

In light of the complexity of the issues on which choice of a constitutional theory appropriately depends, many will wish to avoid opting definitively for one theory and renouncing all others. They will instead prefer a case-by-case approach, similar to that of common law judges. This can indeed be a responsible stance. Nonetheless, taking positions on issues of constitutional theory is ultimately unavoidable. It is impossible to engage in constitutional argument without making methodological assumptions. Moreover, anyone who engages in good-faith argumentation assumes obligations of methodological consistency. The enterprise of constitutional justification requires consistent application of fair standards of valid argument.

To recognize that a constitutional theory should be chosen partly on instrumental grounds is, therefore, not to license unprincipled manipulations. Once adopted, a constitutional theory ought to impose constraints on those who accept it. Nonetheless, it would reflect a deep mistake—a misunderstanding of what constitutional theory is for—not to evaluate constitutional theories based on the results that they are likely to produce.

## B. PROCESS THEORY

### JOHN HART ELY, POLICING THE PROCESS OF REPRESENTATION: THE COURT AS REFEREE

DEMOCRACY AND DISTRUST 73–84, 86–95, 97–101 (1980).

[In earlier chapters, Professor Ely discusses “interpretivism” and “non-interpretivism”—“the former indicating that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution, the latter the contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document.” He argues that “clause-bound interpretivism” (the claim that constitutional phrases be given content solely on the basis of their language and surrounding legislative history) is both impossible and unwise; yet “noninterpretivism” appears to invite judicial value imposition.]

All this seems to leave us in a quandary. An interpretivist approach—at least one that approaches constitutional provisions as self-contained units—proves on analysis incapable of keeping faith with the evident spirit of certain of the provisions. 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 a council of legislative revision—we search in vain. Despite the usual assumption that these are the only options, 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.

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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 may 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 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. 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, 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 something approaching 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 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. \* \* \*

#### THE CAROLINE PRODUCTS FOOTNOTE

The Warren Court's approach was foreshadowed in a famous footnote in *United States v. Carolene Products Co.*, 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 all it had to be was "rational" and it assuredly was that. Footnote four suggested, however, 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 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.<sup>7</sup>

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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. Professor Lusky, who as Stone's law clerk was substantially responsible for the footnote, has recently revealed that the first paragraph was added at the request of Chief Justice Hughes. Any implied substantive criticism seems misplaced: positive law has its claims, even when it doesn't fit some grander theory. It's true, though, that paragraphs two and three are more interesting, and it is the relationship between those two paragraphs that has not been adequately elaborated. Popular control and egalitarianism are surely both ancient American ideals; indeed, dictionary definitions of "democracy" tend to incorporate both. Frequent conjunction is not the same thing as consistency, however, and at least on the surface a principle of popular control suggests 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, 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 isn't enough to render them consistent either, and a system of equal participation in the processes of government is by no means self-evidently linked to a system of presumptively equal participation in the benefits and costs that process generates; in many ways it seems calculated to produce just the opposite effect. To understand the ways these two sorts of participation join together in a coherent political theory, it is necessary to focus more insistently \* \* \* on the American system of representative democracy.

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<sup>7</sup>304 U.S. 144, 152-53 n. 4 (1938) (citations omitted).

## REPRESENTATIVE GOVERNMENT

Representative democracy is perhaps most obviously a system of government suited to situations in which it is for one reason or another impractical for the citizenry actually to show up and personally participate in the legislative process. But the concept of representation, as understood by our forebears, was richer than this. Prerevolutionary rhetoric posited a continuing conflict between the interests of "the rulers" on the one hand, and those of "the ruled" (or "the people") on the other.<sup>10</sup> A solution was sought by building into the concept of representation the idea of an association of the interests of the two groups. Thus the representatives in the new government were visualized as "citizens," persons of unusual ability and character to be sure, 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. 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 required.<sup>17</sup> The principal force 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 the representatives did not shield themselves from the rigors of the laws they passed.

Actually it may not matter so much whether our representatives are treating themselves the way they treat the rest of us. Indeed it may be precisely because in some ways they treat themselves better, that they seem so desperately to want to be reelected. And it may be that desire for reelection, more than any community of interest, that is our insurance policy. If most of us feel we are being subjected to unreasonable treatment by our representatives, we retain the ability—irrespective of whether they are formally or informally insulating themselves—to turn them out of office. 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, the situation will not be so comfortably amenable to political correction. Indeed 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

<sup>10</sup>L. Lusky, *By What Right?* 110–11 (1975).

