THE EMERGING RECONNECTION OF INDIVIDUAL RIGHTS AND INSTITUTIONAL DESIGN: FEDERALISM, BUREAUCRACY, AND DUE PROCESS OF LAWMAKING*

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An intriguing cartoon depicts a tall ship, perhaps the Mayflower, with two pilgrims leaning pensively over its side. As they scan the horizon, one says to the other: "Religious freedom is my immediate goal, but my long-range plan is to go into real estate." The remark nicely portrays a basic duality in our constitutional history. For that history has embraced two dramatically different strands: the first, concerned with intensely human and humane aspirations of personality, conscience, and freedom; the second, concerned with vastly more mundane and mechanical matters like geography, territorial boundaries, and institutional arrangements. It is not always recalled that those two strands once seemed part of a single, grand fabric; that they were stretched by the Civil War almost to the point of rupture; and that it was the Great Depression and its aftermath that ripped the strands in two. My purpose here is to recall the outlines of that story and to sketch its latest chapter— a chapter whose theme might well be the renewed linkage of the two great strands of American constitutional thought, the strand of individual rights and the strand of institutional design.

I have found it useful to organize the principles, rules, and theories that are the subject of constitutional analysis in terms of seven basic models that represent the major alternatives for constitutional argument and decision in American law from the early 1800's to the present. The models I will briefly describe here are those of (I) separated and divided powers; (II) implied limitations on government; (III) settled expectations; (IV) governmental reg-

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* Copyright © 1977 by Laurence H. Tribe. This essay is a revised version of the TePoel Lecture, delivered by the author at the Creighton University School of Law on September 9, 1976. No attempt has been made to document its ideas in detail; the effort is aimed at suggestion rather than demonstration. A fuller treatment of the same themes will appear in the author's forthcoming treatise on constitutional law (Foundation Press, 1977).

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ularity; (V) preferred rights; (VI) equal protection; and (VII) structural justice. It is the last of these seven that offers hope of the renewed linkage to which I have referred.

Representing approximate tendencies, emphases, and approaches rather than formal systems, these models are by no means mutually exclusive; constitutional discourse in any given period can be expected to draw on ideas and categories characteristic of more than one model. The models reflect neither entirely self-conscious patterns of thought nor wholly unconscious explanatory structures; they combine elements at both levels of awareness. Their main purpose is heuristic; I believe they can enlarge understanding. But it will also become clear that they have specific historical roots and concrete reflections in legal and political experience; they are not purely imposed mental constructs but grow out of immersion in the materials themselves. For that reason, I trust that the models will startle no one. Far from idiosyncratic, they should represent quite familiar themes, although the seventh may combine those themes in unfamiliar ways.

I.

From the thought of 17th century English liberals, particularly as elaborated in 18th century France by Montesquieu, the Constitution's framers derived the conviction that human rights can best be preserved by inaction and indirection—shielded behind the play of deliberately fragmented centers of countervailing power. In this first model of separated and divided powers, the centralized accumulation of power in any man or single group of men meant tyranny; its division and separation, both along the federal-state axis and along the legislative-judicial-executive axis, meant liberty.[1]

Although exerting continued influence to the present day, Model I played its most pervasive role from the era of the Marshall Court to the Civil War. While "kicking upstairs" those governmental powers, primarily over commerce, that the individual states could not be relied upon to exercise without undue parochialism or factionalism, Model I relied heavily upon the vitality and autonomy of the states in most other respects to furnish barriers against governmental excess. Interestingly, this reliance on state autonomy did not take the form of judicially declaring Acts of Congress *ultra vires* in the name of state sovereignty. On the contrary, every such challenge was defeated in the pre-Civil War Supreme Court, with the sole exception of *Dred Scott*'s ill-fated invalidation of the

1. *See* THE FEDERALIST Nos. 10, 41, 46, 47, 51 (J. Madison); B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 273-80 (1967).

Missouri compromise.[2] Instead, reliance on state autonomy as a major source of individual rights in Model I took the indirect form of preserving state sovereignty by rejecting all but a handful of individual challenges to exercises of state authority said to violate the Constitution.

In part, the rejection of these challenges reflected a concession to state power as such, and a degree of ambivalence about the actual content of the personal freedom that merited protection. But also implicit in the refusal to extend a charter of liberty against the states seems to have been a view that, just as the states were by and large adequately represented in the Congress, so individuals were likely for most purposes to be sufficiently represented in their own states, whose erosion would leave individuals exposed to oppression by private violence and national tyranny alike. Thus it was largely through the preservation of boundaries between and among institutions in Model I that the rights of persons were to be secured.

