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DEMOCRACY AND DISTRUST REVISITED

*Richard A. Posner**

A book as interesting and important as John Hart Ely's study of constitutional law, *Democracy and Distrust*, requires the perspective of time for a proper evaluation. When published in 1980 it seemed another in a spate of books and articles about constitutional law written by liberals nostalgic for the days when Chief Justice Warren (to whom the book is dedicated) led a like-minded group of Justices in remaking that law; and I confess that, not being a liberal in the relevant sense, I read the book less carefully than I should have done.¹ Reread ten years later, the book stands forth as a work of outstanding merit but also as an exemplar of deep problems both in constitutional law and in the academic study of law generally.

The book is best known for proposing a unifying principle for understanding and extending the program of the Warren Court, but that is the project of the last three chapters of the book. The first three chapters constitute a critical monograph of independent significance. Their aim is twofold: to affirm the necessity for tethering constitutional law—in the sense of the body of principles actually applied by judges—to the Constitution's text and history, against those who would make constitutional law a vehicle for enforcing "fundamental values" discovered by judges as an exercise in moral philosophy; but at the same time to knock down the interpretive approach variously called "strict construction," "textualism," and "originalism," but which Ely calls "clause-bound interpretivism."² As Ely shows con-

* Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. This essay was prepared for the *Virginia Law Review's* symposium marking the tenth anniversary of John Hart Ely's book, *Democracy and Distrust: A Theory of Judicial Review* (1980). Page references to Ely's book appear in the text of this essay. I thank Frank Easterbrook, Lawrence Lessig, and Cass Sunstein for their very helpful comments on a previous draft.

¹ With the result that I failed to make proper attribution to Ely of some of the criticisms of judicial activism and restraint that I made in chapter 5 of *The Federal Courts: Crisis and Reform* (1985), and chapter 7 of *The Problems of Jurisprudence* (1990).

² The "fundamental values" school is the target of Ely's wittiest sallies. "The Constitution may follow the flag, but is it really supposed to keep up with the *New York Review of Books*?" (p. 58). "[W]e may grant until we're blue in the face that legislatures aren't wholly democratic,

vincingly with the aid of an uncommonly lucid and unaffected prose style, the “fundamental values” approach gives judges too much discretion, and “clause-bound interpretivism” too little; the middle way is a moderate interpretivism.

Ely’s book has helped me to see, though in the teeth of his own intentions, that there is no middle way. Rather, there are these two ways that he stresses (of course there are countless others as well) in which judges can go wrong. The first way, what he calls the “fundamental values” approach, is by being too willing to make political judgments (in favor of women, of freedom of contract, of blacks, of fetuses, of labor unions; against criminals, big businessmen, Communists—whatever); the second is by not being willing enough, so that substantive injustices are ratified, even revealed in, in the name of the rule of law. The first mistake invites charges that the judges are being lawless, the second that they are being legalistic. Alternatively—a way of putting the matter that is particularly apt when the subject is constitutional law and the challenge is to legitimate the practice of declaring statutes unconstitutional—the first mistake invites charges that the judges are elitist, antidemocratic, arrogant in setting their judgment against that of the people’s representatives; the second, that they are too quick to yield to populist pressures, too insensitive to the danger of tyranny by the majority, too pious and credulous about the ideology of democracy. You can if you want call the avoidance of these extremes “interpretivism.” The objection is that by doing so you imply the existence of a technique that, if only judges would adhere to it, would prevent them from going to either extreme. If there is such a technique, no one has discovered it.

Not Ely, in any event. The second half of the book is his proposal for a moderate interpretive approach to constitutional law. What he does or at least purports to do is to search for values that can fairly be said to be “in” the Constitution and that judges are equipped by experience and by the nature of their office to promote. What he finds, reading the text of the Constitution in light of what its framers said

but that isn’t going to make courts more democratic than legislatures.” (p. 67). “The notion that the genuine values of the people can most reliably be discerned by a nondemocratic elite is sometimes referred to in the literature as ‘the Führer principle[.]’ . . .” (p. 68). Robert Bork could not have said it better—making his criticisms of *Democracy and Distrust* a little ungenerous. See R. Bork, *The Tempting of America: The Political Seduction of the Law* 194-99 (1990).

about it in the *Federalist Papers* and elsewhere, is that the document's basic purpose—also that of the amendments from the Bill of Rights to the present—is to create a system of government in which elected representatives will do a sincere and competent job of representing the interests of all the people. Representative government presupposes two values, both of which are procedural in a broad sense. They are participation and representation—participation by all competent adults in the election of government officials, and fair representation of all by those officials. Judicial decisions that promote these values not only are lawful because they are consistent with the spirit of the document being interpreted; they also cannot be criticized as antidemocratic because the values they promote are quintessentially democratic ones.

