

4 Policing the Process of Representation: The Court as Referee

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,¹ 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.²

That Court's reputation as "activist" or interventionist is deserved. A good deal of carping to the contrary notwithstanding, however, that is where its similarity to earlier interventionist Courts, in particular the early twentieth-century Court that decided *Lochner v. New York* and its progeny, ends. For all the while the commentators of the Warren era were talking about ways of discovering fundamental values, the Court itself was marching to a different drummer. The divergence wasn't entirely self-conscious, and the Court did lapse occasionally into the language of fundamental values: it would be surprising if the thinking of earlier Courts and the writings of the day's preeminent commentators hadn't taken some toll.³ The toll, however, was almost entirely rhetorical: the constitutional decisions of the Warren Court evidence a deep structure significantly different from the value-oriented approach favored by the academy.⁴

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. Whether these two broad concerns of the Warren Court—with clearing the channels of political change on the one hand, and with correcting certain kinds of discrimination against minorities on the other—fit together to form a coherent theory of representative government, or whether, as is sometimes suggested, they are actually inconsistent impulses,⁵ is a question I shall take up presently. But however that may be, it seems to be coming into focus that the pursuit of these "participational" goals of broadened access to the processes and bounty* of representative government, as opposed to the more tra-

*The reference here should be understood as including exemptions or immunities from hurts (punishments, taxes, regulations, and so forth) along with benefits. It is thus to patterns of distribution generally.

ditional and academically popular insistence upon the provision of a series of particular substantive goods or values deemed fundamental, was what marked the work of the Warren Court.⁶ Some condemn and others praise, but at least we're beginning to understand that something different from old-fashioned value imposition was for a time the order of the day.*

The Carolene 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 ex-

*Participation itself can obviously be regarded as a value, but that doesn't collapse the two modes of review I am describing into one. As I am using the terms, value imposition refers to the designation of certain goods (rights or whatever) as so important that they must be insulated from whatever inhibition the political process might impose, whereas a participational orientation denotes a form of review that concerns itself with how decisions effecting value choices and distributing the resultant costs and benefits are made. See also p. 87n. I surely don't claim that the words have to be used thus. (There is even doubt that "participational" deserves to be recognized as a word at all.) I claim only that that is how I am using them, and that so used they are not synonyms.

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

pected 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.⁷

The first paragraph is pure interpretivism: it says the Court should enforce the "specific" provisions of the Constitution.⁸ We've seen, though, that interpretivism is incomplete: there are provisions in the Constitution that call for more. The second and third paragraphs give us a version of what that more might be. Paragraph two suggests that it is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open. Paragraph three suggests that the Court should also concern itself with what majorities do to minorities, particularly mentioning laws "directed at" religious, national, and racial minorities and those infected by prejudice against them.

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.⁹ 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.¹⁰ Any implied substantive criticism seems misplaced: positive law has its claims, even when it doesn't fit some grander theory.¹¹ 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.¹² 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,¹³ 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 than I did in Chapter 1 on the American system of representative democracy.

Representative Government

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

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

—United States Supreme Court (1944)¹⁴

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.¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸

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 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,¹⁹ 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.²⁰ 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.²¹ 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 homogeneous group whose interests did not vary significantly.²² 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,²³ 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.²⁴ 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.²⁵ As Madison—pointedly eschewing the (“Chapter 3”) 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.²⁶

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,²⁷ 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.²⁸ 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.²⁹

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.³⁰ The Pennsylvania Supreme Court summed it up thus in 1851:

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

But when individuals are selected from the mass, and laws are enacted affecting their property, . . . who is to stand up for them, thus isolated from the mass, in injury and injustice, or where are they to seek relief from such acts of despotic power?³¹

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.³²

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,³³ 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."³⁴ 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 component³⁵ — 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 didn't actually elect anyone, they were "virtually represented" in Parliament. Manchester was taxed, it was pointed out, without the privilege of sending representatives to Parliament; yet surely, the argument concluded, no one could deny that Manchester was represented. The colonists' answer, at least their principal one, took the form of a denial not of the concept's general sense, but rather of its applicability to our case. Thus Daniel Dulany responded:

The security of the non-electors [of Manchester] against oppression is that their oppression will fall also upon the electors

and the representatives . . . The electors, who are inseparably connected in their interests with the non-electors, may be justly deemed to be the representatives of the non-electors . . . and the members chosen, therefore, the representatives of both.

