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Book Review

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DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW. By JOHN HART ELY, CAMBRIDGE: HARVARD UNIVERSITY PRESS 1980, pp. 268. $15.00.

Reviewed by Albert J. Matricciani, Jr.[1]

It is wholly appropriate that this important new work on constitutional theory be reviewed in the *Maryland Law Review*. In addition to making a significant contribution to constitutional law scholarship, its author has delivered a part of his theory as a guest lecturer at the University of Maryland School of Law,[2] and has further set forth his ideas on judicial review in this publication.[3] Moreover, this writer is particularly pleased to have an opportunity to review *Democracy and Distrust* having devoted a portion of last summer to attending John Hart Ely's interesting course on constitutional theory at the Harvard Law School.

Democracy and Distrust carefully examines from diverse and frequently competing perspectives the age-old question of how nine, non-elected Supreme Court justices can invalidate an act of the political branches of the government on constitutional grounds and, at the same time, be said to be acting in a manner consistent with democratic theory. Where is the Supreme Court to look for its authority to overrule the judgment of more politically responsible officials, particularly since the Court normally has the final say in such matters? The history of our constitutional development has been toward a strengthening of representative or majoritarian democracy. Yet, the Court is faced continually with the task of giving content to the Constitution's more open-ended provisions in rather controversial contexts. On what theory should the Court base such decisions? Mr. Ely provides his readers with a deceptively simple and yet comprehensive theory of judicial review, but not before he takes some shots at conventional theories.

Interpretivism,[4] championed by Justice Hugo Black[5] throughout his distinguished career, is Ely's first target. This approach to constitutional

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1. Partner, Matricciani & Smith, Baltimore, Maryland; B.A., 1969, Villanova University; J.D., 1973, University of Maryland School of Law; M.L.A., 1975, The Johns Hopkins University.

2. An abbreviated version of Chapter Four, "Policing the Process of Representation: The Court as Referee," was delivered on April 24, 1978 at the University of Maryland School of Law as part of the Morris Ames Soper Lecture series.

3. Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978).

4. Interpretivism has been known at various times as legal positivism, or strict constructionism. Its counterpart, non-interpretivism, has been called natural law theory or doctrinal elaboration. These terms, Mr. Ely points out, are not necessarily accurate and the confusion increases when labels such as political liberalism or conservatism and judicial self-restraint or activism are applied since they cut across both categories. J. ELY, DEMOCRACY AND DISTRUST 1 (1980).

5. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 509 (1965) (Black, J., dissenting).

construction requires the Court to look to norms stated or implicit in the document itself in order to put flesh on the bones of the Constitution's more general phrases. As theory it has enjoyed popularity, due to both its usefulness in statutory interpretation[6] and its appearance of limiting the Court's role to gleaning the framers'[7] intent in the constitutional context. Indeed, the only checks an interpretivist places on majority rule are those specifically stated in the Constitution. Therefore, only the rights designated by the framers and ratified by the people merit judicial protection.[8]

Mr. Ely, however, points out that "[c]onstitutional provisions exist on a spectrum ranging from the relatively specific [e.g., the requirement that the President 'have attained to the Age of thirty five years'] to the extremely open-textured." (For example, the first amendment's prohibition of congressional laws "abridging the freedom of speech").[9] At one end of this spectrum the author sees provisions which actually invite the Court "to import into the constitutional decision process considerations that will not be found in the language of the amendment or the debates that led up to it."[10] For Mr. Ely the eighth amendment's cruel and unusual punishment clause is such a provision; the fourteenth amendment's famous due process and equal protection clauses and not-so-famous privileges and immunities clause, and most notably, the ninth amendment[11] are also in this category. In fact, Mr. Ely states: [T]he conclusion that the ninth amendment was intended to signal the existence of federal constitutional rights beyond those specifically enumerated in the Constitution is the only conclusion its language seems comfortably able to support."[12]

The author cites the re-emergence of substantive due process in *Roe v. Wade,*[13] the failure of the liberty interest/property interest procedural due process analysis,[14] the death of the privileges and immunities clause in the *Slaughter-House Cases*[15] over a hundred years ago (as well as the clause's ambiguous legislative history), and the failure of the rational basis test[16] under equal protection principles, as strong evidence of the impossibility of establishing a clause-bound interpretivism. To Mr. Ely the Constitution contains

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6. J. ELY, *supra* note 4, at 2. *See* Dworkin, *How to Read the Civil Rights Act,* N.Y. Rev. Books, Sec. 20, 1979, at 6.

