* note 24, at 352 ("By 1774 the colonists, like Jefferson, were contending that Parliament's acts over America were void not because they were unjust, as Otis had argued in the 1760's, but because 'the British parliament has no right to exercise authority over us.'").

76. E.g., E. MORGAN, *THE BIRTH OF THE REPUBLIC: 1763-89*, at 73 (1956); J. POLE, *supra* note 26, at 14-15, 22-24.

77. H. ARENDT, *supra* note 37, at 147.

“property”⁷⁸ — signals its appreciation of the critical role of (democratic) process:

We hold these truths to be self-evident, That all men are created equal, that they are endowed by their creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that to *secure these rights governments are instituted among men, deriving their just powers from the consent of the governed . . .*⁷⁹

The Constitution, less surprisingly, begins on the same note, one not of trying to set forth some governing ideology — the values mentioned in the Preamble could hardly be more indeterminate — but rather one of ensuring a durable structure for the ongoing resolution of policy disputes:

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

I do not suppose it will surprise anyone to be told that the body of the original Constitution is devoted almost entirely to structure — explaining who among the various actors (federal government, state government; Congress, Executive, Judiciary) has authority to do what, and going on to fill in a good bit of detail about how these persons are to be selected and to conduct their business. Even provisions that at first glance might seem primarily designed to assure or preclude certain substantive results seem on analysis to be principally concerned with process. Thus, for example, the provision that treason “shall consist only in levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort,”⁸⁰ appears at least in substantial measure to have been a precursor of the first amendment, reacting to the recognition that persons in power can disable their detractors by charging disagree-

78. See J. POLE, *supra* note 26, at 48, 53; Kenyon, *Republicanism and Radicalism in the American Revolution: An Old-Fashioned Interpretation*, 19 WM. & MARY Q. 153, 168-78 (3d ser. 1962).

79. See also Katz, *The Origins of American Constitutional Thought*, in 3 PERSPECTIVES IN AMERICAN HISTORY 474 (D. Fleming & B. Bailyn eds. 1969).

80. U.S. CONST. art. III, § 3, cl. 1.

ment as treason.⁸¹ The prohibition against granting titles of nobility⁸² seems rather plainly to have been designed to buttress the democratic ideal that all are equals in government.⁸³ The Ex Post Facto and Bill of Attainder Clauses⁸⁴ prove on analysis to be separation of powers provisions, enjoining the legislature to act prospectively and by general rule (just as the judiciary is implicitly enjoined by article III to act retrospectively and by specific decree).⁸⁵

As interpreted by the Court, the Obligation of Contracts Clause⁸⁶ is more of the same, prohibiting only (retrospective) legislation importantly altering *existing* contracts. Powerful arguments have been mounted that this long-standing interpretation misconstrues the original intent underlying the provision, that it was instead meant as a much broader prohibition on the extent to which state governments could (prospectively or retrospectively) control the subjects and content of private contracts.⁸⁷ Obviously the Court is not about to reconsider its interpretation here, but if this competing account of the original understanding is right, and it is at least plausible, that puts the provision — and to that limited extent what the framers thought they were about in the entire document — in a different light.⁸⁸ Unfortunately that light is diffracted. In one sense acceptance of the competing account would simply underscore the point suggested earlier, that the framers may have wanted to nurture private contract as a kind of power center that would further diffuse decision authority in our society. That surely contains elements of truth, but any attempt to wrap this competing interpretation in a *purely* “structural” or separation-of-powers

81. See 3 RECORDS, *supra* note 58, at 163 (James Wilson in Pennsylvania Convention).

82. U.S. CONST. art. I, § 9, cl. 8.

83. See THE FEDERALIST No. 85 (A. Hamilton) 542 (B. Wright ed. 1961), *quoted in text* accompanying note 97 *infra*.

84. U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1. See also U.S. CONST. art. I, § 3, cl. 7 (limiting judgment in cases of impeachment to removal from office and thereby precluding evasion of the Bill of Attainder Clause by labeling attainders impeachments); Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 346 n.107 (1962) [hereinafter cited as *Legislative Specification*].

