

高级法律英语选读

# 宪法学 与 行政法学

程洁 编注

戚渊 审阅



外文出版社

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## 图书在版编目 (CIP) 数据

宪法学与行政法学: 英汉对照/程洁编. -北京: 外文出版社, 2000  
(高级法律英语选读)

ISBN 7-119-02703-4

I. 宪… II. 程… III. ①英语-对照读物, 宪法-英、汉 ②英语-对照读物, 行政法学-英、汉 IV. H319.4: D

中国版本图书馆 CIP 数据核字 (2000) 第 66693 号

外文出版社网址: <a href="http://www.flp.com.cn">http://www.flp.com.cn</a> 外文出版社电子信箱: <a href="mailto:info@flp.com.cn">info@flp.com.cn</a> <a href="mailto:sales@flp.com.cn">sales@flp.com.cn</a>
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## 高级法律英语选读 宪法学与行政法学

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责任编辑 蔡 箐 李春英

封面设计 王 志

出版发行 外文出版社

社 址 北京市百万庄大街 24 号 邮政编码 100037

电 话 (010) 68996075/68995883 (编辑部)  
(010) 68329514/68327211 (推广发行部)

印 刷 三河市三佳印刷装订有限公司

经 销 新华书店/外文书店

开 本 大 32 开 (203 × 140 毫米) 字 数 130 千字

印 数 0001—5000 册 印 张 7.25

版 次 2000 年第 1 版第 1 次印刷

装 别 平装

书 号 ISBN 7-119-02703-4/H·995(外)

定 价 11.00 元

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Due to the inconvenience of communication, we are unable to get in touch with the authors of the articles selected in this book.

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## 出版前言

近年来，各高等院校的法学院系竞相重视法律英语的教学，以期培养法专业的学生阅读法学原著的能力。与之相应，已有各种版本的法律英语教材面世。其特点是集理论法学与各部门法学于一书，为不同部门法专业的读者学习各种专业词汇和知识提供了方便之道。

我社出版的这套“高级法律英语选读”丛书，分法理学、宪法与行政法学、刑法学、民商法学、国际法学五种。其专业特点显而易见。丛书选材既体现法学发展的历史轨迹，又注意吸收当代法学研究的最新成果；既有理论探讨，又有实证分析。在此基础上，各个专业内容相互交融，既自成体系，又浑然一体。选材时，尽可能涵盖本专业各方面的内容，以扩大读者的专业词汇和知识面。非但如此，书中所选内容，多是各专业的精品，因而具有较高的学术价值，是各专业研究生及相关专业研究者不可多得的参考资料。由于英文学术原作大都篇幅宏巨，在选编时，囿于篇幅所限，不得不忍痛割爱，仅择其精华。是故，可能会给读者留下内容不完整的印象，是为遗憾之事，亦敬请读者原谅。

这套读物的问世，端赖各位编著者鼎力相助，戚渊博士参与了创意、选材、组织的全过程，在此表示感谢。

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## UNIT 1

# The Past of Constitutional Theory: A View from Outside

## 宪法理论回顾

Richard Davies Parker

**1** When we first studied constitutional law—sometime around a decade ago—the conventional theory that I have described was pretty much all we were given in the way of constitutional theory. And, even at that, it was still at a relatively nebulous stage of development. Without any apparent alternative to it, without any very clear sense of its defining contours, we were trapped inside it. Controversies about subsidiary issues like the justification of judicial review, judicial “activism”<sup>①</sup> versus “deference,” “neutral principles,” “balancing,” and so forth took up our energy. So, perhaps we can be excused for having failed to distance ourselves and consider critically the more basic problems of constitutional theory.

**2** Now, if we do not try to look at conventional theory from the outside, we will have only ourselves to blame for our entrapment in it.

