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COMMENTARY

PROCESS AND PROPERTY IN CONSTITUTIONAL THEORY

FRANK I. MICHELMAN*

COULD PROPERTY BE A "PROCESS RIGHT"? "Property" does denote, among other things, a class or cluster of legal rights. In appropriate contexts, it plainly means a class or cluster of constitutional rights. But could the constitutional right of property possibly be a "process," as opposed to a "substantive," right?

The distinction between "substantive" and "process" rights appears in John Ely's recent work of constitutional theory, *Democracy and Distrust*.¹ His thesis reflects a more fundamental distinction between substantive and process values, or goals. These two classes of values or goals are, in Ely's conception, strictly relative to one another: Substantive values are values deemed "so important that they must be insulated from whatever inhibition the political process might impose, whereas a participational [or process goal is concerned] . . . with how decisions effecting [substantive] value choices . . . are made."² Process is to substance as method is to result. Thus, substantive rights are rights respecting political outcomes, while process rights are rights respecting modes of participation in the politics that determine outcomes. That the categories are strictly relative to one another is easily seen by an example. Suppose a duly constituted state legislature enacts a statute declaring that chaps with mustaches may not vote in municipal elections. If they make legal objections, what kinds of rights are they asserting?³

A number of Ely's critics argue that even this strictly stipulative and relativistic distinction between substantive and process rights (or values) is illusory or misleading.⁴ Their criticism is a matter to which I want to return.⁵ For now, I want to accept Ely's distinction as he offers

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¹ J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) [hereinafter cited as ELY].

² *Id.* at 75 n.*.

³ The answer, I believe, is both kinds.

⁴ See notes 56-58 *infra* and accompanying text.

⁵ See text accompanying note 56-64, *infra*.

it, and ask where property fits into such a picture.

The question is, I believe, of more than exegetical interest. To help clarify its deeper significance, let us consider two contrasting conceptions of a constitution or constitutional order, which we may call a "higher law" conception and a "popular sovereignty" conception. In the higher law conception, the Constitution is concerned largely with designating certain rights or values as prior and superior to the political order—as beyond the reach of political decision and entitled to prevail in spite of any contrary popular will.

In the contrasting popular sovereignty conception, the Constitution is concerned precisely with "constituting" a system of democratic participation and representation, one in which even the most basic values and principles of civic ordering—of rights and wrongs, property and contract, institutions and relations—are always open to political determination, by the people, through law-making. Of course, the written Constitution does include mention of what looks like fundamental, substantive or higher law rights; but in the purest popular sovereignty view, we are to understand that these rights are established for the sake of—as secondary to—the democratic integrity of the political process. The constitutional right of freedom of expression, for example, may resemble a substantive or outcome right, but in the popular sovereignty conception it functions as a political right, a condition of a fair or good political process. Freedom of expression may thus stand as a paradigm of a process right in substantive dress.⁶

My question about the possibility of property as a process right is just one about whether, in a popular sovereignty conception of the constitutional order, one can make the same kind of sense of the right of property as of freedom of expression. Can one see it as a right having a clear, concrete content and function, in a constitutional system that is deeply committed to popular sovereignty? It has been more usual in our constitutional tradition to think of property as a kind of higher-law, substantive principle, locked in a struggle with popular sovereignty. As Justice Holmes classically put the matter, "[the police power] must have its limits or the contract and due process clauses are gone."⁷ If property is truly a constitutional right, Holmes meant, the Constitution must be a higher law instrument concerned with placing some rights above and beyond politics.

The thesis of this Commentary is that Holmes was wrong—that the constitutional right to property is well understandable as one of the preconditions of a fair democratic system for the determination of the principles of social ordering through public decision.

⁶ It hardly needs noting that such a strictly process-oriented view of freedom of expression is not necessarily an adequate view. See, e.g., L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-1 (1978), and authorities cited therein; ELY, *supra* note 1, at 93-94.

Now, our day's great and sophisticated defense of a pro-popular sovereignty, anti-higher law conception of constitutional order is embodied in Professor Ely's book. Ely insists on distinguishing between substantive and process values—despite the distinction's vulnerability to a logical critique that he is too perceptive not to appreciate⁸—is rooted in a conviction that in any democracy worthy of the name substantive value choices are presumptively for legislatures, not courts, to make, and that, conversely, judges, being lawyers, are specially qualified to say whether the procedures conform to constitutional standards of fair and equal participation in the process of political value choice. Ely claims that such a division-of-labor judgment is reflected in the Constitution as written.⁹ He must and does admit that the instrument establishes individual rights judicially enforceable against the political branches of government; but he insists that these are rights, for the most part, to effective participation and equal consideration in public decision-making, not to substantive outcomes required by particular preferred values.

