Modernization and Representation Reinforcement: An Essay in Memory of John Hart Ely

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INTRODUCTION

The courts, in interpreting the Constitution, should not override the will of the majority in the name of values that supposedly transcend majority rule. Instead, judges should try to make representative democracy more democratic. They should try to make democracy work according to its own underlying principles. That is the simple, powerful thesis of Democracy and Distrust: the courts should be in the business of reinforcing and perfecting, not second-guessing, the work of representative government.

Democracy and Distrust is a great book because it takes this thesis seriously and develops it unflinchingly, with the absolute intellectual integrity that was one of John Ely’s defining characteristics. While the theory set out an...
ideal, not a purported description of what the courts actually do, Ely found much to admire in the work of the Warren Court, in particular. One of the signal contributions of *Democracy and Distrust* was its highly influential defense of the Warren Court: in its most important decisions, Ely convincingly argued, the Warren Court was reinforcing democracy, not just implementing its own constitutional vision. But Ely was also an unsparing critic of many decisions. He certainly did not believe that the Supreme Court consistently conformed to his theory.

In this Article, I want to suggest that the Supreme Court, in some of its most prominent decisions in recent decades, has engaged in an unobvious form of representation reinforcement. It is a kind of representation reinforcement that is adumbrated in *Democracy and Distrust* and is fully consistent with Ely’s approach, although Ely did not specifically advocate it. This kind of representation reinforcement might be called “modernization.”

The idea is that the courts’ task is to identify areas where the laws on the books no longer reflect popular opinion. That can happen for a number of reasons—because of the costliness, in legislative time and effort, of enacting new legislation; because a powerful interest group is able to block legislative reform that is favored by a majority; or because of jurisdictional boundaries that allow some parts of the country to continue enforcing a practice that a national majority considers unacceptable. In these situations, the courts might invalidate statutes in the expectation that they are in fact carrying out the will of the people. A corollary is that the courts should be prepared to retreat, if they find that they have misgauged popular sentiment—that is, if the political process reacts by reaffirming the law that has been invalidated. If judicial review were carried out in this way, it would bring the law more into keeping with popular sentiment.

This kind of modernization has, I think, been central to the work of the Supreme Court in recent decades. It accounts for important constitutional principles that are otherwise hard to explain. It is a plausible and defensible role for the courts to play, or at least so I will argue. It does lead to results—such as the results reached in some of the Supreme Court’s so-called substantive due process decisions—that Ely notably attacked. But I believe that the modernization approach leads to those results in ways that are fully consistent with Ely’s premises.2

Modernization is, of course, not the only thing that the Supreme Court does when it reviews the constitutionality of statutes. Nor is it, in my view at least, a fully adequate account of what the courts should do. But I believe it is not only

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2. ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970), and GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982)—and no doubt many other works—have described a somewhat similar role for the courts, although their proposals differ in significant ways from what I describe as modernization.
a significant part of what the courts do but an approach to judicial review that is entirely consistent with the theory of *Democracy and Distrust*.

In the first Part of this Article, I will discuss four important areas in which, I will argue, the Supreme Court's work can be understood as a form of representation-reinforcing modernization. In the second Part, I will try briefly to defend the modernization approach, both in general and as a faithful implementation of the vision of *Democracy and Distrust*.

I. MODERNIZATION: FOUR EXAMPLES

A. Sex Discrimination

Since the early 1970s, the Supreme Court has closely examined, and frequently struck down, statutes that classify on the basis of sex. Ely generally approved of these decisions. He struggled to explain why they were consistent with his overall view, though, and in the end I believe he suggested a modernizing function for the courts, without calling it that.

Ely's starting point for analyzing the constitutional principles forbidding discrimination was the *Carolene Products* footnote that famously envisioned a more aggressive judicial role in protecting "discrete and insular minorities." But it was hard to see how the *Carolene Products* idea could justify the courts' invalidating laws that discriminated against women. Women are not, Ely said, an "insular" group—"[t]he degree of contact between men and women could hardly be greater." And, he added, "[L]est you think I missed it, women have about half the votes, apparently more. As if it weren't enough that they're not discrete and insular, they're not even a minority!"

Ely nonetheless defended the principle that sex classifications are presumed to be unconstitutional. He began by noting that women were disenfranchised for much of our history. Statutes that discriminate against women and were enacted while women were disenfranchised "should be invalidated." But many statutes that the Court invalidated were enacted after women could vote, notably as part of Social Security and other New Deal-era programs.

As to those statutes, Ely argued that even after women could vote, they may have internalized, as a psychological matter, the widespread stereotypes

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5. ELY, supra note 1, at 164.
6. Id.
7. Id. at 167.
about men's and women's roles that underlay discriminatory legislation. That psychological state would have prevented women from advancing their own interests as effectively as they should have. Until that problem was overcome, there was still a basis, under Ely's representation-reinforcement view, for courts to invalidate laws that discriminated against women.