85. *Legislative Specification*, *supra* note 84, at 343-48.

86. U.S. CONST. art. I, § 10, cl. 1.

87. See *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 332 (1827) (Marshall, C.J., dissenting); 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION 352-60 (1953).

88. It would also suggest, blasphemy of blasphemies, that *Lochner v. New York*, 198 U.S. 45 (1905) and its progeny might have been susceptible to responsible rationalization in interpretivist terms, though of course it would not begin to legitimize the jurisprudence actually employed in those cases.

explanation would be procrustean. In fact, no matter how we interpret the clause, the fact remains that contract was singled out for special mention, and on that basis alone we cannot responsibly exclude the conclusion that the ability to arrive at binding private agreements seemed to the framers a substantive value deserving special constitutional protection from the state legislative process, even though a sensitive commentator would mix that account with strong elements of the "competing power centers" strategy.

It should not surprise us to find a provision with respect to which concerns of both process and value seem to have been intertwined, and surely this is not the only one. Nor should it trouble us greatly; my claim is only that the original Constitution was principally, indeed I would say overwhelmingly, dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values. Any claim that it was exclusively so conceived would be ridiculous (as would any comparable claim about any comparably complicated human undertaking). In fact there are provisions in the original document that seem almost entirely value-oriented, though my point, of course, is that they are few and far between. "Corruption of blood" is forbidden as a punishment for treason.⁸⁹ Punishing a person's children for what the parent did is here outlawed as a substantively unfair outcome: it just cannot be done, irrespective of procedures and also irrespective of whether it is done to all offenders. The federal government, along with the states, is precluded from taxing articles exported from any state.⁹⁰ Here too an outcome is simply precluded; what might be styled a value, the economic value of free trade among the states, is protected.⁹¹ That, however, is about it — save one. And a big one it was. For although an understandable squeamishness kept the word out of the document, it is clear that *slavery* must be counted a value to which the original Constitution meant to extend unusual protection from the ordinary legislative process, at least temporarily. Prior to 1808, Congress was forbidden

89. U.S. CONST. art. III, § 3, cl. 2.

90. U.S. CONST. art. I, § 9, cl. 5; U.S. CONST. art. I, § 10, cl. 2.

91. See also U.S. CONST. art. I, § 9, cl. 6. This obviously benefited the commercial interests of the North, just as the protection of slavery benefited Southern interests. See P. CARROLL & D. NOBEL, *THE FREE AND THE UNFREE* 132 (1977).

to prohibit the slave trade into any state that wanted it,⁹² and the states were obliged to return escaping slaves to their "homes."⁹³

The idea of a bill of rights was not even brought up until close to the end of the Constitutional Convention, at which time it was rejected. The reason seems entirely obvious, and it obviously is not that the framers were unconcerned with liberty. The point, instead, is that by their lights a bill of rights did not belong in a "constitution."

[The new Constitution] was not concerned with rights, but with functions and interests, with obtaining a judicious balance between the effectiveness of political power exercised by a central system and the distribution of that power that would forever prevent the system from becoming tyrannical.⁹⁴

As Hamilton explained in *The Federalist* No. 84, "a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation . . ." ⁹⁵ Moreover, the very point of all that had been wrought had been, in large measure, to preserve the liberties of individuals. "The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."⁹⁶

The additional securities to republican government, to liberty, and to property, to be derived from the adoption of the plan under consideration, consist chiefly in the restraints which the preservation of the Union will impose on local factions . . . in the prevention of extensive military establishments . . . in the express guarantee of a republican form of government to each

92. U.S. CONST. art. I, § 9, cl. 1. Technically this is a federalism provision, since the states were left free to prohibit the importation of slaves. Since the authority was so pointedly excluded from what would otherwise have been the sweep of federal power, however, it seems fair to read the clause as what history teaches it was, an attempt to forestall a certain substantive result, the abolition of slavery in the South. I am not prepared to go to the mat on this point, however, since disagreement here is only further agreement with my overall thesis.