Consider next the Constitution's restrictions on deprivations of liberty and property, and on public takings of property.¹⁰ Why are these restrictions not fatal counter-examples to Ely's characterization of the Constitution as, in general, concerned with process, not substance? "Liberty" and "property" seem to define, exactly and exhaustively, the field of individual substantive rights. They are the very words which, above all others, our legal tradition has used to mark the sphere in which individual will and private preference are sovereign, in which legislation that would override the choices of individuals is, for just that reason, presumptively objectionable.

Ely's response is that the Constitution confers no absolute right of liberty or property, but only (1) a right against deprivation without due process of law—a process right on its face if ever there was one—and (2) a right against uncompensated takings which itself is a guaranty of fair process:¹¹ By making the public fisc bear the burden of paying for property taken, the compensation clause blocks one easy means by which the majority can irresponsibly disregard a minority's interests.¹²

This response is, I believe, not quite adequate to serve Ely's purpose. That purpose, as we have noted, is to provide a reading of the Constitu-

⁸ Compare notes 56-58 *infra* and accompanying text, with ELY, *supra* note 1, at 75 n.*.

⁹ See ELY, *supra* note 1, at 88-101.

¹⁰ U.S. CONST. amend. V provides: "No person shall . . . be deprived of life, liberty, or property . . . ; nor shall private property be taken for public use, without just compensation." *Id.* Amendment XIV provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

¹¹ See ELY, *supra* note 1, at 14-21.

¹² See ELY, *supra* note 1, at 97-98.

tion that relieves judges of fundamental value judgments and confines them to the policing of process. Suppose we grant that a guaranty against deprivation without due process, or against taking without compensation, is directly concerned with mediate process rather than final outcome. How does it follow that judicial substantive value judgement had been avoided? It remains necessary, does it not, to determine whether a deprivation or taking of property or liberty is involved in any particular case?

To take the clearest possible example, in the 1850's a slaveholder's legal protest against the idea of abolition without compensation would plainly have presented a question of fundamental values. True, that particular question has since been settled by the thirteenth amendment, but a multitude of similar questions remain. Property in humans is disallowed, but what about property in animals, or clouds? Would statutory emancipation of all laboratory mammals raise a taking issue? Would a seizure of contraband rabbits without notice and hearing raise a due process issue? What about state-authorized cloud seeding?¹³ What of Justice Thurgood Marshall's declared view that every citizen has a due-process protected property interest in being hired for a government job?¹⁴ All such questions are unanswerable without the aid of value judgments, because "property," the operative constitutional word, is far from self-defining.

Ely would avoid the difficulty by taking us back to the good old days when property was not a constitutionally operative word—when "the phrase 'life, liberty, and property' was read as a unit and given an open-ended, functional interpretation, which meant that the government couldn't seriously hurt you without due process of law. . . . [I]f you were seriously hurt by the state you were entitled to due process."¹⁵ Ely thinks the contemporary Supreme Court has brought us unnecessary value-judgment trouble by reading the due process clause literally¹⁶ to condition the claim to due process on there being at stake an interest that qualifies either as life, or liberty or property—it being understood that there are some significant interests that are none of the above.

Plainly enough courts can, by eliding the three constitutional categories into one—"lifelibertyorproperty," or "substantial interest"—avoid any need to say what property is. But the need for value judgments will remain having just been shifted to some phase no more informative than "property"—something like "grievous loss" or "seriously hurt you."¹⁷ How, for example, is Justice Marshall's proposi-

¹³ Cf. Pa. Nat'l Weath. Ass'n v. Blue Ridge Weath. Modif. Ass'n, 44 Pa. D. & C.2d 749 (1968).

¹⁴ See *Board of Regents v. Roth*, 408 U.S. 564, 588 (1972) (Marshall, J., dissenting).

¹⁵ ELY, *supra* note 1, at 19 (footnote omitted).

¹⁶ See ELY, *supra* note 1, at 19-21.

¹⁷ For example, Justice Frankfurter termed the standard "grievous loss" in *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J.,

tion concerning a citizen's right to public employment any easier to deal with under Ely's formulation¹⁸ than under the Court's?¹⁹

The framers did not use the terms "seriously hurt," "grievous loss" or "lifelibertyorproperty." They chose the phrase "life, liberty, or property," and Ely hardly pauses to say why we should be excused from taking seriously their word choice and their grammar,²⁰ even if that does leave us, and the courts, stuck with value judgments about what counts as property.

