

3-1-1981

Book Review

North Carolina Law Review

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

North Carolina Law Review, *Book Review*, 59 N.C. L. REV. 628 (1981).

Available at: <http://scholarship.law.unc.edu/nclr/vol59/iss3/7>

This Book Review is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

BOOK REVIEW

DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW. By J. H. Ely.†
Cambridge, Massachusetts: Harvard University Press, 1980. Pp. viii, 268.
\$15.00.

REVIEWED BY GARY C. LEEDES*

Almost two centuries ago, following a ruling of a North Carolina court which, in effect, declared unconstitutional an act of the legislature, Richard Spaight was dubious and fearful. He admitted that many of the Assembly's acts had been intemperate, but the question he posed to James Iredell was this: "If the judiciary acts as a check on the legislature, then who is to act as a check upon the judiciary?"¹ Mr. Spaight's question still reverberates, but the Constitution provides no singular answer. In our own century, when the Warren Court was making new law, Learned Hand restated another question that stirs nagging doubts: "Who made [courts] the arbiters of all political authority in the nation with a discretion to act or not, as they please[d]?"²

Challenging questions that arouse doubts and fears³ tend to stimulate theories—or apologies. In *Democracy and Distrust*, Professor Ely formulates a theory which designates a boundary for judicial review that is narrower than the "prevailing academic line."⁴ Courts, however, are powerful within the Elysian field and are free to substitute their judgment in political cases.⁵ When the courts determine that "representative government cannot be trusted,"⁶ judicial scrutiny should be strict; notions of political thickets, defer-

† Professor of Law, Harvard University.

* Professor of Law, University of Richmond, T. C. Williams School of Law.

1. See R. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 8 (1971).

2. L. HAND, *THE BILL OF RIGHTS* 15 (1958).

3. There is "fear that extensive reliance upon courts instead of self-government through democratic processes may deaden a peoples' sense of moral and political responsibility for their own future." A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 103 (1976). There are many other fears as well: "Government by judiciary will fail . . . because its present success exalts autocracy over democracy . . . faction over society, equality over liberty . . . and mindlessness over reason." Kurland, *Government by Judiciary*, 2 U. ARK. L.J. 307, 320 (1979). It is therefore understandable that theories of "democratic" judicial review are devised to counteract the fears of the Supreme Court's critics. See, e.g., E. ROSTOW, *THE SOVEREIGN PREROGATIVE* (1962). It is a salutary pastime. Theories build logical bridges connecting judicial activism with some superior and binding valid norm.

4. J. Ely, *DEMOCRACY AND DISTRUST* 43 (1980). Cf. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980) (Ely's "process theme" can determine almost nothing without a full theory of substantive rights and values to specify its presuppositions and supplement its content).

5. "Elysium is as far as to
The very nearest Room
If in that Room a Friend await
Felicity or Doom—"

3. *THE POEMS OF EMILY DICKINSON* 1180 (T. Johnson ed. 1955).

6. J. ELY, *supra* note 4, at 183.

ence, and comity are inappropriate.

Our system of government has its share of antinomies.⁷ For example, there is a "commitment to control by a majority of the governed."⁸ Majority rule, however, is a democratically faulty tenet to the extent that it allows the majority to subject the minority to tyranny. Thus, there is a tension. The "tricky task" is to protect the minority, or as Ely emphasizes, the "minorities," in a way "that is not a flagrant contradiction of the principle of majority rule."⁹ Ely relies on courts to perform that task whenever the majority abuses our democratic system by denying political equality.

Minorities need judicial intervention when the processes of government, that is, the "mechanisms of decision and distribution,"¹⁰ are "undeserving of trust."¹¹ More specifically, judicial review is justified

7. The republic was to be governed by law, not men, yet the limits of law were to be determined by the state of the body politic's knowledge, morality, and common agreement. See Rossiter, *The Political Thought of the American Revolution*, in 3 SEEDTIME OF THE REPUBLIC 227 (rev. ed. 1963). The states are politically equal, but there should be proportional representation of the entire population in the United States House of Representatives.

There should be equal participation, but participation in public affairs was not so much a right as a privilege, limited to men who "have an evident stake in society." *Id.* Representatives should be impartial and not give undue influence to any segment of the population, yet Madison hoped that the "laws should silently 'reduce extreme wealth . . . and raise extreme indigence towards a state of comfort.'" R. HOFSTADTER, *THE IDEA OF A PARTY SYSTEM* 81 (1969).

Blacks were created equal but born and kept in slavery. Fundamental natural rights were inalienable but "can be surrendered by a freely contracting individual—in return for a proper equivalent"; namely peace, order, and "the good of the whole." Rossiter, *supra*, at 116. There was a higher *unwritten* law, yet somehow it can be found in the Constitution. A substantial number of delegates to the 1787 Constitutional Convention in Philadelphia wanted judicial review to act as a check upon the legislative and executive branches of the central government; yet overwhelmingly in committee, the Convention rejected a council of revision and structured the Constitution to reflect the very different separation of powers principle. See P. SMITH, 3 *THE SHAPING OF AMERICA* 62, 72, 91 (1980).

The Supreme Court was generally recognized as an authority to interpret the Constitution, yet John Marshall feared impeachment and destruction of the Court if he exercised the power of judicial review against Jefferson and Madison in favor of William Marbury. The written Constitution was intended to be the ultimate check on the limits of the Government's power, but how this check would operate in practice was a mystery, and "roughly one half of the nation could not agree with the other half about what the words in the Constitution really meant" (in 1787 or now). *Id.* at 108.

