

Columbia Law School

## Scholarship Archive

---

Faculty Scholarship

Faculty Publications

---

1980

### Democracy and Distrust: A Theory of Judicial Review

Gerard E. Lynch

*Columbia Law School*, [glynch@law.columbia.edu](mailto:glynch@law.columbia.edu)

Follow this and additional works at: [https://scholarship.law.columbia.edu/faculty\\_scholarship](https://scholarship.law.columbia.edu/faculty_scholarship)



Part of the [Law Commons](#)

---

#### Recommended Citation

Gerard E. Lynch, *Democracy and Distrust: A Theory of Judicial Review*, 80 COLUM. L. REV. 857 (1980).

Available at: [https://scholarship.law.columbia.edu/faculty\\_scholarship/2121](https://scholarship.law.columbia.edu/faculty_scholarship/2121)

This Book Review is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact [cls2184@columbia.edu](mailto:cls2184@columbia.edu).

# BOOKS

**DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW.** By John Hart Ely. Cambridge: Harvard University Press, 1980. Pp. 268. \$15.00.

*Reviewed by Gerard E. Lynch \**

John Hart Ely's *Democracy and Distrust* is an ambitious attempt to create a new theory of judicial review, breaking away from both "interpretivism" and "noninterpretivism"—a division Professor Ely regards as a "false dichotomy" (p. vii). The book is brilliant and provocative, so much so that one fears less that its faults will be obscured—there is little danger that polemic critics will fail to pounce on them—than that the flash of Professor Ely's reasoning and the controversy it generates will distract us from the genuine importance of the insight that powers his analysis.

## I

Professor Ely wants to reject both sides of what most writers have seen as the fundamental division between theories of judicial review that are interpretivist and ones that are noninterpretivist—"the former indicating that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution, the latter the contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document" (p. 1). As Professor Ely rightly recognizes, each theory "racks up rhetorical points by exposing the unacceptability of the only alternative" (p. vii). In this war of destruction, Professor Ely suggests that both sides are correct, for both theories are indeed unacceptable.

The interpretivists are Professor Ely's first target. However unfashionable in the academy,<sup>1</sup> interpretivism remains a kind of conventional wisdom; the courts, for example, inevitably purport, except in the very last resort, to fit their interventions into an interpretivist mold. Professor Ely suggests two reasons for "the allure of interpretivism":<sup>2</sup> first, that doctrine "better fits our usual conceptions of what law is and the way it works" (p. 3), and second, its opposite faces "obvious difficulties . . . in trying to reconcile itself with the underlying democratic theory of our government" (p. 4).

---

\* Assistant Professor of Law, Columbia University. B.A. 1972, J.D. 1975, Columbia University.

1. The beleaguered Raoul Berger is perhaps its sole prominent exponent. See, e.g., R. Berger, *Government by Judiciary* (1977).

2. The phrase is the title of Ely's opening chapter, and derives from that of an earlier article, in which he develops some of the reasoning of this portion of the book. See Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 *Ind. L.J.* 399 (1978).

But if interpretivism has its allure, it also has serious problems. Academic critics frequently argue the case against a narrow concentration on the intentions of the framers of constitutional provisions by pointing to the (to them) unacceptable consequences of such a position: the framers do not always seem to have intended results that most of us find of vital importance.<sup>3</sup> Professor Ely's attack on interpretivism is especially devastating because it proceeds largely on the interpretivists' own premises. If "incompatibility with democratic theory" is a problem for the noninterpretivist, it is not much less a problem for the most faithful strict constructionist (pp. 11-12), for the most frequently litigated constitutional provisions, "to the extent that they ever represented the 'voice of the people[.],' represent the voice of people who have been dead for a century or two" (p. 11; see also p. vii). If democracy requires that a majority of any group be empowered to set policy, it is constitutionalism itself, not any particular variant of it, that is the problem.