One imagines that from the standpoint of the Framers there was no such problem—that they simply understood property to mean claims on material wealth of whatever description, including the then conventional non-possessory and incorporeal forms such as future interests, easements, and franchises and contracts. The Framers may have had no problem with the idea of each identifiable item of wealth being distinguishably the property of some specific person. In any given case it might have seemed obvious what "the property" in question consisted of and who, if anyone, owned it. Property, then, would have been envisioned as a finite set of standard types of interests that people might have in items of material or conventional wealth and, therefore, there would be no problem in determining when a taking or deprivation of property occurred.

We have long since departed that state of cognitive grace.²¹ For us as lawyers, property has become a purely analytical notion with no compelling intuitive content. The word property, the Supreme Court advised, is used in the Constitution not in the "vulgar and untechnical sense of the physical thing.... [Instead, it]... denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it."²² Thus, property has come to signify abstract legal relations on the order of rights, powers, privileges and immunities. Specifically the question of what relations or relational complexes count as property has no well-defined answer. "The Constitutional provision is addressed to every [i.e., each] sort of interest the citizen may possess."²³

We can speculate with some confidence as to how this derangement of legal perspectives on property has come to pass. The process has, I believe, been one of common-sense notions dissolving in the crucible of case-by-case adjudication in a modernizing world. For example, in adjudicating "takings" claims, courts inevitably meet borderline cases like

concurring).

¹⁸ When the government refused to hire you, has it seriously hurt you?

¹⁹ When the government refused to hire you, has it deprived you of property?

²⁰ See ELY, *supra* note 1, at 192 n.28, for his suggestion on this point.

²¹ See generally Vandevelde, *The New Property of the Nineteenth Century*, 29 BUFFALO L. REV. 325 (1980), an article to which my argument in the preceding and the following paragraphs is heavily indebted.

²² United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945).

²³ *Id.* at 378.

*United States v. Causby.*²⁴ Does the government take your property when it flies bombers so low and frequently over your poultry farm that the birds, crazed by noise and vibration, stop laying and break themselves against their coops? In order to resolve these problems in a judicially responsible way, the judges have had to enunciate some general principles for distinguishing takings of property from other events, which means that judges have to attribute some persuasive political purpose or value to the constitutional guaranty against uncompensated takings. As a result, the most evident constitutional purposes have clashed with common-sense notions of property.

There could be no better illustration than *Pennsylvania Coal Co. v. Mahon*.²⁵ In a common-sense view, there is no taking under a statute forbidding owners of underground coal deposits from mining their coal, when doing so would endanger nearby houses.²⁶ The coal, after all, remains legally theirs and in their possession. At the same time, to deny absolutely that a restriction on use might amount to a taking of property seems arbitrary, given the apparent purpose of the just compensation clause to prevent unfair concentration on a few of the costs of government actions supposedly taken in the interest of all.²⁷ This arbitrariness can be avoided by making the word property stand for any identifiable modicum of established legal entitlement—a move that enables one to say that the state takes the coal company's property when it denies the company's legal privilege to remove the coal from the ground. It is under such pressures, perhaps, that we have moved from a common-sense to an artificial, from a concrete to an abstract, from an intuitive to an analytical conception of property.

Such a conceptual shift comes at a high price. Dissolved into the Hohfeldian relations,²⁸ and thus rendered applicable to any legally established entitlement whatever, the category property is also rendered useless as a limiting term in constitutional adjudication. If, to use the Supreme Court's words, "every sort of interest" counts as property, then not every governmental destruction or negation of one can count as a deprivation or a taking, at least not without paralysis of government.²⁹ Yet it is unclear how courts can tell where on the continuum of

²⁴ 328 U.S. 256 (1946).

²⁵ 260 U.S. 393 (1922).

²⁶ Perhaps Bruce Ackerman's judgment about the common-sense view of this case would differ from mine. See B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 136-45 (1977).

²⁷ See, e.g., *San Diego Gas & Elec. Co. v. San Diego*, ____ U.S. ___, 101 S. Ct. 1287, 1306 (1981) (Brennan, J., dissenting).

²⁸ That is, "rights," "powers," "privileges" and "immunities." See generally W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING (W. Cook ed. 1919); Kennedy and Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 751 nn. (1980).

²⁹ See, e.g., *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82 (1980).

damage "deprivation" or "taking" sets in, or—to vary the metaphor—how courts can even say what factors get weighed in the balance. What does seem clear is that courts cannot make such determinations without overt or covert appeal to value judgments, of a kind for which the purely analytical conception of property provides no clue.