**3** There seem to be two main sorts of external critique which are beginning to be applied to conventional theory. They suggest different directions for the constitutional theory of the future. The first, I believe,

is fine as far as it goes. But it does not go far enough. I shall argue, instead, that the second offers us the best opportunity at last to free ourselves from the dead hand of conventional theory and strike out on our own.

**4** The first sort of external critique distances itself from the debates going on within conventional theory by occupying high ground from which it looks down and discerns in them a distorting, deluded superficiality. From its vantage point, the problem with conventional theory is the all-consuming focus on “process values”—and, in particular, on the quality of the political process—rather than on more fundamental “substantive values.” The burden of this critique is that constitutional theory should be a theory, as Laurence Tribe puts it, of “fundamental substantive rights.”

**5** The critique begins by exploiting and extending an internal critique of “process-orientation.” “Process values” cannot be regarded as primary and, at the same time, be set off from “substantive values” since. Tribe insists, the former, if primary, are entwined with the latter. This is so in two respects. The reason process is “constitutionally valued,” Tribe argues, is for “its intrinsic characteristics”—for example, “as an expression of the equal respect in which we as a society aspire to hold each individual” or of “a right to individual dignity, or some similarly substantive norm.” If it is valued only “as a means to some independent end,” it can hardly be viewed by theorists as primary. Process itself, therefore, becomes substantive. What is more, the two kinds of values are entwined. Tribe shows, in application as well. To decide whether the political process malfunctioned in burdening some group, for instance, we cannot help making some substantive estimate of the group’s interest and of the interests served by burdening it. Thus, Tribe notes, “[a]ny constitutional distinction between laws burdening homosexuals and laws burdening exhibitionists . . . must depend



on a substantive theory of which [group is] exercising fundamental rights and which [is] not.”

**6** Having argued that if “process values” are to be viewed as primary, they must be acknowledged as “substantive,” the critique goes on to contend that “substantive values,” in fact, deserve to be viewed as being of primary importance in constitutional theory. The focus of “process-orientation,” in other words, is not simply confused. Worse, it is upside down. Constitutionally, substance is more fundamental than process. Tribe suggests that this is so on three grounds. First, the latter may depend on fundamental assumptions about the former, while the former may not depend on assumptions about the latter. Second, a narrow concentration on the process by which a decision was reached may produce toleration of decisions whose effects are what really most matter and strike us as substantively obnoxious. And, third, there are certain conceptions of value fundamental to specific constitutional provisions—like “freedom” in the first amendment, “equality” in the fourteenth—that ought to be fully (including substantively) explored instead of being shaped automatically and superficially to fit the mold of “process values.”

**7** In some respects, this critique is attractive. And some of the directions it points out for future theory ought to be heeded.

**8** Nevertheless, the critique does not go far enough. It is not. I believe, critical enough of conventional theory. Nor does it provide us adequate direction for the future. First, it relies on and, simultaneously, undermines a distinction between “process values” and “substantive values” that sometimes seems just a play on words. It is true, to be sure, that “process-oriented” theory makes much of the distinction. So, it is worthwhile to undermine it, showing that process issues *are* substantive issues. But then to turn around and contend not only that “substantive values” are entwined in process issues and deserve full ex-

ploration, but also that they are more fundamental and should be the primary focus of constitutional theory is to indulge in unnecessarily metaphysical typologies. It is to become obsessed with the same over-abstract distinction that fascinates “process-orientation.” I would think that the crux of conventional theory is *which* values are embedded in its assumptions, not that those values are viewed as having to do with “process” instead of “substance.” And, by the same token, what we need to know is *which* values to explore in future theory.

9 This is not to say that the critique utterly ignores the question of *which* values ought to be treated as basic in constitutional theory. To the contrary, the champions of “substantive theory” do take a position on this question. Thus Tribe calls for—and criticizes “process-oriented” theory for lacking—“a developed theory of fundamental rights.” What, then, are such “fundamental rights”? They are rights, says Tribe, “secured to persons against the state.” And he insists that other norms cannot be “understood, much less applied, in the absence of” some attention to those values. For Tribe—and he appears typical of the champions of this approach in this respect—the values that ought to be treated as basic in constitutional theory have to do with the security of persons vis-à-vis government.

