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DEMOCRATIC DESPOTISM AND THE INADEQUACY OF A REPRESENTATION-REINFORCING POINT OF VIEW

Gary C. Leedes*

I. INTRODUCTION

Constitutionalism implies canalized discretion, but does not necessarily imply judicial review. Judicial review, however, helps reduce the scope of unfettered official discretion. If most political outcomes were immune from judicial review, the idea of constitutionalism would not be carried out in practice when officials abuse their discretion, or go beyond their limits of power.

Occasionally democracy runs riot, notwithstanding freedom of speech, widespread suffrage, and adequate participation in government by racial and ethnic minorities. In such cases, legal protection is illusory when courts of constitutional law lack the will to mark the limits of the government’s sovereignty. Judicially manageable standards that are suitable for discerning arbitrary and irrational legislation should be developed and applied. Otherwise, the free people in a democracy have inadequate protection against the despotism of their own representatives.

II. VESTED RIGHTS VERSUS THE POLICE POWER AND POSITIVE LAW

Ordinary courts of law, in the early nineteenth century, had power to mark the limits of legislative sovereignty, and were relied upon to delineate the contours of an individual’s constitutionally protected rights. Courts protected fundamental rights, not because they were mentioned in the Constitution; but because they were fundamental, separate, and apart

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from their enumeration within the Constitution. E.C. Corwin wrote, with reference to the vested rights doctrine: "The written constitution is . . . but a nucleus or core of a much wider region of private rights, which . . . are as fully entitled to the protection of government as if defined in the minutest detail." The Supreme Court's substantive due process doctrine in many respects is the modern equivalent of the earlier vested rights doctrine. According to the vested rights doctrine, in its strong form, the police power stops short of an enclave of protected rights.

By 1830, the vested rights doctrine was no longer the dominant theory of constitutional law. Its many qualifications and exceptions proved to be its undoing. The case law precedent, which had earlier given the doctrine vitality and legitimacy, was undermined. The idea of natural rights, which had originally justified the protection of individual rights, became less convincing to more people.

The vested rights, most carefully protected by judges, were property rights, but it became increasingly obvious that restrictions on property are necessary to police a variety of nuisances that interfere with the general welfare. When the pertinent judicial question narrows to whether the legislature's goal is legitimate and its means reasonable, the vested rights doctrine becomes a rational basis test, a deferential level of judicial scrutiny. Nevertheless, the police power remains limited in scope, and courts of law have properly fixed "the outside border of reasonable legislative action, the boundary beyond which the . . . police power, and legislative power in general cannot go." If it were not so, legislation, incompatible with the deepest presuppositions of society, would be unreviewable.

Chief Justice Gibson doubting the courts' power of judicial review, wrote "that the people are wise, virtuous, and competent to manage their own affairs." The legal question,

2. Id. at 248.
4. Id. at 32.
however, is the authority of the people's representatives. Chief Justice Gibson disagreed; since "sovereignty and legislative power are . . . convertible terms, . . . it is [not] the business of the judiciary, to . . . scan the authority of the lawgiver . . . ."6 Although Gibson's view was never fully accepted, the vested rights doctrine declined in influence as the courts began to respect the scope of the police power.

Despite the declining influence of the vested rights doctrine in its original form, and the expanded scope of the police power in the twentieth century, the great seventeenth and eighteenth century notions of natural justice and liberty survive. Due process of law is presently a synonym for venerable principles of justice and liberty, and as applied, it is also "a synonym for the collective wisdom of civilized mankind . . . ."7 This gossamer remnant of the ancient ideal of natural law, is vague,8 and vague principles of justice present at least two problems: First, the abstractions do not provide specific guidance when the pending case requires a practical choice between two or more plausible alternatives; second, the judges lack special insights into the collective wisdom of civilized mankind. The opinion in the abortion decision, Roe v. Wade,9 for example, did not display any unique sagacity on the part of the Supreme Court. After Roe v. Wade, a controversial case ruling, the stage was set for a theory of judicial review that designated a new limit for judicial activism, one more confining than the "prevailing academic line."10

III. THE ELYSIAN CHALLENGE TO CONVENTIONAL THEORY

The representation-reinforcing point of view propounded by John Ely favors judicial intervention to correct political process defects, yet Ely urges almost total judicial abstinence when political outcomes are challenged by litigants relying upon substantive due process principles.11 Justice Holmes, an