8. J. ELY, *supra* note 4, at 7.

9. *Id.* at 7-8. Ely writes, "rule in accord with the consent of a majority of those governed is the core of the American governmental system". *Id.* at 7. But Ely often treats the commitment to majority rule as if it were simply an "expedient" to make the principle of "political equality" a working part of a complicated system. See also M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* 220 (1964). But Robert A. Dahl writes, "no amount of tampering with democratic theory can conceal the fact that a system in which the policy preferences of minorities prevail over majorities is at odds with the traditional criteria for distinguishing a democracy from other political systems." Dahl, *Decisionmaking in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 283 (1958) (hereinafter cited as *Decisionmaking*). Dahl perhaps goes too far. The real danger is this: overzealous protection of minorities by courts replaces majority tyranny with judicial tyranny. For, as Richard Spaight worried, if the judiciary goes too far in checking the legislature's lawmaking power, then who can check the judiciary? Dahl also writes, "should a legislature represent interests or individuals? It cannot do both. For if interests are to be given equal representation, then individuals must be denied equal representation." R. DAHL, *DEMOCRACY IN THE UNITED STATES: PROMISE AND PERFORMANCE* 184 (3d ed. 1976) (hereinafter cited as *DEMOCRACY*). Ely does not suggest any way out of this dilemma.

10. J. ELY, *supra* note 4, at 181.

11. *Id.* at 103.

when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.¹²

In this deplorable situation, representatives violate their "duty of equal concern and respect."¹³

Ely argues that the "elected representatives are the last persons we should trust with the identification of . . . these situations."¹⁴ This vacuum creates a role for the courts, particularly the federal courts. Why the courts? Again, basically because, like a disinterested "referee,"¹⁵ courts should enforce the rules of the game (the Constitution) when there are "failures of representation"¹⁶ contrary to the preeminent values of participation that are part of "the American system."¹⁷ Ely describes his model as a "representation-reinforcing theory of judicial review."¹⁸

12. *Id.*

13. *Id.* at 98. Equal concern and respect does not connote economic equality or equality of outcome. Ely is a liberal, not a Marxist. Nevertheless, concerning this indefinite norm, one asks, "equal concern and respect with reference to what: rights, each person's moral worth, needs, abilities, interests?" Does the quality of the concern and respect owed vary at all depending on the group's actual stake in the decision or the intensity of its members' feelings? See E. REDFORD, *DEMOCRACY IN THE ADMINISTRATIVE STATE* 16-17 (1969). Doesn't one have to *earn* respect? Ely leaves all these questions in the final analysis to the Supreme Court of the United States.

14. J. ELY, *supra* note 4, at 103. Is the prohibition of consensual sexual conduct between homosexuals a result of hostility or a prejudiced refusal to recognize commonalities of interests? Or is it the result of legitimate opposition? Assuming there is a difference, and I submit there is, should the federal courts treat all cases alike with strict scrutiny, or should it defer to the judgment of the elected representatives of each community? Ely believes that homosexuals should be added to the list of suspect classifications that triggers special scrutiny and that they should "seek salvation in the courts." *Id.* at 163. Relief, maybe; salvation—a bit difficult even for the Supreme Court.

15. *Id.* at 103. The Republican platform of 1980 and Jimmy Carter promised to appoint federal judges who are *not* disinterested. Wermel, *The Supreme Court: Will It Become a Campaign Issue?*, WALL ST. J., Aug. 1, 1980, at 12, col. 3. One can get too carried away with the referee analogy especially if the Court acts like National Football League Commissioner Pete Rozelle instead of the fellows with the striped shirts. See also P. KURLAND, *POLITICS, THE CONSTITUTION AND THE WARREN COURT* 56 (1969); see also note 75 *infra*. Moreover, "if justices were appointed primarily for their 'judicial' qualities without regard to their basic attitudes on fundamental questions of public policy, the Court could not play the influential role in the American political system that it does in reality play." Dahl, *Decisionmaking*, *supra* note 9, at 285.

On the other hand the referee analogy is a useful fiction. Widespread public recognition that the Court is simply another political institution rather than an exclusively legal one "would solve one set of problems at the price of creating another" set. *Id.* at 280. Ely wants us to perceive the courts as referees who act politically. Is that a non sequitur?

16. J. ELY, *supra* note 4, at 181.

17. *Id.* at 102.

18. *Id.* at 181. Representation "is a rather loose concept . . . used in different ways by different writers, each of whom tends to claim that the meaning he attributes to it is the only proper meaning." A BIRCH, *REPRESENTATION* 124 (1971). The term "participation" is also used to refer to a wide variety of different rights by different political theorists. See C. PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 1 (1970). It is "impossible to construct a single *a priori* theory, model, or definition of democracy that will command universal support." M. SHAPIRO, *supra* note 9, at 218. Ely is of course well aware of the exclusive and abstract nature of these terms and focuses his attentions on the underlying assumptions of "our system," J. ELY, *supra* note 4, at vii.

The argument for entrusting the courts with the power to make the abiding premises of the democratic system "a reality"¹⁹ comes down to necessity. When elected representatives violate their trust, there is supposedly no other peaceful recourse. The courts shore up the system by performing basically two functions:

1. "Clearing the Channels of Political Change"²⁰ which are clogged
 - a. when rights in the ballot access and "voting area"²¹ are denied, or
 - b. if the rights of "free speech, publication, and political association"²² are impeded.
2. "Facilitating the Representation of Minorities"²³—or at least those minorities whose attempts to become part of protective coalitions "prove recurrently unavailing."²⁴

A court enlisted to perform these functions is vindicating, not violating the system's "underlying democratic assumptions."²⁵

The courts should perform their role adventurously.²⁶ Federal courts no

He derives these assumptions, pertaining to representation and equal participation, from his survey of selected historical documents, *id.* at 77-87, his analysis of the Constitution's text and structure, *id.* at 88-101, and our constitutional development, with no small emphasis on footnote four of *Carolene Products*, *id.* at 75-77. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

