

THE CONSTITUTIONAL BEDROCK OF DUE PROCESS

ALLAN IDES*

Rather than discussing economic liberty as a product of federalism, I will address economic liberty as a product of constitutionalism. This idea is based on three key principles of our constitutional system. The first pertains to the relationship between democracy and republicanism, the second is the practice of judicial review, and the third is the fundamental idea of due process. And I will attempt to show how these seemingly disparate principles are all closely related to one another.

It is well known that the Constitution reflects a profound distrust of popular democracy.¹ One of the motivating forces behind the Constitutional Convention was a perception that democracy at the state level had become excessively abusive.² The Convention sought to temper those perceived democratic excesses by filtering the method of democracy through a government structure built on the principles of republicanism with an aim toward promoting civic virtue.³ Thus, we have the separation of powers among the three branches of the federal government, the separation of governmental authority between the states and the federal government, and a series of important checks on those who temporarily hold the reins of federal

* Professor of Law and Christopher N. May Chair, Loyola Law School, Loyola Marymount University.

1. See, e.g., U.S. CONST. amends. I–II (denying Congress the authority to interfere with fundamental human liberties); THE FEDERALIST NO. 10, at 76 (James Madison) (Clinton Rossiter ed., 2003) (“[I]t may be concluded that a pure democracy . . . can admit of no cure for the mischiefs of faction.”).

2. See *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 454–61 (1934) (Sutherland, J., dissenting) (explaining the Contract Clause was inserted in response to state debtor relief); Michael B. Rappaport, Note, *A Procedural Approach to the Contract Clause*, 93 YALE L.J. 918, 931–32 (1984).

3. See John Adams, *Thoughts on Government* (1776), reprinted in 4 PAPERS OF JOHN ADAMS 65, 86–93 (Robert J. Taylor & Gregg L. Lint eds., 1979).

power, including bicameralism,⁴ presentment,⁵ and the state-based composition of the Senate.⁶

The body of the original Constitution also included specific limits on the states' democratic impulses, with the most important being the Contract Clause, which prohibits states from passing laws that impair the obligation of contracts.⁷ Although it is now rarely taught in introductory constitutional law courses, the Contract Clause was a key motivator for the Constitutional Convention because states had been forgiving debts incurred during the War of Independence, thus impairing the contractual rights of creditors.⁸ The Contract Clause specifically limits the states' democratic authority to do that.

In tension with republicanism is, of course, the principle of democracy, a principle that was reflected more in the *Anti-Federalist Papers* than in the *Federalist Papers*.⁹ This may be a silly quibble, but I always thought the Federalist Society should have been named the Anti-Federalist Society, because that's really the states' rights society. Regardless, the value of democracy was reflected in the *Anti-Federalist Papers*, and it is also reflected in certain essential Founding-era and historical documents. President Abraham Lincoln's Gettysburg Address is distinctly democratic,¹⁰ and I take as my definition of democracy President Lincoln's apt description of the ideal government as being "of the people, by the people, and for the people."¹¹

4. U.S. CONST. art. I, §§ 1–3.

5. U.S. CONST. art. I, § 7, cl. 2–3.

6. U.S. CONST. art. I, § 3, cl. 1.

7. U.S. CONST. art. I, § 10, cl. 1.

8. See James W. Ely, Jr., *Economic Liberties and the Original Meaning of the Constitution*, 45 SAN DIEGO L. REV. 673, 699–702 (2008) (discussing the problematic practice of states enacting debt-relief laws that violated contracts prior to the Convention, while also noting that despite the issue's great importance, attendees gave it little attention at the Convention).

9. See, e.g., Akhil Reed Amar, *Anti-Federalists, The Federalist Papers, and the Big Argument for Union*, 16 HARV. J.L. & PUB. POL'Y 111, 112–15 (1993) (explaining that the Anti-Federalists argued for a weaker central government, the inclusion of a Bill of Rights, and more direct democratic participation by citizens); see also SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828*, at 1, 29–31 (1999).

10. See Abraham Lincoln, *Gettysburg Address* ("Bliss Copy") (Nov. 19, 1863) (proclaiming "that government of the people, by the people, for the people, shall not perish from the earth").