<sup>17</sup>[Buel, "Democracy and The American Revolution: A Frame of Reference," 21 *Wm. & M.Q.* 165, 184 (1964).]

one or more minorities whose backing they don't need less favorably. Even assuming we were willing and able to give it teeth, a requirement that our representatives treat themselves as they treat most of the rest of us would be no guarantee whatever against unequal treatment for minorities.

This is not to say that the oppression of minorities was a development our forebears were prepared to accept as inevitable. The "republic" they envisioned was not some "winner-take-all" system in which the government pursued the interests of a privileged few or even of only those groups that could work themselves into some majority coalition, but rather—leaving slavery to one side, which of course is precisely what they did—one in which the representatives would govern in the interest of the whole people. Thus every citizen was said to be entitled to equivalent respect, and equality was a frequently mentioned republican concern. Its place in the Declaration of Independence, for example, could hardly be more prominent. When it came to describing the actual mechanics of republican government in the Constitution, however, this concern for equality got comparatively little explicit attention. This seems to have been largely because of an assumption of "pure" republican political and social theory that we have brushed but not yet stressed: that "the people" were an essentially homogenous group whose interests did not vary significantly. Though most often articulated as if it were an existing reality, this 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, while doubtless partly explainable simply in terms of the perceived desirability of such a change, also was quite consciously connected 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 that the ideal of homogeneity could be achieved, legislation in the interest of most would necessarily be legislation in the interest of all, and extensive further attention to equality of treatment would be unnecessary.

The key assumption here, that everyone's interests are essentially identical, is obviously a hard one for our generation to swallow, and in fact we know perfectly well that many of our forebears were ambivalent about it too. Thus the document of 1789 and 1791, though at no point explicitly 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 procedural). The original Constitution's more pervasive strategy, however, can be loosely styled a strategy of pluralism, one of structuring the government, and to a limited extent society generally,

so that a variety of voices would be guaranteed their say and no majority coalition 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 *Federalist 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 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.

The crucial move from a confederation to a system with a stronger central government was so conceived. Madison has been conspicuously attacked for not understanding pluralist political theory, but in fact there is reason to suppose he understood it rather well. His theory, derived from David Hume and spelled out at 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. The Constitution's various moves to break up and counterpoise governmental 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.

It is a rightly renowned system, but it didn't take long to learn that from the standpoint of protecting minorities it was not enough. Whatever genuine faith had existed at the beginning that everyone's interests either were identical or were about to be rendered so, had run its course as the republic approached its fiftieth birthday. Significant economic differences remained a reality, and the fear of legislation hostile to the interests of the propertied and creditor classes—a fear that of course had materialized earlier, during the regime of the Articles of Confederation, 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. \* \* \*

Also relevant 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 blur, there came into focus another reason for doubting that the protection of the many was necessarily the protection of all.

Simultaneously 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 won't 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, isn't going to help much either. 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 to ensure not simply that the representative would not sever his interests from those of a majority of his constituency but also that he would not sever a majority coalition's interests from those of various minorities. Naturally that cannot mean that groups that constitute minorities of 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."<sup>34</sup> The Fourteenth Amendment's Equal Protection Clause is obviously our Constitution's most dramatic embodiment of this ideal. Before that amendment was ratified, however, its theory was understood, and functioned as a component—even on occasion as a judicially enforceable component—of the concept of representation that had been at the core of our Constitution from the beginning.

It's ironic, but the old concept of "virtual representation" is helpful here. The actual term was anathema to our forefathers, since it was invoked to answer their cries of "taxation without representation." But the concept contained an 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

<sup>34</sup>R. Dworkin, *Taking Rights Seriously* 180 (1977).

didn't actually elect anyone, they were "virtually represented" in Parliament. \* \* \*