Two qualifications must be noted. First, a Bill of Rights directed against federal abuses was thought necessary in addition to the separation and division of powers; although actual Bill-of-Rights invalidation of congressional legislation is a fairly recent phenomenon, institutional boundaries in the absence of such a list of liberties were not deemed quite sufficient to preserve individual rights. Indeed, two supplementary models—that of settled expectations (Model III) and that of governmental regularity (Model IV)—are directly traceable to the earliest decisions of the federal judiciary. Built on the leanest of substantive premises that could be teased from Model I, these additional models were expressed most frequently through guarantees against contract impairment and uncompensated takings (in Model III) or against ex post facto laws, bills of attainder, and procedurally arbitrary deprivations (in Model IV). These models posited judicially enforceable protections for vested rights and for conduct taken in reliance on settled rules of law, and although their independent significance was not to be demonstrated until many decades later,[3] Models III and IV plainly went beyond notions of checks and balances from the very beginning.

Second, although the effort was finally rejected in the Senate, the House was sufficiently persuaded by James Madison's fear of state and local oppression across a wide spectrum of issues to approve a constitutional amendment, prophetically numbered the

2. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

3. Hence my decision to label them Models III and IV, saving the label "Model II" for the dominant heir to Model I.

14th in Madison's list of 17, which would have provided that "No State shall infringe the right of trial by Jury in criminal cases, nor the right of conscience, nor the freedom of speech or of the press."[4] Not until well after the adoption of the 14th amendment itself some 79 years later was Madison's aim accomplished. For our purposes, it is noteworthy both that he came close to succeeding in 1790, and that it took a Civil War to make the difference.

That Madison nearly succeeded even in 1790 suggests that the willingness to trust each state to shield its people's rights was more qualified even in the late 18th century than might be inferred from the Constitution's initial inclusion of no explicit shields beyond those of the Contracts Clause, the Ex Post Facto Clause, and the Bill of Attainder Clause. And that the Civil War made the crucial difference points to a key weakness in Model I's linkage between individual rights and federal-state institutional boundaries: The linkage relied heavily upon an identity of interests between the states, as the level of government closest to the people, and the primary corpus of civil rights and liberties of the people themselves—an identity incomplete from the start, and quite impossible to maintain after the great battle over slavery had been fought.

II.

Leaving largely intact Model I's connection between individual rights and the tripartite separation of powers, the Civil War necessarily challenged the model's connection between individual rights and the federal-state division of governmental responsibility. Yet the Supreme Court persisted in defending that linkage between freedom and geography for more than a decade beyond the war's end. Thus the Court reiterated the state-shield idea as late as 1873, when it refused to hold Louisiana's slaughterhouse monopoly a violation of the then recently-enacted 14th amendment on the primary ground that the amendment was not meant to displace the central role of the states as protectors of their own citizens.[5] And even in controversies involving race, the Court was slow to treat the Civil War Amendments as fundamentally realigning federal-state relations.[6] But it was only a matter of time until the weakened link would be more fully severed.

A major stumbling block to its severance was the perisistent fear of national tyranny. However great the supposed need to use

4. *See* E. DUMBAULD, THE BILL OF RIGHTS 215 (1957); 1 ANNALS OF CONG. 440 (Gales & Seaton eds. 1789).
5. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).
6. *See, e.g.*, Civil Rights Cases, 109 U.S. 3 (1883).

the 14th amendment as a shield for citizens against their own states, the cure was feared by many to be worse than the disease, since it seemed to mean that Congress could deploy the amendment as a sword against the only governments close enough to the people to provide enduring protection for their interests.

By the mid-1880's, however, general principles of common law enabled the Court to distinguish between national legislation remedying state infringements upon common law rights (state actions which were not "true" exercises of the police, taxing, and eminent domain powers reserved to the states) and national legislation invading the proper sphere of reserved state authority. Once the possibility of such a distinction was clearly perceived and forcefully articulated at the federal bench by the allies of property and contract, it became possible—or so it seemed—to employ the 14th amendment as a federal shield without transforming it into a fatal sword.

The synthesis embodying that vision was Model II, the model of implied limitations on government, which held sway through the first quarter of the 20th century. By defining the spheres of private, state, and national power in terms of the essential character and hence the implied limitations of each, federal judges believed they had derived a science of rights in which congressional laws intruding upon the state domain would be invalidated just as state laws invading the private domain would be struck down.[7] Model II thus tied its own knot between individual and institutional concerns. It was a knot more complex than that of Model I, since it no longer leaned heavily upon the presumed trustworthiness of state and local governments in dealing with their own citizens. But it was a knot with its own difficulties, since it presupposed instead an objective judicial method for defining the limitations of state power and hence filling out the contents of personal liberty.