93. See U.S. CONST. art. IV, § 2, cl. 3. See also R. COVER, *JUSTICE ACCUSED* 151-52 (1975); P. PALUDAN, *A COVENANT WITH DEATH* 3-4 (1975).

94. J. POLE, *FOUNDATIONS OF AMERICAN INDEPENDENCE: 1763-1815*, at 196 (1972). See also, e.g., J. GOEBEL, *ANTECEDENTS AND BEGINNINGS TO 1801, 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 249 (1971).

95. *THE FEDERALIST* No. 84 (A. Hamilton) 534 (B. Wright ed. 1961).

96. *Id.* at 536.

[state]; in the absolute and universal exclusion of titles of nobility⁹⁷

A number of the state ratifying conventions were not convinced, of course, and a bill of rights did emerge. "Aha," you are saying, "there's a list of values if ever I saw one." "Stick around," say I, displaying my self-confidence by suggesting we begin at the beginning. The expression-related provisions of the first amendment — "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" — were centrally intended to help make our governmental processes work, to ensure the open and informed discussion of questions of which values should be vindicated at the expense of which others, and to check our government when it gets out of bounds.⁹⁸ We can attribute other functions to freedom of expression, but the exercise has the distinct smell of the lamp about it: the view that free expression per se, without regard to what it means to the process of government, is the right we should protect above all others has a highly elitist cast. Of course positive law has its claims, and I am not suggesting that such other purposes as are plausibly attributable to the language should not be attributed: the amendment's language is not limited to political speech, and it should not be so limited by construction (even assuming someone could come up with a determinate definition of "political").⁹⁹ But we are presently engaged in an exploration of what sort of document the framers thought they were putting together, and in that regard the linking of the politically oriented protections of speech, press, assembly and petition is highly informative.

The first amendment's religious clauses — "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" — are a somewhat different matter. As we have mentioned, the Free Exercise Clause undoubtedly exists in part to preserve the church as an additional power center.¹⁰⁰ The Establish-

97. THE FEDERALIST NO. 85 (A. Hamilton) 542 (B. Wright ed. 1961). See also THE FEDERALIST NO. 9 (A. Hamilton) 125 (B. Wright ed. 1961).

98. See *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring, characterizing views of Holmes, J.); *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937). See also Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUNDATION RESEARCH J. 521.

99. Whether clearly nonpolitical speech should be protected under the open-ended language of the fourteenth amendment is a different question, however. See generally *Constitutional Interpretivism*, *supra* note 1, at 427-33.

100. One might also attempt otherwise to style the Free Exercise Clause a process-protecting provision by arguing that only total freedom of thought, even on

ment Clause is there to maintain its separation, to keep organized religion from exercising *too much* influence on government (and vice versa).¹⁰¹ Together, therefore, they perform a sort of separation of powers function, seeking to maintain in the church an extragovernmental center of influence. But again one must take care not to infer that because an account one finds congenial fits the data it must follow that that is the only appropriate account, and here the obvious cannot be blinked: that at least part of the explanation of the Free Exercise Clause has to be that for the framers religion was an important substantive value they wanted significantly to put beyond the reach of the federal legislature.

The second amendment, protecting "the right of the people to keep and bear Arms," seems (at least if that is all you read) calculated simply to set beyond legislative control another "important" value, the right to carry a gun. It has not been construed that way, however, and instead has been interpreted essentially as a federalism provision, protecting the right of state governments to keep militias (National Guards) and to arm them. The rationalization for this narrow construction has been historical, that the purpose the framers talked most about was maintaining state militias to protect the states from attack and so forth.¹⁰² This argument should not succeed, however. A provision cannot responsibly be restricted to less than its language indicates simply because a particular purpose received more attention than others, and in fact that favored purpose of today's firearms enthusiasts, the right of *individual* self-protection, was mentioned more than a couple of times. Arguments can be right for the wrong reasons, though, and this one appears to be. The second amendment, in this unique among constitutional provisions, has its own little preamble: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Thus here, as nowhere else, the framers and ratifiers apparently opted against leaving to the future the attribution of purposes,

nonpolitical subjects, and an ability to "do one's own thing" can guarantee that one will be an effective participant in the democratic process. This makes sense as regards freedom of thought (though it provides no account of why religious thoughts were here singled out) but as regards actions it obviously proves too much, implying if followed through an inability on the part of legislatures to regulate conduct.