6. Id. at 348.
10. J. Ely, supra note 8, at 43.
11. Id. at 180. There should be strict judicial scrutiny when the courts determine that "representative government cannot be trusted." Ely favors judicial intervention, not prudence, in the area of voting rights, freedom of speech and areas where
earlier advocate of judicial restraint, once reminded Justice Frankfurter, "A law should be called good if it reflects the will of the dominant forces of the community even if it will take us to hell." Ely's modern process-oriented theory of judicial restraint is less hard-nosed: the road to hell must be paved with good intentions, and it must have no procedural roadblocks.

Ely brings forward certain premises of the framers to justify his thesis. As he describes his position along the spectrum of scholarly thought:

[The representation-reinforcing approach] is . . . a position . . . capable of keeping faith with the document's promise in a way . . . 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 . . . and the relative institutional capabilities of legislatures and courts . . . .

Thus, according to Ely, "a representation-reinforcing approach to judicial review, unlike its rival value-protecting approach, . . . is entirely supportive of the underlying premises of the American system of representative democracy." The underlying premises—what Ely calls "Carolene Products premises"—are utilized to minimize the countermajoritarian difficulty of having "Justices appointed for life permanently thwarting the will of the people by striking down the work of their elected representatives."

The Carolene Products premises are consistent with the modern Court's position that economic regulation lies principally in the legislature's domain, and that economic legislation

the Court can ensure a "broadened access" to representative government. Id. at 74. He favors a higher level of judicial scrutiny to protect the politically powerless minorities who are not benefiting from adequately responsive representative government. Id. at 135-72.

13. J. Ely, supra note 8, at 88-89.
14. Id. at 88.
ordinarily enjoys a powerful presumption of constitutionality. Justice Stone, after noting that presumption of constitutionality might not hold with the same force when legislation appears to contravene specific prohibitions of the Constitution, wrote:

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.18

This footnote, Professor Ely writes, can be seen as "a participation-oriented, representation-reinforcing approach to judicial review,"19 since it directs our attention to failures of process rather than to failures in substantive political outcomes that violate individual rights and liberties.

A supporter of Ely's theory writes:

The representation-enforcing approach commands judicial intervention where the mechanisms of participatory government have failed to operate, but it also requires deference where no such defect appears. The failure to defer to the legislative product undercuts the democratic process in a multitude of ways. It permits substitution of judicially imposed policies for evenhanded and rationally based state legislative efforts. It encourages politically influential interest groups to seek remedies in judicial rather than legislative tribunals. It induces congressional and agency abrogation of responsibility.20

Supporters of Ely's theory try to convey the impression that

18. Id. at 152-53 n.4.
19. J. Ely, supra note 8, at 87.
voters have adequate influence, and that representative government is generally responsive to voters. Ely's critics, however, point out that his process-oriented theory ignores too many social and economic inequalities. His critics also deplore the significant political imbalances that make the very idea of a well-functioning system of representational democracy a delusion.\textsuperscript{21}

The difference between Ely's thesis, and the process-oriented theories of previous generations is that Ely rejects a consensus-focused conception of popular consent.\textsuperscript{22} For the most part, Ely assumes that a bare majority may take all and that the Court should not determine whether the political outcome is substantively fair. Since he believes the election results reliably reflect the relevant consensus, Ely assumes that "our political process works well enough as it is, and is given [only] to rather discrete sorts of malfunction."\textsuperscript{23} Not all social and political scientists agree.

In terms of resources, skills and incentives, "citizens by no means exert equal influence over their government."\textsuperscript{24} Robert Dahl explains that

\begin{quote}

political weakness leads to continued political weakness and strength to continued strength. Where a long history of inequality creates a group with a few resources—wealth, income, status, education, official position—the prospects of successful political action are so meager that incentives to act politically are low: as a consequence, political skills are not acquired. So the cycle tends to be perpetuated.\textsuperscript{25}
\end{quote}