Major signs of doubt as to the existence of any such objective method appeared in federal judicial decisions by the early 1920's,[8] but it was the Great Depression, the New Deal, and the intellectual movements to which both contributed, that finally severed Model II's peculiar linkage between institutional boundaries and personal rights. The crucial impact of that national economic upheaval, and of the conceptual revolution that attended it, was to devastate the belief that property and its contractually realizable advantages

7. *See* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1745-55 (1976).

8. *See, e.g.*, the reasoning of the majority and dissenting opinions in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

were attributable to some natural order of things implicit in a revealed structure of common-law rights. Who had property and who did not became a function of whom government had chosen to protect through its legal rules and whom it had decided to abandon to the strength of others.[9] Liberty of any meaningful sort came to be seen by growing numbers as a function of positive action by the state—not simply a function of leaving undisturbed the economic results of blind social forces. In such a universe, the conduct of federal judges in policing preconceived limitations on governmental powers came to be viewed ever more broadly as an exercise in will rather than a study in logic, and the invisible hand of reason became instead the all too visible hand of entrenched wealth and power.

Although the Court-packing plan may have fixed the precise timing of Model II's fall, it was thus the rise of the positive state that made alternative models inevitable. The years since 1937 are best understood in terms of a search for such alternatives; its triumphs and failures mark the history of modern constitutional thought.

III.

From time to time after the fall of Model II, lawyers and judges have had recourse to either or both of the two models with the clearest antecedents in Model I—Model III, that of settled expectations; and Model IV, that of governmental regularity. The continuing appeal of those models traces largely to their appearance of neutrality and objectivity. This is not the place to attempt a demonstration,[10] but my own conclusion is that this appearance has for the most part been an illusion, and that the edifice of doctrine built on the ideals of respecting expectations and proceeding regularly has been defensible only in terms of rarely articulated substantive beliefs. To the extent that the models genuinely avoid reliance on such beliefs, they prove circular, or empty, or both.

Squarely confronting the need to defend constitutional principles in substantive terms is Model V, the model of preferred rights. Expressed through doctrines involving freedom of expression and association, rights of political participation, rights of religious autonomy, and rights of privacy and personhood, this model seeks not to define inherent limits on the power of all governmental

9. *See* G. GILMORE, THE DEATH OF CONTRACT (1974); M. WEBER, LAW IN ECONOMY AND SOCIETY 188-91 (1954); R. WOLFF, THE POVERTY OF LIBERALISM 89-93 (1968).

10. For such an attempt, see chapters 9 and 10 of my forthcoming treatise.

institutions but aims more modestly to exclude governmental power from certain spheres, by identifying islands of "preferred freedoms" and immunizing choices within those islands from all but the most compellingly justified instances of governmental intrusion. Broad limitations on economic intervention once thought to be derived from the internal structure of governmental powers were thus replaced by more selective limitations imposed from without. Distributions of advantage through contractual transactions came to be regarded as the shifting products of the economic system as a whole rather than the fixed contents of a sphere put beyond governmental reach by the intrinsic limits of the power that the people had ceded to public authority; but particular forms of expression or action perceived as touching deeply on human personality came to be regarded as the constitutents of freedom rather than mere reflection of the "system," and thus served to set new boundaries on majority rule.

Throughout the same post-1937 period, a competing Model VI, that of equal protection, has offered alluring alternatives for constitutional argument. Drawing its deepest norms from a shared aversion to governmental action reflective of prejudice, decisions under Model VI have sought to identify those fundamental aspects of social structure which should be presumptively open to all on equal terms, and those criteria of government classification most suspect as reflecting habitual reaction rather than reflective understanding. Again, as with Model V, it has been possible to give content to this model only through controversial substantive judgments.

IV.

Spurred partly by general social change and partly by the appointment of judges unsympathetic to how their recent predecessors had resolved the substantive controversies in Models V and VI, the Supreme Court has spent much of its time since 1970 cutting off avenues, both substantive and procedural, for growth in these two models.[11] The Court's actions have plainly reflected disenchantment with what had become a mounting tendency to invoke federal judicial power for systemic reform, a disenchantment especially acute when the reform seemed to entail significant costs, psychic or economic, for middle and upper middle income groups. To urge that the Court's retrenchment exaggerated the objections to what had been occurring, or understated the strength of the case

11. *See generally* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977).

for continued judicial action along lines initiated by the Warren Court, would take me well beyond the aims of this essay. My purpose is less to praise or blame than to describe, although I gladly embrace such normative implications as my descriptions may entail.