101. See also U.S. CONST. art. VI, cl. 3 (prohibiting religious tests for public office).

102. The "so forth" talked about included a too powerful federal government, but it seems fair to ignore that for interpretive purposes, in light (*inter alia*) of art. I, § 8, cl. 15, which provides for the federalization of the militias.

choosing instead explicitly to legislate the goal in terms of which the provision was to be interpreted.¹⁰³

The third amendment, undoubtedly another of your favorites, forbids the nonconsensual peacetime quartering of troops. Like the Establishment of Religion Clause, it grew largely out of fear of an undue influence, this time by the military; in that aspect it can be counted a separation of powers provision. Again, however, one cannot responsibly stop there. Other provisions provide for civilian control of the military, and although that is surely one of the purposes here, there is obviously something else at stake, a desire to protect the privacy of the home from prying government eyes (to say nothing of the annoyance of uninvited guests). Both process and value seem to be involved here.

Amendments four through eight tend to become relevant only during lawsuits, and we tend therefore to think of them as procedural — instrumental provisions calculated to enhance the fairness and efficiency of the litigation process. That is exactly what most of them are: the importance of the guaranties of grand juries, criminal and civil petit juries, information of the charge, the right of confrontation, compulsory process, and even the assistance of counsel inheres mainly in their tendency to ensure a reliable factual determination.¹⁰⁴ Unconcerned with the substance of government regulation, they refer instead to the ways in which regulations will be enforced against those they cover. Once again, however, that is not the whole story. The fifth amendment's privilege against self-incrimination surely has a lot to do with wanting to find the truth: coerced confessions are less likely to be reliable. But at least as interpreted,¹⁰⁵ the privilege needs further rationalization than that: there is simply something immoral, the argument runs (though it has proved tricky pinning down exactly what it is), about the state's

103. "Militias" in colonial times were anything but highly organized groups, a fact that would seriously undercut the received construction were it not for the amendment's use of the phrase "well regulated."

104. See Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1317-18 (1977). Of course things are seldom unfunctional, and noninstrumental significance can also be attributed to most of these provisions. See, e.g., Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1308 (1974); Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1391-92 (1971). Such additional significance should probably figure in a determination whether one or another of these provisions should be construed to cover a given borderline case. The exercise in which we are presently engaged, however, is one of seeking generally to characterize the nature of the document the framers thought they were writing, which should lead us to concentrate on the obvious central thrusts where they are identifiable.

105. See *Rogers v. Richmond*, 365 U.S. 534 (1961).

asking a person whether he committed a crime and expecting him to answer. The same amendment's guaranty against double jeopardy gets complicated. Insofar as it forbids retrial after acquittal, it seems a largely procedural protection, designed to guard against the conviction of innocent persons. But insofar as it forbids additional prosecution after conviction or added punishment after sentence, it performs the quite different (and substantive) function, which obviously is present in the acquittal situation too, of guarantying a sense of repose, an assurance that at some definable point the defendant can assume the ordeal is over, its consequences known.¹⁰⁶ The Just Compensation Clause seems somewhat out of place in the fifth amendment. Guarantying that the government will pay you a fair price if it takes your property, it obviously makes a move (albeit quite limited) in the direction of securing private property as a power center alternative to government. As elsewhere, however, this power center rationale must be tempered with the realization that a substantive judgment probably was involved as well — here to the effect that private property is a value important enough to be insulated, at least against the risk of uncompensated confiscation.