However,

there is not that intimate and inseparable relation between the electors of Great Britain and the inhabitants of the colonies, which must inevitably involve both in the same taxation. On the contrary, not a single actual elector in England might be immediately affected by a taxation in America . . . Even acts oppressive and injurious to an extreme degree, might become popular in England, from the promise or expectation that the very measures which depressed the colonies, would give ease to the inhabitants of Great Britain.³⁶

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."³⁷ 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.³⁸ 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.³⁹

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.⁴⁰ From one perspective the claim of such groups to protection from the ruling majority is even more compelling than that of the out-of-stater: they are, after all, members of the community that is doing them in. From another, however, their claim seems weaker: they do have the vote, and it may not in the abstract seem unreasonable to expect them to wheel and deal as the rest of us (theoretically) do, yielding on issues about which they are comparatively indifferent and "scratching the other guy's back" in order to get him to scratch theirs. "[N]o group that is prepared to enter into the process and combine with others need remain permanently and completely out of power."⁴¹ 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.

The issues adumbrated here—relating to the conditions under which it is appropriate constitutionally to bind the interests of the majority to those of some minority with which no felt community of interests has naturally developed—obviously need a good deal more attention, and they shall receive it in Chapter 6. The point that is relevant here is that even before the enactment of the Equal Protection Clause, the Supreme Court was prepared at least under certain conditions to protect the interests of minorities that were not literally voteless by constitutionally tying their interests to those of groups that did possess political power—and, what is the same thing, by intervening to protect such interests when it appeared that such a guarantee of "virtual representation" was not being pro-

vided. In the landmark case of *McCulloch v. Maryland*, decided in 1819, the Court invalidated a state tax on the operations of all banks (preeminently including the Bank of the United States) not chartered by the state legislature. Toward the end of Chief Justice Marshall's Court opinion, there appears a potentially baffling qualification: "This opinion . . . does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state."⁴² What ever did he have in mind? It can't have been that he knew the sorts of property taxes mentioned were in fact less burdensome, for nothing in his opinion had indicated that the tax the Court was invalidating was in fact disabling or even burdensome. Indeed it was at the heart of his argument that no such showing was necessary: "the power to tax involves the power to destroy" and a little tax on bank operations was declared as impermissible as a big one. A tax on the land on which the local branch of the Bank of the United States sits also has the potential to destroy, however. *Either* tax, if it got out of hand—and there was no indication that either had—could destroy the Bank.

By now we should be in a position to spot the trick right away: it lies in Marshall's indication that the real estate tax would have to be "in common with the other real property within the state," the tax on any interest held by citizens "in common with other property of the same description throughout the state." The unity of interest with all Maryland property owners assured by this insistence on equal treatment would protect the Bank from serious disablement by taxes of this sort. The power to tax real or personal property *is* potentially the power to destroy. But people aren't lemmings, and while they may agree to disadvantage themselves somewhat in the service of some overriding social good, they aren't in the habit of destroying themselves en masse.⁴³

The tax in issue, on the operations of banks not chartered by the state, presented a different configuration of interests. Naturally the Bank of the United States didn't have a vote in the Maryland legislature, but no corporation did. The interests of organizations generally have to be protected by persons whose interests are tied up with theirs—officers, employees, stockholders—and in these re-

spects there is no reason to suppose the Bank of the United States was more impoverished than any other organization. Thus the Bank was not voteless, at least not voteless in any sense that other corporations were not. Yet the tax on bank operations was invalidated, and the reason it was is quite obvious: this was a tax exclusively on banks, indeed exclusively on banks not chartered by the state. The Bank of the United States may have had a "vote" as effective as that of any other single corporation, but it was clear nonetheless that with regard to a tax on the operations of non-state-chartered banks it would find itself in a perpetually losing situation politically, since at best—though it appears even this was lacking—its only allies on this issue would be a couple of wildcat banks. Here too there is reason to suppose that constitutional salvation would have been found only in a genuine guarantee of virtual representation—if, for example, the Bank's operations had been taxed only as part of a tax equally affecting all business operations in Maryland.⁴⁴