11. *Id.*

According to this view, the Declaration of Independence is much more democratic than the Constitution.¹² The Bill of Rights is also the product of the democratic impulse. It is a reaction to what the Anti-Federalists saw as the Constitution's excessive obeisance to republicanism.¹³ The Anti-Federalists wanted a democratic guarantee.¹⁴ Many of the amendments in the Bill of Rights are directed toward rights of the people that would be essential for an effective democracy: the First Amendment's protection of freedom of speech;¹⁵ the Second

12. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("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 . . ."); see also Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN ST. L. REV. 413, 415–31 (2006) (recounting the reliance that leaders of various popular movements—including abolition of slavery, civil rights, women's suffrage, and pro-life—have placed on the natural law principles of the Declaration of Independence in galvanizing support).

13. See Michael J. Zydney Mannheimer, *The Contingent Fourth Amendment*, 64 EMORY L.J. 1229, 1232 (2015) (noting that "a sufficient number of moderate Anti-Federalists dropped their opposition to the Constitution in return for the promise of a Bill of Rights that would provide such constraints"); see also Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 616 (2006) (asserting that since Anti-Federalists were likely "[i]nfluenced by Montesquieu's maxim that republican government can encompass only a small territory and that rule in large territories necessarily tends towards tyranny, [they] claimed that the new constitution would result in centralization, consolidation, and—through enforced uniformity—despotism" (footnote omitted)); Nils Gilbertson, Note, *Return of the Skeptics: The Growing Role of the Anti-Federalists in Modern Constitutional Jurisprudence*, 16 GEO. J.L. & PUB. POL'Y 255, 258 (2018) (citing Cecelia M. Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. 3, 6 (1955) (observing that "Anti-Federalist opposition to increased centralization of power in the national government was the belief that republican government was possible only for a relatively small territory and a relatively small homogeneous population"))).

14. See William A. Aniskovich, Note, *In Defense of the Framers' Intent: Civic Virtue, The Bill of Rights, and the Framers' Science of Politics*, 75 VA. L. REV. 1311, 1328–29 (1989) (noting that "close examination of the Federalist/Anti-Federalist debate reveals . . . an unresolved tension at the Founding between those who believed proper institutional arrangements could alone protect individual rights in a democratic society and those who believed that, in addition, government had to play some role in promoting those American civic virtues that could guide popular sentiments").

15. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the free-

Amendment's protection of the right to bear arms,¹⁶ if you accept the Supreme Court's interpretation of the Second Amendment in *District of Columbia v. Heller*;¹⁷ the Fourth Amendment's protection of the right of the people to be free from unreasonable searches and seizures;¹⁸ and the Fifth Amendment's guarantee of due process of law.¹⁹ So while the Constitution emphasizes antidemocratic, very republican perspectives, the Bill of Rights provides a strong democratic response to that.

Some might argue that the Bill of Rights is antidemocratic to the extent that it allows the unelected and undemocratic Supreme Court to limit the power of representative institutions. Judicial review is often perceived as deviating from what is an otherwise democratic system. But such a perception presumes a state of affairs that is more theoretical than real. Certainly, at the federal level, neither Congress nor the Executive are truly representative of the people—that is, if we take “the people” to mean a majority of the electorate nationwide. Rather, the judicial enforcement of rights is a check on power invested through

dom 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.”).

16. U.S. CONST. amend. II (“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.”).

17. 554 U.S. 570, 582, 595, 618, 635 (2008) (noting the connection between the First and Second Amendments); *id.* at 579–92 (discussing the Second Amendment generally); *id.* at 580–81 (“Reading the Second Amendment as protecting only the right to ‘keep and bear Arms’ in an organized militia therefore fits poorly with the operative clause’s description of the holder of that right as ‘the people.’ We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.”).

18. U.S. CONST. amend. IV (“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.”); *Heller*, 554 U.S. at 579 (noting that the Fourth Amendment’s Searches and Seizures Clause is regarded as a “right of the people”).

19. U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law”); *see Heller*, 554 U.S. at 616; *see also* U.S. CONST. amend. XIV (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

a non-majoritarian republican structure. The enforcement of the Bill of Rights is a—somewhat ironic—republican promise to democracy.