The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The provision most often becomes relevant when a criminal defendant tries to suppress evidence seized as the fruit of an illegal search or arrest, but it would be an obvious mistake to conclude from that that it is a purely procedural provision. In fact (as thus enforced by the exclusionary rule) it *thwarts* the procedural goal of accurately determining the facts, in order to serve one or more other goals felt to be more important.¹⁰⁷ The standard line is that that other, more important goal is privacy, and surely there is something to that account. Two important qualifications are in order, however. The first is that to the extent the framers were concerned here with the privacy of the home (and it is that image that seems to be invoked most frequently), that concern to a significant extent is a "process"

106. See Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 726 (1974).

107. See *id.* at 724-26, 739-40; Monaghan, *Forward: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

concern, protecting yet another center of influence separate from government. The second is that when the provision is considered in its entirety, the notion of "privacy" proves inadequate to account for it. The amendment covers seizures of goods and arrests ("seizures of the person") along with searches, and in addition does not distinguish public episodes from private: a completely open arrest or seizure of goods is as illegal as a search of a private area if it is effected without probable cause. It thus "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all."¹⁰⁸

Some commentators have attempted to explain the entire amendment by noting that the right not to be searched or arrested or to have one's property seized without probable cause is one that is likely to have difficulty protecting itself politically.¹⁰⁹ That seems true and to the point, but it is plainly incomplete. Many interests that cannot protect themselves politically are not, often rightly are not, granted constitutional protection; obviously something more is required, something that convinces the constitution-makers the interest in question *deserves* protection. We are necessarily groping here, but what seems to me most comfortably to explain the coverage of the fourth amendment is a realization even on the part of the framers, though undoubtedly only partly self-conscious, that law enforcement officers, in deciding whose lives to disrupt in hopes of shaking out a criminal conviction — that is, whom to search or arrest or whose goods to seize — will necessarily have a good deal of low visibility discretion, and in addition are very likely in such situations to be sensitive to social station and other factors that should not bear on the decision. Thus the framers required not

108. *Katz v. United States*, 389 U.S. 347, 350 (1967) (footnote omitted). The *Katz* Court quoted, in part, the following passage from Justice Black's dissent in *Griswold*:

[I]t belittles [the Fourth] Amendment to talk about it as though it protects nothing but "privacy." To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provision should be given. The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. He simply wants his property left alone. And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.

Griswold v. Connecticut, 381 U.S. 479, 509 (1965) (Black, J., dissenting), *quoted in Katz v. United States*, 389 U.S. 347, 350 n.4 (1967).

109. See, e.g., L. LUSKY, *supra* note 19, at 12, 98-99. See Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153, 1207-09.

simply a certain quantum of probability but also when possible, via the warrant requirement, the judgment of a "neutral and detached magistrate." From this perspective the fourth amendment can be regarded as a harbinger — one of several, as we have seen — of the Equal Protection Clause, concerned with avoiding indefensible inequities in treatment.

The eighth amendment's ban on "cruel and unusual punishments" seems even more obviously amenable to this account. Apparently part of the point was to outlaw certain understood and abhorred forms of torture,¹¹⁰ but the decision to use open-ended language can hardly have been inadvertent.¹¹¹ It is possible that part of the point also was to ban punishments that were unusually severe in relation to the crimes for which they were being imposed. But much of it surely had to do with a realization that in the context of imposing penalties too there is tremendous potential for the arbitrary or invidious infliction of "unusually" severe punishments on persons of various classes other than "our own."¹¹²

With one important exception, the Reconstruction Amendments¹¹³ do not designate substantive values for protection from the political process.¹¹⁴ The exception, of course, involves a value we

110. See generally Granucci, "*Nor Cruel and Unusual Punishment Inflicted*": *The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

111. See *Weems v. United States*, 217 U.S. 349, 371-73 (1910).

112. See *Furman v. Georgia*, 408 U.S. 238, 249-53 (1972) (Douglas, J., concurring). The same analysis obtains to the other clauses of the eighth amendment. That the Court has not seriously pursued this line proves little, since it has not taken the clause very seriously in any way.