Thinkers who search for ideas to reconstruct the legal system will be disappointed in Ely's theory, which encourages courts to enter into the political thicket, but only part of the way. The theory gets bogged down in what Daniel Boorstein called "the thicket of unreality which stands between us and the facts of life."\textsuperscript{26} Not only the more progressive and radical

\begin{itemize}
\item \textsuperscript{22} Id. at 231.
\item \textsuperscript{23} Id. at 240.
\item \textsuperscript{24} R. Dahl, Democracy In The United States 448 (3d ed. 1976).
\item \textsuperscript{25} Id. at 488.
\item \textsuperscript{26} Daniel J. Boorstein is quoted in The American Heritage Dictionary Of The English Language 1337 (1969).
\end{itemize}
thinkers are disappointed, many conventional specialists in constitutional law, like their intellectual role models, Justice Frankfurter, Justice Harlan, and Professor Bickel, recognize the need for courts to secure the first principles of liberty and justice. This is not to say that Ely’s thesis is not without many supporters. Much support, however, is attributable to an overreaction to the poorly reasoned opinion in the abortion decision, *Roe v. Wade.* It is therefore necessary to compare the concept of due process with the concept of representation in order to discern their common ground: the reasonable expectations of the governed.

**IV. COMPARING THE MISCHIEVOUS CONCEPTS OF DUE PROCESS OF LAW AND REPRESENTATION**

Due process of law is a legal concept with political ramifications, and representation is a political concept with legal ramifications. Both vague concepts are mischievous since they can be used by overzealous advocates to justify worrisome abuses of power. The two concepts are not necessarily in tension with each other; and indeed the two concepts interact harmoniously when a political system, responsive to society’s demands, is functioning satisfactorily. Ideally, the concept of due process of law preserves established rights in order to protect reasonable expectations; therefore, representatives are obligated to protect their constituents’ rights and their reasonable expectations.

Constitutional violations occur when representatives breach their duty to provide due process of law. Under these circumstances, it would seem that adequate representation is a secondary issue because a violation of due process is inadequate representation. The situation is somewhat more complicated than a syllogism, however, because the due process clauses are evocative.

All specialists in constitutional law agree that the concept of due process is constantly in need of clarification. Justice Matthews stated that law “in furtherance of the general public good, which regards and preserves [principles] of liberty and justice, must be held to be due process of law.”

28. *Hurtado v. California,* 110 U.S. 516, 537 (1884) (California statute which permitted criminal proceedings to be instituted by information was upheld on the
conception of the general public good harkens back to John Marshall and Alexander Hamilton "who were responsible for developing a Rousseauan conception of the general will." In *Fletcher v. Peck*, for example, Marshall relied upon the "general principles" of society to reinforce his interpretation of the contract clause. Subsequently, the Court occasionally used the ex post facto and bill of attainder prohibitions "to do service for the latter-day concept of due process." Justice Frankfurter ably expounded the latter-day version of the concept of due process in *Joint Anti-Fascist Refugee Committee v. McGrath*. He wrote:

The requirement of "due process" is not . . . a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the democratic faith which we possess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

With those eloquent phrases in mind, one understands why the due process clause has acquired an independent potency
that is neither confined nor comprehended by the more specific provisions in the Constitution. The need for a flexible standard, yet one that provides guidance, was satisfied by Justice Harlan who wrote:

Due process has not been reduced to any formula; its content cannot be determined by any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon the postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society . . . . No formula could serve as a substitute . . . for judgment and restraint.87

Though lacking a formula, according to Justice Harlan, the Court considers the following factors:

[T]he nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, the existence of alternative means for effectuating the purpose, and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen.88

Thus, the Supreme Court's flexible due process standard was given structure by Justice Harlan; his methodology, however, does not give the courts freewheeling authority to circumscribe the choices of representatives.

Justice Harlan's methodology is both too liberating in some areas, and too confining in others for the process-oriented. Elysians claim that the balance our nation has struck between individual liberties and the demands of organized society is a political balance. Judges are not trustworthy or competent enough to strike the political balance. Why, then, are judges competent enough to use the premises of a representation-reinforcing theory of judicial review to correct the political dysfunctions of our democratic system?