Well, all right, yes, so value judgments are required in applying the property clauses³⁰ of the Constitution. But do they have to be the Court's value judgments? If there is some way the Court can refer the necessary value judgments back to the legislatures, and still give the constitutional property clauses some bite, all would be well with Ely's world. And is there not such a way, and has not the contemporary Supreme Court espoused it, and is it not ironic that for its pains the Court has earned a pen-lashing from Professor Ely?

What the contemporary Court has done is stated that a person adversely affected by official action is entitled to due process if that action deprives that person of property—and that, for this purpose, property means any claimed entitlement, but only those entitlements for which legal recognition can plausibly be found in existing law apart from the constitutional due process guaranty itself.³¹ Similarly, the Court has said that governmental activity that injuriously affects, but does not formally expropriate, a person's holdings can amount to a compensable taking of property only if it contravenes specific "investment backed expectations" that were reasonable under the nonconstitutional law as it stood when the investment occurred.³² The Court is thus apparently trying to ensure that the value judgments required for determining whether property, in the constitutional sense, is at stake in a given case are ultimately under legislative rather than judicial control. The Court's attempt, however, has not been successful. In practice, the Court has been unwilling or unable to live by its own declared rule of self-denial. It is easy to cite cases in which the Court has required a due process hearing although no positive-law entitlement can clearly and convincingly be made out,³³ and in which the Court has required payment of compensation for damage to interests which prior standing law did not purport to protect.³⁴

³⁰ This term refers to the due process and the taking clauses set out in note 10 *supra*.

³¹ See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 599-603 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972). For Ely's critique, see ELY, *supra* note 1, at 19.

³² See, e.g., *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 124-25, 136 (1978); see also *Agins v. Tiburon*, 447 U.S. 255, 262-63 (1980).

³³ *Goss v. Lopez*, 419 U.S. 565 (1975); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

³⁴ *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). See Michelman, *Property As A Constitutional Right*, 38 WASH. & LEE L. REV. 1098, 1106-07. I believe such judicial value judgments are inevitable. See *id.* at 1105-09;

It does not follow yet that Ely's goose is cooked. Ely's position is not that the Constitution never calls upon judges to enunciate and enforce value judgments, including some that are contrary to the legislature's. Judically uttered counter-legislative judgments are what constitutional process rights, and process values, are all about. Judically uttered does not mean judicially authored; and counter-legislative need not mean, in the deepest sense, counter-majoritarian.

Judges, Ely argues, can take their values from the Constitution—from its perceived, pervasive meaning and purpose, when specific texts fall short. In Ely's perception, that pervasive purpose is equal political participation. Thus, Ely might have salvaged property for his theory just as he salvaged free speech and privileges-or-immunities. His position then would have been that judges, in supplying content to the property clauses by deciding in particular cases whether a deprivation or taking of property has occurred, should do so not by asking whether the challenged official action impairs some particular substantive value, but rather by asking whether that action has unduly constricted the "opportunity to participate . . . in the political process by which values are appropriately identified and accommodated."³⁵ Property, according to Ely, must be a process right.

But what can it mean to see and to understand property, of all things, as a process right? I have suggested before that property is "an essential component of individual competence in social and political life," a "material foundation" for "self-determination and self-expression," "an indispensable ingredient in the constitution of the individual as a participant in the life of the society, including not least the society's processes for collectively regulating the conditions of an ineluctably social existence."³⁶

Or consider a more graphic version of one aspect of the idea:

Without basic education . . . what hope is there of effective participation in the . . . political system? . . . But . . . then what about life itself, health and vigor, presentable attire, or shelter not only from the elements but from the physical and psychological onslaughts of social debilitation? Are not these interests the universal rock-bottom prerequisites of effective participation in democratic representation? . . . One might as well say to those who are under-represented in a malapportioned legislature that their remedy lies through legislative politics, as say to those

Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS: NOMOS XVIII (J. Pennock & J. Chapman eds. 1977), Ely seems to think so, too, though for somewhat different reasons. See note 45 *infra* and accompanying text.

³⁵ ELY, *supra* note 1, at 77.

³⁶ Michelman, *Mr. Justice Brennan: A Property Teacher's Appreciation*, 15 HARV. CR.-GR. L.J. 295, 304 (1980).

who lack access to the basic necessities of life that their right of democratic participation is not constricted.³⁷

It is not my chief purpose here to expound on Ely's theory, or to show that it can accommodate the problem of "supplying content" to the property clauses. There are reasons quite independent of his theory, and its internal needs, for regarding property as a process right.

Let us, then, begin anew. It is undisputed that the Constitution recognizes and offers protection in some form to rights under the name of property. At the very least, private property is not to be formally expropriated without a fair procedural opportunity to contest the deprivation.