Although the term understandably has not been revived, the protective device of guaranteeing "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 drafting of our original Constitution and its subsequent interpretation. Article IV's Privileges and Immunities Clause was intended and has been interpreted to mean that state legislatures cannot by their various regulations treat out-of-staters less favorably than they treat 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."<sup>37</sup> Article IV conveys no set of substantive entitlements, but "simply" the guarantee that whatever entitlements those living in a state see fit to vote themselves will generally be extended to visitors. An ethical ideal of equality is certainly working here, but the reason inequalities against nonresidents and not others were singled out for prohibition in the original document is obvious: nonresidents are a paradigmatically powerless class politically. And their protection proceeds by what amounts to a system of virtual representation: by constitutionally tying the fate of outsiders to the fate of those possessing 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 states. But early on the Supreme Court gave this provision a self-operating dimension as well, one growing out of the same need to protect the politically powerless and proceeding by the same device of guaranteed 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. By thus constitutionally binding the interests of out-of-state manufacturers to those of local manufacturers represented in the legislature, it provided political insurance that the taxes imposed on the former would not rise to a prohibitive or even an unreasonable level.

These examples 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. 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

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<sup>37</sup>Toomer v. Witsell, 334 U.S. 385, 395 (1948).



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."<sup>41</sup> 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 a state of persistent inability to protect themselves from pervasive forms of discriminatory treatment. Such groups might just as well be disenfranchised.

\* \* \* Whatever may have been the case before, the Fourteenth Amendment quite plainly imposes a judicially enforceable duty of virtual representation of the sort I have been describing. My main point in using the examples has been to suggest a way in which what are sometimes characterized as two conflicting American ideals—the protection of popular government 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 duty of representation. \* \* \*

\* \* \* [C]ontrary to the standard characterization of the Constitution as "an enduring but evolving statement of general values," \* \* \* the selection and accommodation of substantive values is [in fact] left almost entirely to the political process and 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 large—with ensuring broad participation in the processes and distributions of government. An argument by way of *ejusdem generis* seems particularly justified in this case, since the constitutional provisions for which we are attempting to identify modes of supplying content, such as the Ninth Amendment and the Privileges or Immunities Clause, seem to have been included in a "we must have missed something here, so let's trust our successors to add what we missed" spirit. On my more expansive days, therefore, I am tempted to claim that the mode of review developed here represents the ultimate interpretivism.<sup>48</sup> Our

<sup>41</sup>A. Bickel, *The Supreme Court and the Idea of Progress* 37 (1970).

<sup>48</sup>As I've indicated, I don't think this terminological question is either entirely coherent or especially important. Obviously the approach recommended is neither "interpretivist" in the usual sense (of treating constitutional clauses as self-contained units) nor "noninterpretivist" in the usual sense (of seeking the principal stuff of constitutional judgment in one's rendition of society's fundamental values rather than in the document's broader themes). What counts is not whether it is "really" a broad interpretivism or rather a position that does not fall entirely in either camp, but whether it is capable of keeping faith with the document's promise in a way I have argued that a clause-bound interpretivism is not, and capable at the same time of avoiding the objections to a value-laden form of noninterpretivism, objections rooted most importantly in democratic theory. In that regard the two arguments that close this chapter, those addressed explicitly to consistency with democratic theory and the relative institutional capacities of legislatures and courts, seem at least as important as the argument from the nature of the Constitution (which given the complexity of the document must be a

review will tell us something else that may be even more relevant to the issue before us—that the few attempts the various framers *have* made to freeze substantive values by designating them for special protection in the document have been ill-fated, normally resulting in repeal, either officially or by interpretative pretense. This suggests a conclusion with important implications for the task of giving content to the document's more open-ended provisions, that preserving fundamental values is not an appropriate constitutional task.

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### THE NATURE OF THE UNITED STATES CONSTITUTION

Many of our colonial forebears' complaints against British rule were phrased in "constitutional" terms. Seldom, however, 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. "Constitutional" claims thus were often jurisdictional—that Parliament lacked authority, say, to regulate the colonies' "internal commerce"—the foundation for the claim being generally that we were not represented in Parliament. (Obviously the colonists weren't any crazier about being taxed than anyone else is, but what they damned as tyrannical was taxation *without representation*.) Or they were 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. Thus the colonists' "constitutional" arguments drew on the two participational themes we have been considering: that (1) their input into the process by which they were governed was insufficient, and that (partly as a consequence) (2) 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 \* \* \*."<sup>53</sup>

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I don't suppose it will surprise anyone to learn 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

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qualified one in any event).

