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John Ely: The Harvard Years

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expectations of succeeding decades, seek out divergences we now assume to have been always present. It may be useful, for purposes of history it is still too soon to write, to suspend those expectations. We rightly celebrate John Ely and his work here. We may also want to recall the uncommon bustle of the place and time within which much of that work was done.

*Henry Paul Monaghan**

John Ely: The Harvard Years

John Ely's life ended too soon, on October 25, a few weeks before his sixty-fifth birthday. Six months earlier, Yale had awarded him an honorary Doctor of Laws. The citation accompanying the award stated, "Your work set the standard for constitutional scholarship for our generation." It is, I believe, particularly appropriate that this *Law Review* dedicate an issue to John's memory. John taught at Harvard Law School from 1973 to 1982. During that time he produced his signature work, *Democracy and Distrust*,[1] and the articles most closely associated with his name, several of which appeared in this *Review*.

I met John shortly after his arrival at Harvard Law School, at a forum on *Roe v. Wade*.[2] We argued that *Roe* was an abuse of judicial power, not because the decision conflicted with our ideas of progress but because nothing in the text, structure, or history of the Constitution suggested that the abortion issue fell within the Court's domain. Moreover, no metric existed by which the Court could resolve abortion-related issues in a principled way. (As John later wrote, *Roe* "is *not* constitutional law and gives almost no sense of an obligation to try to be."[3]) From that point on we saw a good deal of one another.

I lack the literary skills of a biographer necessary adequately to describe John's personality. John was quite proud of his considerable academic achievements, but he wore the marks of success quietly. He was private and wholly unassuming in manner. Endowed with a gentle and playful wit, he greatly enjoyed good humor. In his judgments,

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[1] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

[2] 410 U.S. 113 (1973).

[3] John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973).

John was eminently fair and dispassionate — I never heard him characterize anyone or any work in pejorative or dismissive terms. John took great pleasure in and was intensely loyal to his friends, and greatly valued the lifelong friendships he made while at Harvard. John's nonlegal interests were wide-ranging, extending from philosophy, literature, music, and ballet, to sports and scuba diving. Finally, John had his faults, of course. As his friends well know, on his very best days John was not long on patience.

John was a particularly gifted writer, and his prose sparkled with his gentle wit. One reason that *Democracy and Distrust* is so successful is that its important points are made with both wit and eloquence. Consistent with his character, however, that wit was never employed at anybody else's expense. John's years at Harvard were productive ones. Several of his articles were incorporated into *Democracy and Distrust*. In addition, this *Review* published two other articles of enduring importance. One dealt with an important methodological question of First Amendment jurisprudence: how should the Court treat legislation not directed at protected speech but that nonetheless includes some speech within the general statutory prohibition?[4] In such situations, John argued that a meaningful balancing test should be employed. John also wrote my favorite article, an outstanding examination of the "*Erie* problem." While the topic is too complex to pursue in detail here, John challenged the embedded Harvard Law School orthodoxy as mistaken in important aspects.[5]

John's most significant work was, of course, *Democracy and Distrust*, published in 1980. This is the single most cited work on constitutional law in the last century.[6] It is and will remain for a very long time to come a rite of passage for all those who hope to do serious work in the field of constitutional law.

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[4] John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975) (assessing the famous draft card desecration case, *United States v. O'Brien*, 391 U.S. 367 (1968)).

[5] John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693 (1974). The entrenched wisdom was that *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), required the federal courts to apply state substantive law whenever state law was applicable *ex proprio vigore*. How to define "substantive" became the bone of contention. *Compare* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) (Frankfurter, J.) (defining state rules as substantive when they "determine the outcome of litigation"), *with* HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 659–60, 678 (1953) (articulating the orthodox view that state rules are substantive when they affect "primary private activity"). Chief Justice Warren's opinion in *Hanna v. Plumer*, 380 U.S. 460 (1965), rejected both Frankfurter's and Hart's framework when the validity of a federal statute or rule was involved. John was Warren's clerk at the time. Further, your deponent sayeth not.