What emerges is impressionistic; Ely highlights the broad themes of maximum political equality and wide participation. He ignores, however, a number of complications in the movement known as democracy. Since the purpose of judicial review is to vindicate the underlying assumptions of our system, Ely's tendency to reduce them to catchy slogans is unfortunate. We lose sight of the crosscurrents, discontinuities, and contradictions noted by other writers. *See generally* R. ELLIS, *supra* note 1; E. REDFORD, *supra* note 13; *see also* R. DAHL, *supra* note 9, at 188, 204, 216-17, 228-29, 264-68. *But see* G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 596-615 (1969). Ely emphasizes equality but not *freedom*, "a tricky word" either in tension with equality, or its complement, depending on one's usage. M. SHAPIRO, *supra* note 9, at 228-29. *See* M. FRIEDMAN & R. FRIEDMAN, *FREE TO CHOOSE* 128 (1980). P. KURLAND, *supra* note 15, at 98-110; *see also* B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 117-19, 139-40, 188, 229, 283-84, 293-94, 318-19 (1969). Ely often treats indiscriminately the rights of individuals and the rights of groups. Although a group is an abstraction from the individuals who constitute it, "[t]o think that groups behave like individuals is to [confuse] abstractions with life." C. CURTIS, JR., *LIONS UNDER THE THRONE* 253 (1947). Ely ignores the fact that power depends not merely on votes and representation, but on complex social and economic power, prestige, organization, and many other factors in and out of government. In the brokerage of claims, mediators strive for stability, and the goal is a *working* democracy—not simply an ideal. *See* E. REDFORD, *supra* note 13, at 26-27, 199-200. Through the interaction of leaders of different types in strategic positions of influence who engage in the negotiation necessary for the brokerage of claims, political equality is both difficult to measure and to attain. *See* M. SHAPIRO, *supra* note 9, at 230-31.

Ely refers to tyranny, but "[t]he concept of tyranny, or rather the less dramatic idea of 'the abuse of power,' may not be susceptible of very precise definition." M. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 308 (1967). Ely also ignores the contributions made to democracy by the two-party system. *See* text accompanying notes 85-91 *infra*. Despite all this ambiguity, the "assumptions" that Ely highlights are to be the justification for judicial review.

19. J. ELY, *supra* note 4, at vii.

20. *Id.* ch. 5.

21. *Id.* at 116.

22. *Id.* at 105.

23. *Id.* ch. 6.

24. *Id.* at 151.

25. *Id.* at vii.

26. Courts should expand "the set of suspect classifications beyond the core case of race," *id.*

longer are to be so inhibited by the question that preoccupied Jefferson and Madison, Frankfurter and Harlan: Is this exercise of power *appropriate* for the central government's judiciary branch? When the system malfunctions, action, not prudence, is required.

While clerking at the Supreme Court, Ely witnessed firsthand how the pursuit of "intellectual disinterestedness" (a phrase coined by Justice Frankfurter²⁷) worked to promote values incompatible with Chief Justice Warren's humanitarian impulses and Ely's own liberal "political philosophy."²⁸ The designations "political question," "our federalism," "separation of powers," and "cases or controversies" were used as excuses to avoid controversial political cases. No longer is prudence a virtue; Ely's new constitutional theory is contrived to subordinate the values furthered by judicial restraint to the "participational values"²⁹ woven into the fabric of American democracy.

Professor Ely's theory of constitutional law is deliberately designed to implement his political philosophy. Some of his ideas are drawn from the liberal "tradition of utilitarianism."³⁰ His test for the adequacy of a well-functioning political system is basically the same as Bentham's and James Mill's test: Does it protect the interests of the governed against the abuse of power?³¹

Like Bentham's calculus,³² Ely's theory designates no particular substan-

at 148, and review such classifications with "special scrutiny," *id.* at 146. If illicit motivation "appears materially to have influenced," *id.* at 138, government action, it is unconstitutional. Since the "ins have a way of wanting to make sure the outs stay out," *id.* at 106, courts must employ techniques to identify the "groups in society to whose needs and wishes elected officials have no apparent interest in attending," *id.* at 151.

Several provisions in the Constitution are useful to prevent agents of the majority from "singling a person out," *id.* at 172, owing to a separate set of rules reserved for "the comparatively powerless," *id.* at 177. The provisions that can be "viewed through this prism," *id.* at 172, include the following: the fourth and eighth amendments, *id.* at 172-73, the Just Compensation Clause, *id.* at 97-98, the Privileges and Immunities Clauses of Article IV, *id.* at 90, and the fourteenth amendment, *id.* at 22-30, the negative implications of the Commerce Clause, *id.* at 91, and, not the least important, the ninth amendment, *id.* at 34-41. Similarly, the Republican Form of Government Clause expresses the "ideal," *id.* at 119, of nondiscriminatory distribution of the franchise, and it and the Equal Protection Clause protect a wide variety of rights in the "voting area," *id.* at 118. The Republican Form Clause could also serve federal courts willing to extend the nondelegation doctrine to the states, a doctrine still useful in policing the process of representation, *id.* at 131-34. The first amendment, of course, is "critical to the functioning of an open and effective democratic process." *Id.* at 105.

But Ely does not limit himself to rights clearly implicit in the Constitution. For example, the right to migrate and relocate "fits quite snugly," *id.* at 179, into the theory, because "one should have an option of escaping an incompatible majority." *Id.*

Ely's theory pulls out all the stops. It is a call for compulsory judicial action but not one imprisoned by the words of the Constitution. Instead, it is vitalized by the Framers' choice of language that is "capable of growth," *id.* at 30, and consistent with democratic assumptions concerning "equal participation in the processes of government." *Id.* at 77. His detractors, of course, will not hesitate to say that he uses the Constitution not as a guide, but as an instrument—perhaps a pretext—for courts to "get away with intervening," *id.* at 48, in the political process.

27. 371 U.S. x (1962) (Justice Frankfurter on his retirement).

28. J. ELY, *supra* note 4, at 72.

29. *Id.* at 75 n.*.

30. *Id.* at 187 n.14.