<sup>53</sup>H. Arendt, [On Revolution] 147 [(1963)].

primarily designed to assure or preclude certain substantive results seem on reflection 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,” 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 disagreement as treason. The prohibitions against granting titles of nobility seem rather plainly to have been designed to buttress the democratic ideal that all are equals in government. The Ex Post Facto and Bill of Attainder Clauses 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). And we have seen that the Privileges and Immunities Clause of Article IV, and at least in one aspect—the other being a grant of congressional power—the Commerce Clause as well, function as equality provisions, guaranteeing virtual representation to the politically powerless.

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\* \* \* [M]y claim is \* \* \* 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). And indeed there are other provisions in the original document that seem almost entirely value-oriented, though my point, of course, is that they are few and far between. Thus “corruption of blood” is forbidden as a punishment for treason. Punishing people for their parents’ transgressions is outlawed as a substantively unfair outcome: it just can’t be done, irrespective of procedures and also irrespective of whether it is done to the children of all offenders. The federal government, along with the states, is precluded from taxing articles exported from any state. Here too an outcome is simply precluded; what might be styled a value, the economic value of free trade among the states, is protected. This short list, however, covers just about all the values protected in the original Constitution—save one. And a big one it was. Although an understandable squeamishness kept the word out of the document, *slavery* must be counted a substantive 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 to prohibit the slave trade into any state that wanted it, and the states were obliged to return escaping slaves to their “homes.”

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 is not that the framers were unconcerned with liberty, but rather that by their lights a bill of rights did not belong in a constitution, at least not in the one they had drafted. As Hamilton explained in *Federalist* 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 \* \* \*.” 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*.” “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 [state]; in the absolute and universal exclusion of titles of nobility \* \* \*.”<sup>72</sup>

Of course a number of the state ratifying conventions remained apprehensive, and a bill of rights did emerge. Here too, however, the data are unruly. 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 political issues, and to check our government when it gets out of bounds. We can attribute other functions to freedom of expression, and some of them must have played a role, but the exercise has the 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 our preeminent right has a highly elitist cast. 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”). But we are at present engaged in an exploration of what sort of document our forebears 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 different matter. Obviously part of the point of combining these cross-cutting commands was to make sure the church and the government gave each other breathing space: the provision thus performs a

<sup>72</sup>The *Federalist* no. 85, at 542 (B. Wright ed. 1961) (Hamilton).

structural or separation of powers function. But we must not infer that because one account fits the data it must be the only appropriate account, and here the obvious cannot be blinked: part of the explanation of the Free Exercise Clause has to be that for the framers religion was an important substantive value they wanted to put significantly beyond the reach of at least the federal legislature.

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Amendments five 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's exactly what most of them are: the importance of the guarantees 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 determination. Unconcerned with the substance of government regulation, they refer instead to the ways in which regulations can be enforced against those they cover.

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With one important exception, the Reconstruction Amendments do not designate substantive values for protection from the political process. The Fourteenth Amendment's Due Process Clause, we have seen, is concerned with process writ small, the processes by which regulations are enforced against individuals. Its Privileges or Immunities Clause is quite inscrutable, indicating only that there should exist some set of constitutional entitlements not explicitly enumerated in the document: it is one of the provisions for which we are seeking guides to construction. The Equal Protection Clause is also unforthcoming with details, though it at least gives us a clue: by its explicit concern with equality among the persons within a state's jurisdiction it constitutes the document's clearest, though not sole, recognition that technical access to the process may not always be sufficient to guarantee good-faith representation of all those putatively represented. The Fifteenth Amendment, forbidding abridgment of the right to vote on account of race, opens the process to persons who had previously been excluded and thus by another strategy seeks to enforce the representative's duty of equal concern and respect. The exception, of course, involves a value I have mentioned before, slavery. The Thirteenth Amendment can be forced into a "process" mold—slaves don't participate effectively in the political process—and it surely significantly reflects a concern with equality as well. Just as surely, however, it embodies a substantive judgment that human slavery is simply not morally tolerable. 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.

What has happened to the Constitution in the second century of our nationhood, though ground less frequently plowed, is most instructive on the subject of what jobs we have learned our basic document 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. Extension of the franchise to groups previously excluded has therefore been the dominant theme of our constitutional development since the Fourteenth Amendment, and it pursues both of the broad constitutional themes we have observed from the beginning: the achievement of a political process open to all on an equal basis and a consequent enforcement of the representative's duty of equal concern and respect to minorities and majorities alike. Three other amendments—the Twentieth, Twenty-Second, and Twenty-Fifth—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. That's it, save two, and indeed 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 suggest, 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 that they don't become issues (corruption of blood, quartering of troops) or so interlaced with procedural concerns they seem appropriate in a constitution (self-incrimination, double jeopardy). Those sufficiently conspicuous and 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 our forebears did not intend very seriously 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 be counted as discrete and insular minorities, such as the Amish, Seventh Day Adventists, and Jehovah's Witnesses. Whatever the original conception of the Free Exercise Clause, its function during essentially all of its effective life has been one akin to the Equal Protection Clause and thus entirely appropriate to a constitution.