But Professor Ely's longer and even more compelling argument against interpretivism is his demonstration that several constitutional provisions plainly direct the importation into the Constitution of values not found in the text or its legislative history.<sup>4</sup> The fourteenth amendment—most particularly, the privileges or immunities clause—and the ninth amendment constitute straightforward "delegation[s] to future constitutional decision-makers to protect certain rights that the document neither lists, at least not exhaustively, nor even in any specific way gives directions for finding" (p. 28).<sup>5</sup> One can ignore these provisions—indeed, the dominant constitutional tradition has ignored them—but, as Ely persuasively demonstrates, to do so one must be faithless to the idea of interpretivism.

But if the Constitution itself directs its interpreters to go beyond mere interpretation, where are they to look for the "privileges or immunities" of citizens, or the unenumerated rights "retained by the people"? Professor Ely rejects "[t]he prevailing academic line . . . that the Supreme Court should give content to the Constitution's open-ended provisions by identifying and enforcing upon the political branches those values that are, by one formula or another, truly important or fundamental" (p. 43). His argument here is rich and complex in presentation, but its essence is simple: few would find acceptable a theory of adjudication which held that "judges should use their own values to give content to the Constitution's open texture" (p. 45),<sup>6</sup>

3. See, e.g., Grey, *Do We Have an Unwritten Constitution?*, 27 *Stan. L. Rev.* 703, 710-12 (1975).

4. Such importation is to be distinguished from the mere elaboration of concepts that are specified in the text, even if the text and its history give little guidance about their precise contours, as for example the prohibition of "cruel and unusual punishments" in the eighth amendment. The interpretation of such clauses poses some problems for the interpretivist, but does not leave the courts free to invent new anti-majoritarian rights (pp. 13-14).

5. The cited quotation refers to the privileges or immunities clause, but Ely takes essentially the same position with respect to the ninth amendment.

6. Indeed, Ely argues, following Linde, that "such a 'realist' theory of adjudication is not a theory of adjudication at all, in that it does not tell us *which* values should be imposed" (p. 44).

since such a theory would be profoundly undemocratic. But, as Ely wittily though thoughtfully proceeds to demonstrate, all other potential sources of fundamental values—Professor Ely considers in turn natural law, neutral principles, reason, tradition, consensus, and predictions of the direction of evolving values—when used by courts as bases for overturning legislative judgments, lack sufficient agreed-upon content to amount to much more than masks for precisely such imposition of the judges' policy preferences.

Having thus demolished both interpretivism and noninterpretivism, Ely proceeds to erect his own theory of judicial review. Heavily influenced by Justice Stone's *Carolene Products* footnote,<sup>7</sup> Professor Ely suggests that in interpreting the open-ended provisions of the Constitution courts should not look for substantive values to elevate to a constitutional stature, but rather should restrict themselves to pursuing "procedural" or "participational" goals that open up and make effective the process of representative government, and ensure the fair representation of minority interests. In this way, constitutional interpretation can be freed from the narrowness and self-contradictions of "clause-bound" interpretivism, without opening the door to the imposition of substantive outcomes by unelected officials. Judicial review becomes an adjunct, rather than an adversary, of the democratic process.

## II

It is worth asking, I think, where these limitations on judicial review come from. Professor Ely states three arguments in support of "a participation-oriented, representation-reinforcing approach to judicial review" (p. 87). Close analysis of these arguments suggests to me, however, that Professor Ely has not really escaped the potholes he has found the interpretivists and noninterpretivists driving into.

The first argument, presented at greatest length, is that the Constitution "is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small) and, on the other, with what might capaciously be designated process writ large—with ensuring broad participation in the processes and distributions of government" (p. 87). As Professor Ely recognizes, this is essentially an interpretivist argument,<sup>8</sup> proceeding by the maxim *ejusdem generis*: the framers must have meant the content of an open-ended catchall provision like the ninth amendment to refer to additional rights somehow analogous to those enumerated.

Surely Professor Ely is correct that the Constitution as a whole is principally concerned with process and structure. That, of course, is to be

---

7. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938). See also L. Lusky, *By What Right?* (1975).