31. See L. MACFARLANE, *MODERN POLITICAL THEORY* 239 (1973); Benn, *Democracy*, in 2 *THE ENCYCLOPEDIA OF PHILOSOPHY* 338, 341 (1967). But see I. BERLIN, *FOUR ESSAYS ON LIBERTY* 130, 165 (1970).

32. As John Rawls put it, referring to Bentham's calculus: "In calculating . . . it does not

tive values, such as privacy, as fundamental. It prescribes, instead, a method. But the utilitarian's calculus (through its manifestation, the political system) malfunctions if it is unable to count and respect everyone's informed preferences. Accurate counting is insured by auxiliary rights in the voting area and by side constraints like freedom of speech. The whole constitutional system, nevertheless, becomes a tool for tyranny if the elected representatives arbitrarily disadvantage the politically weak in contradiction of the system's underlying value of political equality. This sham the judges must not tolerate.

Ely's rationalization for judicial review is not completely original. Some forty years ago Justice Jackson wrote, "when the channels of opinion and of peaceful persuasion are corrupted or clogged . . . the democratic system is threatened In that event the Court, by intervening, restores the processes of democratic government; it does not disrupt them."³³ But Jackson, mindful of Bentham's diatribes against the courts,³⁴ went on to warn would-be guardians of the system that some of the "most subtle and pervasive forms of intolerance are not technically violations of the Constitution . . . and cannot be dealt with in the courts."³⁵ Jackson also regarded the procedures of constitutional litigation as "clumsy" and "tricky,"³⁶ so "what is wanted," he said, "is not innovation, but a return to the . . . conviction that it is an awesome thing to strike down an act of the legislature . . . [a] power . . . not to be used save where the occasion is clear beyond fair debate."³⁷

Ely tinkers with the Bentham calculus and *innovates* by exalting the democratic system as policed by the federal courts over the nation, substantive rights, or the individual. In Ely's view, the courts will serve both nation and individual by meliorating mistrust and by tying together the interests of all, however artificially,³⁸ for the common venture.

Ely's political philosophy and his theory of judicial review, which coincide neatly, demand arrangements that satisfy his conception of equal partici-

matter, except indirectly, what the desires are for. We are to arrange institutions so as to obtain the greatest sum of satisfactions; we ask no questions about their source or quality" J. RAWLS, *A THEORY OF JUSTICE* 30 (1971).

33. R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 285 (1941). Ely gladly acknowledges that his justification for judicial review guided the Warren Court whose "approach was foreshadowed in a famous footnote in *United States v. Carolene Products Co.*, decided in 1938." J. ELY, *supra* note 4, at 75.

34. See R. JACKSON, *supra* note 33, at 322-23.

35. *Id.* at 285.

36. *Id.* at 288. Ely does not discuss the Court's prudential concerns or rules of self-restraint at any length. His theory, however, is designed to eliminate prudence and self-restraint when the system is malfunctioning and when representatives cannot be trusted. Justice Jackson, however, and most Justices hold to the safer belief that "self-restraint should lead to prompt and final declination to interfere with the legislative process in those cases where the lawsuit is inappropriate to overrule statecraft." *Id.* at 310.

37. *Id.* at 323.

38. Of course, it has to be an "artificial" identification of interests in a society in which persons mistrust each other and their governors. Cf. E. HALEVY, *THE GROWTH OF PHILOSOPHIC RADICALISM* 404-07 (1972) (discussion of Bentham's political and constitutional philosophy). Bentham maintained that the judge's role was to counsel the legislature, not control it. See J. BENTHAM, *THE LIMITS OF JURISPRUDENCE DEFINED* ch. 21, reprinted in C. MORRIS, *THE GREAT LEGAL PHILOSOPHERS: SELECTED READINGS IN JURISPRUDENCE* 274, 287 (1959).

pation—"everyone's vote is to count for the same."³⁹ This means, at the very least, that "the franchise must be universally available, absolute equality of the vote and equality in the size of constituencies are essential."⁴⁰ This demand goes beyond those of Bentham,⁴¹ James Mill,⁴² and J.S. Mill.⁴³ Until recently most political theorists "rejected universal suffrage" as an essential ingredient of democracy.⁴⁴ Significant restrictions on the right to vote and ballot access, engendering bitter controversies, are common in the United States. Indeed, the concept of separation of powers, mixed with checks and balances, the bicameral legislature, and the electoral college, if not judicial review itself, limit, in many respects, the principle of equal participation.⁴⁵

Theorists, who agree that equal participation is essential to a constitutional democracy, disagree when they discuss how extensive equal participation should be. The inability to agree on this question is, according to John Rawls, the main problem.⁴⁶ Another dispute renewed by Ely's theory of judicial review is his assumption that courts are better qualified than the body politic to solve this main problem.

Ely is obviously concerned with ensuring a "broadened access"⁴⁷ to a more responsive and more representative government. This was also the concern of the Warren Court whose decisions, Ely asserts, have a "deep structure."⁴⁸ Professor Ely refers to *deep* structure presumably because "our Constitution is guilty of an embarrassing lapse; it contains no broad guarantee of the right to participate in the democratic process."⁴⁹ For example, the original Constitution, for the most part, "appears to have treated voting rights as a matter solely of state concern and permitted the states wide tolerance in deciding who could—and who could not—vote."⁵⁰

39. J. ELY, *supra* note 4, at 122.

40. A. BICKEL, *THE MORALITY OF CONSENT* 6 (1975).

41. Bentham hesitated to grant women and illiterates the vote. *See* E. HALEVY, *supra* note 38, at 416.

42. James Mill would not grant the right to vote to women or young men on the grounds that it was too expensive. *See* BENN, *supra* note 31.