7. *See also* R. BERGER, GOVERNMENT BY JUDICIARY (1977).

8. Occasionally an interpretivist like Justice Black will search out the contemporary counterpart of an eighteenth century evil against which protection is required. *See* H. BLACK, A CONSTITUTIONAL FAITH 46–48 (1968).

9. J. ELY, *supra* note 4, at 13.

10. *Id.* at 13-14.

11. The ninth amendment to the United States Constitution provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

12. J. ELY, *supra* note 4, at 38.

13. 410 U.S. 113 (1973).

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

15. 83 U.S. (16 Wall.) 36 (1872).

16. J. Ely, *supra* note 4, at 31.

mostly delphic provisions, capable of being illuminated by any number of sources, whether they be the framers' debates, the literature of the day, discussions in the state assemblies in which the amendments were ratified or the *Federalist* propaganda of James Madison. Subjected to Ely's close scrutiny and candid analysis, these constitutional provisions require us to look beyond their four corners to provide a meaningful content.

Under the Ely analysis, traditional non-interpretivist theories fare little better. In Chapter Three[17] he criticizes several non-interpretivist methods of judicial review. The realist concept that the justices impose their own values provides no standards at all, and leaves the judiciary, which Hamilton called the "least dangerous"[18] branch of our government, with virtually untrammeled power. The natural law theory,[19] which so pervades the Declaration of Independence,[20] is unmentioned in the Constitution and, as the author remarks, "It has . . . become increasingly evident that the only propositions with a prayer of passing themselves off as 'natural law' are those so uselessly vague that no one will notice — something along the 'no one should needlessly inflict suffering' line."[21] Moreover, a reliance on "neutral principles" to give content to the Constitution's open-textured clauses provides merely a blind adherence to precedent rather than a guide to any substantive values that should be imposed. Also, moral philosophy, or judicial reasoning based on moral philosophy, is too dependent upon the particular bias for one philosophy over another by a majority of the Court,[22] and in any event, reflects the reasoning of a rather homogeneous class of citizens. This can hardly be said to be the most democratic approach. Tradition points in no particular direction and often is grounded in apocrypha or, at best, in uncertainty. The notion of rulings firmly founded upon a popular consensus is elusive (a consensus of whom?), paradoxical (for example, an opinion which employs the consensus methodology and which contains three vigorous dissents?),[23] and undemocratic (the Court strikes down an act of the legislature because it speaks more truly for the peoples' values?).[24] Mr. Ely remains unconvinced even by his favorite non-interpretivist, the late constitutional scholar Alexander Bickel,[25] who suggested that the Warren Court properly attempted to "prefigure the future to shape its constitutional principles in accord with its best estimate of what tomorrow's observers would be prepared

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17. *See also* Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978).

18. THE FEDERALIST No. 78, at 490 (A. Hamilton) (B. Wright ed. 1961).

19. *See* J. ELY, *supra* note 4.

20. *See* G. WILLS, INVENTING AMERICA 60–61 (1978).

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

22. As the author points out: "What may be the two most renowned recent works of moral and political philosophy, John Rawls's [sic] *A Theory of Justice* and Robert Nozick's *Anarchy, State and Utopia*, reach very different conclusions." *Id.* at 58.

23. *Id.* at 65.

24. *Id.* at 68.