8. Pp. 87-88. Professor Ely correctly points out that the label is not particularly significant. The nature of the argument is worth noting, however, in order to decide what standards to apply in judging it.

expected; it is, after all, a Constitution we are expounding, and constitutions are primarily concerned with creating institutions—a business of structure and process. But the ninth amendment, the principal open-ended provision that Professor Ely wants to tame, is not a part of the original body of the Constitution. Instead, it is part of a Bill of Rights that at least some of the framers thought was not appropriately included in a constitutional document precisely because it *does* attempt to insulate substantive values from majoritarian decision in exactly the way Professor Ely finds objectionable.<sup>9</sup> If we are playing by interpretivist rules, the other “rights . . . retained by the people” protected by the ninth amendment must be of the same genus as those enumerated in the first eight amendments.

Recognizing this, Professor Ely proceeds to examine the Bill of Rights, with a view to establishing that there, too, “participational” and procedural concerns predominate. This portion of the book contains some of the most brilliant law-professing I have seen in a while. Professor Ely is remarkably adept at finding procedural values lurking behind apparently substantive values, and for that matter at identifying substantive strands in what might have seemed primarily procedural protections. The result of these intellectual fireworks is a sense that even in the Bill of Rights, the enshrinement of substantive value choices is rarer than we might have thought.

But this effect is created, I fear, as much by the smoke as by the light generated by Ely’s flares. A more pedestrian account suggests that the framers of the Bill of Rights made no sharp distinction between the designation of protected substantive entitlements and the protection of the democratic political process, and at the very least had no aversion to including the former in their document. The first amendment, for example, mingles in the same sentence the protection of religious freedom (which Professor Ely concedes was for the framers “an important substantive value they wanted to put significantly beyond the reach of at least the federal legislature” (p. 94)) and the rights of assembly and petition (in Ely’s terms, procedural values)—with the freedoms of speech and press, which can be seen in either light, poised neatly between.<sup>10</sup> Is the second amendment a protection of a sub-

---

9. See, e.g., Federalist No. 84, quoted with approval at p. 93.

10. Professor Ely’s assessment of the free-expression provisions of the first amendment with respect to his dichotomy between participational and substantive values is uncharacteristically awkward. He states without qualification that these provisions “were centrally intended to help make our governmental processes work” (pp. 93-94). Nevertheless, his argument is apparently not based on the legislative history of the amendment, for he concedes that “other functions” (presumably including a concern for the substantive protection of individual autonomy, see Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. Pa. L. Rev. 45 (1974)) “must have played a role” in their inclusion, and that the amendment’s protection cannot be limited to political speech. Nor can the classification of freedom of expression unambiguously on the participational side of the great divide rest on Ely’s sneer at the “highly elitist” “view that free expression per se, without regard to what it means to the process of government, is our preeminent right” (p. 94). I agree that this is a view that comes more naturally to academics than to others, but the point isn’t that self-expression is preeminent among our rights, only that it might well have appeared important enough to be enumerated, among such other controversial values as religion, gun-toting, and one’s-home-as-one’s-castle, as a substantive right.

stantive right "to keep and bear arms" or a structural provision preserving state militias? I'd like to agree with Professor Ely that it's the latter, but if the object of the game is to figure out what sort of document the framers thought the Bill of Rights was, I would agree more with his concession that "the point is debatable" (p. 95). The third and fourth amendments seem primarily concerned with substantive rights of privacy, personal security, and property. Professor Ely concedes the third (after hinting at a partial separation of powers rationale), but incredibly finds the fourth "another harbinger of the Equal Protection Clause, concerned with avoiding indefensible inequities in treatment" (p. 97). Well, in a way, perhaps; let's just say, with Professor Ely, that this perspective "obviously is only one of several" (id.). To finish the catalogue more briefly, I remain unconvinced by Professor Ely's ingenious arguments that the fifth amendment's prohibition of the taking of property without just compensation is anything other than a (limited) protection of the substantive value of private property, or that the eighth is not in essence a prohibition of substantive abuses (pp. 97-98). The rest of the fifth, sixth and seventh amendments, as Professor Ely agrees, are primarily concerned with fair procedure, with some substantive components (pp. 95-96).