43. J.S. Mill's idea of democracy was a "meritocracy by consent." *See* L. MACFARLANE, *supra* note 31, at 205-06.

44. J. RAWLS, *supra* note 32, at 231; *but see* J. ELY, *supra* note 4, at 122.

45. J. RAWLS, *supra* note 32, at 224.

46. *Id.*

47. J. ELY, *supra* note 4, at 74.

48. *Id.* at 73. The Warren Court opinions form a mosaic that has a distinct character, but according to critics, lacks legitimate, coherent doctrinal underpinnings. *See* G. WHITE, *THE AMERICAN JUDICIAL TRADITION* 317-68 (1976). Ely's work is important because it provides that missing foundation. Nothing gives greater credibility to a political value than the thought that it is an essential element of a historical movement. Such a value can then be propagandized as one that is historically necessary. *See* R. NISBET, *HISTORY OF THE IDEA OF PROGRESS* 4 (1980).

49. B. NEUBORNE & A. EISENBERG, *THE RIGHTS OF CANDIDATES AND VOTERS* 13 (rev. ed. 1980).

50. *Id.* *See also* W. GILLETTE, *THE RIGHT TO VOTE* (1965); J. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 117-18 (1956).

"Is federalism still a reigning value, or merely a practical inconvenience?" R. McCLOSKEY, *THE MODERN SUPREME COURT* 331 (1972). Ely makes no special effort to reconcile the tension between minority rights and states' rights. Perhaps a state's insistence on *its* political equality, or its rights, when they are in conflict with the rights of powerless minorities, is, in Ely's book, just

Ely shrugs off the apparent lapses in the Constitution by emphasizing the inadequacy of constitutional theory. What is inadequate in his view is not the Constitution, but our way of interpreting it. In his words, "[c]ontemporary constitutional debate is dominated by a false dichotomy,"⁵¹ which forces us to choose between "interpretivism" and "noninterpretivism."⁵² Interpretivism sticks closely to "norms that are stated or clearly implicit in the written Constitution."⁵³ Noninterpretivism does not necessarily stick closely to anything.⁵⁴

Neither noninterpretivism nor interpretivism—said to be the only two competing theories of constitutional law prevailing at the moment—are reconcilable with the "underlying democratic theory of our government."⁵⁵ With respect to interpretivism, this is a startling argument, because the interpretivist argues that he "takes his values from the Constitution, which means . . . they ultimately came from the people."⁵⁶ Ely points out that the people who ratified the critical provisions of the Constitution "have been dead for a century or two" and quotes Jefferson's remark that "the earth belongs . . . to the living."⁵⁷ Jefferson, however, was writing privately about a continuing right to revolution, certainly not judicial review.⁵⁸ As regards judicial review, he believed it was a dreadful threat to states rights, which was then a party cry for democracy and popular control of government, and argued: "Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction."⁵⁹ This is one of the interpretivists' better arguments. What is wrong with it?

In brief, despite its allure, interpretivism is "incomplete."⁶⁰ Reference by courts to the Framers' thoughts is often unrealistic; "one cannot hope to gather

another instance of the malfunctioning of the democratic system. But isn't participation by individuals more meaningful when tendencies towards more centralization yield to local control?

51. J. ELY, *supra* note 4, at vii.

52. *Id.* at 1.

53. *Id.*

54. Ely is keen to distinguish his own theory from the "academically popular," *id.* at 75, noninterpretivism that is fueled by a desire to "vindicate particular substantive values," *id.* at 74, which supposedly are "important or fundamental." *Id.* He reminds us that discoveries of fundamental values are mirror images of the searcher's own personal preferences. No one has demonstrated more effectively than Ely the misleading nature of euphemistic terminology such as "natural law" (uselessly vague or inherently subjective), "neutral principles" and "reason" (not a source of values with substantive content), "tradition" and "consensus" (these sources are manipulatable, too often at the expense of minorities' rights), and "the idea of progress" (undemocratic guesswork by the elite). *Id.* at 43-72. In short, there "isn't any impersonal value source out there," *id.* at 72, discoverable by judges. Therefore, the worrisome undemocratic aspects of judicial review are exacerbated by the noninterpretivist approach, which is infamous for "second-guessing the legislature's value choices." *Id.* at vii. His critique of noninterpretivism is no less devastating because his own theory relies on some of the same unreliable criteria. *But see* Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980); Tribe, *supra* note 4.

55. J. ELY, *supra* note 4, at 4.

56. *Id.* at 8.

57. *Id.* at 11.

58. R. MORRIS, *SEVEN WHO SHAPED OUR DESTINY* 138 (1973).

59. 4 T. JEFFERSON, *WRITINGS* 506 (Washington ed. 1859), *quoted in* Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865, 869-70 (1960).

60. J. ELY, *supra* note 4, at 76.

a reliable picture of their intentions"⁶¹ Worse, many provisions, even the less open-ended clauses, are unintelligible and require "the injection of content"⁶² drawn from outside the Constitution. Worst of all, a clause-bound interpretivist who reads "constitutional provisions as self-contained units"⁶³ is incapable of "keeping faith with the document's promise."⁶⁴ Its promise can be realized only by determining the Constitution's "specific implications for each age . . . in contemporary context."⁶⁵ Hence, interpretivism is "hoist by its own petard."⁶⁶ Q.E.D.

Justice Black was a living contradiction of Ely's theory. "The quintessential interpretivist,"⁶⁷ he was aware of the more glaring weaknesses of a clause-bound interpretivism. His constitutional philosophy was not "a historically straitjacketed literalism."⁶⁸ For the most part, he had the "ability to reason by analogy, to sense the relevance of constitutionally stated principles in unfamiliar settings."⁶⁹ The Justice was among the staunchest defenders of civil liberties ever, yet "when his constitutional philosophy (interpretivism) and his political philosophy (liberalism) diverged . . . [he] went with his constitutional philosophy."⁷⁰ Justice Black was scrupulous, believing, with Jefferson, that the Constitution could be destroyed by courts acting as roving commissions. Ely sees something irresponsible about the Justice's scruples: Black's constitutional philosophy proved to be too legalistic to keep the broad democratic themes in tune with the changing times, and the momentum of the Warren Court's egalitarianism.