I certainly do not mean to suggest that *McCulloch* was a direct precursor of the *Carolene Products* footnote, generally heralding the special judicial protection of discrete and insular minorities: it is most unlikely that the Bank would have received this special solicitude had it not been a federal instrumentality. The Court's discussion is instructive nonetheless. It suggests by its reference to the property taxes the clear assumption of even that early day that representatives were expected to represent the entirety of their constituencies without arbitrarily severing disfavored minorities for comparatively unfavorable treatment. And it suggests by its invalidation of the bank operations tax its further assumption that at least in some situations judicial intervention becomes appropriate when the existing processes of representation seem inadequately fitted to the representation of minority interests, even minority interests that are not voteless. I do not suggest that these themes were very often made explicit before the Civil War, but the frequency of their invocation is not to the present point. 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 con-

cern and respect on the other—in fact can be understood as arising from a common duty of representation. Once again, Madison said it early and well:

I will add, as a fifth circumstance in the situation of the House of Representatives, restraining them from oppressive measures, that they can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of society . . . If it be asked, what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? I answer: the genius of the whole system; the nature of just and constitutional laws; and above all, the vigilant and manly spirit which actuates the people of America . . . ⁴⁵

The remainder of this chapter will comprise three arguments in favor of a participation-oriented, representation-reinforcing approach to judicial review. The first will take longer than the others, since it will necessitate a tour, albeit brisk, of the Constitution itself. What this tour will reveal, contrary to the standard characterization of the Constitution as “an enduring but evolving statement of general values,”⁴⁶ is that in fact the selection and accommodation of substantive values is 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.⁴⁷ 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.⁴⁸ On my more expansive days, therefore, I am tempted to claim that the mode of re-

*I don’t mean to be hanging any of the argument on this characterization. See p. 75n. It is true, however, that the approach I shall recommend is more thoroughly process-oriented in elaboration than might be supposed even from the discussion thus far. See generally Chapter 6.

view developed here represents the ultimate interpretivism.* Our 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.

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

The Nature of the United States Constitution

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

—Lon Fuller⁴⁹

Many of our colonial forebears' complaints against British rule were phrased in "constitutional" terms. Seldom, however, was the claim

*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

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.⁵⁰ “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.⁵¹ (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.⁵² 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 . . .”⁵³

The theme that justice and happiness are best assured not by trying to define them for all time, but rather by attending to the governmental processes by which their dimensions would be specified over time, carried over into our critical constitutional documents. Even our foremost “natural law” statement, the Declaration of Independence, after adverting to some admirable but assuredly open-ended goals — made more so by using “the pursuit of happiness” in place of the already broad Lockean reference to “property”⁵⁴ — signals its appreciation of the critical role of (democratic) process:

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 qualified one in any event).

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that *to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed . . .*⁵⁵

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

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

I 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 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.⁵⁶ 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.⁵⁷ 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).⁵⁸ 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.

During most of this century the Obligation of Contracts Clause has not played a significant role.⁵⁹ Powerful arguments have been made that the clause was intended importantly to limit the extent to which state governments could control the subjects and terms of private contracts.⁶⁰ Early in the nineteenth century the Supreme Court rejected this broad interpretation, however, holding that the clause affected only the extent to which the legislature could alter or overrule the terms of contracts in existence at the time the statute was passed, and thus did not affect what legislation could say about future contracts.⁶¹ What's more, though there have been signs of stiffening in the past two years,⁶² the Court in general has not been very energetic about protecting existing contracts either, holding in essence that legislatures can alter them so long as they do so reasonably (which virtually denudes the clause of any independent function).⁶³ It is tempting to conclude that the Court's long-standing interpretation of the clause as protecting only existing contracts reduces it to just another hedge against retroactive legislation and thus, like the Ex Post Facto Clause, essentially a separation of powers provision. That conclusion, however, is a little quick. Legislation effectively overruling the terms of an existing contract is not really "retroactive" in the ex post facto sense of attaching untoward consequences to an act performed before it was enacted; rather it refuses to recognize a prior act (the making of the contract) as a defense to or exemption from a legal regime the legislature now wishes to impose.⁶⁴ Thus both interpretations of the clause recognize the existence of a contract as a special shield against legislative regulation of future behavior, though on the long-accepted narrow interpretation only contracts already in existence can serve thus.