On my scorecard, then, we have three amendments, the third, fourth and eighth, that are primarily concerned with protecting substantive rights; one, the seventh, that is purely procedural, plus two, the fifth and sixth, that contain a mixture of mostly procedural requirements with a few protections of substantive values; and two draws—the first, because its substantive and participational values are so exactly balanced, and the second, because of the difficulty of deciding what it was intended to do. But the point, of course, is not to be decided by counting heads. What does emerge is that if we are to determine the content of the ninth amendment by the rule of *ejusdem generis*, we can only conclude that the framers of the Bill of Rights saw values of both a substantive and a participational nature (as Professor Ely uses the terms) as of the same kind, and that we therefore cannot limit ourselves, in giving content to that amendment, to rights of the latter sort.<sup>11</sup>

---

So Professor Ely's conclusion that, for purposes of exploring "what sort of document our forebears thought they were putting together," the free-expression clauses rate as participational is supported only by the "highly informative" linkage of speech and press with assembly and petition—a weak prop, given the equally close linkage of speech and press with the admittedly substantive protection of religion.

11. Professor Ely might well reply that I have unfairly limited his argument. Although at times he explicitly identifies this branch of his argument as "an exploration of what sort of document our forebears thought they were putting together" (p. 94), at other times his argument appears much less narrowly interpretivist. But at those points he appears vulnerable to his own attacks on noninterpretivist reasoning. For example, Professor Ely applies his *ejusdem generis* analysis not only to the document of which the principal text to be explained is a part (the Bill of Rights), but to the entire Constitution, including subsequent amendments up to and including ERA, and draws support from the claim that of those constitutional provisions he admits embody substantive policy choices, most have been insignificant, disastrous, or repealed. I wouldn't say these approaches are unpersuasive, but they appear infected with exactly the vices Professor Ely elsewhere sees as insuperable. The crux of these arguments is not the light they shed on what the authors of the ninth amend-

Professor Ely's analysis of the content of the Constitution contains not only skillful worrying of particular provisions, but also a useful reminder of the extent to which our constitutional scheme does rely on procedural strategies to safeguard liberty. It does not, however, in the end provide a convincing interpretivist demonstration that the protection of substantive values from the majoritarian process is not also a significant aspect of that scheme and a legitimate basis for judicial elucidation of open-ended constitutional provisions.

Professor Ely's second argument in favor of his proposed limitations on judicial review is the most important, and constitutes the major message of the book. The "representation-reinforcing orientation" he urges on the courts, "unlike an approach geared to the judicial imposition of 'fundamental values,' . . . is not inconsistent with, but on the contrary is entirely supportive of, the American system of representative democracy" (pp. 101-02). Of course, Professor Ely is correct that the kind of review he suggests is less intrusive into the representative political process than a theory that permits the courts to constitutionalize substantive value choices,<sup>12</sup> and that the dominant constitutional tradition in the United States is democratic and majoritarian.<sup>13</sup> I do have two problems with this argument, however.

The first is that Professor Ely seems to think that the question of an institution's consistency with democratic principles can be answered yes or no, rather than more or less. No one can question that the elected branches of government are more responsible to popular majorities than unelected judges. But both our formal political institutions and our actual structure of power abound in significant checks on majoritarian power. These checks are hardly as trivial as they seem to Professor Ely. The representational nature of our democracy is not just a concession to the impracticality of large-scale town-meetings (p. 4), but a significant moderation of majoritarian control that fosters the influence of political elites and activist minorities. The separation of powers between executive and legislature makes our system considerably less responsive to popular majorities than a parliamen-

---

ment meant, but rather what they say about the nature of our constitutional tradition. Granted, this inquiry is not quite as elusive as the attempt to identify fundamental values in our *extraconstitutional* tradition, but the problems are very similar. Perhaps the protection of substantive values is not the "dominant theme of our constitutional document" (p. 101), but all of Professor Ely's formidable interpretive skill can't make it go away altogether. In that case, what warrant can there be for selecting one strand of a complex tradition and reading it out of the document? I would have to conclude that "[t]here does not exist an unambiguous American tradition on the question" whether protection of substantive values does or doesn't belong in a constitution (pp. 62, 99).