In this frame of reference, perhaps the most noteworthy development of recent years has been the emergence of a new model of constitutional argument—one with clear antecedents in prior models (particularly in Model I), and indeed one composed almost entirely from themes and doctrines already present in those prior models, but one that nonetheless seems distinctive in its potential reconnection of individual rights with institutional design.

We may begin by observing that all six of the constitutional models thus far examined have been concerned with ways of achieving substantive ends through variations in governmental structures and processes of choice. Whether by separating and dividing those structures into mutually checking centers of power, by insisting that certain spheres of choice be placed beyond the reach of governmental authority altogether, or in some other way, each model has reflected a conception in which one or more features of the society's overall structure for making decisions serves to implement, and perhaps even to mirror, some set of social ideals or values.

From this perspective, a model concerned to match decision structures with substantive human ends might seem indistinguishable from the models already set forth. Yet if such a model were to draw eclectically on all of the first six, seeking to achieve such ends as human freedom not through any one characteristic structure of choice but through that combination of structures that seems best suited to those ends in a particular context, then the model would indeed be distinct from Models I through VI. Such a Model VII might comfortably embrace, for example, both *Skinner v. Oklahoma*[12] and *West Coast Hotel v. Parrish*[13] as establishing choice structures best suited to serve the end of freedom, although in *Skinner* the structure mandated was one that *denied* government the power to select who shall procreate, thereby leaving the matter to be shaped by personal choices, while in *Parrish* the structure accepted *gave* government the power to impose contract terms, thereby taking a matter from the realm of personal determination. A judgment that meaningful freedom precludes governmental deci-

12. 316 U.S. 535 (1942) (invalidating compulsory sterilization of selected categories of convicted criminals).

13. 300 U.S. 379 (1937) (upholding minimum wage law).

sion in the first context is entirely consistent with a judgment that such freedom permits, and perhaps even mandates, governmental decision in the second. So also a judgment that respect for unconventional ideas or choices of lifestyle precludes highly individualized decision under open-ended standards in a context like that of licensing pamphleteers[14] is consistent with a judgment that the same respect for the unconventional compels precisely such individualized decision in a context like that of unwed parenthood or pregnant teachers, as the Court has in fact held in the 1970's.[15]

By Model VII, then, I mean the approach to constitutional values that either mandates or at least favors the use of particular decisional structures for specific substantive purposes in concrete contexts, without drawing on any single generalization about which decisional pattern is best suited, on the whole, to which substantive aims.[16] I would call it the model of structural justice.

In understanding the two distinct ways in which structural concerns may be brought to bear on a substantive constitutional analysis, it is useful to compare *Panama Refining Co. v. Ryan*[17] to *Hampton v. Mow Sun Wong.*[18] In *Panama Refining*, the Supreme Court struck down a congressional delegation of lawmaking authority to the executive, holding that the challenged delegation had gone beyond the bounds of Congress' power to abdicate responsibility for substantive policy choice; Congress was thereby told how it would have to enact laws in the future.[19] In *Hampton*, on the other hand,

14. *See, e.g.*, Lovell v. Griffin, 303 U.S. 444 (1938) (invalidating open-ended licensing ordinance as creating undue risk of censorship).

15. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972) (unwed father must be given individualized opportunity to show he is a fit parent); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (school board must give pregnant teachers individualized opportunity to show fitness notwithstanding school rule requiring unpaid maternity leaves several months before expected childbirth).

16. *Cf.* Kennedy, *supra* note 7, at 1703-04.

17. 293 U.S. 388 (1935).

18. 426 U.S. 88 (1976).

19. Panama Refining Co. v. Ryan, 293 U.S. 388, 420-33 (1935). *See also* decisions like United States v. Brown, 381 U.S. 437 (1965), setting bounds on the allowable degree of legislative specification when punitive measures are involved. Rules governing permissible lawmaking are typically (1) of the *Brown* type, specifying bounds on the *form* a law may take (neither so specific as to single out identifiable persons for punishment, nor so general as to afford inadequate notice to the law's targets and/or insufficiently focused debate among its initial proponents and opponents); or (2) of the *Panama Refining* type, insisting on assurance of a policy's promulgation *by a sufficiently accountable body. See also* note 27 *infra*. Not only a legislative assembly but also the community as a whole, acting through a public referendum, is such a body, *see* Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976), but a group of private citizens

the Court's decision to strike down a Civil Service Commission regulation barring federal employment of aliens presented neither Congress nor the Commission with a formal requirement for the structuring of future decisions. The Court treated as relevant the circumstance that the broad employment disability challenged by aliens in that case had been promulgated by an agency to which neither Congress nor the President had openly and clearly entrusted the sorts of foreign policy concerns that alone might have furnished persuasive justification for the rule.[20] The agency was not found to have acted beyond its statutory mandate; nor was the mandate itself deemed too broad to comply with constitutional prohibitions on undue delegation. Either of those conclusions could have been expressed as a formal requirement for similar regulatory decisions in the future. Instead, how this rule had been made counted against its validity—but not in a manner giving rise to a recipe for future rulemaking.