Suppose we now ask: Does the Constitution in any sense, or to any extent, guarantee that there will be any property to expropriate, or to withdraw without due process? Stated in a somewhat different manner: Does the Constitution establish a public right to the existence of a private property system respecting any given class of valued objects, as it does, apparently, establish a public right to a system of nonestablishment of religion?³⁸

Clearly, none of the constitutional texts in which the word property appears purport to establish such a public, or as it might be called, systemic right. All they say is that insofar as there happens to be any property, and you happen to have some, you won't lose what you have at the hands of the government without due process and/or just compensation. That proposition would be fully met in a property-less world, assuming for the moment such a world is conceivable. *A fortiori*, it does not affirmatively require that the standing laws of the country establish a private-property regime over any given class of possible objects of ownership.

There is, to be sure, one constitutional text that might conceivably be read as establishing a systemic right of property, namely, the guaranty in Article IV, section 4 of a republican form of government. That a republican government entails a propertied citizenry is a highly plausible and appealing proposition, for reasons which will be discussed later.³⁹ It is not easy, however, to turn that proposition into a judicially enforceable right. The problem is that the notion of private property is radically indeterminate and incurably contested. Who can say with any certainty what kinds of legally established relations, respecting what kinds of interests in what kinds of objects, constitute the necessary and sufficient conditions of private property system?

Is it, for example, a private property system if the law allows you to own land, but only for life and not in fee, or with no cause of action against those who negligently harm the land, crops and improvements,

³⁷ Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659, 677-78.

³⁸ Cf. *Flast v. Cohen*, 392 U.S. 83 (1968).

or totally subject to invasion, dispossession or regulation by the state? Is it a private property system if the law allows a household member to acquire something that looks like ownership of assets in fee, but provides that they are then automatically owned in common by all the members of that household? The testing questions could go on forever, but perhaps I have offered enough to indicate that the criteria of a private property system may fairly be deemed nonjusticiable, a classic political question.⁴⁰ I proceed, accordingly, on the assumption that there can be no pure, high-law systemic right of property under the Constitution.

Still, it is common ground that the Constitution recognizes and offers protection in some form to rights under the name of property. How can that be so, without it also being true that the Constitution tells us what rights it recognizes under that name? The most obvious solution is that the constitutional right of property is strictly parasitic on non-constitutional positive law. Such a parasitic constitutional right would make no demands on the content of the standing general laws, such as, that those laws must establish, as to some range of valued objects or opportunities, a regime of legal relations intuitively recognizable as private property. Rather, the parasitic conception would allow that those laws may, as of any given moment, provide or not provide for any form of private entitlement respecting any class of objects. The right would attach to whatever such entitlements the standing general law does happen to establish. It would protect those and only those commitments against certain kinds and modes of governmental impairment.

Such a constitutional right, although utterly dependent on non-constitutional law, cannot be brushed aside as empty or pointless. As Justice Stewart once explained, "it is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."⁴¹ Since daily commitments are supposedly influenced by contemporaneous legal rules, an obvious purpose of constitutional safeguards is to guard against uncompensated defeat of expectations fairly engendered by those rules.

The parasitic conception of constitutional property rights is not a mere hypothetical possibility. It is, as we have seen, the conception actually professed by the contemporary Supreme Court.⁴² Were it a tenable and satisfying conception, this Commentary would have come to an end. The evidence is strong, however—in the forms of external

⁴⁰ For more elaborate discussion, see Michelman, *Ethics, Economics, and the Law of Property*, in ETHICS, ECONOMICS, AND THE LAW: NOMOS XXIV (J. Pennock & J. Chapman eds. 1982).

⁴¹ *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

⁴² See notes 31-32 *supra* and accompanying text.

criticism and internal irresolution—that the parasitic conception is neither tenable nor satisfying. To a chorus of critics, the parasitic conception of constitutionally protected property appears doomed to self-defeating circularity, avoidable only by arbitrarily selective nonapplication.⁴³ The core of the difficulty, as the critics see it, is this: As to any given case of injurious governmental action, either the nonconstitutional positive law provides for compensation or due process, or it does not. If it does, then the constitutional compensation or due process guaranty is redundant. If it does not, then there is no positive law entitlement not to be thus injured without compensation or due process, and, under the parasitic conception, no constitutionally protected property is at issue. As Ely has somewhat sarcastically stated: "It turns out . . . that whether it's a property interest is a function of whether you're entitled to it, which means the Court has to decide whether you're entitled to it before it can decide whether you get a hearing on the question whether you're entitled to it."⁴⁴