At this point another temptation arises, to characterize the Contracts Clause as serving an institutional or "separation of powers" function of cordoning off an extragovernmental enclave, in this case an enclave of decision via contract, to serve as a counterpoise to governmental authority.⁶⁵ The problem with this account is not that it does not fit, but rather that it will *always* fit: it is difficult to imagine any purported constitutional right that cannot be described as creating a private space where actions antithetical to the wishes of our

elected representatives can be taken. For this reason the account seems incapable of serving as a meaningful explanation (or as a basis from which broader constitutional themes can responsibly be extrapolated).⁶⁶ Thus whichever interpretation of the clause was in fact intended, it is difficult to avoid the conclusion that in the Contracts Clause the framers and ratifiers meant to single out for special protection from the political processes—though note that in this case it is only the *state* political processes—a substantive value that is not wholly susceptible to convincing rationalization in terms of either the processes of government or procedure more narrowly conceived. On the broad and rejected interpretation, that value is contract, the ability to arrive at binding agreements. On the narrower and received interpretation, applying the clause only to contracts in existence at the time of the legislation—which I should reiterate is an interpretation the Court has not, at least until very recently, pursued very enthusiastically either—what is protected is a somewhat narrower reliance interest, an assurance that by entering into a contract one can render oneself immune from future shifts in the identity or thinking of one's elected representatives.

This needn't throw us into a tailspin: my claim is only that the original Constitution was principally, indeed I would say overwhelmingly, dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values. Any claim that it was exclusively so conceived would be ridiculous (as would any comparable claim about any comparably complicated human undertaking). 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

*I realize that by stressing the few occasions on which values *were* singled out for protection, I run the risk of conveying the impression that that is the character of much of the Constitution. My point of course is quite the opposite, but I'm not sufficiently sadistic to list all the provisions that are obviously concerned only with process. If you find yourself thinking I'm not making my case here, please read a few pages of the Constitution to assure yourself that I could.

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.⁶⁷ 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,⁶⁸ and the states were obliged to return escaping slaves to their “homes.”⁶⁹

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 . . . ”⁷⁰ 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*.”⁷¹ “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 . . . ”⁷²

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.⁷³ We can attribute other functions to freedom of expression, and some of them must have played a role,⁷⁴ 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 pre-eminent 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 structural or separation of powers function.⁷⁵ 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.

The Second Amendment, protecting "the right of the people to keep and bear Arms," seems (at least if that's all you read) calculated simply to set beyond congressional control another "important" value, the right to carry a gun. It hasn't been construed that way, however, and instead has been interpreted as protecting only the right of state governments to keep militias (National Guards) and to arm them. The rationalization for this narrow construction has ordinarily been historical, that the purpose the framers talked most about was maintaining state militias. However, a provision cannot responsibly be restricted to less than its language indicates simply because a particular purpose received more attention than

others (and in fact that favored purpose of today's firearms enthusiasts, the right of *individual* self-protection, was mentioned more than a couple of times). Arguments can be right for the wrong reasons, however, and though the point is debatable,⁷⁶ the conclusion here is probably correct. The Second Amendment has its own little preamble: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Thus here, as almost nowhere else,⁷⁷ the framers and ratifiers apparently opted against leaving to the future the attribution of purposes, choosing instead explicitly to legislate the goal in terms of which the provision was to be interpreted.