[6] Adam Liptak, *John Hart Ely, a Constitutional Scholar, Is Dead at 64*, N.Y. TIMES, Oct. 27, 2003, at B7.

Democracy and Distrust analyzes American constitutional law through the lens of democratic political theory, not history-based originalism. Essentially, *Democracy and Distrust* is two books. Book One (Chapter 3) is a sustained attack on fundamental rights theory — that is, upon judicial and academic efforts to fashion fundamental interests that are not grounded in the constitutional text, history, or structure. John's attack on *Roe v. Wade* was the precursor to his *Foreword* in this *Review* entitled *On Discovering Fundamental Values*, which in turn constituted his argument in *Democracy and Distrust*. His fundamental point was that, in their open-ended efforts to discover non-textually based fundamental values somewhere "out there"[7] (for example, in reason, natural law, consensus, or tradition), judges embark upon little more than a voyage of self-discovery, "whether or not [they are] fully aware of it."[8] This line of criticism drew inspiration from John's strong grounding in British empirical philosophy; indeed, Chapter 3 reads as though it were penned by David Hume.

John's attack on fundamental rights theory is, I believe, the finest piece he ever wrote. But that part of *Democracy and Distrust* has been overshadowed by the remainder of the book. *Democracy and Distrust* defended an important affirmative judicial role in constitutional adjudication: courts, he argued, had a legitimate and important role in reinforcing the Constitution's democratic aspects in order to ensure effective access and representation to minorities previously excluded from effective participation in the political process. John developed this "representation-reinforcing" conception of judicial review by examining impermissible barriers to voting and political speech. His final chapter, *Facilitating the Representation of Minorities*, extended his analysis into the legislative process itself, the area of suspect classifications. There, he tried to develop the full implications of a principle that classifications discriminating against minorities justifiably bore a heavy burden of justification. That analysis, of course, is widely understood as the classic exposition of the *Carolene Products* footnote.[9]

The Harvard years were professionally happy ones for John. But he had a restless streak. While at Harvard, he took a year's leave to serve as general counsel to the Department of Transportation. After publishing *Democracy and Distrust*, John felt the need for a new challenge. Two choices were available: dean of Stanford Law School, or (temporarily, of course) a detective in a California police department. John took the former opportunity and served as Stanford's dean from

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[7] ELY, *supra* note 1, at 48.

[8] *Id.* at 44.

[9] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

1982 to 1987. In 1996, he moved to the University of Miami, where he served as Hausler Professor of Law. There, for several reasons, his restlessness ceased.

While at Stanford, John developed a strong interest in war-power issues, and he wrote extensively on that topic.[10] He decried both presidential warmaking power and Congress's refusal to discharge its warmaking responsibilities. At Miami, John expanded his earlier interest in voting, and he wrote several essays on that topic.[11] Continuing from an article he wrote at Harvard that defended race-based affirmative action programs,[12] John insisted that affirmative action programs could be justified only on the premise that the political process itself was free of racial gerrymandering.[13]

John's early death ended a career, but his intellectual legacy will go on. What will not go on, save in memories, is the warmth and pleasure he brought to the lives of his family and friends.

*Richard D. Parker**

John, Fred, and Ginger

His office was at the opposite end of the hall from mine. I was new. And I didn't know him well. But we both worked nights. Often, we were the only ones on the hall. We left our doors open. John tended to talk to himself — loudly. Usually, mumbling and muttering. Sometimes, outbursts. One night, what I heard made me get up and go down there. He had proclaimed — proclaimed ecstatically: "Yes, Yes, Yes, Yes, Yes." I said something to him about Molly Bloom. He laughed. (His laugh was a guffaw from deep inside, an authentic happiness.) He was writing.

John was a writer. Of course, he was a lot more. In fact, I can see the grumpy look with which he might react to any idea that he was

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[10] *See, e.g.*, JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993).

[11] *See, e.g.*, John Hart Ely, *Standing To Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576 (1997).

[12] John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

[13] John Hart Ely, *Confounded by* Cromartie*: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U. MIAMI L. REV. 489 (2002). This was John's last article, and the writing is vintage Ely: elegant, witty, and incisive.

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