113. The ninth amendment, of course, is one of the inscrutable provisions for which we are seeking guides to construction, presently by exploring the nature of the rest of the document. The tenth amendment is a federalism provision, underscoring the reservation of non-enumerated powers to the states. The eleventh, making clear that by itself article III does not grant federal courts jurisdiction over suits against states, and the twelfth, making a comparatively technical change in the way the President and Vice President were to be elected, both plainly relate to the mechanics of government. (Even if the eleventh amendment had been intended to extend sovereign immunity to the states, it would still seem to have been moved by a concern for the security of the machinery of government rather than the unlikely substantive judgment that it is preferable that costs be borne by the injured party rather than spread among the population. In any event the better view seems to be that the amendment was intended merely to make clear that article III did not by itself grant federal courts jurisdiction in cases where states were defendants, not to bar Congress from creating such jurisdiction. See Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976).)

114. The fifteenth amendment provides that the vote shall not be denied on account of race. The Due Process Clause of the fourteenth amendment involves process writ small, and the Privileges or Immunities and Equal Protection Clauses,

have mentioned before, slavery. The thirteenth amendment can obviously be forced into a "process" mold — slaves do not participate effectively in the political process — but that is a procrustean description. The main point of the amendment was that slavery was morally intolerable and for *that* reason was not to be countenanced further. Thus at no point has the Constitution been neutral on this subject. Slavery was one of the few values the original document singled out for protection from the political branches; *non*slavery is one of the few values it singles out for protection now.

So much for our Constitution's first century. What has happened to it in the second century of our nationhood, though ground less frequently plowed, is most instructive on the subject of what jobs we have learned it is suited to. There were no amendments between 1870 and 1913, but there have been eleven since. Five of them have extended the franchise: the seventeenth extends to all of us the right to vote for our senators directly; the twenty-fourth abolishes the poll tax as a condition of voting in federal elections; the nineteenth extends the vote to women, the twenty-third to residents of the District of Columbia, and the twenty-sixth to eighteen-year-olds. Three others (twenty, twenty-two and twenty-five) involve presidential eligibility and succession. The sixteenth, permitting a federal income tax, adds another power to the list of those that had previously been assigned to the central government.¹¹⁵ That is it, save two, and sure enough, one of those two did place a substantive value beyond the reach of the political process. The amendment was the eighteenth, and the value shielded was temperance. It was, of course, repealed fourteen years later by the twenty-first amendment, precisely, I would argue, because such attempts to freeze substantive values do not belong in a Constitution. In 1919 temperance obviously seemed like a fundamental value; in 1933 it obviously did not.

What has happened to the Constitution's other value-enshrining provisions is similar, and similarly instructive. Some surely have survived, but typically because they are so obscure they do not become issues (corruption of blood, quartering of troops); so

like the ninth amendment, are part of the present problem. See generally *Constitutional Interpretivism*, *supra* note 1. Sections three and four of the fourteenth amendment contain what can be regarded as backward-looking substantive provisions, "punishing" the South, albeit rather mildly, by forbidding any state to pay off a Confederate debt and denying certain political rights to Confederate leaders unless exempted by a two-thirds vote of Congress. See also K. STAMPP, *THE ERA OF RECONSTRUCTION 1865-1877*, at 143-44 (1965).

115. Moreover, the amendment most likely (though apparently not likely enough) to become the twenty-seventh, the Equal Rights Amendment, is a guarantor of fair distribution akin to the Equal Protection Clause: it does not designate any substantive values as worthy of constitutional protection.

interlaced with procedural concerns that they seem appropriate in a constitution (self-incrimination, double jeopardy); or so uncontroversial in their generality that no one objects (interstate trade, just compensation). Those that have been conspicuous and sufficiently precise to be controvertible have not survived. The most dramatic examples, of course, were slavery and prohibition. Both were removed by repeal, in one case a repeal requiring unprecedented carnage. Two other substantive values that at least arguably were placed beyond the reach of the political process by the Constitution have been "repealed" by judicial construction — the right of individuals to bear arms, and freedom to set contract terms without significant state regulation. Maybe, in fact, the framers never intended to protect those values, but the fact that the Court, in the face of what must be counted at least plausible contrary arguments, so readily read these values out of the Constitution is itself instructive of American expectations of a constitution. Finally, there is the value of religion, still protected by the Free Exercise Clause. Something different has happened here. In recent years that clause has functioned primarily to protect what must in political terms be counted as discrete and insular minorities, such as Amish, Seventh Day Adventists, and Jehovah's Witnesses. Whatever the original conception of the Free Exercise Clause, its function during essentially all of its functional life has been one akin to the Equal Protection Clause and thus entirely appropriate to a constitution.