This concept, representation, that is being reinforced by the Elysians is no more and no less susceptible to principled elaboration than due process of law. Representation is a concept that initially was not "linked with elections or democ-

racy, nor was [it] considered a matter of right." 39 It is a concept, developed for the most part by politicians and propagandists, 40 and, like the substantive due process concept of liberty, it is a "loose concept, often used in various ways" 41 by different advocates, "each of whom tends to claim that the meaning he attributes to it is the only proper meaning." 42

Political scientists, after examining several types of normative political theory, have concluded that "none of the traditional formulations of representation are relevant to the solution of the representational problems which the modern day polity faces." 43 Dean Ely, however, insists that judges may actively enforce a somewhat Burkean conception of virtual representation, called "equal concern and respect," 44 which justifies judicial activism with respect to "the process by which the laws that govern the society are made." 45

Ely who criticizes the indeterminacy of the due process clauses, advances a "purity of the process" argument that "is indeterminate to the point of virtual uselessness." 46 Ely himself candidly admits that his starting premises "could be elaborated in various ways," 47 and that they do "not exhaust the set of appropriate constitutional premises for our courts ..." 48 I have noted elsewhere that Elysian theory, no less than the Court's substantive due process doctrine, authorizes judges to articulate political values that lack support in constitutional text and history. 49 In this section, however, I will discuss the unduly deferential component of Ely's representation-reinforcing point of view.

The deferential component is based on a utilitarian 50 /ec-

41. Id.
42. Id.
43. Id. at 101. (quoting H. Eulau, Changing Views Of Representation, reprinted in Micro-Macro Political Analysis 77 (1969)).
44. J. Ely, supra note 8, at 98.
45. Id. at 74 (emphasis added).
46. Ely, supra note 15, at 397.
47. Id. at 398.
48. Id.
50. J. Ely, supra note 8, at 187 n.14 (citing Ely, Constitutional Interpretivism: Its Allure And Impossibility, 53 Ind. L.J. 399, 405-08 (1978)).
onomic model since it is designed to count the preferences of voters according to a one person, one vote formula of apportionment. The courts keep their hands off of political outcomes, which are compatible, theoretically, with democracy's underlying assumptions. To carry the economic analogy further, representative democracy is "regarded as a sort of economic marketplace in which votes constitute money, and would-be representatives are competitively trying to sell themselves to buyers." Voters, however, do not decide the issues; they choose the representatives who do, and assuming there are no process defects, the only remedy an individual has, when the political check fails, is to use "the ballot" once again in hope of a new and better deal.

Ely's model is unresponsive if not insensitive to some basic values of human dignity, which should command elevated levels of judicial scrutiny in order to protect individual rights. The individual voter in Ely's utilitarian/economic model is represented only in a formal sense and, acting alone, is powerless to undo the irrationality and inefficiency of various voting outcomes that perpetuate inadequate and unresponsive representation.

In contrast, Hanna Pitkin writes that "a representative government is one . . . responsive to popular wishes" when "there [are] institutional arrangements for responsiveness to those wishes." She recognizes that "institutions develop a momentum . . . of their own; they do not always work as intended . . . ." She concludes that "it is incompatible with the idea of representation for the government to frustrate or resist the people's will without a good reason," or "to frustrate or resist it systematically over a long period of time." The representation-reinforcing point of view, however, condones the opposite conclusion, absent process defects, and therefore, it is incompatible with Pitkin's vision of substantive representation, which applies to all forms of government whether democratic or not.

The difference between the Elysian and the Pitkin ap-
proaches is that the latter "has both substantive and formal components." Even Edmund Burke recognized that representation is a concept that "has substantive content." Obviously, if institutions do not respond to the grievances of the represented, virtual representation "becomes an empty formality." It is, therefore, difficult to see the representation-reinforcing nature of a theory that denies the individual meaningful access to courts when the government has violated first principles of justice and liberty.

Some theorists stress the formal aspects of representation, that is, its "outward performance," and others stress the desired substantive behavior expected of representatives. This is an understandable dichotomy in political science, given the different views of the behaviorists and the normative theorists. Constitutional law, however, deals with behavior, norms, and the grievances of litigants; therefore, a theory of constitutional law is incomplete unless it contains both formal and substantive ingredients.