Based on that understanding of the democratic role of the Bill of Rights, I disagree with the standard perception of judicial review drawn from Professor Alexander Bickel's statement that "judicial review is at least potentially a deviant institution in [American] democratic society."²⁰ Judicial review is a republican part of American democracy. It is meant to ensure that the structure of government is honored, that Congress operates within and only within its enumerated powers, and that the branches of government operate according to their design. The Supreme Court's discussion of bicameralism in *INS v. Chadha*²¹ demonstrates this.²² In other words, in many contexts, and especially those involving structure, judicial review is republican for the sake of being republican.

Though judicial review is republican in design, it is not necessarily deviant from a democratic perspective—for although it is part of a republican institution, the judiciary is potentially the most democratic institution. To the extent that judges engage in the enforcement of rights against republican power, they play a role in the enforcement of the democratic Bill of Rights and the highly democratic Reconstruction Amendments. This does not just mean the principle of one person, one vote or issues pertaining to gerrymandering. Rather, all enforcements of liberty and equality are inherently democratic. To conclude otherwise would be to presume that legislative judgments are universally or even usually democratic, which is not the case, according to my thicker understanding of democracy.

So the judiciary is not a deviant institution, nor is judicial review merely a device of republicanism designed to enforce the structure of government. It exists in between those two poles, and it offers the best of both worlds. It is republican in nature but potentially democratic in operation. And that brings us to the Due Process Clause. The Due Process Clause can be traced

20. Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 47 (1961).

21. 462 U.S. 919 (1983).

22. *See id.* at 948–51.

directly to the *Magna Carta's* "law of the land" principle,²³ which evolved over several centuries into the phrase "due process of law."²⁴ And the law of the land principle is a principle that objects to the arbitrary application of law.²⁵ Due process was meant as a bulwark against arbitrary exercises of power. As such, it provides both procedural and substantive protections.²⁶ To conclude otherwise would be to presume that the substance of the law is never arbitrary.²⁷

I have a slightly different view of the Supreme Court's decisions in *Lochner v. New York*²⁸ and the more modern economic substantive due process cases such as *Ferguson v. Skrupa*,²⁹ *Williamson v. Lee Optical of Oklahoma, Inc.*,³⁰ and *New Orleans v. Dukes*.³¹ The holding of *Lochner*, that economic legislation must rest upon reasonable grounds, was correct in theory.³² If the law does not rest on reasonable grounds, by which I mean some fact-premised grounds, then it is arbitrary. The criticism that the *Lochner* era embraced an antidemocratic judicial activism is fair.³³ While *Lochner* was right in theory, it was wrong in fact. The reason for this can be found in Justice John Marshall Harlan's masterful dissent, where he considered the scientific information then available that supported the proposition that

23. J.C. HOLT, *MAGNA CARTA* 389 (George Garnett & John Hudson eds., 3d ed. 2015) ("No free man is to be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land." (quoting *MAGNA CARTA*, ch. 39 (1215)) (internal quotation marks omitted)).

24. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856) ("The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Carta*."); see Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL'Y 283, 287-94 (2012).

25. See Christine N. Cimini, *Principles of Non-Arbitrariness: Lawlessness in the Administration of Welfare*, 57 RUTGERS L. REV. 451, 467-68 (2005).

26. See *id.* at 460-61.

27. See *id.* at 479-82.

28. 198 U.S. 45 (1905).

29. 372 U.S. 726 (1963).

30. 348 U.S. 483 (1955).

31. 427 U.S. 297 (1976).

32. *Lochner*, 198 U.S. at 61.

33. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2615-16 (2015) (Roberts, C.J., dissenting) ("In reality, however, the majority's approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as *Lochner v. New York*"); see also Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 11-12 (1971).

the job of being a baker was a particularly unhealthful and dangerous one.³⁴

Unlike Justice Harlan in dissent, the majority embraced its own imagined set of facts, saying that it is common knowledge that being a baker is not that tough of a job.³⁵ But Justice Harlan's opinion observed that the material available to the legislature could lead a reasonable legislator to conclude that the law in question was a reasonable protection of bakers.³⁶ The contrast between the two opinions is remarkable. The majority held that the law just needed to rely on some reasonable grounds, but decided that common sense dictated there were no reasonable grounds.³⁷ But judges should not be simply applying their common sense. They should have common sense, of course, but they should defer to a legislative judgment that is built on facts.