Whatever else it might be, Ely's theory of judicial review is not unduly legalistic. In fact, Justice Black would likely regard so-called "democratic assumptions" and the values of participation to be criteria no more definite than our "Anglo-American legal heritage," a test that he believed left the judges free to decide a case unmindful of the real limits imposed by the Constitution.⁷¹ Ely demurs on the irresistibly tempting ground that the mode of review he has developed "represents the ultimate interpretivism."⁷²

Ely insists that a court concerned "only with questions of participation"⁷³ can be in harmony with the "broader themes"⁷⁴ that inspired the original Constitution, and which animate it still. For John Hart Ely, those "broader

61. *Id.* at 17.

62. *Id.* at 41 n.*.

63. *Id.* at 73.

64. *Id.* at 89 n.*.

65. *Id.* at 1.

66. *Id.* at 43.

67. *Id.* at 2.

68. *Id.*

69. *Id.* at 185 n.2.

70. *Id.* at 2.

71. See *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 350-51 (1969) (Black, J., dissenting).

72. J. ELY, *supra* note 4, at 88. Ely is also familiar with Aristotle's insight that people writing briefs for new theories must, if "the written law tells against our case . . . appeal to the universal law, and insist on its greater equity and justice." *Id.* at 49 n.*.

73. *Id.* at 181.

74. *Id.* at 88 n.*.

themes" are the *real* Constitution.⁷⁵ I respectfully question that approach. Ely does not distinguish, as he should, between rhetoric and reality, and he exaggerates the extent to which our noble aspirations have become law.

The Ely plan is submitted as a modern counterpart of the founding fathers' attempt to design a mechanism that corrects imbalances in the system of representation. Ely reinforces the original machinery by making the federal courts the sturdy balance wheel of democracy. The balance wheel is activated when legislative *process* deviates from the norm of equal concern and respect. This "theme" presupposes the existence of what Richard Hofstadter called a "general oneness of spirit" and the hope of a "comprehensive unity or harmony."⁷⁶ These notions were wistful in the 1780's; they are fatuous in the 1980's. The political arena is occupied by some extremist elements featuring nasty, mean-spirited people motivated by malice and hostility. In addition, there is tumultuous discord, and a no-holds-barred partisan competition among opposed selfish interest groups.

There is naiveté in the suggestion that the Supreme Court (plus hundreds of federal judges) is, or ever could be, a totally benign, apolitical, and consistent force that restores virtue to a power structure once it becomes corrupt. The courts, on occasion, can initiate reforms if they are prudent and clever. Timing counts. But Ely's zeal for compulsory judicial activism in the service of participational values takes too optimistic a view of the judicial system's capability. Politics usually involves the choice between lesser evils, and is governed by circumstance, not by homiletics.

Widespread faith in the efficacy of judicial review is a mixed blessing. It dilutes the importance of the representative's own obligation to his constituents and the Constitution, which leads to increased abuses of power, requiring more judicial intervention, and so on.⁷⁷ The prospect of a quick judicial fix also immunizes legislation in the short run from concerted political pressure applied by minority groups. If judicial review is perceived as a less costly, more efficient method of reform than an organized and vigorous political effort, the democratic process suffers in the long run. Thus, "we see the wisdom of Solon's remark, that no more good must be attempted than the nation can bear."⁷⁸

Faith in the efficacy of judicial review may be misguided. We do not know that judicial review, all things considered, results in a better quality of representation for minority groups, or anyone else. There is inadequate empirical evidence to support Ely's intuitive judgment.⁷⁹ Another drawback to Ely's approach is that it creates excessive dependence on the judiciary by the very minority groups his theory singles out for special protection. No minority

75. It must be desperation rather than necessity that impels some of us to prefer the Court's double standards and sliding scales to the legislature's double standards. For the empirical evidence of the Supreme Court's double standards see A. Amsterdam, 1 TUL. LAW. 2 (1980).

76. R. HOFSTADTER, *supra* note 7, at ix.

77. See R. MUELLER, PUBLIC CHOICE 17 (1979).

78. R. ELLIS, *supra* note 1, at 29 (quoting Thomas Jefferson).

79. See R. MUELLER, *supra* note 77, at 5.

group can count on the federal courts, except on occasion, to impose an egalitarian ideology that compensates for legislative insensitivity to the needs of the group. The Supreme Court will not abandon "prudential" strategies, because it cannot "neglect the task of sustaining political support for itself."⁸⁰

Professor Ely's confidence in judicial review is unusual. He believes that "the process by which the laws that govern society are made"⁸¹ should be subjected to intensified judicial review. Why? Again he reminds us, courts should be concerned with "participational values."⁸² Ely's awkward term, "participational values," confuses the concepts of representation and participation. They are quite different. For the question relevant to representation is not how many, but how well.

The quality of representation is not easy to evaluate. In most cases, judicial techniques are too crude and unsuitable to protect the interests of disfavored minority groups from a majority that needs an attitudinal adjustment. But Ely insists on a judicial "strategy" that enforces the "duty of equal concern and respect."⁸³ In view of the limited tools⁸⁴ the courts have at their disposal to enforce this alluring norm (for example, shifting the burden of proof to demonstrate a close fit between means and ends), Ely's strategy deems doctrinaire.

Doctrinaire solutions to social problems ultimately prove to be inadequate. What supplements the constitutional mechanism, as even the founding fathers began to realize, is the idea of a party system.⁸⁵ The two-party system in the United States has done much to tame the explosive power, sometimes ignited by courts, latent in the competition among racial, religious, and ethnic groups. Indeed, the two-party system effectively checks most intolerable abuses of power by the "ins," provides an outlet for opposition and a means for change, and yet it somehow arrives at a rough approximation of the public

80. Hazard, *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1, 15 (1978).

81. J. ELY, *supra* note 4, at 74.

82. *Id.* at 75 n.*.