A theory of constitutional law that counsels deference to legislatures should not totally ignore—out of habit, resignation, or the lack of a disciplined but creative imagination—the potential injustice of a system of representation. There are not any understandings among the people in the United States which require courts to accept political outcomes that are demonstrably violative of an individual's reasonable expectations. Although the representation-reinforcing point of view embraces the venerable doctrine of legislative sovereignty, the historic dualism in the United States between individual rights and legislative sovereignty, inevitably in constant tension, was not and could not be eliminated by the Court's Carolene Products footnote. The warrant for Dean Ely's abject surrender of the individual to the political process is hardly implicit in Justice Stone's concise statement about the need for judicial activism in extraordinary situations.

"[P]ermanent reconciliation between the principles of

57. Id. at 235.
58. Id. at 175.
59. Id. at 175-76.
60. Id. at 238.
61. Id.
63. Id.
representative government and the opposing principle of judicial authority” is not to be found in Justice Stone’s jurisprudence. Elysian theory attempts to resolve Stone’s dilemma about double standards by creating a different double standard that subordinates judicial activism in substantive due process cases. Justice Stone, however, did not measure the stature of American constitutional law “by the number of judicial restraints or by the height of the statutory mortality rate.” He recognized that the value of the Constitution will be judged by history on the basis of its strength and responsiveness to the needs of both the society and the individual. That ever present political dualism cannot be eliminated by a footnote. When he published his Carolene Products opinion, Justice Stone was concerned with the plight of the discrete and insular minorities unable to bring their power to bear because of restrictions that hampered their political freedom. He was also concerned with the unresponsiveness of legislatures to these groups, but he did not attempt in a footnote “to map the entire area of judicial hegemony.”

The footnote, at the behest of Chief Justice Hughes, indicated that there is a more exacting scrutiny “of the first ten amendments, which are deemed equally specific when held to be embraced within the fourteenth.” Clearly, Chief Justice Hughes was concerned with “the nature of the [constitutional] right.” He sent a note to that effect to Justice Stone, who

64. R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY vi (1941).
67. The phrase “statutory mortality rate” is borrowed. See B. WRIGHT, supra note 29, at 259.
68. Id. Wright is referring to James Madison’s conception of the Constitution, wherein the Constitution is flexible and adaptable but not flabby.
69. Other indications of Justice, then Chief Justice, Stone’s interest in the political check of adequate representation are found in Helvering v. Gerhardt, 304 U.S. 405 (1938); South Carolina State Highway Dep’t v. Barnwell Bros., 303 U.S. 177, 184 n.2 (1938).
70. L. LUSKY, supra note 66, at 109.
72. A. MASON, supra note 65, at 513 (quoting letter from Charles Evans Hughes to Harlan Fiske Stone (April 19, 1938)).
replied, “I wish to avoid the possibility of having what I have written in the body of the opinion about the presumption of constitutionality in the ordinary run-of-the-mill due process cases applied as a matter of course to . . . other more exceptional cases.”” Justice Stone later indicated that he accepted Justice Cardozo’s formulation of the due process standard which referred to “those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.’” Justice Cardozo and apparently Justice Stone believed “neither liberty nor justice would exist if [certain substantive guarantees] were sacrificed.”

Further evidence of Justice Stone’s acceptance of Justice Cardozo’s formulation of the due process of law standard is his concurring opinion in Skinner v. Oklahoma ex rel. Williamson. Justice Stone wrote that the Oklahoma statute, which authorized sterilization of a thief, had violated “the first principles of due process,” since there was no evidence that a thief’s “criminal tendencies are of an inheritable type.” Justice Stone, then Chief Justice, added, “There are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person

73. Id. at 514 (quoting reply letter, Harlan Fiske Stone to Charles Evans Hughes (April 19, 1938)).
74. Id.
75. Palko v. Connecticut, 302 U.S. 319, 328 (1937). For quotations from Stone’s letters indicating his approval, see A. Mason, supra note 65, at 516.
77. 316 U.S. 535 (1942).
78. Id. at 545.
79. Id. at 544.