10 There lies the second shortcoming of the approach. Bent on combatting the “process-oriented” focus on values that have to do with the systemic quality of political life, it goes too far. It tends to slight the importance of such values—and exaggerate the significance of personal security values. Instead of arguing that both be viewed as basic, it tends to eclipse the former with the latter. This blunts its critique of conventional theory. It can fault that theory for downplaying values of personal security. But it disables itself from getting at what. I would think, is the crux of conventional theory: *which* values involving the systemic quality of political life are taken seriously within that theory.

Furthermore, it also points future theory in a wrong direction. How can it be that the constitution of our polity is not basic to constitutional theory? Perhaps the quality of political life cannot be evaluated without considering what “fundamental rights” persons ought to have against the state. But how can we consider questions of “fundamental rights” without evaluating the quality of the political life which is the context of all rights and which shapes the state?

**11** This approach, finally, suffers from a third shortcoming. It recognizes, as Tribe says, that constitutional theory “demands precisely the kinds of controversial substantive choices that the process proponents are so anxious to leave to the electorate and its representatives. It thereby sweeps aside the anxiety that cripples conventional theory from within. If ever there is to be progress beyond conventional theory, we have to applaud this move; good riddance. But the champions of this approach generally fail to support the move. Tribe assumes that any controversial issues addressed by theory must then be given to courts for resolution, invoking “the care and humility that we are entitled to expect of judges” to support allocation of controversial choices to them.

**12** If, in future constitutional theory, we are to recognize and embrace the necessity for controversial choices of value, freeing ourselves from the selfdefeating anxiety of past theory, we must free ourselves of old rationalizations that only compound the problem. We must confront directly the assumptions that lead “process-oriented” theorists to shy from controversial choices in constitutional theory, blandly consigning them to the workings of the political process—assumptions, that is, about the quality of the political process itself.

**13** There is another critique—the one I want to promote—that distances<sup>2</sup> itself from the internal debates of conventional theory not by taking ground high above them to bombard them with a typology of values, but rather by engaging them directly so as to cut the ground out from

under them. It concentrates on *which* values are taken more or less for granted in such debates and so dominate conventional theory. And, in particular, it criticizes values involving the systemic quality of our political life that are the foundation of that theory. This approach, I believe, not only can yield a more powerful critique, freeing us from our entrapment in the theory of the past. It can also point out the direction for a promising constitutional theory of the future.

**14** Like the first sort of external critique, this one begins by exploiting an internal critique of “process-orientation.” It capitalizes on the recognition that the prescriptive-descriptive conception of the functioning and malfunctioning of the political process promoted by “process-oriented” theory cannot be shown to be objectively “correct.” But it is not satisfied merely to show that the conception is open to controversy. Instead, it proceeds to investigate and characterize the particular values structuring that conception. In the end, it characterizes “process-oriented” theory as a sophisticated apology for the truncated, systemically biased political life of our liberal welfare state.

**15** For now. I simply intend to sketch very roughly the *sort* of critique this involves. To illustrate at least its contours, I shall criticize the crucial structural limitations of that conception.

**16** The first limitation of the “process-oriented” conception of political life is, of course, its primary focus on the process by which outcomes are generated, not on the outcomes themselves. In particular, “process-oriented” theory maintains that, from the point of view of constitutionality, *distributive* outcomes are not of primary importance. Thus Ely opines that constitutional order does not depend on “some ‘appropriate’ distributional pattern.”

