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Democracy and Distrust (By John Hart Ely)

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BOOK REVIEWS

DEMOCRACY AND DISTRUST. By John Hart Ely.* Cambridge: Harvard University Press. 1980. Pp. viii, 268. $15.00.

*Reviewed by Judge Gilbert S. Merritt***

Democracy and Distrust,[1] an often funny book on a serious subject by a careful, witty and inventive scholar, seeks a single unifying answer to the hard questions faced by federal courts from the beginning when they review the constitutionality of legislative and executive actions: What is the justification for judicial review by life-tenured magistrates in a system of government where the people elect their representatives and executives? When state or federal action penalizes particular groups—aliens, racial groups, pregnant women, homosexuals, the poor—what sources of enlightment should we look to for guidance as we interpret the "open ended" provisions of the Constitution like the Equal Protection, Due Process, Privilege and Immunities and Republican Form of Government clauses and the Ninth Amendment? Where should we look for the guiding principles of judicial review in hard cases not answered by the constitutional text or the body of precedent? How are we to avoid *ad hoc*, purely intuitive decisions?

Professor Ely believes there is a justification, a source of enlightenment and a means of avoiding simple intuition. He takes up and disposes of a number of possible sources of "fundamental values" outside the Constitution that have persuaded others—natural law,[2] moral philosophy,[3] neutral principles,[4] tradition,[5] reason alone,[6] concensus,[7] personal values.[8] He persuasively argues that none provides a unifying principle or a satisfactory answer.

He also disposes of the "clause bound" theory, called "interpretivism," so dear to the hearts of ardent advocates of judicial

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1. J. ELY, DEMOCRACY AND DISTRUST (1980) [hereinafter cited by page number only].
2. P. 48.
3. P. 58.
4. P. 54.
5. P. 60.
6. P. 56.
7. P. 63.
8. P. 44.

restraint.[9] Ely demonstrates again, as have many others before him, that judges cannot simply lay the text or the legislative history of a broad constitutional provision next to the facts and extract an answer to the case. Times, social and economic issues and expectations change. As they change lawyers attack new issues—segregation, legislative apportionment, burdens imposed on voting, privacy, economic activity, speech, and association. Courts must decide what the Constitution should sanction and what it should disallow. The framers have woven a group of broad, somewhat shapeless concepts into a pattern too intricate for easy answers.

Professor Ely finds the key to the justification and the limits of judicial review in the considerations listed in the famous footnote 4 of Justice Stone's opinion in *United States v. Carolene Products Co.*[10] The basic idea is that the "open ended" provisions of the Constitution authorize the federal courts (1) to keep the processes of representative government (the executive and legislative branches of government) equally open and fair to all and (2) to keep majoritarian institutions from unfairly penalizing identifiable, or "discreet and insular," minorities whose voting power is insufficient to always insure fair treatment by the majority. Ely says that his purpose is "the elaboration of a *representation-reinforcing* theory . . . that . . . can appropriately concern itself only with questions of *participation* and not with the substantive merits of the political choice under attack."[11]

The Warren Court's legislative apportionment and First Amendment decisions are examples of controversial decisions that do not exceed these limitations, according to Professor Ely. They open the pro-

9. Pp. 11-41.

10. 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. On restrictions upon the right to vote, see . . . on restraints upon the dissemination of information, see . . . on interferences with political organizations, see . . . as to prohibition of peaceable assembly, see . . . .

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

304 U.S. 144, 152-53 n. 4 (1938) (citations omitted).

11. P. 181 (emphasis added).

cesses of majoritarian institutions to the votes and voices of citizens whose influence would not otherwise be felt and protected from unfair treatment. These decisions were:

> fueled not by a desire on the part of the Court to vindicate particular substantive values it had determined were important or fundamental, but rather by a desire to ensure that the political process—which is where such values *are* properly identified, weighed, and accommodated—was open to those of all viewpoints on something approaching an equal basis.[12]

The segregation cases are classic examples of controversial decisions that give legitimate protection to an identifiable minority whose voting strength was insufficient to protect it from a hostile majority.

Professor Ely argues that these "representation-reinforcing," process-oriented values require enforcement by a non-majoritarian judicial institution. These same values, because they provide the justification, also provide the limits of judicial review under the "open-ended" provisions of the Constitution. If these principles are followed, courts will "not enact Mr. Herbert Spencer's Social Statics,"[13] or any other "particular economic theory, whether paternalism . . . or *laissez faire*"[14] into the Constitution under the guise of substantive due process or some other broad constitutional label.

Ely's attractive theory provides limits; but it also legitimizes, in a coherent way, much controversial judicial activity that most Americans, including most federal judges, now intuitively believe is right. Ely's elaboration of this theory is a great addition to the literature and the theory of constitutional adjudication. It will shape the thinking of students, lawyers and judges for many years to come.