Moreover, as Professor Ely has warned us to expect, the appeal to *extraconstitutional* tradition can be selectively invoked: if the judicially-accomplished "repeal" of the second amendment or the contracts clause is relevant in determining the genius of our constitutional tradition (p. 100), why isn't the judicially accomplished creation of economic or "privacy" rights? Aren't both equally parts of our constitutional heritage?

12. Professor Ely's theory by no means calls for a supine Supreme Court, however. He finds essentially all of the work of the Warren Court, for example, consistent with his principles (pp. 73-75).

13. "We have as a society from the beginning, and now almost instinctively, accepted the notion that a representative democracy must be our form of government" (p. 5).

tary system. Major powers are assigned to a Senate not elected according to population,<sup>14</sup> increasing the influence of certain regions. Constitutionalism, even with review far more narrowly constrained than Professor Ely would permit, puts certain questions beyond the wishes of a simple majority. Permitting judges to reject political choices they find inconsistent with their views of the nation's basic values may be just another part of a system that on the whole does not require instant effectuation of the will of today's majority, but that rather commonly requires major decisions to be based on broader, more lasting consensus, occasionally with formal or de facto veto powers lodged in particular social or regional groups.

There isn't space here to debate the significance of these or other limits on majoritarianism that are built into our political system, or the related question of just how unresponsive to popular sentiments the courts really are.<sup>15</sup> I wouldn't for a moment argue that Professor Ely is wrong in concluding that majoritarian democracy is at the core of our political institutions (p. 7), and that the courts are further from that core than the elected branches of government. What I would say is that the thesis that judges should have a role in substantive policy choices is not so alien to the spirit of American institutions as to be illegitimate.

My second problem with Professor Ely's argument concerns the type of argument it is. Professor Ely is in effect arguing that substantive judicial review is illegitimate because it is inconsistent with what he sees as the dominant theme in the American political tradition. But that argument is vulnerable to the same criticisms Professor Ely has made of attempts to find substantive values in that tradition.<sup>16</sup> The American political tradition is a rich one, and contains many contradictory elements. As I have argued above, without questioning that majoritarianism is a dominant element in that tradition, other elements are present as well, many of which directly limit the majoritarian tendency.

My point, in short, is this: Professor Ely complains that the noninterpretivist who would have judges give content to open-ended constitutional provisions by deciding what political decisions are contrary to our traditions is essentially deceiving herself—the judge will in the end be applying her own values to thwart the popular will. But that is just what Mr. Justice Ely himself is doing. Reading such provisions in light of *his* view of our traditions, he would override majoritarian decisions that conflict with *his* preferred portion of that tradition, that which favors broad political participation and relatively few substantive constraints on majority choices.

Professor Ely's third argument in favor of "representation-reinforcing" judicial review only makes this point clearer. I would agree with him that

---

14. Indeed, the power to block treaties is given to a *minority* of the Senate.

15. Still less is there space to debate the extent to which political institutions, elective or not, are influenced or dominated by social or economic elites. Nor, for that matter, are law professors particularly well equipped to debate that issue.

16. Pp. 60-63. See also note 11 *supra*.

judges, as outsiders to the political system, are better able than legislators to decide when legislators have perverted the process of popular representation. But this argument implies that a judge applying an open-textured constitutional provision should give it content by asking what role the courts can most effectively play in a representative democracy. In that case, what ultimately divides Professor Ely from the judge who would embark on the admittedly personal and fallible search for basic values that the legislature should not be allowed to tamper with is not a question of legitimacy but of practical political philosophy. Professor Ely's reminder to judges that they are not necessarily in closer harmony than elected officials with popular values, or with what popular values would be if people would only stop to think, is extremely important. But I am not convinced that the presence of an institution composed of politically selected but tenured members that is officially commissioned, in a way the political branches of government are not, to compare political decisions with a rationalized account of the longer-range value commitments our political tradition has made is not on balance a valuable addition to a system of representative democracy.