See Kadish, Methodology and Criteria In Due Process Adjudication: A Survey and Criticism, in SELECTED ESSAYS ON CONSTITUTIONAL LAW 522, 528 (1963). Professor Kadish was quoting from Palko v. Connecticut, 302 U.S. 319 (1937) and Snyder v. Massachusetts, 291 U.S. 97 (1934). Kadish refers to these formulations as examples of “flexible-natural law due process.” Id.
is concerned."⁸⁰

_Skinner_ was an extraordinary due process case in that it differed from the kinds of cases identified in the _Carolene Products_ footnote. The Court's level of scrutiny, depending on the case, has ranged from no scrutiny at all to a completely independent judgment. As J. B. Thayer wrote:

The laying down of some rule of administration is legitimate, for... all courts, in regulating the exercise of their functions, lay down, from time to time, rules of presumption and rules of administration. It is a usual, legitimate, and necessary practice. It is, to be sure, judicial legislation; but it is impossible to exercise the judicial function without such incidental legislation.⁸¹

The Court, Chief Justice Stone knew, adjusts its level of scrutiny for special policy reasons in civil liberties cases involving both process values and substantive rights. Chief Justice Stone's concurring opinion in _Skinner_ demonstrates that his footnote was intended (to use Robert McCloskey's figure) to protect Peter, without abandoning Paul.⁸² More specifically his _Skinner_ opinion indicates that he did not approve of legislation which condemns, without hearing, "all the individuals of a class to so harsh a measure... because some or even many merit condemnation..."⁸³ Thus Chief Justice Stone recognized that the concept of due process of law is concerned with individuals—even if the legislature treats many alike—when the nature of the wrong perpetrated by officials puts the government's civilized decency on trial.

Elysian preoccupation with politically powerless classes neglects the due process clause of the fourteenth amendment, which protects all "persons,"⁸⁴ including the individual "who belongs to no identifiable group at all."⁸⁵ The isolated individual can be "about as impotent a minority as can be imagined,"⁸⁶ and to think that groups behave like individuals

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⁸⁰. _Id._
⁸¹. _J. THAYER, supra_ note 3, at 150.
⁸⁴. _U.S. CONST. amend. XIV, § 1._
⁸⁵. _McCloskey, supra_ note 82, at 174.
⁸⁶. _Id._
or feel like individuals is to confuse abstractions with life. 87

A political scientist writes, "If [group] interests are to be given equal representation, the individuals must be denied equal representation. There is no way out of this dilemma," 88 except by giving each individual access to a responsive court, which has power to accommodate competing interests by giving due respect to each litigant, regardless of his membership or lack of membership in a particular suspect class. 89 Roscoe Pound wrote:

[T]he liberty guaranteed by our bills of rights is a reservation to the individual of certain fundamental reasonable expectations involved in life in civilized society and a freedom from arbitrary and unreasonable exercise of the power and authority of those who are designated or chosen in a politically organized society to adjust relations and order conduct, and so are able to apply the force of the society to individuals. 90

There will inevitably be disputes about the enclaves of an individual's liberty, its boundaries, its exceptions, its constitutional significance and weight—disputes that will be resolved "by the courts in ordinary proceedings at the suit of the persons aggrieved." 91 Contrary to a theory of process values, however, the individual's constitutional protection is not diminished when a majority violates his right to due process of law, simply because the individual had an equal right to participate in the political process.

Not every human desire for gratification can be satisfied by the Constitution, nor should it be. There are, however, some rights that human beings have qua human beings. To put the matter in its crudest terms, there is a distinction between human and animal experience. 92 To be sure, this distinction implies there are human rights, not all of which are

87. For the same thought, see C. Curtis, Jr., Lions Under The Throne 253 (1947).
88. R. Dahl, supra note 24, at 184.
91. Id. at 8.
guaranteed explicitly by the Constitution. Some of these basic moral rights, however, can be affirmed by plausible interpretations of the text, which focus on the deepest presuppositions of our society. The first amendment rights to read or write about ideas, for example, is a moral right protected by the fourteenth amendment's due process clause. It is, however, the substantive due process dimension of the Constitution that protects "a man's right to read, write, or preach for reasons that go beyond the value of public debate in insuring wise or fair legislation."\(^7\)

The absorption by the fourteenth amendment of substantive first amendment values is not a mechanical incorporation of the Bill of Rights. Moreover, the selective incorporation of rights is not based on a theory that focuses solely upon the participational aspects of representation. The Court's focus is partly upon enduring basic values, which respect the isolated human being who seeks access to the courts.