Don't get me wrong: our Constitution has always been substantially concerned with preserving liberty. If it weren't, it would hardly be worth fighting for. The question that is relevant to our inquiry here, however, is how that concern has been pursued. The principal answers to that, we have seen, are by a quite extensive set of procedural protections, and by a still more elaborate scheme designed to ensure that in the making of substantive choices the decision process will be open to all on something approaching an equal basis, with the decision-makers held to a duty to take into account the interests of all those their decisions affect. (Most often the document has proceeded on the assumption that assuring access is the best way of assuring that someone's interests will be considered, and so in fact it usually is. Other provisions, however—centrally but not exclusively the Equal Protection Clause—reflect a realization that access will not always be sufficient.) The general strategy has therefore not been to root in the document a set of substantive rights entitled to permanent protection. The Constitution has instead proceeded from the quite sensible assumption that an effective majority will not inordinately threaten its own rights, and has sought to assure that such a majority not systematically treat others less well than it treats itself—by structuring decision processes at all levels to try to ensure, first, that everyone's interests will be actually or virtually represented (usually both) at the point of substantive decision, and second, that the processes of individual application will not be manipulated so as to reintroduce in practice the sort of discrimination that is impermissible in theory. [There are] a few provisions that do not comfortably conform to this pattern. But they're an odd assortment, the understandable products of particular historical circumstances—guns, religion, contract, and so on—and in any event they are few and far between. To represent them as a dominant theme of our constitutional document one would have to concentrate quite single-mindedly on hopping from stone to stone and averting one's eyes from the mainstream.

The American Constitution has thus by and large remained a constitution properly so called, concerned with constitutive questions. What has distinguished it, and indeed the United States itself, has been a process of government, not a governing ideology. Justice Linde has written: "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.”<sup>95</sup>

**LAURENCE H. TRIBE, THE PUZZLING  
PERSISTENCE OF PROCESS-BASED  
CONSTITUTIONAL THEORIES**

59 YALE L.J. 1063, 1065–73, 1075–1077 (1980).

I. THE CONSTITUTION’S OPENLY SUBSTANTIVE COMMITMENTS

One difficulty that immediately confronts process theories is the stubbornly substantive character of so many of the Constitution’s most crucial commitments: commitments defining the values that we as a society, acting politically, must respect. Plainly, the First Amendment’s guarantee of religious liberty and its prohibition of religious establishment are substantive in this sense. So, too, is the Thirteenth Amendment, in its abolition of slavery and repudiation of the Constitution’s earlier, ostensibly procedural, protections of that institution.

In many of its parts, the Constitution also evinces a substantive commitment to the institution of private property and to the contractual expectations that surround it. The just compensation clause of the Fifth Amendment is an obvious example. The contracts clause of article I, section 10 is another. The old substantive due process, which is obviously an important part of our constitutional history and thus significant for our understanding of what the Constitution is about, also served to protect the transactions and expectations to which the institution of private property gives rise. Whatever our views of the substantive due process heyday, most of us would readily concede that the framers of the 1787 Constitution adopted a federal system of government organization in order to, among other goals, help secure the institution of private property. When Madison, in his theory of faction, suggested that shifting the legislative responsibility for certain problems from the state to the national level could help assure that majorities would not trample minority rights, the problems he had in mind were largely economic; the minority rights the federal system would protect were, for the most part, rights of property and contract.

Religious freedom, antislavery, private property: much of our constitutional history can be written by reference to just these social institutions and substantive values. That the Constitution has long addressed such matters, and often with beneficial effect, ought to surprise no one. What is puzzling is that anyone can say, in the face of this reality, that the Constitution is or should be predominantly concerned with *process* and *not* substance.

<sup>95</sup>Linde, “Due Process of Lawmaking,” 55 Neb.L.Rev. 197, 254 (1975).