Like most satisfying legal theories, however, Ely's theory does not automatically provide an answer to hard cases. Certain questions remain: By what process are we to decide which of the multitude of groups in a diverse, pluralistic society deserve identification as "discrete and insular minorities"? By what processes are we to determine the kinds of legislative and administrative activity that unfairly penalizes such groups once they are so characterized? Ely's answer to questions at this level, the level at which most of our reasoning must take place when we decide cases, is less satisfying than his general political theory drawn from *Carolene Products*.

Defining "discreet and insular minorities" under Ely's theory is

12. P. 74 (emphasis in original).
13. Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).
14. *Id.*

not easy. It requires us to analyze the degree of suspiciousness of a particular classification. That analysis turns on a complex set of factors: the nature of the common identifying thread or characteristic which forms the group, the stated purposes of the classification, any unstated public purposes served by the classification, the harm imposed, the political and economic power that the class possesses to defend itself, present levels of hostility and past patterns of prejudice against the class and, according to Professor Ely, the real, or subjective, motivations of the classifier. These are the factors that courts do in fact consider, except that the Supreme Court and other courts, state and federal, have behaved inconsistently with respect to motivation. Some would argue that the subjective motivation of the legislator is not normally a proper subject of judicial inquiry, and most judges for many reasons are reluctant to speculate on this subject unless the real motivation is clearly proved and is at odds with the stated purpose of the legislation.

The abortion cases and the exclusionary zoning cases are good examples of hard cases in which Professor Ely's theory does not fully describe the kind of constitutional inquiry that is necessary. In both sets of cases there are strong, traditional, substantive interests supporting the legislative classification and the social costs imposed upon a particular group by the legislation. There are also strong, legitimate, substantive interests opposing the legislation. In such cases Professor Ely's theory counsels courts not to choose between the contending political values at stake but rather to let the legislative majority prevail.

But in both cases individual legislators may have, and a few may openly express, hostile, illegitimate motivations directed at "them", a group of "outsiders" with whom the legislators cannot identify and against whom the legislation is directed. Some may simply conceive of women who choose abortion as promiscuous or sinful or they may want to enact into law the religious doctrines of a particular church. The majority of a city council or zoning board may be motivated by a desire to segregate "them", blacks or the poor, into particular sections of a community outside their own neighborhood.

When only legitimate, rational, "substantive values" are informing the minds of legislators on either side of an issue, it seems clear that courts should not interfere. Ely is clearly right that we should not weigh political values here. The difficulty comes when we introduce the fact or probability that inadmissible factors are also at work and that these considerations may have tipped the balance of "substantive values" in favor of penalizing a particular group without much power. In these hard cases how are federal courts to weigh the strength and effect of the irrational factors without considering in some degree the

relative strength or weight of the legitimate interests, the substantive values, at stake on both sides?

Our constitutional and political structure, and our legal tradition, by a process of evolution, has apparently come to expect federal courts to weigh the strength of substantive social values, legislative-type values, in that relatively narrow band of cases where careful judicial inquiry demonstrates that strong irrational factors, harmful to a relatively powerless group, are also at work in the legislative or executive decision-making process. Legitimate political values, for example in the abortion and zoning cases, the value of embryonic life, the beauty of lawns and trees, are sometimes simply a pretext for prejudice.

The federal judiciary will abuse, and eventually undermine, whatever trust the public has placed in its integrity, moderation and diligence as an institution if it consistently exceeds these bounds by weighing and choosing among substantive social and political values outside this narrow band of cases. On the other hand, the federal judiciary will not deserve, or long retain, whatever faith disadvantaged groups have in us if we are unwilling to weigh substantive social values in certain cases. There is no alternative to weighing to some extent the strength of substantive social values, as I see it, when the issue is whether they are being used as a public relations pretext, a party line, for prejudice. If I read Professor Ely correctly, such a view allows a greater degree of judicial intervention than Professor Ely finds justifiable. To this extent, I disagree with the analysis contained in *Democracy and Distrust*.

I find the book a remarkable gold mine of original insight, epigram, humor and rigorous analysis. And I agree with the essential point that federal courts run serious risks of error anytime they weigh and decide between controversial substantive social values, even in the narrow band of cases I have described. In these cases, however, it is a risk that falls within our commission as judges, as I see it, and decisions like *Roe v. Wade*[15] demonstrate that the risk should be taken. The commission that judges receive, happily, does not demand that they never contradict themselves or that their decisions fit comfortably within a unitary theory of judicial review. It would probably be unwise for all judges to adhere to any particular theory of judicial review or for one judge to adhere to it when, upon reflection and deliberation, his sense of fairness counsels otherwise. If one were going to adopt a particular unitary theory, however, Professor Ely's comes as close to providing a satisfying explanation as any I have read.

15. 410 U.S. 113 (1973).