### III

I have concentrated on Professor Ely's arguments for his "participation-oriented, representation-reinforcing approach to judicial review" (p. 87) because I think they reveal his failure to get beyond the dichotomy between interpretivist and noninterpretivist approaches. His essentially interpretivist argument that "the sort of document our forbears thought they were writing" dictates that open-ended provisions of the Constitution should be read in accordance with his scheme fails because if the intention of the authors is to be our guide, at least one such provision, the ninth amendment, is embedded in that part of the Constitution that more than any other embodies substantive value choices. On the other hand, his attempt to read those provisions in light of what he sees as the genius of American democracy suffers from precisely the weaknesses he identifies in other non-interpretivist efforts to find other sorts of values in our political traditions: the tradition is too rich and contradictory to support a confident assertion that one or another of any complex set of values, including Professor Ely's participational values as well as various substantive ones, is mandated or forbidden sufficiently plainly to justify overriding political decisions. In the end, Professor Ely is reduced to arguing, just as he predicts the noninterpretivist would be, that judges should adopt his approach because it's a good one—that is, because it represents his own values and ought to represent theirs.<sup>17</sup>

---

17. The same problems exist for Professor Ely when he applies his approach to particular constitutional problems. Even if we grant that judicial review should be "participation-oriented [and] representation-reinforcing," this succeeds only in isolating what sorts of issues are appropriate for constitutional adjudication (or more precisely, what sorts of issues are not). But when the time comes to apply that approach to, say, the problem of legislative delegation

But the contradiction between Professor Ely's strictures on noninterpretivist thinking and his decided noninterpretivist practice hardly robs his book of value. As between what Ely says and what he does, I much prefer what he does—which is very impressive indeed, and seems to me to represent a most productive style of constitutional interpretation.

Having determined that certain constitutional provisions "cannot intelligibly be given content solely on the basis of their language and surrounding legislative history, indeed that certain of them seem on their face to call for an injection of content from some source beyond the provision" (p. 12), Professor Ely proceeds according to the method developed by Ronald Dworkin for his ideal judge Hercules: he attempts to look for those values in a theory derived from "the constitutional scheme as a whole."<sup>18</sup> Professor Ely suggests that his theory should be derived "from the general themes of the entire constitutional document and not from some source entirely beyond its four corners," (p. 12) but that turns out to be impractical. At numerous points in his argument, Professor Ely resorts to extraconstitutional sources of law, including judicial interpretation and state constitutional developments.<sup>19</sup> In effect, Professor Ely is deriving his set of values from our entire constitutional tradition—attempting to create a scheme of judicial review premised on the genius of American political institutions, as he understands it.

Now, Professor Ely is exactly right that this is an enterprise that will be heavily influenced by the judge's own values. Whether we are looking for substantive or participational values, or trying to decide whether one or the other type is preferable, the complexity of the system ensures that some elements will be inconsistent with any theory, and will have to be explained away or disregarded as aberrations. What elements of the tradition seem most important will be affected by the judge's views of what constitutional theory is most wise and just (and indeed Professor Ely, like most judges and scholars, winds up finding that the scheme inherent in our constitutional order is the one he finds most attractive).<sup>20</sup> The fact that the sources of values in

---

(pp. 131-34), the question of how much delegation is consistent with the general participationalist principle that decision-makers should be politically responsible (which can be deduced from the constitutional document) is wide open. Other than the judge's own reasoned preferences and what can be gleaned from judicial and political tradition, I don't see what sources of principle are available.

18. R. Dworkin, *Taking Rights Seriously* 106 (1977). Compare *id.* with Ely at 12.

19. For example, Professor Ely minimizes the importance of the indirect election of the President by noting the early evolution in the states toward popular selection of electors (p. 6); relies on judicial "repeal" of the second amendment and the contracts clause to limit their importance as counter-examples to his thesis that the Constitution does not protect substantive entitlements (p. 100); and tries to reduce the significance of the religion clauses on the same point by noting the types of cases that have in fact been brought in recent years (*id.*).