So Ely has done more than find in the Constitution the very values whose vigorous deployment by the Supreme Court in the heyday of Earl Warren's chief justiceship called down upon the Court charges of elitism; any defender of the Warren era could do that, working imaginatively upon the plastic material for interpretation that an ancient document provides. Ely's trick is to argue that the Court, far from acting in elitist fashion with or without the permission as it were of the framers, was making America more democratic by promoting the foundational democratic principles of participation and representation.

Participation was promoted, for example, by judicial decisions that required apportionment on the basis of "one man, one vote," that outlawed poll taxes, that limited the power of states to discriminate against nonresidents (who because they are such have no political voice in the state), and that protected freedom of political advocacy and association. Representation was promoted by identifying minority groups whose interests were unlikely to be weighed sympathetically by representatives drawn primarily from the majority, and by forbidding government to place unequal burdens on such groups without a compelling and noninvidious reason for doing so. Discrimination against aliens illustrates both forms of democratic failure against which Ely's program is directed. Aliens have no voting power; and legislators—citizens all—lack the sort of firsthand experience with aliens that would enable them to empathize with their problems and needs.

Ely is ingenious in relating the clauses of the Constitution (including the amendments) to the values of participation and representation. He points out, for example, that the commerce clause, in its "negative" or "dormant" aspect, limits the power of a state to shift the costs of government to residents of other states by means of a tax on a scarce commodity produced within the state but consumed mainly elsewhere. Similarly, the free exercise clause of the first amendment has been used for the most part to protect marginal, despised sects, such as Jehovah's Witnesses; the protections that the Bill of Rights extends to criminal defendants ensure a form of representation for the denizens of the despised and poorly understood social margin from which most criminals come. At times, it is true, Ely's analysis is circular. The negative commerce clause, for example, is a free (some believe an unsound) judicial interpretation of the textual commerce clause, so one cannot use *that* text to argue that Ely's approach is immanent in the Constitution. On the other hand, a number of constitutional provisions, such as the equal protection clause, the privileges and immunities clause, the fifteenth amendment, the other voting rights amendments, and the republican form of government clause, fit his model without strain. Of course, he is treating as an integrated whole a set of documents written in different centuries, and of course it is an embarrassment to his project that nowhere in this palimpsest can be found the conferral of a right to vote *tout court*. But these are not decisive objections. They merely underscore the uncertainty of constitutional interpretation.

The body of constitutional law that Ely's approach generates bears, as one would expect from the book's dedication, a general resemblance to the constitutional jurisprudence of the Warren era. But there are interesting differences not all of which are merely extrapolations from that jurisprudence to the problems of the 1970's. Here are the ones Ely emphasizes:

1. Women, being an electoral majority, are entitled to no special constitutional solicitude. By the same token, however, laws discriminating against women that were enacted before they got the vote are unconstitutional—but if those laws are reenacted after being found unconstitutional, then they are acceptable.
2. Affirmative action is unproblematic since it is a matter of whites discriminating against themselves. Obviously whites are ade-

quately empathetic toward the problems of fellow whites adversely affected by policies that favor blacks.

3. There is no constitutional right to privacy. The "privacy" decisions (really decisions about the sexual and reproductive freedom of women), culminating in *Roe v. Wade*,³ have no relation to a "participation-oriented, representation-reinforcing approach to judicial review" (p. 87). There is no other "interpretivist" basis for them either since they are the product of "fundamental rights" jurisprudence, nothing more.