Often placed in contrast to *Lochner* are cases like *New Orleans v. Dukes*, which is a combined Due Process Clause and Equal Protection Clause case.³⁸ The City of New Orleans passed an ordinance that gave one hotdog vendor—Lucky Dogs, which you can still visit on Bourbon Street—the right to operate a hotdog stand on Bourbon Street and in the French Quarter.³⁹ All other curbside vendors were banned from the French Quarter.⁴⁰ The law was designed and written to exclude everyone except Lucky Dogs without explicitly mentioning Lucky Dogs,⁴¹ which allows us to conclude that it was designed for the benefit of Lucky Dogs.

An individual who, prior to the enactment of the ordinance, had been operating a curbside food stand in the French Quarter challenged the ordinance in the United States District Court for the Eastern District of Louisiana.⁴² Applying a deferential rational basis test, rather than the more intrusive *Lochner* model, the court found that the city could do whatever it wanted in

34. *Lochner*, 198 U.S. at 69–71 (Harlan, J., dissenting).

35. *Id.* at 59 (majority opinion).

36. *Id.* at 68–73 (Harlan, J., dissenting).

37. *Id.* at 56, 59 (majority opinion).

38. *See* 427 U.S. 297, 298 (1976).

39. *Dukes v. New Orleans*, 501 F.2d 706, 709 (5th Cir. 1974).

40. *Id.*

41. *Id.*

42. *Dukes*, 427 U.S. at 299.

this area.⁴³ A liberal panel of the Court of Appeals for the Fifth Circuit applied a form of economic substantive due process and concluded that the peculiarity of the statute was enough to raise a suspicion that this was, in general, a rent-seeking statute designed to create a monopoly.⁴⁴ As such, the Fifth Circuit held the ordinance unconstitutional as a matter of substantive due process.⁴⁵

The Fifth Circuit's opinion was very carefully reasoned. It recognized that although courts usually defer to the legislative judgment at the national level, the state level, and the local level, there was enough in this ordinance to trigger a court's suspicion.⁴⁶ One of the judges in the case, Judge Minor Wisdom, was a resident of New Orleans, and he was familiar with the way the New Orleans City Council operated.⁴⁷

The Supreme Court's reversal of the Fifth Circuit⁴⁸ was wrong in theory and wrong in fact. It did not adopt the *Lochner* theoretical model of demanding a reasonable justification for the ordinance, nor did it apply a standard form of deferential basis review. Rather, the Court embraced a conceivability standard,⁴⁹ which is based not on the facts of the case, but rather on anything a court might imagine that the lawmakers could have considered in supporting the ordinance. The Court also got the facts wrong, because the facts were imagined facts. The Court held that if the New Orleans City Council had thought in the way the Court imagined it could have thought, then the ordinance would be constitutional. This is troubling because judges—especially Article III judges—are supposed to apply the law to the facts of the case, not to an imagined set of facts.⁵⁰

43. *Dukes*, 501 F.2d at 709.

44. *Id.* at 712–13.

45. *Id.* at 713.

46. *Id.*

47. See *Wisdom, John Minor*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/wisdom-john-minor> [<https://perma.cc/4ZPP-LVYP>] (last visited Dec. 30, 2019).

48. *Dukes*, 427 U.S. at 299.

49. *Id.* at 303–04.

50. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 59 (July 13, 2009) (statement of J. Sonia Sotomayor) (“The task of a judge is not to make law, it is to apply the law. . . . In each case I have heard, I have applied the law to the facts at hand.”); *Our Government: The Judicial Branch*,

The Due Process Clause does have a role in securing economic substantive due process. Rational basis should not be based on a hypothetical set of facts, but on the actual facts as likely (not conceivably) relied on by the lawmakers. This approach reflects a prodemocratic impulse that would lead a court to examine carefully the sometimes-corrupted democratic practices that lead to laws that offer rent-seeking or are irrational in terms of the legitimate interests of a city council, a state legislature, or the federal government. Courts should not be actively involved in striking down statutes—they should defer to the judgment of the legislative branch. That deference has less to do with democracy and republicanism than it does with the locus of responsibility placed in the legislative branch. We might say that courts should not invade the realm of discretionary power. But there should be a judgment of the legislative branch to examine. Not a conceived set of facts, but a real set of facts. That means *Lochner's* standard, applied with deference and considered judgment.