Circularity and self-defeatingness aside,⁴⁵ it is extremely doubtful that a strictly parasitic conception of constitutionally protected property, offering no protection against legal redefinition of property rights to the point of extinction, could every be quite acceptable either to the observant public or to the Court itself.⁴⁶ From *Truax v. Corrigan*⁴⁷ and *Pennsylvania Coal Co. v. Mahon*,⁴⁸ to *Fuentes v. Shevin*,⁴⁹ *Arnett v. Kennedy*,⁵⁰ *Goss v. Lopez*,⁵¹ *Kaiser Aetna v. United States*,⁵² and *Pruneyard Shipping Center v. Robins*,⁵³ the Court has expressed or betrayed its un-

⁴³ E.g., L. TRIBE, AMERICAN CONSTITUTIONAL LAW 525, 533-35 (1978); Van Alstyne, *Cracks in "The New Property"*, 62 CORNELL L. REV. 445, 462-70 (1977).

⁴⁴ ELY, *supra* note 1, at 19.

⁴⁵ Not everyone is so sure of the validity of this charge. See Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS: NOMOS XVIII 133-34 (J. Pennock & J. Chapman eds. 1977); Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405, 438-39 (1977).

⁴⁶ See Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981); see also Glennon, *Constitutional Liberty and Property*, 51 S. CAL. L. REV. 355, 358, 361, 372-81 (1978); Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS: NOMOS XVIII (J. Pennock & J. Chapman eds. 1977); Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405 (1977).

⁴⁷ 257 U.S. 312 (1921).

⁴⁸ 260 U.S. 393 (1922).

⁴⁹ 407 U.S. 67 (1972).

⁵⁰ 416 U.S. 134 (1974).

⁵¹ 419 U.S. 565 (1975).

⁵² 444 U.S. 164 (1979).

⁵³ 447 U.S. 74, 84, 88-89 (Blackmun, J., concurring), 93-95 (Marshall, J., concurring) (1980).

willingness to abandon the idea that some rights or interests are protected property by direct mandate of the Constitution, regardless of nonconstitutional positive law.

But then we have a puzzle on our hands. We have arrived at the following two positions: (1) The Constitution mandates recognition and protection, as property, of some rights or interests regardless of their status in non-constitutional positive law; and (2) there is no constitutional right to the establishment of a private property system, and such a right might well be nonjusticiable. How can these two propositions co-exist? If the Constitution cannot be read to tell the judges what a private property system is in essence, how are the judges suppose to identify the rights the Constitution tells us to protect as property without regard to non-constitutional law? If the constitutional property right is neither determined by the particulars of the positive law, nor determinative of the system of positive law, then what are the relationships among these three entity-classes, *viz.*, positive-law particulars, constitutional property rights and positive-law system?

One possible answer is that constitutional property rights are relative to, and determined by, the prevailing legal and institutional system as a whole. Thus, the constitutional rights would not be immutable higher law prescribing that system. Rather they, along with the system, would be historically contingent and changeable. Neither, however, would the constitutional property rights be fully and strictly determined by specific portions of positive law. The assumption is that on some occasions it would be possible to say that particular positive law, in denying or negating some claimed entitlement to use or control of a resource, contradicts the implications of the institutional system as a whole that the claim should be recognized and protected. That claim, then, would be a constitutionally protected property right.

For such a conception to work, property must represent a value of a certain kind; that is, a value whose concrete implications for legal entitlement so clearly are inferrable from, and vary with, the general state of social and economic affairs and institutions, that specific legal rules can sometimes be judged dissonant with those concrete implications. It follows, I think, that property must represent a value that is, in the loosest possible sense, comparative or competitive—whose worth to the individual is in some way relative to the endowments of others—so that specific withdrawals or denials can be judged unfair or disadvantageous. It follows then, that property is a process right; an “ingredient in the constitution of the individual as a participant in the life of the society, including not least the society’s processes for regulating the conditions of an ineluctably social existence.”⁶⁴

⁶⁴ Michelman, *Mr. Justice Brennan: A Property Teacher’s Appreciation*, 15 HARV. C.R.—C.L.L. REV. 296, 304 (1980).

Rather crude illustrations of the idea are all that I can muster at this stage of its development. Consider the question of constitutionality of legal rules allowing self-help repossession of automobiles sold on secured credit and held for personal use. The approach suggested would indicate that it should make a difference whether we were in a society in which legs, two-wheeled vehicles and public transit were the standard modes of locomotion, or rather in a society like our own, where lack of a personal automobile is probably an isolating condition, a significant impairment of one's ability to engage in the normal round of social, economic and political intercourse. (It is worth wondering how the approach would apply to the consumer durables in *Fuentes v. Shevin*⁵⁵—the legendary stove and stereo.)