20. As Professor Dworkin points out, the constitutional theory any judge will develop would be more or less different from the theory that a different judge would develop, because a constitutional theory requires judgments about complex issues of institutional fit, as well as judgments about political and moral philosophy . . . . So the impact of [the judge's] own judgments will be pervasive, even though some of these will be controversial. But they will not enter his calculations in such a way that different parts of the theory he constructs can be attributed to his independent convictions rather than to the body of law that he must justify.

R. Dworkin, *supra* note 18, at 117-18.

which the judge must search for her theory—tradition, the essence of the constitutional document as a whole, reason, etc.—are incapable of totally filtering out the judge's own perceptions of right bothers Professor Ely, because his preferred constitutional theory, in my view, pays too little heed to the restraints our system puts on majoritarianism. Valuing these more highly, I find a judicial role in enunciating fundamental substantive values to give content to open-ended constitutional provisions consistent with the Constitution, and not undesirable.

In any event, I would say that the difference between the kinds of anti-majoritarian interventions Professor Ely would permit and those I would find legitimate is a matter of degree as much as of quality. And in that respect I find Professor Ely's contribution to constitutional theory enormously valuable. While I do not think that he has succeeded in elaborating a completely new approach to constitutional interpretation, or in demonstrating that his is the only legitimate theory of judicial review, his insistence on the importance of the democratic process, and his frequent reminders that the theories of judicial review favored by many academics further the interests of the social class to which they belong with suspicious regularity,<sup>21</sup> are useful correctives to the current conventional wisdom. And his analyses of many particular constitutional issues, especially in the areas of free expression and equal protection, are remarkably perceptive.<sup>22</sup>

Overall, then, though I have concentrated mostly on my disagreements with Professor Ely's approach, I would recommend *Democracy and Distrust* as a thoughtful, well-written,<sup>23</sup> and provocative book that makes a significant contribution to constitutional theory. I hope it is widely read.

---

21. Indeed, one of the most troubling aspects of judicial review in any form is that the very mode of reasoned discourse on which it relies, and which constitutes its distinctive contribution to the political process, is closely associated with what some would view as a powerful segment of society. See A. Gouldner, *The Future of Intellectuals and the Rise of the New Class* (1980). (Admittedly, Professor Gouldner sees this association more hopefully than I, but see G. Konrad & I. Szelenyi, *The Intellectuals on the Road to Class Power* (1980).)

22. I do find Professor Ely's analysis of women's rights somewhat perplexing. Because women in the past were formally blocked from access to the political process, he would have the courts strike down as violations of equal protection any statute that dates from that past era. But because women are free today to participate in politics, he would permit present and future legislatures to reinstitute such laws, since they would then be the product of a fair process, even if many of us would regard them as unfair in substance, since the latter issue is not of constitutional importance (pp. 164-70). While I agree with Professor Ely that in practice it is likely that most official gender discrimination would be eliminated by this approach, this analysis seems to me to put too heavy an emphasis on formal access to power, and too little on the need to reject stereotypes that, even if they were shared by a majority of women, as a substantive matter unfairly restrict the freedom of those men and women who do not share them. But that is just an example of an area in which I find substantive review desirable, and I quite understand that Professor Ely does not. What perplexes me is that Professor Ely apparently supports the Equal Rights Amendment (p. 99), which I would have thought is clearly intended to prohibit even future legislatures from adopting non-gender-neutral laws, with only the narrowest of exceptions. If the same result should not be reached by interpretation of the equal protection clause, because it is not a matter of fair procedure, then isn't the ERA an example of the attempt to "freeze substantive values" that Professor Ely thinks "do[es] not belong in a constitution" (p. 99)?

23. Professor Ely's style has been much and deservedly praised for its liveliness, humor, and vividness. I would note only one reservation: at times his tone becomes a shade too flip and sarcastic for my taste, suggesting an arrogance that his warm and graceful tributes to Alexander Bickel, Earl Warren, and Hugo Black belie.