Both the *Panama Refining* approach and that of *Hampton* put pressure on legislatures and/or agencies to reconsider the invalidated provision from a fresh perspective, and both approaches leave open the possibility that the Court may uphold a somewhat revised provision if such reconsideration leads to its enactment in an altered form or by a different body. Thus both approaches bear some similarity to the notion of "remand to the legislature" often advocated

exercising delegated authority in an open-ended way within the community is not, *see* Eubank v. Richmond, 226 U.S. 137 (1912), cited with approval in *Eastlake*, 426 U.S. at 677-78. Finally, it has been suggested that, in contrast to general policy-setting, the status of *particular individuals* may not be adversely disposed of by popular referendum, *see Eastlake*, 426 U.S. at 680 (dissenting opinions of Justices Powell, Stevens, and Brennan), any more than by legislative action, *see Brown*.

20. Hampton v. Mow Sun Wong, 426 U.S. 88, 99-117 (1976). Efficiency concerns, also argued in defense of the rule, *had* clearly been entrusted to the agency. But these provided no sufficient justification because the agency invoked them only as an afterthought; the record showed no actual agency determination, at the time the rule was adopted, that the rule would be more "efficient" than a less sweeping ban. In stressing these factors, the Supreme Court was plainly, and properly, influenced by the disconcerting ease with which conversation-stopping rationales either as ubliquitous and potentially trivial as "efficiency," or as rare and potentially momentous as "foreign policy," can be invoked to rescue a challenged rule or policy. Accountable lawmaking would be ill-served by ready judicial acquiescence in such impenetrable forms of justification. But note the Court's greater willingness to uphold on efficiency grounds rules promulgated directly by *legislatures*, even where the rules burden important (though non-fundamental) interests or impinge on groups having some similarity to disadvantaged minorities. *Compare, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (upholding legislatively enacted mandatory retirement age of 50 for state police).

by constitutional and common-law commentators.[21] The idea is not new; what is new is the eagerness of the modern Court to embrace it, whether through narrowing construction, as in the *National Cable* case in 1974,[22] or through outright constitutional invalidation, as in the *Hampton* case in 1976.[23]

In a parallel vein, the Court has found itself with growing frequency not quite prepared to pull out the heavy artillery of strict (and almost invariably fatal) scrutiny under Model V or VI—but nonetheless prepared to reject justifications for a government action where those justifications had not actually been considered by the governmental entity that took the action in question.[24] In such cases, the Court treats decision-making structure as relevant in the second, weaker sense, of the *Hampton* decision. For example, in recently striking down the Social Security Act's less favorable treatment of widowers than of widows, the Supreme Court in *Califano v. Goldfarb* found it important that the differential treatment resulted not, as the government asserted, from a "deliberate congressional intention to remedy the arguably greater needs of [widows]," but from "archaic and overbroad" generalizations about women.[25] Since the use of such stereotypes is the very evil to which doctrine in this area is directed, surely it is appropriate for substantive outcomes to be sensitive to whether the governmental

21. *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH 111-198 (1962); R. KEETON, VENTURING TO DO JUSTICE (1969); J. SAX, DEFENDING THE ENVIRONMENT 175-192 (1971); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957); Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); Tribe, *Structural Due Process*, 10 HARV. CIV. RTS.—CIV. LIB. L. REV. 269, 314-18 (1975). But neither in *Hampton* nor in *Panama Refining*, unlike some of the "legislative remand" proposals, could a simple re-enactment of the provision, by the same government body that initially promulgated it, automatically save it in a subsequent judicial challenge.

22. National Cable Television Ass'n v. United States, 415 U.S. 336 (1974) (construing FCC's statutory authority as not encompassing power to impose on regulated operators fees unrelated to benefits they received; doubt as to Congress' constitutional authority to delegate taxing power resolved by refusing to find such power in the FCC unless and until Congress clearly purports to delegate it). *See also* Kent v. Dulles, 357 U.S. 116 (1958) (construing Congressional statute as not having delegated authority to deny passports to Communists).