4. In apparent tension with point three, discrimination against homosexuals is suspect because legislators are unlikely to empathize with their problems and concerns. But if satisfied that the laws criminalizing homosexual behavior are founded on "a sincerely held moral objection to the act (or anything else that transcends a simple desire to injure the parties involved)" (p. 256 n.92), judges should uphold the laws, unembarrassed by any claim that homosexuals have a right to sexual freedom because Ely believes that no one has a constitutional right to sexual freedom. Aliens are even more clearly entitled to judicial solicitude than homosexuals since they do not even have a right to vote.

5. It is strongly arguable that capital punishment is unconstitutional because murderers from the affluent, educated class that supplies our representatives, judges, and other public officials are never executed.

6. There is a constitutional right of travel, specifically a right to move to another state without the penalty imposed, for example, by a durational residency requirement in order to qualify for welfare benefits. The recognition of this right serves to add "exit" to "voice" as a mode of participation in the political process.

The foregoing list does not, of course, exhaust the content of constitutional law according to Ely. He recognizes that some provisions of the Constitution confer substantive rights wholly unrelated to participation or representation, and naturally he endorses the participation-oriented and representation-reinforcing decisions and doctrines of the Warren and Burger eras, such as the reapportionment, poll tax, and political speech decisions. The propositions in my list are, however, the *distinctive* product of his theory, his interpretive middle way.

³ 410 U.S. 113 (1973).

Ely's argument is ingenious, elegant, and plausible. But is it convincing? It is true that the framers, both of the original Constitution and of most of the amendments, were concerned about problems of representative government. It is also true that two of the problems in this realm are lack of participation and lack of effective representation. But, to begin with, these really are one problem, not two. If some people are not effectively represented because they are not allowed to vote or because their candidates are put in jail for espousing their interests; or if they are not represented on equal terms because their vote is weighted less heavily in the election than other people's; or if they are not represented because their nominal representatives do not understand or care about their problems and their needs, as a consequence of the fact they are importantly different sorts of people from the representatives (they are aliens or blacks or homosexuals or whatever), then, in all of these cases, there is a defect in representation.

But the defect is found in a number of other cases as well, cases that Ely does not discuss. There is the matter of interest group politics, whereby a compact group will often be able to use the political process to transfer wealth to itself from a larger, more diffuse group—consumers or taxpayers, for example—whose members are, as a practical matter, helpless to protect themselves against this mulcting. So the fact that women are an electoral majority does not guarantee that the political process will reflect their preferences. A large and amorphous majority may be at the mercy of the very sort of interest group that Ely conceives it to be the fundamental purpose of the Constitution to protect. There is (a related point) the electorate's pervasive ignorance of, and substantial indifference to, the effects of public policies. There is also the fact that representatives are not perfect agents of the electors; they have their own interests, selfish and otherwise. And there is the fact that, except in states that have referenda or initiatives, we vote for people rather than for policies—which means that, at best, we are voting for a package of policies—and it is easy to show that particular policies may end up being adopted that are not the preference of a majority of the voters.

No doubt most of the problems of representation are beyond the practical reach of judicial correction. But if they are left unsolved, it is by no means clear that the judicial initiatives that Ely commends will improve the functioning of representative government, or even

that those he opposes will *not* improve it. Take, to illustrate the first point, affirmative action. Forget the fact that there are cities in which blacks are an electoral majority. Concede, as I am certainly prepared to do, that, notwithstanding "white guilt," white legislators do not ignore the costs of affirmative action to whites. It does not follow that affirmative action passes Ely's representation test. Affirmative action programs give a boost to a traditionally disfavored minority, such as blacks. The boost might take the form of an award of super-seniority or of extra points on a civil service exam, or a lowering of the test score required for admission to a prestigious school. Who is hurt by such thumb-on-the-scale tactics? The *marginal* white—the white who would have been the first to be rehired in the event of layoffs, the last to be hired, or the last to be admitted to the school. Is it realistic to assume that *his* plight is uppermost in the thinking of the upper-middle class legislators or educators who adopt affirmative action programs? And shall we exclude the possibility of coalitions between blacks and whites to advance some blacks at the expense of some whites for selfish political reasons, unrelated to social justice?