Now, what precedes is far short of a logical demonstration of the necessity of regarding property, in its constitutional usage, as a process right. At most I have shown that there are some grounds for so regarding it, that one could adopt it if so minded. But why should one be so minded? What's so hot about process rights?

Let us take note of what isn't so hot about them. I agree completely with Ely's critics such as Laurence Tribe⁵⁶ and Paul Brest,⁵⁷ when they suggest that the need for substantive, political value judgments is in no way avoided or lessened by casting constitutional issues in terms of process rather than result. A part of their point is sufficiently illustrated by the hypothetical mustache-disfranchisement law:⁵⁸ Does it not affect substantive rights? How can we distinguish it from a law disfranchising children, or felons, without resort to substantive value judgments?

Tribe and Brest convincingly show that Ely falls victim to his own attack, i.e., that his critique of fundamental values analysis of issues in constitutional law applies in full force to the choices that judges have to make in carrying out the constitutional program according to Ely—that of facilitating the fair operation of political processes and assuring fair consideration of minority interests. Process talk and process rights are not intrinsically any more objective than substance talk and substantive rights. Even so, it does seem that, in practice, process talk can often help disputant progress towards mutually acceptable resolutions of difficult issues. Why so?

Perhaps the answer lies in part in two related values, impulses or compulsions, that may be called reasoned discourse and autonomy-of-law. These are legalistic impulses, in the sense that they are liable to be found not only in lawyers but in lay conversation about law. They are

⁵⁵ 407 U.S. 67 (1972).

⁵⁶ See Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

⁵⁷ Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981).

⁵⁸ See notes 3, 4 *supra* and accompanying text.

also, however, humanistic impulses. It seems to be simply descriptive of our nature as social beings that reason-giving is an essential part of purposive conversation. This is so despite an overall willingness to acknowledge that the giving of reasons can neither reach an end nor go on forever. One wants, simply, to present an argument for one's recommended conclusion. All the better if the argument is rooted in grounds to which one's co-conversationists are committed. This helps explain why, during conversations about legal matters, one seeks grounds supplied by the acknowledged law itself and, to that extent at least, experiences or imagines the autonomy of law.

In legal as well as in other discourse one reaches for argument, for rationalization, for the unification of arguments across topics which in the unattainable limit would become true objectivity.⁵⁹ Add to that simple bit of sociology the apparent fact that the Constitution is seemingly occupied, if not preoccupied, with matters of process. A unified or integrated constitutional discourse would then, tend to be pervasively, if not exclusively, a process-oriented discourse. And that, I suggest, is a factor that might help explain the allure of constitutional processism.

But of course we know from Ely that the alluring is also the impossible,⁶⁰ and constitutional processism is no exception. As duly skeptical denizens of a post-Realist age, we know that any apparent preoccupation with process we may detect in the Constitution is not, in the final analysis, objectively *in* the document but rather imputed to it by us. It is historically or, as some might prefer to say, ideologically contingent. In other words, the Tribe-Best critique—viz., Ely himself can't get anywhere without substantive value choices—it is not only internal to Ely's process-rights program but external to it as well: To see the constitutional program as one of process-rights is itself an act of value choice.⁶¹ I, again, agree; and yet, again, there seems to be a pragmatic virtue in process talk: a virtue of sometimes making worthwhile conversation possible, of feeling right and persuasive when talk about preferred results would feel weak and arbitrary, or futile and hopeless, in the face of disagreement.

For illustration, consider the idea of property as a process right. That idea posits a connection between franchise and property. The strongest possible connection would be one to the effect that (as Dad was told by

⁵⁹ Professor Duncan Kennedy uses the term "integration." D. KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL CONSCIOUSNESS (unpublished manuscript) (on file with author).

⁶⁰ See Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978).

⁶¹ See, e.g., Tribe, *supra* note 56, at 1077-79; Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981).

Mother) you can't have one without the other.⁶² Suppose the issue is: what property rights do people have? The issue is not resolved and the need for value judgment is not obviated by switching into a process mode. For let it be granted, with respect to franchise and property, that you cannot have one without the other. The question remains: all, or nothing? Is it love, and therefore marriage; or is it no marriage, so no love?

We can detect in our tradition two schools of thought on this matter. Let me call them the "Whig" school and the "Democratic Humanist" school. Both schools could march under banners reading "no franchise without estate."⁶³ They would mean, however, different things by their identical mottos.