23. 426 U.S. 88 (1976). *See also* New York Times Co. v. United States, 403 U.S. 713 (1971) (invalidating "national security" injunction against publishing Pentagon Papers, and stressing absence of any Act of Congress expressly forbidding the publication).

24. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Eisenstadt v. Baird, 405 U.S. 438 (1972). The "efficiency" justification in *Hampton* was also in this category. *See* note 20 *supra*.

25. 97 S. Ct. 1021 (1977).

process that produced the challenged rules from 1939 to 1950 was itself an example of the very evil to be avoided. A decision like *Goldfarb*, unlike *Panama Refining*, cannot be employed to extract a "rule" about how the lawmaking process must proceed in the future if its results are to be sustained; but it does express principled concerns with political process, concerns surfacing with mounting regularity in the cases.

Cutting across the distinction between structural considerations expressible as rules for decisionmaking and structural considerations expressible only as principles bearing on particular substantive outcomes[26] is another dichotomy, one which identifies two distinct levels of governmental choice. The examples thus far considered involve structural considerations bearing on the initial formulation of a governmental provision or regulation; the concern has been with what might be termed "due process of lawmaking"[27]—*who* promulgated the provision, to *what ends*, and *in what manner*. No less significant is "due process of law-applying" in the eventual enforcement of the provision or regulation—its application to particular persons. At this bureaucratic level too, concerns with *who* does the applying, *why*, and *how*, may be expressed in structural terms, and again such concerns may take the form either of *rules* about permissible *structures*, or of *principles* shaping the analysis of specific outcomes.[28]

Rules governing permissible structures of enforcement may in turn take the form of mandatory opportunities for participation by various affected individuals.[29] They may also set boundaries on

26. *See* Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967), on the distinction between rules and principles.

27. The phrase is Hans Linde's. *See Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976) (adopting, however, a far more limited notion of such legislative due process than that espoused here). *See also* Justice Stevens' dissenting opinion in Delaware Tribal Business Comm. v. Weeks, 97 S. Ct. 911, 925-26 (1977).

28. For a discussion of how structural concerns can cut across the lawmaking/law-applying dichotomy, *see* Tribe, *Structural Due Process*, 10 HARV. CIV. RTS.—CIV. LIB. L. REV. 269, 290, 303-21 (1975).

29. Such participation in law-*making* as opposed to law-*applying* is ordinarily assured only through rights of equal voting for elected representatives. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (requiring that both houses of bicameral state legislature be apportioned on one person-one vote basis); Hadley v. Junior College Dist., 397 U.S. 50 (1970) (extending *Reynolds* to elected local officials); *cf.* Sailors v. Board of Educ., 387 U.S. 105 (1967) (leaving open the question whether a state must provide for election, rather than appointment, of officers performing "legislative" as opposed to "administrative" functions); Younger v. County of El Dorado, 5 Cal. 3d 480, 487 P.2d 1193, 96 Cal. Rptr. 553 (1971) (finding no such duty so long as the body that appoints the legislative officers is itself elected on a

executive discretion in order to confine its implicit dangers.[30] Or they may, at the other extreme, insist on leaving room for discretionary adjustment, as in the recent "irrebuttable presumption"[31] and "mandatory death penalty"[32] decisions, where mandatory, per se rules have either become too insensitive to personal differences in matters of great moment, or too impervious to changing values and conceptions to represent a fair expression of the continuing consent of the governed.

Again, the way in which a provision is enforced may simply be deemed relevant, although not in the dispositive sense suggested by the above paragraph's structural rules about permissible enforcement mechanisms. Consider, for example, the increasingly frequent refusal of the Supreme Court to entertain justifications considered by the legislature or agency initially promulgating a rule but no longer pressed in its defense.[33] Such a judicial refusal

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fairly apportioned basis). Although advisory or policymaking government meetings that are opened to the public must give every interested person an equal chance to participate personally, *see* City of Madison v. Wisconsin Employment Rel. Comm'n, 97 S. Ct. 421 (1976), there has ordinarily been no requirement that such sessions be opened to public participation at all; participatory rights have generally been limited to (1) rules assuring the representative character of the decision-making body, *see Reynolds, Hadley, supra*; and (2) rules assuring a fair hearing before policies made by such a body are applied to deprive a particular person of life, liberty, or property, *see, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972) (public employee discharge); Fuentes v. Shevin, 407 U.S. 67 (1972) (government-aided repossession). But the line between rule-making and rule-applying may not always be either bright or decisive. *Compare, e.g.*, Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (no right of all affected property-owners to be heard personally before agency promulgates county-wide increase in property valuations for tax purposes), *with* Thompson v. Washington, 497 F.2d 626 (D.C. Cir. 1973) (right of all tenants in public housing project to participate personally, at least by written submissions, before agency even *adopts* project-wide rent increase). On the problems of sharply distinguishing rule-making from rule-applying for purposes of defining participatory rights, *see* note 28 *supra*.