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

Amendments 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.⁷⁸ Unconcerned with the substance of government regulation, they refer instead to the ways in which regulations can be enforced against those they cover. Once again, however, that is not the whole story. The Fifth Amendment's privilege against self-incrimination surely has a lot to do with wanting to find the truth: coerced confessions are less likely to be reliable. But at least as interpreted,⁷⁹ the privilege needs further rationalization than that: the argument runs that there is simply something immoral—though it has proved tricky pinning down exactly what it is—about the state's asking

somebody whether he committed a crime and expecting him to answer. The same amendment's guarantee against double jeopardy gets complicated. Insofar as it forbids retrial after acquittal, it seems a largely procedural protection, designed to guard against the conviction of innocent persons. But insofar as it forbids additional prosecution after conviction or added punishment after sentence, it performs the quite different (and substantive) function, which obviously is present in the acquittal situation too, of guaranteeing a sense of repose, an assurance that at some definable point the defendant can assume the ordeal is over, its consequences known.⁸⁰

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This provision most often becomes relevant when a criminal defendant tries to suppress evidence seized as the fruit of an illegal search or arrest, but it would be a mistake to infer from that that it is a purely procedural provision. In fact (as thus enforced by the exclusionary rule) it *thwarts* the procedural goal of accurately determining the facts, in order to serve one or more other goals felt to be more important.⁸¹ The standard line is that that other, more important goal is privacy, and surely privacy is sometimes implicated.⁸² But the language of the amendment reaches further—so for that matter did the customs abuses we know had a lot to do with its inclusion—and when it is read in its entirety the notion of "privacy" proves inadequate as an explanation. The amendment covers seizures of goods and arrests ("seizures of the person") along with searches, and it does not distinguish public episodes from private: a completely open arrest or seizure of goods is as illegal as a search of a private area if it is effected without probable cause. It thus "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all."⁸³

A major point of the amendment, obviously, was to keep the government from disrupting our lives without at least moderately convincing justification. That rationale intertwines with another—and the historic customs abuses are relevant here too—namely, a fear of

official discretion. In deciding whose lives to disrupt in the ways the amendment indicates—that is, whom to search or arrest or whose goods to seize—law enforcement officials will necessarily have a good deal of low visibility discretion. In addition they are likely in such situations to be sensitive to social station and other factors that should not bear on the decision. The amendment thus requires not simply a certain quantum of probability but also when possible, via the warrant requirement, the judgment of a “neutral and detached magistrate.” From this perspective, which obviously is only one of several, the Fourth Amendment can be seen as another harbinger of the Equal Protection Clause, concerned with avoiding indefensible inequities in treatment. The Eighth Amendment’s ban on “cruel and unusual punishments” is even more obviously amenable to this account. Apparently part of the point was to outlaw certain understood and abhorred forms of torture, but the decision to use open-ended language can hardly have been inadvertent.⁸⁴ It is possible that part of the point also was to ban punishments that were unusually severe in relation to the crimes for which they were being imposed. But much of it surely had to do with a realization that in the context of imposing penalties too there is tremendous potential for the arbitrary or invidious infliction of “unusually” severe punishments on persons of various classes other than “our own.”⁸⁵

On first reading, the Fifth Amendment’s requirement that private property not be taken for public use without just compensation may appear simply to mark the substantive value of private property for special protection from the political process (though, on the face of the document, from only the federal political process). Again, though, we must ask why. Because property was regarded as unusually important? That may be part of the explanation, but note that property is not shielded from condemnation by this provision. On the contrary, the amendment assumes that property will sometimes be taken and provides instead for compensation. Read through it thus emerges—and this account fits the historical situation like a glove⁸⁶—as yet another protection of the few against the many, “a limit on government’s power to isolate particular individuals for sacrifice to the general good.”⁸⁷ Its point is to “spread the cost of operating the governmental apparatus throughout the society rather than imposing it upon some small segment of it.”⁸⁸ If we want a

highway or a park we can have it, but we're all going to have to share the cost rather than imposing it on some isolated individual or group.*

With one important exception, the Reconstruction Amendments do not designate substantive values for protection from the political process.⁸⁹ 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.⁹⁰ 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

*This view of the clause is also of some assistance in deciding whether a given government action should be counted a taking in the first place as opposed to, say, a regulation or a tax. In recent discussions of this issue the Court has begun to ask whether the measure under review singles out a minority for unusually harsh treatment or rather affects a class sufficiently generalized to have a fair shot at protecting itself politically. E.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 132 (1978).