A judge does not need any special legal talent to recognize when a person is being treated as a non-person by the government. This kind of common sense judgment, however, is said to present a problem for the judicial process: "Legal judgment loses its oracular force, and the jurists are robbed of their most visible claim to expertise."\(^6\) But if there is infliction of serious harm judges have authority to determine whether legislation excessively ignores material differences among individuals who have reasonable expectations of more humane treatment.

It is claimed that judicial intervention will "encourage politically influential pressure groups to seek remedies in judicial rather than legislative tribunals."\(^5\) If the reasonable expectations of individuals are demonstrably frustrated by governmental officials, influential groups should file class actions seeking court orders, since the legislature presumably has failed to respond to the class members' just claims before the commencement of litigation. It is said that judicially imposed policies will be substituted for "evenhanded and rationally based state legislative efforts."\(^6\) When, however, an even-

\(^93\) C. Fried, Right And Wrong 109 (1978).
\(^95\) Eule, supra note 20, at 425, 442.
\(^96\) Id.
handed and rational legislative effort crudely violates certain basic expectations concerning civic virtue, there should be an invalidation of the law; democratic government has no more power to be inhumane than a totalitarian government.

Judicial review dilutes the apparent importance of a representative's obligation to his constituents. A court, nevertheless, has a duty to redress legitimate grievances after an official body violates its constitutional obligation to aggrieved constituents. Finally, it is claimed that judicial review will lead to more governmental abuses requiring more judicial intervention and so on ad infinitum and ad nauseum; but, justified judicial intervention is a saner option than condoning a serious violation of the individual's reasonable expectation of civilized treatment.

Hard cases arise from the fact that we have a representative government, and admittedly judges often abuse their power. Alexander Hamilton replied to this concern. He wrote in the The Federalist, "The possibility of particular mischiefs can never be viewed, by a well-informed mind, as a solid objection to a general principle, which is calculated to avoid general mischiefs, and to obtain general advantages." In short, judicial restraint is ordinarily appropriate, indeed preferable, but since excessive judicial restraint gives the government an undeserved, unfair advantage, undue deference can be a misuse of power.

Representative government can degenerate into an organized form of despotism, contrary to the Constitution's system of checks and balances. The Elysian objection that judicial intervention will interfere with "the democratic process in a multitude of ways" is a telling admission that an institutionalized system of checks and balances substantially influences political behavior in a democracy. The power of judicial review inhibits outrageous behavior by electorally accountable officials, who know court's provide effective relief for the system's victims.

Constitutional rules that require due process of law are worthless when, as Madison argued, they are "not buttressed by institutionalized structures of real power related to social

97. Id. at 442, 443.
100. Eule, supra note 20, at 442.
reality . . .” 101 Madison, although “wrong in detail about the way in which the institutions of the new government work . . . was right in the long run about the importance of channeling political activity in certain directions.” 102 Ely who asserts “that the . . . original Constitution is devoted almost entirely to structure,” 103 misses Madison’s point that the basic skeletal structure was designed to contain the social forces that violate the basic law of the land.

Ely notes that the Constitution was not dedicated “to the identification and preservation of specific substantive values.” 104 Before its ratification, the absence of a complete list of specific rights concerned many of the Constitution’s opponents. Hamilton, however, explained that “a minute detail of particular rights” 105 is applicable only to a constitution that is designed to regulate “every species of personal and private concerns.” 106 The United States Constitution, Hamilton pointed out, is not such a document. 107 He also wrote, “It is not . . . to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents.” 108 Thus, the need exists for the Court to adopt a methodology that keeps the legislature “within the limits assigned to their authority.” 109

While “it is an awesome thing to strike down an act of the legislature,” the power is there to be used “where the occasion is clear beyond fair debate.” 110 Constitutional guarantees are not guarantees on paper only so long as courts armed with credible opinions are empowered to declare what government action constitutes a majority’s unlawful oppression of innocent individuals. If judicial review were limited to participational rights, an individual’s freedom might be a matter of the expediency of group interaction, the casual outcome of whatever pleases the dominant forces in the legislature at a

102. Id.
103. J. Ely, supra note 8, at 90.
104. Id. at 92.
106. Id.
107. Id.
109. Id.
110. R. Jackson, supra note 64, at 323.
The Elysians, however, are right about one point: a limit on the people's representatives is countermajoritarian. This is the essence of constitutionalism. The constraints imposed by constitutionalism "place a limit on supreme political authority without denying its existence."  