30. *See, e.g.*, Lovell v. Griffin, 303 U.S. 444 (1938), *supra* note 14. *See also* Furman v. Georgia, 408 U.S. 238 (1972) (totally discretionary imposition of death penalty held cruel and unusual punishment).

31. *See* note 15 *supra*.

32. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280 (1976) (holding mandatory death penalty insufficiently respectful of the individual's dignity and too unresponsive to evolving standards of civilized punishment). *See also* Witherspoon v. Illinois, 391 U.S. 510 (1968) (requiring inclusion of death-scrupled jurors on jury panel fixing punishment, in order to assure system's responsiveness to changing attitudes about capital punishment where such attitudes might not be adequately reflected in statutes themselves).

33. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating state ban on use of contraceptives, finding the ban insufficiently related to control of extramarital sex and refusing to address possible jus-

to credit "nonarticulated" bases for action is best understood as part of an attempt to assure law's continuing legitimacy. In cases close to the line of substantive invalidity, declining to uphold the enforcement of a law or regulation on a theory that its enforcers are unwilling to espouse may serve a role analagous to the careful examination of actual enactment processes and purposes in cases like *Hampton* and *Goldfarb*.

Indeed, even when a case is close to *no* clearly marked substantive constitutional boundary, values of responsiveness and accountability, from enactment through enforcement, may be enhanced by judicial decisions that focus on how the lawmaking and law-applying processes have in fact functioned, or failed to function, in a particular case.[34] Respect for those processes need not imply fanciful assumptions about their actual operation; it may indeed require greater realism.[35] Moreover, direct and open attention to actual process reduces the temptation to distort a law's clear meaning or to pervert various doctrines (such as vagueness and delegation)[36] in response to an undifferentiated dissatisfaction with the way in which a governmental decision came about, or with why it persists. Model VII analysis may provide more focused ways of dealing with such dissatisfaction.

V.

As new substantive principles emerge, it will often prove difficult to discern whether the structural analysis beneath the surface is operating at the enactment or the enforcement level, and whether the doctrine enunciated operates more as a rule or as a principle. That those categories may nonetheless remain illuminating is suggested by examination of a recent case posing more than ordinary difficulty, *National League of Cities v. Usery*.[37]

For the first time in four decades, the Supreme Court in *National League of Cities* held a congressional regulation of com-

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tification in terms of immorality of contraception *per se*, where that justification was no longer being argued by the state's attorney); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

34. *See generally* McGautha v. California, 402 U.S. 183, 248-87 (1971) (Brennan, J., dissenting).

35. *See* Justice Stevens' discussion of "[r]espect for the legislative process" in Califano v. Goldfarb, 97 S. Ct. 1021, 1034 (1977) (concurring opinion).

36. *See, e.g.*, Gunther, *The Subtle Vices of the 'Passive Virtues'—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

37. 426 U.S. 833 (1976).

merce to be an impermissible intrusion upon the sovereignty of state and local governments. Overruling *Maryland v. Wirtz*,[38] the Court invalidated the 1974 amendments to the Fair Labor Standards Act that had extended federal minimum wage and maximum hour provisions to almost all state and municipal employees. While conceding that the regulations were "undoubtedly within the scope of the Commerce Clause,"[39] the Court insisted that wage and hour determinations bearing on "functions . . . which [state and local] governments are created to provide, [involving] services . . . which the States have traditionally afforded their citizens,"[40] were matters "essential to separate and independent existence"[41] of the states and hence beyond congressional control.[42]

The decision in *National League of Cities* startled some, but its rhetoric of state sovereignty and local autonomy may make it seem simply a natural extension of the heightened concern for states' rights that the Supreme Court has displayed in recent years.[43] Yet the very familiarity of that general theme creates a danger that the decision will be read as a general vindication of the rights of states and municipalities regardless of context, and will be invoked uncritically to defeat the just claims of individuals whose ability to win political relief in their own communities is far more limited than the abilities of those communities to protect their institutional interests in the halls of Congress.[44]

A close reading of the decision suggests that such invocation of the precedent, in derogation of a theme as old as Model I, would be unwarranted. Indeed, the decision proves ultimately incomprehensible except on the premise that the Court's real concern was not with state and municipal autonomy as ends in themselves, but with