83. *Id.* at 98.

84. Ely favors objective tests like the categorical rule announced in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which distinguishes between protected and unprotected categories of speech. Categorical rules are useful to avoid unpredictable results in particular cases and to facilitate the Supreme Court's supervision over the lower courts. See *Gertz v. Welch*, 418 U.S. 323, 343-44 (1974). These tests, however, are not useful instruments to evaluate the quality of representation. To the contrary, objective tests in the first amendment area are designed, in part, to avoid second-guessing the legislative judgment, and to reduce the number of confrontations between a court and a legislature. See G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW*, 1142-43 (10th ed. 1980).

In the first amendment and equal protection clause area, Professor Ely also favors use of the "less restrictive alternative" and "tight fit" approaches. J. ELY, *supra* note 4, at 105. These requirements, however, rarely shed light on the quality of representation. For example, when time, place, and manner restrictions are challenged on first amendment grounds, these techniques should be simply aids used by judges to decide legal disputes concerning the limits of legislative power. As facets of a case-by-case balancing approach, these techniques, while judicially manageable, do not necessarily reveal whether "the process is undeserving of trust," *id.* at 103, or whether "the political market is systematically malfunctioning." *Id.* No mechanical test (albeit one manipulatable by judges) is adequate to measure whether representatives are giving full and fair consideration to the subject matter of the lawmaking process.

85. R. HOFSTADTER, *supra* note 7, at viii.

interest. All this occurs as a natural, dynamic, and unquestionably democratic process. Political parties are movements of the people, not a mechanism imposed upon the people by the courts.

"[T]he political parties," one of their critics admits, "created [modern] democracy and . . . modern democracy is unthinkable save in terms of the parties."⁸⁶ Unfortunately, Ely's book discloses no realization on his part that the two-party system contributes significantly to democracy.⁸⁷ Idealists may regret the movement towards political parties devoid of equal concern and respect towards the opposition, but they should not ignore the party system in a discussion about democratic assumptions in the United States.

How the party system works is no mystery. The parties formulate "policies in order to win elections, rather than win elections in order to formulate policies."⁸⁸ Pragmatic and rational self-interest dictates a selection of candidates who support the positions most favored by the median voter.⁸⁹ Commentators often lose sight of the median voter in their discussions of majorities and minorities. But the median voter, by and large, has moderate rather than radical or illicit policy preferences. The party system, required by necessity to appeal to the median voter, is more likely to produce mediocre, noncontroversial representatives than tyrants. In short, the two-party system works to secure *adequate* representation, if not equal concern and respect for everyone. It is an imperfect,⁹⁰ but practical filtering process. Yet "representative government," says Herman Finer, "is party government."⁹¹

Ely has to demur and say he seeks to supplement the party system, not replace it. But the gap can be wide between the level of the federal judges' "wisdom" and the level of the median voters' knowledge and morality—too wide on some issues to maintain stability, unity, and respect for the judicial system. Should the judgment of the federal courts nevertheless *always* be substituted? The founding fathers, whom Ely emulates, wanted a mechanism that delayed momentous political changes until "wisdom prevails among the people."⁹² But Ely, in his modern rush to secure democratic or, more accurately, republican ideals, cannot wait that long.

A political party, arguably, is no better than the legislature in providing equal doses of concern and respect to groups who have failed to form effective coalitions. But the most imponderable theme in Ely's theory is the equal concern and respect norm. This notion, as stated by Ely, is untested in the courts.

86. E. SCHATTSCHNEIDER, *PARTY GOVERNMENT* 1 (1942).

87. See generally C. ROSSITER, *PARTIES AND POLITICS IN AMERICA* (1960). See also R. DAHL, *DEMOCRACY*, *supra* note 9, at 322-23; D. REISMAN, *INDIVIDUALISM RECONSIDERED* 17, 36 (1954).

88. A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 28 (1957).

89. R. MUELLER, *supra* note 77, at 101.

90. See R. HOFSTADTER, *supra* note 7, at 271; C. ROSSITER, *supra* note 87, at 45, 51, 173-86. Rossiter adds that most of what is wrong about parties is what is wrong about the American people. *Id.* at 173-74.

91. H. FINER, *THEORY AND PRACTICE OF MODERN GOVERNMENT* 237 (rev. ed. 1949). See also R. HOFSTADTER, *supra* note 7, at 6-7.

92. See H. PITKIN, *THE CONCEPT OF REPRESENTATION* 196 (1967).

What does it mean? The norm possibly requires no more than impartiality during the *process* of lawmaking. But even this requirement, modest as it seems, can impose on the courts a responsibility often greater than they can bear. Learned Hand wrote: "In theory any statute is always open to challenge upon the ground that it was not in truth the result of an impartial effort, but from the outset it was seen that any such inquiry was almost always practically impossible, and moreover it would be to the last degree 'political.'"⁹³

It is practically impossible, as Judge Hand said, for courts to determine, mechanically or otherwise, if representatives are truly impartial. First, there is the problem of identifying the groups entitled to equal concern and respect. Females presumably constitute a group that counts, but are married females to be distinguished from the unmarried? Are older females a group? Similarly, there are feminists and those satisfied with the status quo. Are they separate groups entitled to equal concern and respect?

A second problem is identification of the spokesmen of the groups. Does the American Medical Association speak for all physicians? Who speaks for homosexuals who, as Ely suggests, do not, by and large, speak out at all? Who speaks for women? Does Jesse Jackson or Andrew Young speak for the blacks? All blacks? If not all, which ones? How is the Supreme Court to know which voices not heeded by the legislature or political parties are representative of the group? Since it is practically impossible for any court to make this determination, how can the judge in the ordinary case confidently deny that a legislature does not give equal concern and respect to a particular group?