In the Whig view, whether one has estate, and if so how much, is one's own look-out. Further, since no one ought to have a public voice wanting estate, because he would be irresponsible and uninformed, it follows whiggishly that if you lack estate, you are disqualified from the franchise. Society, then, is no more responsible for your franchise than you for your material holdings. What you properly make your own, it protects, and that is all. In the Humanist view, by contrast, each citizen begins with a claim on the franchise, because public voice and participation are deemed essential ingredients of human personality. The motto then means that each is similarly entitled to whatever estate is required in order to make voice effective (reputable, educated or audible).

In short, for Whigs, the motto—"no franchise without estate"—functions as an argument for selective disfranchisement whereas the Humanist motto signifies an argument for universal material entitlement. The roots of the conflict lie deep inside the respective moralities of the two views, in their respective conceptions of what it is to be human and to be free. For the Whig, being human essentially means owning yourself while freedom essentially means independence from the wills of others; hence the very ideas of franchise and of group decision, are for Whigs problematic and, at best, instrumental. You have a vote if you have a proper stake in its exercise and your situation is such that you can be relied upon to use it responsibly and prudently. For the democratic Humanist, by contrast, franchise is essential and constitutive, since to be human essentially means to be an active participant in civic life, and to be free means to be in equal political association with your fellows.

One does not imagine that talking process can magically resolve such cosmic issues as that between the Whig and the Humanist. And yet it

⁶² Mother was, of course, speaking of love and marriage, not franchise and property.

⁶³ Compare to the old revolutionary slogan, "No taxation without representation!"

does seem that one who wanted to persuade an audience of judges or legislators in favor of, say, generous welfare or entitlements might do better by appealing to intuitions about fair process than by asserting an outcome-oriented right to, say, "life."

Allow, for just a moment, that this is so as a matter of social fact. (I shall shortly return to the question of why it is so.) Such a social fact, assuming it exists, certainly seems to justify constitutional processism. After all, constitutional adjudication, insofar as it ultimately succeeds, has to succeed as dialogue. It therefore requires premises that not only are discernible in the extant authoritative materials, and consonant with the intuitive political morality of the country as that comes to light in political disputation, including constitutional argument and much else besides, but also are potentially critical of the existing order.⁶⁴ Constitutional adjudication is an activity requiring a normative language that hooks into contemporary inclinations of political morality firmly enough to allow for some critical tension without ripping out the hook. It seems that in a liberal political culture, that language is often going to be the language of process. So insofar as it is true that Process is just another name for Substance—insofar as any value conflict is freely translatable from one category into the other—it behooves adjudicators (and their fellow travelers, the advocates, commentators and theorists) to know how and when to make the necessary translations.

What I have just said will seem to depreciate the process-based approach, reducing it to a matter of culturally contingent rhetorical prudence. In truth I think there is more than that to be said on its behalf, which we can perhaps get at by asking what might lie behind the feelings and experiences to which I have called attention, that we can sometimes make headway talking process when we can't get anywhere talking substance. Those feelings and experiences have, of course, some well-known sinister interpretations. They are called a form of false consciousness, or apologetics, or reflections of a mystifying dualism in liberal thought—meaning, among other things, that people whose true interest is in resisting substantive injustice can be fooled into thinking that there are such things as fair procedures and as long as the procedures are fair they have nothing to complain about. That there is in such cautionary views of process talk a truth worth learning I do not deny. I doubt, however, that they are the whole truth. For there is also a benign interpretation of the gratifying quality of process talk; that is, that it fits a self-concept ideal, a preferred sense of ourselves as members of a Kingdom of Ends⁶⁵—as individuals not only rational but

⁶⁴ See R. Parker, *Constitutional Vision* (unpublished manuscript) (on file with author).

⁶⁵ The phrase, of course, is Kant's. See, I. KANT, THE GROUNDWORK OF THE METAPHYSIC OF MORALS 100-02 (H. Paton tr. 1, 3d ed. 1956). The construal is chiefly from R. WOLFF, THE POVERTY OF LIBERALISM 191-93 (1968).

reasonable, in principle capable through a proper dialogue of arriving at positions of true mutual respect and accommodation, and capable through a proper pooling of judgment of arriving at a common interest. In other words, our susceptibility to process talk might be a reflection of aspirations far from ignoble.

That suggestion is not, of course, without its apparent problems. For one, I see that the benign view of process talk is itself open to the charge of false consciousness—mine, in this instance—though I don't quite see what I'm supposed to do about it. For another, the notion that reasoning together is a high human calling could perhaps be said to have about it a certain aura that John Ely (not meaning flattery) calls “the smell of the lamp.”⁶⁶ But that, I suggest, is as much Professor Ely's problem as it is mine.

⁶⁶ Ely, *supra* note 1, at 94.