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38. 392 U.S. 183 (1968).
39. *National League of Cities*, 426 U.S. at 841.
40. *Id.* at 851.
41. *Id.* at 845.
42. Except control interfering in the most limited way consistent with a pressing national need, as in Fry v. United States, 421 U.S. 542 (1975) (upholding temporary application to state and municipal employees of nationwide wage freeze), cited approvingly in *National League of Cities*, 426 U.S. at 853.
43. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362 (1976) (equitable restraint); Paul v. Davis, 96 S. Ct. 1155 (1976) (no 14th amendment right); Edelman v. Jordan, 415 U.S. 651 (1974) (11th amendment); Younger v. Harris, 401 U.S. 37 (1971) (abstention).
44. *See generally* Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). *See also* Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 695-97 & nn.71, 73, 711 & n.137 (1976).

such autonomy as a means of satisfying individual claims of right to decent levels of police and fire protection, public health and sanitation, and those other governmental services for which people have come to rely primarily upon states and localities. Detailed demonstration that nothing less can explain the Court's decision is left to another article.[45] Suffice it to note here that, on this understanding, *National League of Cities* nicely exemplifies Model VII and its renewed linkage between institutional arrangements and individual rights. For a structural rule bearing on legislative enactment may be deemed violated by the very circumstance that the congressional wage and hour regulations interfered with discharge of a constitutional duty to furnish basic services but emanated from a level of government not ordinarily held accountable for how that duty is discharged.[46]

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45. *See* Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977). The central idea is that the Court's limitation of the new states' rights doctrine to federal commerce regulations interfering with delivery of traditional government services, and its apparent unwillingness to extend the doctrine either to (a) federal commerce regulations interfering with state proprietary activities or with state regulations or private conduct, or to (b) federal enforcement of 14th amendment rights, makes sense only if the Court is positing (a) that there exists a 14th amendment *right* to have states or municipalities meet the needs to which traditional governmental services are directed (but no such right to the fruits of public or private proprietary activities), and (b) that this 14th amendment right can be infringed as necessary to protect conflicting individual rights secured by Congress in enforcing the 14th amendment (but not simply to advance a congressional policy preference under the Commerce Clause).

46. *Compare* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), in which an interference with the important (but in that case non-fundamental) liberty interest in federal civil service employment emanated from a level of government (the Civil Service Commission) not ordinarily held accountable for making basic policy choices with respect to the disadvantaged (but in that case not fully "suspect") group adversely affected—aliens. Note that *Hampton* would be harder to cast in the form of a structural rule than *National League of Cities* because there seems no real likelihood that Congress would assume a nationwide responsibility for such services as fire and police protection, whereas Congress might well *either* promulgate rules about alien employment in the civil service *or* expressly and openly entrust to the Civil Service Commission the foreign policy-related concerns bearing on such employment. In *National League of Cities*, it is thus more plausible than in *Hampton* to insist that the wrong level of government had made the choice in question and thus to extract a rule for the future. As the text following this note explains, however, even in *National League of Cities* it turns out that if a different justification had been offered for Congress' choice, the level of government might well have seemed appropriate, suggesting that we are working less with a rule of fixed scope than with a principle to be considered in an overall assessment of the substantive validity of Congress' choice.

Analysis of the *National League of Cities* decision reveals, however, that the regulations there invalidated might have been defended as protecting individual employees against state and municipal exploitation with respect to their own constitutional rights to material well-being.[47] The Court's failure to uphold the regulations on any such theory, where the record showed congressional action and executive enforcement predicated on the quite different theory that the regulations implemented national economic policy rather than protecting individual rights, may of course be entirely defensible in light of the concern for continuing accountability that helped us understand decisions like *Hampton* and *Goldfarb*.[48] At all events, understanding of the decision seems enhanced by explicit attention to the way in which structures of enactment and enforcement bore on the outcome.

Despite the ease with which a decision like *National League of Cities* could in theory, and might in fact, be invoked to defend state or local policies challenged as endangering individual constitutional rights to decent physical protection, examination of the decision in terms of Model VII underscores the unjustifiable character of any such effort and illustrates how this new model, properly understood, can serve to unite crucial recent decisions in ways calculated to advance personal rights rather than defeat them. If the model of structural justice is to be worthy of its legacy, we must tolerate nothing less.

47. Congress plainly has more power to interfere with satisfaction of a 14th amendment right (such as a right to decent police protection) when Congress is enforcing a competing 14th amendment right (such as a right to equal pay for equal work) than when Congress is simply acting under the Commerce Clause to advance its general conception of the national economic interest.

48. *See* text accompanying notes 24 & 33 *supra*.