**17** This structural limitation—diverting attention from the distribution of resources that comes out of the political process—may have an effect of diverting attention from inequalities in the distribution of resources

that influence what comes *into* the process as well. But the effect is only tentative Ely, in fact, suggests that inattention to distributive outcomes does not imply inattention to unequal inputs. He notes parenthetically that the “distributional pattern” resulting from the political process may even be worth studying as “powerful evidence of what that process is likely to have been.” And, in one brief passage, he goes so far as to note that recently “more stress has been placed on the undeniable concentrations of power, and inequalities among the various competing groups, in American politics.” In that passage, he almost seems to promise that his theory will grapple with the impacts of general inequalities and concentrations of power on the political process. He does not, however, deliver on the promise. To begin to interpret his failure, we have to look at the other structural elements of his theory.

**18** The second limitation built into the “process-oriented” conception of our political life is its primary focus on only one dimension—the simplest and most restricted dimension—of the phenomenon of power: decisionmaking. The power which absorbs its attention is power evidenced in particular decisions—decisions, for example, to benefit or burden particular groups or activities. To put the point even more simply, the power that counts is power whose evidence is visible in concrete actions, concrete behavior.

**19** The behaviorist character of this conception of politics limits its capacity to perceive a broader, deeper, more difficult dimension of power. Focusing on power evidenced in decisions, it tends not to see power as a relationship among groups—a relationship, that is, in which certain groups simply “have” more power than other groups by virtue of having more resources of one sort or another. In the eyes of “process-oriented” theory, the condition of “being” weak is not significant in itself. Thus the theory ignores the probability that a condition of weakness might prevent a group from appreciating, articulating, and mobi-

lizing to promote its interests. It thereby ignores the probability that a condition of weakness might impair a group's capacity even to get its interests on the "agenda" of the political process. In other words, the "process-oriented" conception of politics is oblivious to a dimension of power involving "nondecisions," that is, inaction.

**20** Even in assessing decisionmaking, a third structural factor restricts its vision. As perfected by Choper and Ely, the theory concentrates on only two dimensions of the decisionmaking process: whether "access" was open and whether decisions were motivated by "prejudice." The focus on access and prejudice diverts attention, once again, from the fact of unequal participation in the process. Access, of course, is important. But "process-orientation" fails to assess what actually was *done* with access. It is blind to the dimension of the process "located" in between access and decision: the competition among—and the capacity of—groups to exploit their access and influence the decision. By neglecting to attend to this dimension, "process-orientation" fails to take account of the *effectiveness* with which groups having unequal resources take part in the competition. Undoubtedly, its focus on motivation of decisions by prejudice can get at some distortions of the process of competition indirectly. But since it gets only at distortions afflicting minority victims of prejudice—and since, even as to them, it provides a check only against manifest oppression, not a guarantee of effective participation—it further obfuscates the competitive disadvantages of masses of ordinary citizens.

**21** The fourth limitation built into the "process-oriented" conception of politics is probably the one most taken for granted. The decision-making process the theory addresses represents simply one dimension of decisionmaking processes—the one located in the government. Hence, the sort of power with which the theory deals represents only one dimension of power: official power. Although political theorists long

have known that the (small "c") constitution of a polity resides not only in the distribution and use of official power, but also in the distribution and use of "private" power, "process-oriented" theory concentrates on the former and, for the most part, ignores the latter.

**22** It is true, of course, that Choper and Ely assign great importance to prejudice against minorities, and prejudice has its origin in society, not in government. It is true, also, that Ely stresses the importance of "social intercourse" as the solvent of prejudice. But, in the end, prejudice is important to them only insofar as it seems to infect decisions by government. They do not even bother to mention what would appear one of the most critical doctrines of constitutional law: the state action doctrine. For "process-oriented" theory is, at bottom, blind to the distribution and exercise of social power outside government. It thereby blinds itself to conditions which frustrate "social intercourse," inequalities which disable masses of citizens from effective participation in the official political process, and myriad circumstances in which individuals, day by day, are subject to—and are trained to subject themselves to—the will of others.