Thus only rarely has our Constitution attempted to tell elected officials what substantive values to favor or disfavor, and when it has tried, most often the attempt has been doomed.¹¹⁶ Our Constitution by and large has remained a constitution properly so called, concerned with constitutive questions¹¹⁷ — primarily with the mechanics of decision, but also in important measure with whether all the people are in fact being represented or rather some are being unjustifiably excluded from either the process or the benefits with

116. *Judicial* attempts to cement fundamental values in the Constitution have for similar reasons met similar fates. That *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), did not prove durable is the grisliest of understatements. Neither, though not so dramatically, did *Lochner v. New York*, 198 U.S. 45 (1905). Even as I write, the Supreme Court, under pressure of a public opinion its decision in *Roe v. Wade*, 410 U.S. 113 (1973), did much to galvanize, is being forced to back and fill, in an outrageously discriminatory way at that, on the subject of abortion. See *Maher v. Roe*, 432 U.S. 464 (1977). See generally J. POLE, *supra* note 26, at 1 ("[S]elf-evident truths, whatever the influence they may exert on mankind's opinions at particularly impressionable moments, never succeed in commanding concentrated attention over long periods.").

117. See 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 383 (1971); see also A. BICKEL, *THE MORALITY OF CONSENT* 30 (1975); R. DAHL, *supra* note 38, at 136-37.

which the effective majority has seen fit to favor itself. What has distinguished the American Constitution, and indeed America itself, has been a process of government,¹¹⁸ not a governing ideology.¹¹⁹ "As a charter of government a constitution must prescribe legitimate processes, not legitimate outcomes, if like ours (and unlike more ideological documents elsewhere) it is to serve many generations through changing times."¹²⁰

Democracy and Distrust

The first of the two remaining arguments I want to make is entirely obvious by now, that unlike an approach geared to the judicial imposition of "fundamental values," the participational orientation whose contours I have sketched is not inconsistent with, but on the contrary entirely supportive of, the American system of representative democracy. It recognizes the unacceptability of the claim that appointed and life-tenured judges are better reflectors of conventional values than elected representatives,¹²¹ devoting itself instead to policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent. There may be an illusion of circularity; the approach described here is more consistent with representative democracy largely because that is the way it was planned. But of course it is not any more circular than setting out to build an airplane and ending up with something that flies.

The final point worth serious mention¹²² is that (again unlike a fundamental values approach) a participational orientation assigns

118. See Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 225 (1975). See also Dixon, *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B.Y.U. L. REV. 43, 78; Kommers, *Abortion and Constitution: United States and West Germany*, 25 AM. J. COMP. L. 255, 280 (1977):

A more plausible explanation for the German decision is to be found in certain normative aspects of the Basic Law. The Constitution might be said to be normative in the sense that it protects certain kinds of values and community interests. . . .

. . . American constitutionalism fails to incorporate a specific notion of the common good or a concept of authority responsible for directing men toward goodness.

119. I suppose if one were pressed to identify "the American ideology," laissez-faire capitalism would be the most likely candidate. This obviously is a value today's fundamental values theorists shrink from recognizing, lest, *inter alia*, *Lochner* turn out to have been right.