Consider now *Griswold v. Connecticut*,⁴ the Connecticut contraceptive case, first of the sexual autonomy cases. Had it, as Ely believes, nothing to do with representation? Was it not a case about the power of an interest group, consisting of the Catholic Church and devout Catholics, to block legislative reform that would have benefitted lower class and lower-middle class girls and women primarily—a diffuse group, not all of voting age, with a weak political voice—whose access to family planning services was severely impeded by the Connecticut statute?⁵ In discussing legislation discriminating against women that was passed before they got the vote and has not yet been repealed, Ely

⁴ 381 U.S. 479 (1965).

⁵ See Comment, The History and Future of the Legal Battle over Birth Control, 49 Cornell L.Q. 275, 287-91 (1964) (discussing the development and application of the law in Connecticut). Robert Bork has argued that the law—a ban on the use of contraceptives—was not enforced. R. Bork, *supra* note 2, at 95-96. It is true that the statute was enforced only against birth control clinics—all of which closed down after Connecticut's highest court upheld the constitutionality of the statute in *State v. Nelson*, 126 Conn. 412, 11 A.2d 856 (1940), not to reopen until the Supreme Court of the United States struck down the statute in *Griswold*. (All this was discussed extensively in the briefs and oral argument in *Griswold*, which can be found in 61 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 3-453 (P. Kurland & G. Casper eds. 1975).) Birth control clinics cater primarily to persons of low income. L. Gordon, *Woman's Body, Woman's Right: A Social History of Birth Control in America* 288-89 (1974); N. Himes, *Medical History of*

displays sensitivity to the inertial character of the political process; but it was inertia that prevented Connecticut from repealing its archaic ban on contraception.

Consider now apportionment. At first glance it might seem that there could be no more palpable affront to the principles of representative government than to make the votes of people from one part of a state count for more than the votes of people from another part. But on reflection it becomes apparent that people rarely have the same voting power. There are more senators per capita in Delaware than in New York; so each Delaware voter has more voting power in United States Senate elections than each New York voter. I live in a congressional district in which Republicans have no voting power so far as the election of a representative is concerned because there are too few Republicans in the district to induce the Republican Party to put up a plausible candidate. Voting power is, moreover, only one element of political power; others include money, education, age, membership in or good access to a constitutionally privileged class, such as the press, and membership in a politically effective interest group. So various is the allocation of political power wholly apart from whether state legislatures are malapportioned that it is impossible to predict whether reapportionment will have any systematic impact on policy outcomes. And there is, in fact, little evidence that it has had any such impact.⁶

The weaknesses in Ely's analysis that these examples expose are at once internal to his argument (the "malapportioned" character of the United States Senate suggests that the Constitution embodies a different democratic theory from the one Ely would impose on the states in the name of the Constitution) and illustrative of a weak sense of fact (for example in his discussion of *Griswold*⁷). They are also weaknesses at the level of political and social theory. Almost the only political scientist whom Ely cites is Robert Dahl, who did his major work in the 1950's. Ely cites none of the economic literature on interest groups, though there was already an abundant and accessible literature when he wrote his book.⁸ He cites none of the public choice

Contraception 357 (1936) ("American birth control clinics serve primarily the working classes").

⁶ R. Posner, *The Problems of Jurisprudence*, supra note 1, at 151 n.44.

⁷ See J. Ely, *Democracy and Distrust* 67, 219 n.118 (1980).

⁸ See, e.g., G. Stigler, *The Citizen and the State: Essays on Regulation* (1975); Posner, *Theories of Economic Regulation*, 5 *Bell J. Econ. & Mgmt. Sci.* 335 (1974).

literature, which is closely related and even earlier.⁹ He cites Gordon Allport and other psychologists on the nature of prejudice to bolster his contention that we may have trouble empathizing with persons of a different race or religion or social class or sexual preference. This is true, but neither the psychologists nor Ely presents evidence that failures of empathy are common in the political arena. Whatever their considerable other failings, politicians might be thought specialists in discerning the interests of their constituents.

So the book is not a masterpiece of social science; but so what? Ely is engaged in interpretation, isn't he? Do you need social science to *interpret* the Constitution? Ely calls his approach interpretive, and it is that, at least in the sense of being connected, by however long a chain, to a document. The Constitution created a representative form of government. Ely believes that by correcting some defects of representation, judges could make government even more representative than it is. The almost embarrassing plenitude of vague constitutional provisions gives judges ample power to carry out this program. They can do, in fact, *anything*—abolish capital punishment, force the states to allow homosexual marriage, force them to extend the franchise to nonresidents and maybe even to aliens—all in the name of the Constitution's participation-oriented, representation-reinforcing theme. They could, I have suggested, though Ely demurs, bring the sexual privacy cases, some of them anyway (and not just ones brought by homosexuals), under that umbrella.