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

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

conspicuous and precise to be controvertible have not survived.⁹¹ 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.⁹² 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. We have noted 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,⁹³ not a governing ideology.⁹⁴ 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."⁹⁵

Democracy and Distrust

As I have tried to be scrupulous about indicating, the argument from the general contours of the Constitution is necessarily a qualified one. In fact the documentary dictation of particular substantive outcomes has been rare (and generally unsuccessful), but our Constitution is too complex a document to lie still for *any* pat characterization. Beyond that, the premise of the argument, that aids to construing the more open-ended provisions are appropriately found in the nature of the surrounding document, though it is a premise that seems to find acceptance on all sides, is not one with which it is impossible to disagree. Thus the two arguments that follow, each overtly normative, are if anything more important than the one I have just reviewed. The first is entirely obvious by now, that unlike an approach geared to the judicial imposition of "fundamental values," the representation-reinforcing orientation whose contours I

have sketched and will develop further is not inconsistent with, but on the contrary is entirely supportive of, the American system of representative democracy. It recognizes the unacceptability of the claim that appointed and life-tenured judges are better reflectors of conventional values than elected representatives, devoting itself instead to policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent. There may be an illusion of circularity here: my approach is more consistent with representative democracy because that's the way it was planned. But of course it isn't any more circular than setting out to build an airplane and ending up with something that flies.

The final point worth serious mention is that (again unlike a fundamental-values approach) a representation-reinforcing approach assigns judges a role they are conspicuously well situated to fill.* My reference here is not principally to expertise. Lawyers *are* experts on process writ small, the processes by which facts are found and contending parties are allowed to present their claims. And to a degree they are experts on process writ larger, the processes by which issues of public policy are fairly determined: lawyers do seem genuinely to have a feel, indeed it is hard to see what other special value they have, for ways of insuring that everyone gets his or her fair say. But too much shouldn't be made of this. Others, particularly the full-time participants, can also claim expertise on how the political process allocates voice and power. And of course many legislators are lawyers themselves. So the point isn't so much one of expertise as it is one of perspective.

The approach to constitutional adjudication recommended here is akin to what might be called an "antitrust" as opposed to a "regulatory" orientation to economic affairs⁹⁶—rather than dictate sub-

*For reasons that are currently obscure, I went through a period of worrying that the orientation here recommended might mean less protection for civil liberties. (Of course it would deny the opportunity to create rights out of whole cloth: that is much of its point and strength. What I had in mind was the possibility that the *same* freedoms might systematically come out thinner if derived from a participational orientation than they would if protected on the ground that they are "good.") Reflection has convinced me that just the opposite is true, that freedoms are more secure to the extent that they find foundation in the theory that supports our entire government, rather than gaining protection because the judge deciding the case thinks they're important. Cf. C. Black, *Structure and Relationship in Constitutional Law* 29-30 (1969). Indeed, the only remotely systematic "Carolene Products" Court we have had was also clearly the most protective of civil liberties.

stantive results it intervenes only when the "market," in our case the political market, is systemically malfunctioning. (A referee analogy is also not far off: the referee is to intervene only when one team is gaining unfair advantage, not because the "wrong" team has scored.) Our government cannot fairly be said to be "malfunctioning" simply because it sometimes generates outcomes with which we disagree, however strongly (and claims that it is reaching results with which "the people" really disagree—or would "if they understood"—are likely to be little more than self-deluding projections). In a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office. Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.⁹⁷

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

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

The search must be for a function . . . which is peculiarly suited to the capabilities of the courts; which will not likely be performed elsewhere if the courts do not assume it; which can be so exercised as to be acceptable in a society that generally

shares Judge Hand's satisfaction in a "sense of common venture"; which will be effective when needed; and whose discharge by the courts will not lower the quality of the other departments' performance by denuding them of the dignity and burden of their own responsibility.⁹⁸

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