25. *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

to credit as progress."[26] Ely's response is terse: "The fact that things turned out as the Supreme Court predicted may prove only that the Supreme Court is the Supreme Court."[27] The Court's predictions shape the future and the present too. Thus, the fundamental-value theorists' basic tenet is violated again with the inevitable imposition of the Justices' own values.[28]

According to Mr. Ely, the non-interpretivists' task is equally impossible. There is no "timeless set of objectively valid natural law principles out there to be discovered by judges or anyone else."[29] Instead, the author combines the interpretivists' search for content within the document with the fundamental-value theorists' quest for a set of neutral principles to guide the Court's constitutional jurisprudence. What emerges is a *United States v. Carolene Products*[30] approach which provides substance to the Constitution's delphic provisions by reference to its pervasive spirit, and which concentrates on enforcing the necessary preconditions of democratic choice and on protecting certain minorities from majority tyranny.

It is, of course, no accident that *Democracy and Distrust* is dedicated to Earl Warren. The author, a former law clerk to the late Chief Justice, views the Warren Court as the embodiment of the *Carolene Products* principles. Despite that Court's occasional meanderings toward fundamental values or toward engagement in interpretivist analysis, Mr. Ely proposes a different theme by which the Court in the Warren years gave content to the Constitution's more indeterminate phrases. And Ely sees that theme as derived from the famous *Carolene Products* footnote:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .
>
> It is unnecessary to consider now whether legislation which *restricts those political processes* which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . .: whether *prejudice against discrete and insular minorities* may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect

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26. J. ELY, *supra* note 4, at 69.
27. J. ELY, *supra* note 4, at 10.
28. *Id.*
29. *Id.* at 71.
30. This theory takes its name from a famous footnote of Justice Stone in the case of United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938).

minorities, and which may call for a correspondingly more searching judicial inquiry.[31]

In essence, the theme is twofold: the Court should be exacting in its demands for justification of legislation that places barriers in the way of persons who would otherwise be free to participate in the political process, and of legislation that fails to protect discrete and insular minorities from discrimination at the hands of the majority. The theme is, for John Hart Ely, the essential spirit of the Constitution. As he explains: "The original Constitution's more pervasive strategy . . . can be loosely styled a strategy of pluralism, one of structuring the government and to a limited extent society generally, so that a variety of voices would be guaranteed their say and no majority coalition could dominate."[32]

Mr. Ely makes three arguments in support of his "participation-oriented, representation-reinforcing" approach to judicial review.[33] For the first of these, Mr. Ely reaches the history and the text of the document — from its Preamble, through its body (devoted to the governmental structure) to the Bill of Rights — to demonstrate that American values are not written into the Constitution. Values are left to the political process for development. On the other hand, the Constitution is chiefly devoted to establishing "procedural fairness [and to] ensuring broad participation in the processes and distributions of government."[34] Indeed, one of the rare instances where a substantive value was sought to be embodied in the document was the enactment of the eighteenth amendment: the prohibition measure failed dramatically and ultimately was repealed by the twenty-first amendment.

The second argument is that Ely's (and the Warren Court's) "representation-reinforcing approach to judicial review, unlike its rival value-protecting approach, is not inconsistent with, but on the contrary (and quite by design) entirely supportive of, the underlying premises of the American system of representative democracy."[35] Finally, Ely argues that his "approach, again in contradistinction to its rival, involves tasks that courts, as experts on process and (more important) as political outsiders, can sensibly claim to be better qualified and situated to perform than political officials."[36]

Guided by the *Carolene Products* principles, the Warren Court understandably became enmeshed in controversial constitutional decisions. Areas where that Court attempted to "police the process" to permit broad political participation included the free speech provision of the first amendment,[37] and the voting

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31. *Id.* (emphasis added).
32. J. ELY, *supra* note 4, at 80.
33. *Id.* at 87.
34. *Id.*
35. *Id.* at 88.
36. *Id.*
37. *See, e.g.*, Brandenberg v. Ohio, 395 U.S. 444 (1969).

rights,[38] and malapportionment issues,[39] relying on the fourteenth amendment's equal protection clause. The Court's concern for the protection of "discrete and insular minorities" led it to develop "suspect classes," of blacks, aliens, illegitimates, and the poor.[40] Its seminal decision, *Brown v. Board of Education*,[41] reflects a unanimous Supreme Court's concern that public education (which the Warren Court clearly considered the foundation upon which other rights and opportunities in American life are often based) be administered on an equal basis. Black school children sought and obtained the Justices' protection under the shield of the equal protection clause.