We do not have any maxim that the people or the people's representatives are above the basic law.

The idea that certain individual rights are guaranteed against the majority's will is disconcerting to those who claim democracy is like a monarch above the law. But, however excruciatingly difficult it is to identify society's reasonable expectations of due process of law, "[t]he concept of liberty in the Fourteenth Amendment is hardly adequate if it is limited to the specific substantive guarantees of the first eight Amendments and to procedural guarantees." In short, despite the apparent incongruity of judicial review in a political democracy, the concept of due process of law reinforces a person's rights to the minimum essentials of substantive representation and fundamental fairness.

V. DEMOCRATIC DESPOTISM

Isaiah Berlin writes, "The desire to be governed by myself, or at any rate to participate in the process by which my life is to be controlled, may be as deep a wish as that of a free area for action, and perhaps historically older. But it is not a desire for the same thing." Indeed, when majorities unduly constrict an individual's free area for action, democracy is "at times, no better than a specious disguise for brutal tyranny." By tyranny, Berlin refers to coerced "service to human masters."

Tyranny in a political democracy, however, is not conceived as such by those whose creed apparently is that the "law cannot be a tyrant." Benjamin Constant, who saw the

111. See generally M. Vile, supra note 102 at 294-314 (discussion of political theory, constitutionalism, and the behavioral approach).
114. I. BERLIN, FOUR ESSAYS ON LIBERTY 131 (1970).
115. Id.
116. Id. at 162.
117. Id.
irony in the Elysian viewpoint, queried "why a man should deeply care whether he is crushed by a popular government or by a monarch, or even by a set of oppressive laws."118 "The triumph of despotism is to force the slaves to declare themselves free."119 Elysian theory defends participatory self-government as a system that, on the whole, can provide adequate guarantees against tyranny; but, at the same time, the theory undervalues the connection between representation and oppressive laws. This attitude is difficult to reconcile with the liberal tradition of civic virtue, according to which:

no society is free unless it is governed by . . . two interrelated principles: first, that no power, but only rights, can be regarded as absolute, so that all men, whatever power governs them, have absolute right to refuse to behave inhumanely; and, second, that there are frontiers, not artificially drawn, within which men should be inviolable, these frontiers being defined in terms of rules so long and widely accepted that their observance has entered into the very conception of what it is to be a normal human being, and therefore, also of what it is to act inhumanely . . . .120

This liberal notion describes a substantive dimension of freedom, but the existence of this area of freedom depends partly on the strength of legally effective barriers that block a representative government's intrusion into the protected enclave.

Democracy can become either an organized anarchy, or a Kafkaesque bureaucratic nightmare. The theorists who depend on process values to prevent political malfunctions are depending on the effectiveness of public opinion to protect the enduring values that are traditionally protected by most American legislatures. Excited public opinion, however, can viciously impinge on traditionally protected substantive liberties. Demagogic representatives can do much damage before the public's sanity is restored. A political outcome, it follows, can be the antithesis of the ideas of fundamental fairness and civic virtue. Ely's thesis is therefore troubling to the libertarian, the humanist, and the constitutionalist because process values do not cope adequately with the problem of democratic

118. *Id.* at 163.
119. *Id.* at 165.
120. *Id.*
VI. Conclusion

The ultimate end of individuals in a free society is the improvement of their welfare, individually and collectively. Accordingly, individuals owe each other civic duties. Civic duties engender expectations, and entail reciprocal rights. Transient majorities, however, do not always respect the reasonable expectations of all segments of the electorate in a democracy.

Courts of constitutional law limit the power of elected representatives. For the individual who has no other place to go when democratic government malfunctions, the countermajoritarian concept of due process of law has evolved. Accordingly, despotic laws can be invalidated. Judicial review, if effective, is a means to prevent politics from running riot. Those who object to the concept of substantive due process, because of the underlying assumptions of democracy, would do well to remember that democracy is not the ultimate end of a free people. It is a system for working out, under law, a reasonable, socially acceptable relationship between the interests of each individual and his or her community’s welfare.