If this is interpretation—and I do not doubt that it is—then what exactly is “noninterpretivism” or “fundamental rights” jurisprudence? You need a handle in the constitutional text to be able to say that you are interpreting—but liberty, surely, could do as well in that role as representation—and then you are off and running. It is true that if you run from the liberty side of the field you run into the argument that the courts are elitist. There is more open ground on the representation side. Fine. But to run well, you need more social science than Ely deploys in *Democracy and Distrust*. It is true that Ely might be seen as finessing this point, despite the citations to Dahl and Allport, inasmuch as one reason he prefers the theme of representa-

⁹ Famous examples are J. Buchanan & G. Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (1962); M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1965).

tion to that of liberty is that he thinks lawyers and judges better equipped to deal with questions of process than with questions of substance. This would be correct if Ely were speaking at the level of trials and hearings. But he is speaking of the design of political institutions. About this level of governmental process, lawyers and judges know as much or as little as they know about our society's fundamental values. The effects of apportionment, the political dynamics of affirmative action, the conditions for effective minority politics, the significance of conflicting interests within a group (housewives and working women, for example, have sharply different economic interests), the force of inertia in the political process—these and other matters central to the construction and evaluation of a participation-oriented representation-reinforcing jurisprudence are issues in social science. They are not issues of “process” rather than “substance” in any sense relevant to the capacities of the legal and judicial professions. Ely has imposed a specific and highly contestable political theory on the long dead framers.

So, in the end, one is not convinced by Ely, though impressed by his ambition and panache. The reasons for his (in) magnificent failure have ultimately to do with the nature of constitutional law and of the academic study of law. The Constitution is an old document drafted by men who, despite much civic piety to the contrary, were not clairvoyant. Two centuries of amendments have created a confusing palimpsest. A document that as a result is inscrutable with respect to most modern problems has been overlaid by hundreds of thousands of pages of judicial interpretation, much of it internally inconsistent. The sum total of all this documentation is not a directive, but a resource, and further interpretive ventures, therefore, whether that of Ely or that of his opponents to the left and right, are bound to illustrate interpretation as creation, not as constraint. You will not be able to choose among these interpretations on semantic or conceptual grounds. You will have to choose on the basis of which seems best, in a sense that includes but also transcends considerations of fidelity to a text and a tradition, making the interpretive question ultimately a political, economic, or social one to which social science may have more to contribute than law.

At least this is the case when law is treated in so provincial a fashion as is the accepted mode even at the best of our law schools. How absurd it is that constitutional law should be considered a single spe-

cialty, so that a John Ely is presumed to be able to speak knowledgeably about the social treatment of aliens and of illegitimate children, of homosexuals and of women, of political agitators, of religious dissenters, and of murderers on death row. Academic law is "clause-bound" in its own way. Because government programs dealing with aliens, illegitimates, members of racial minorities, indigent criminal defendants, non-veterans, and women are all challenged and litigated under one tiny clause of the Constitution—the equal protection clause—it is natural to think that one person should be able to evaluate all those programs, together with laws and policies affecting fetuses, homosexuals, and others whose rights are litigated under the adjacent due process clause; natural, but wrong. The programs are heterogeneous and their social consequences complex.

The truth is that constitutional lawyers know little about their real subject matter—a complex of political, social, and economic questions. What they know is a body of decisions written by other poorly informed lawyers. Nowadays most judicial decisions, even those in the Supreme Court, are written by law clerks a year or two away from graduation. What professors of constitutional law teach and study is, to an extent I should think they would find embarrassing, the work of their recently graduated students. It is not a sustaining diet.

This means that Ely wrote his book under considerable handicaps. In these circumstances, if it must as I believe ultimately be judged a failure, it is not only an exemplary but a heroic one. And it is a failure only in its constructive ambitions. As a work of criticism it is a triumphant success. We should not be surprised. The lawyer's power of destructive analysis is his greatest gift.