Democracy and Distrust's last and longest chapter (Chapter Six) elaborates on the second part of the *Carolene Products* approach — the protection of minorities within the democratic system. For John Hart Ely it is a matter which goes straight to the heart of his theory. In fact, it is the "distrust" which ensures the proper functioning of the "democracy." As the author states at the outset: "No matter how open the process, those with most of the votes are in a position to vote themselves advantages at the expense of the others, or otherwise to refuse to take their interests into account."[42]

A jurisprudence informed by the *Carolene Products* distrust thesis requires careful attention to the motivation behind legislative and administrative action,[43] a "special scrutiny"[44] that suspect classifications fit most closely the goals imputed to them by the government lawyers. Moreover, it demands a close examination of classifications which appear arbitrary or stereotypical of groups subject to widespread hostility. Mr. Ely contends that "discreteness and insularity" have a social component as well, and it is that component which obstructs full political participation by a disadvantaged class even when the doors have been opened to that class. In paraphrasing Justice Stone's intentions, he tells us: "His reference was . . . to the sort of pluralist wheeling and dealing by which the various minorities that make up our society typically interact to protect their interests, and constituted an attempt to denote those minorities for which such a system of mutual defense pacts will prove recurrently unavailing."[45]

In an explanation of what he terms "the psychology of decision," the author discusses the role of prejudice, particularly that of legislators and judges, in both its "first degree" and its more subtle forms. Ely performs, in light of the *Carolene Products* theory, an interesting analysis of legislation that discriminates against women.[46] He presents his readers with the suggestion that a "date

38. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).
39. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962).
40. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1012–60 (1978).
41. 347 U.S. 483 (1954).
42. J. ELY, *supra* note 4, at 135.
43. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960).
44. J. ELY, *supra* note 4, at 196.
45. *Id.* at 151.
46. *Id.* at 166–70.

of passage" test be applied (since women could not even vote until the nineteenth amendment was ratified in 1920), whereby the Court should remand to the political process for a "second look" at statutes passed during the period when women's access to the process was blocked.

Mr. Ely (to no one's surprise at this point) approves of affirmative action because: "There is nothing constitutionally suspicious about a majority's discriminating against itself . . . ."[47] On the imposition of the death penalty, he writes, "Death being the ultimate and irreversible penalty, one can at least strongly argue that a prophylactic equal protection holding that capital punishment violates the Eighth Amendment is appropriate. It is so cruel we know its imposition will be unusual."[48]

Finally, on our fundamental right to travel from state to state, the author states:

> I cite it . . . because I think it points us in the right direction, one that associates the right to relocate not with the idea that it is some kind of handmaiden of majoritarian democracy but, quite to the contrary, with the notion that one should have an option of escaping an incompatible majority. Thus viewed, the right is one that fits quite snugly into the constitutional theory of this book.[49]

That theory is indeed intriguing: it would have the Supreme Court police the process and permit the legislatures to supply the substantive values. In the classroom last summer, Professor Ely revealed that he had resisted the *Carolene Products* approach for years because it was "the stuff of which college political science courses are made." It surely bears its share of faith in the American democratic system. But then, what Mr. Ely urges is a democracy tempered with distrust. For this writer, its appeal is its emphasis on the latter and its commitment to an opportunity for full participation in the former. Therefore, I welcome *Democracy and Distruct* as a challenge to the Court to do well that which it does best — to assess constitutional claims carefully and objectively.

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47. *Id.* at 172.
48. *Id.* at 176.
49. *Id.* at 179.