A third problem arises because the equal concern and respect norm presumably is violated when the legislature—contrary to the interests of myriad groups—does not consider bills submitted to legislative committees. Ely himself does not say specifically that courts should compel legislatures to consider all introduced bills, but his theory suggests that they should police even this step in the lawmaking process. Remember, Ely celebrates the Warren Court, which envisioned a role for itself that went beyond a negative restraining role. *That* Court claimed a share in the governing process that was more imposing and daring than any previous Court. It took the initiative and intervened in many, perhaps too many, major policy questions that affected the democratic process.

A fourth problem is that the federal courts' recognition of certain groups weakens the power of those, within the groups, struggling to become recognized. For example, if the courts recognize the American Medical Association as *the* representative spokesman for the medical profession, those physicians opposed to A.M.A. positions do not receive equal concern and respect.

Without belaboring the point further, it is far from clear that the courts can do a better job as a referee than the legislatures, which, together with the political parties, carry on a continuing dialogue with the individuals negotiating political change.

93. L. HAND, *supra* note 2, at 67.

The party system, far from ideal, sometimes (by focusing on the wrong issues, smothering others) blunts and minimizes sharp conflict at too high a cost.⁹⁴ A trade-off of rights for stability and unity is a delicate matter. But generally the American people know whom to punish when their parties and officials guess wrong about the central thrust and direction of the democracy. Free and frequent elections provide the means of punishment for those with a stake in the outcome. How can minority groups punish the federal courts "for unkept promises and wrong guesses?"⁹⁵

When representatives make wrong guesses, they pay the price. Most of them do not have the luxury of staying around long enough to reverse their erroneous judgments. Why, then, does anybody feel obligated to comply voluntarily with a judgment of the Supreme Court perceived to be erroneous? This is a jurisprudential question; the fact is, we do feel obligated. We do comply, and this acquiescence suggests that the Court is, after all, an appropriate organ to decide controversial political cases. But this acquiescence does not help support Ely's novel theory, for the Court, sometimes prudent,⁹⁶ and sometimes daring,⁹⁷ has always taken an entirely different path than the one he suggests.⁹⁸

Ely's theory, it turns out, is not a purely process-oriented approach. If it were, the public interest would be simply what interested the public. The point of a purely process-oriented theory is to prevent the democratic system from favoring any particular political philosophy—neither Herbert Spencer's nor J.S. Mill's. But Ely took care to make sure that the democratic system he wants reinforced will carry on the egalitarian movement of the Warren Court. In short, there is a tilt built into *his* process-based theory. Therefore, his description of our country's democratic assumptions should not be mistaken for an objective or balanced effort to reflect the realities of our system. The democratic system in the United States guarantees equal political rights only

94. See R. HOFSTADTER, *supra* note 7, at 271.

95. See C. ROSSITER, *supra* note 87, at 45.

96. Justice Jackson acknowledged that "the Court can never quite escape consciousness of its own infirmities, a psychology which may explain its apparent yielding to expediency." R. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 25 (1955).

97. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

98. The Supreme Court's own path (to continue the metaphor) is not always straight; it is more like a maze. Ely, to his credit, tries to establish a route for the Court that keeps it out of the substantive due process area. But within the uncharted area of participational values, the Court has awesome discretion to promulgate general rules governing the political process. Yet Ely does not trust the federal judges' discretion in freedom of speech cases, for he wants the courts to adhere strictly to a verbal formula that cannot be easily manipulated and which eliminates "flabby balancing." J. ELY, *supra* note 4, at 116, when dangerous speech is "a specific threat," *id.* at 111, to national security. Incidentally, one of the puzzling features of Ely's theory is his preference for speech values when campaign reform legislation is challenged. It would seem that the principle of equal participation loses some of its value when those with greater means are able to use their wealth to control debate and influence legislation. In such cases, the equal concern and respect norm would seem to be an insufficient counterweight. See J. RAWLS, *supra* note 32, at 224-27. Ely, however, urges "more stringent review," J. ELY, *supra* note 4, at 234 n.27, protective of first amendment values, in cases like *Buckley v. Valeo*, 424 U.S. 1 (1976). Thus, Ely's theory of judicial review has its own labyrinthian passages.

to the extent permitted by the political context. The Supreme Court, if not Ely, generally conforms to this reality.

Those who find Ely's political philosophy agreeable will welcome his reasoned elaboration of "a Constitution that needs filling in."⁹⁹ It is a powerfully argued, stimulating, and bold analysis of what the role of the federal courts could be. Others will never be convinced that a process-based constitutional theory is adequate.¹⁰⁰ Professor Cox, for example, asks, "[w]here does the theory stop?"¹⁰¹ Has Ely reconciled judicial review with popular sovereignty? I remain doubtful and, frankly, anxious. Despite a virtuoso performance that enlivens and enriches an important debate, Ely has not answered Richard Spaight's question, nor Learned Hand's.¹⁰²

99. J. ELY, *supra* note 4, at 73.

100. See Tribe, *supra* note 4; see also Tushnet, *supra* note 54.

101. Cox, Book Review, 94 HARV. L. REV. 700, 712 (1981).

102. See text accompanying notes 1-2 *supra*. The words of the Court accepted by "we the people" as the authoritative last word have made the Court our authority. See C. FRIEDRICH, TRADITION AND AUTHORITY (1972). The words of Professor Ely perhaps reinforce the Court's authority. But as Hobbes wrote: "[w]ords are wise mens counters, they do but reckon by them: but they are the money of fooles, that value them by the authority of an *Aristotle*, a *Cicero*, or a *Thomas*, or any other Doctor whatsoever, if but a man." T. HOBBS, LEVIATHAN 27 (new Am. ed. 1950).

Despite my criticism, I realize that Ely's book is now *the* standard against which subsequent commentary on the Supreme Court's role is to be judged.