120. Linde, *supra* note 118, at 254.

121. See also *Foreword*, *supra* note 2.

122. For reasons that are currently obscure, I went through a period of worrying that a *Carolene Products* orientation might mean less protection for civil liberties. (Of

judges a role they are conspicuously well situated to fulfill. My reference here is not principally to expertise. Lawyers *are* experts on process writ small, the processes by which facts are found and contending parties are allowed to present their claims. And to a degree they are experts on process writ larger, the processes by which issues of public policy are fairly determined; lawyers really do have a feel, indeed it is hard to see what other special value they have, for ways of insuring that everyone gets his fair say. But too much should not be made of this point. Others, particularly the full-time participants, can also claim expertise on how the political process allocates voice and power, and in any event most legislators are lawyers themselves. So the point is not so much one of expertise as it is one of perspective.

The approach to constitutional adjudication recommended here is akin to what might be called an "antitrust" as opposed to a "regulatory" approach to economic affairs¹²³ — rather than dictate substantive results it intervenes only when the "market," in our case the political market, is malfunctioning. (A referee analogy is also not far off: the referee is to intervene only when one team is gaining unfair advantage, not because the "wrong" team has scored.) Our government cannot fairly be said to be "malfunctioning" simply because it sometimes generates outcomes with which we disagree, however strongly (and claims that it is reaching results with which "the people" really disagree — or would if they "understood" — are likely to be little more than self-deluding projections). In a representative democracy, value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can kick them out of office. Malfunction occurs whenever the *process* cannot be trusted, whenever: (1) the in's are choking off the channels of political change to ensure they will stay in and the out's will stay out, or (2) though no one is actually denied a voice or a vote, an effective majority, with the necessary and understandable cooperation of its representatives, is systematically advantaging itself at the

course it would deny the opportunity to create rights out of a whole cloth; that is its point and strength. What I had in mind was the possibility that the *same* freedoms might systematically come out thinner if derived from a participational orientation than they would if protected on the ground that they are "good." Reflection has convinced me that just the opposite is true, that freedoms are more secure to the extent they find foundation in the theory that supports our entire government, rather than gaining protection because the judge deciding the case thinks they are important. See also C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 29-30 (1969). Indeed, the only remotely systematic *Carolene Products* Court we have had was also clearly the most protective of civil liberties. I wonder what I was thinking of.

123. See, e.g., 2 A. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 114-15 (1971).

expense of one or more minorities whose reciprocal support it does not need and thereby effectively denying them the protection afforded other groups by a representative system.

Obviously our elected representatives are the last persons we should trust with identification of either of these situations. Appointed judges, however, are comparative outsiders in our governmental system: they are largely removed from the political hurly-burly and need worry about continuance in office only very obliquely.¹²⁴ This does *not* give them some special pipeline to the genuine values of the American people; in fact it goes far to ensure they will not have one. It *does*, however, put them in a position objectively to assess claims — though no one could suppose it will not be full of judgment calls — that either by clogging the channels of change or by acting as accessories to simple majority tyranny, our elected representatives in fact are not representing the interests of those that the system presumes and presupposes they are.

Before embarking on his career-long quest for a satisfactory approach to constitutional adjudication,¹²⁵ Alexander Bickel described the challenge thus:

The search must be for a function . . . which is peculiarly suited to the capabilities of the courts; which will not likely be performed elsewhere if the courts do not assume it; which can be so exercised as to be acceptable in a society that generally shares Judge Hand's satisfaction in a "sense of common venture"; which will be effective when needed; and whose discharge by the courts will not lower the quality of the other departments' performance by denuding them of the dignity and burden of their own responsibility.¹²⁶

As quoted, it is a remarkably appropriate set of specifications, one that fits the orientation suggested here precisely. Unfortunately, by adding one more specification (where I have put the ellipsis) and thereby committing himself to a value orientation — "which might (indeed must) involve the making of policy, yet which differs from the legislative and executive functions"¹²⁷ — he built in an inescapable contradiction and thereby ensured the failure of his enterprise.

124. Of course I do not claim that judges are unconcerned about what the next election will bring. The important point is that their personal fortunes are vastly less tied up with that question than are the fortunes of those who have to stand for reelection. (I apologize for the preposterous obviousness of this point, whose inclusion I am aware will be incomprehensible to those who are not acquainted with the literature in this area.)

125. See *Foreword*, *supra* note 2.

126. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 24 (1962).

127. *Id.*