**23** The last structural limitation of the "process-oriented" conception of political life follows from the others and helps to put them into sharp relief. It involves the nature of the rights guaranteed by constitutional order. On this subject, Ely pursues the implications of "process-orientation" farther than any of his predecessors. He characterizes most constitutional guarantees as guarantees of a fair process. Then, he concentrates on two kinds of guarantees: <sup>9</sup> rights of access to the political process ("voice" and "vote") and rights of minorities to fair treatment within the process. As to the former, he acknowledges an irreducible core of "substantive constitutional entitlement." But, outside that minimum core, he proposes one principle to inform and govern both kinds of guarantees: the principle that government must treat all interests with

“equal concern and respect.”<sup>4</sup> This principle means that whether interests are to be protected will depend on whether the *reason* for a decision burdening them was *neutral* in regard to those interests. Thus “process-orientation” homogenizes a huge portion of constitutional rights and grants us a general right to a neutral reason when government fails to serve our interests.

(Selected from Vol. 42 Ohio State Law Journal)

### New Words and Expressions

- |   |   |
|---|---|
| <p>1 nebulous 模糊不清<br/>contours 轮廓<br/>judicial review 司法审查<br/>judicial activism 司法积极主义<br/>neutral principle 中立原则</p> | <p>11 good riddance 可喜的摆脱<br/>champion 冠军</p>   |
| <p>4 process-values 程序价值<br/>substantive value 实体价值</p>   | <p>12 typology 类型学<br/>13 capitalize 投资<br/>truncate 截去<br/>welfare state 福利国家</p>  |
| <p>5 process-orientation 程序取向<br/>right to individual dignity 个人尊严<br/>权利<br/>homosexual 同性恋<br/>exhibitionist 暴露癖</p>  | <p>14 opine 认为<br/>15 parenthetically 顺便一说<br/>grapple 抓住<br/>16 behaviorist 行为主义者<br/>articulate 清楚地表达<br/>oblivious 健忘<br/>nondecision 无决定<br/>inaction 无行动</p> |
| <p>6 obnoxious 不愉快的, 讨厌的<br/>superficially 表面上</p>  | <p>17 manifest 表明<br/>obfuscate 使模糊</p>   |
| <p>7 entwine 缠绕<br/>crux 要点</p>   | <p>18 social intercourse 社会交往<br/>19 homogenize 匀质化, 弄均匀</p>  |
| <p>9 vis-a-vis 关于, 和…相对</p>   |   |
| <p>10 eclipse 遮蔽, 衰落<br/>applaud 鼓掌叫好</p>   |   |



## Notes

- ① judicial activism: 司法能动主义。与司法克制 (judicial constrain) 相对, 是对司法机关作用的一种态度。司法能动主义倡导法官接受新的政策, 即使是那些与既定法律规范和先例不一致的政策, 这使得司法机关在处理其与立法机关以及行政机关的关系时表现为积极地宣告立法或行政行为违宪。
- ② There is another critique ... but rather by engaging them directly so as to cut the ground out from under them. 还有另外一种批评, 这种批评也正是我所倡导的, 这种批评之所以能够远离传统理论的各种内部争论的原因在于, 它没有套用任何一种高高在上的价值观对传统理论狂轰烂炸, 而是直接将他们结合进来, 从而彻底切断了其所依据的理论基础。
- ③ Then he concentrate on ... and right of minorities to fair treatment within the process. 然后, 他集中阐释了两种保障: 参与政治过程的权利 (发言权与表决权), 以及在此一过程当中少数派得以公平对待的权利。
- ④ Equal concern and respect. 同等的关注与尊重。最早是德沃金在“认真对待权利”一书当中提出的原则, 强调政府对少数派的平等对待。

## Questions

1. What are the two main types of external critique applied to conventional theory?
2. What is the orientation of the conventional theory, process value or substantive value?
3. According to Tribe, what is the relationship between process value and substantive value?
4. Why does the author not agree with Tribe?
5. What are the drawbacks of the process-oriented conception of political life?