Ely drew two related conclusions from this analysis. The first was that "the case of women seems one where the date of enactment should be important" because the date "seems unquestionably relevant to" the continued existence of these "official or unofficial" barriers to full participation in the political process. Second, Ely suggested, the courts' approach to sex classifications should not be simply to invalidate them and require the legislature to use sex-neutral classifications. Rather, the courts should be prepared to uphold a sex classification if it was reenacted by a democratic process that was unencumbered by either formal or psychological barriers to full participation. "The fact that due process of lawmaking was denied in 1908"—when women did not have a constitutional right to vote—"or even in 1939"—when, as Ely suggested, there was widespread acceptance, even among women, of stereotyped sex roles—"needn't imply that it was in 1982 as well." This is the germ of the modernization idea. Ely puts the point in terms of the erosion of psychological barriers to participation—of women coming to reject invalid stereotypes that they once accepted. But this is probably more specific than it needs to be. The general idea, which is surely plausible, is simply that attitudes toward sex roles have changed since, say, 1950. If they have, then laws based on the earlier attitudes may not reflect true popular sentiment. They may persist only because of some form of inertia. The courts would enhance, not thwart, democracy if they invalidated those laws, especially if—as Ely suggested—they left the door open for the laws to be upheld if they were reenacted.

Of course, one crucial objection—which I will try to answer later—is that courts are not institutionally equipped to make that kind of judgment about changes in popular sentiment. A partial (and only partial) answer is that if the courts are prepared to uphold a reenacted version of the law, they hedge against the possibility that they have misjudged popular sentiment; if they got it wrong, the democratic process will correct them, and they will accept the correction. But in any event, if the objection about the courts' institutional capacity can be met, the case for a constitutional principle forbidding sex discrimination—on representation-reinforcing grounds—seems to follow. Laws enacted in the

9. See Ely, supra note 1, at 165-69 ("A sufficiently pervasive prejudice can block its own correction not simply by keeping its victims 'in the closet' but also by convincing even them of its correctness.").
10. Id. at 167-68.
11. Id. at 167.
12. Id. at 169.
earlier era reflect a way of thinking that the popular sentiment would now reject; despite that, those laws have not yet been changed by the democratic processes, because of various inertial forces. The courts should, therefore, invalidate those laws—thereby furthering the operation of democracy—while being prepared to uphold the same laws should they be reenacted.

This account of the constitutional law of sex discrimination helps explain both the rhetoric and the outcomes of the Supreme Court’s decisions. When the Court has invalidated sex classifications, it has characterized them as resting on “archaic,” “traditional,” or “stereotyped” views about men’s and women’s roles, or as the result of “old notions” that are inconsistent with “contemporary reality.”13 These terms might suggest that the problem with these stereotypes and old notions is that they are inaccurate.14 But many of the gender classifications invalidated by the Court rested on generalizations that were certainly accurate in a purely descriptive sense—such as the generalization that women are more likely to be interested in becoming nurses than men,15 or that women are more likely than men to be economically dependent on their spouses.16 The real problem seems not to have been inaccuracy, but the idea that the classifications were “archaic,” “old,” and “traditional” in the sense that they were the product of a bygone era and were out of keeping with today’s views about sex roles.

Similarly, when the Supreme Court has upheld sex classifications, it has often suggested that it was doing so because it had confidence that the classification was the product of a present-day decision. In Califano v. Webster,17 for example, the Court upheld a provision of the Social Security Act that seemed very similar to a provision it had invalidated just a few months earlier in Califano v. Goldfarb.18 Part of the Court’s explanation was that the legislative history of the Webster provision showed that it, unlike the Goldfarb provision, was “not ‘the accidental byproduct of a traditional way of thinking about females,’ but rather was deliberately enacted to compensate for particular economic disabilities suffered by women.”19 Although the Court did not quite spell it out, the logical inference from its reasoning is that a classification that had been invalidated could be reenacted, and would be upheld, if it were reenacted in circumstances that reflected the influence of present-day thinking about sex roles.

15. See id. at 729.
16. See, e.g., Goldfarb, 430 U.S. at 205-06.
18. 430 U.S. 199.
19. Webster, 430 U.S. at 320 (quoting Goldfarb, 430 U.S. at 223 (Stevens, J., concurring)) (citation omitted).
The Court’s most important recent sex discrimination decision, United States v. Virginia, in which the Court declared unconstitutional the Virginia Military Institute’s exclusion of women—is, I think, best understood as a modernizing decision. Virginia had argued that VMI’s sex discrimination was justified for two reasons: the state wished to provide an option of single-sex education in order to preserve a diversity of educational opportunities; and it wished to provide, at VMI, an “adversative” form of education that, it asserted (and the district court found, as a matter of fact), could not be provided if women joined men in the school.

There are many strands to the Court’s reasoning in Virginia, but there is reason to think that modernization was central to what the Court was doing there. In striking down VMI’s policy, the Court was very careful not to foreclose the possibility that public single-sex education might be constitutional in other circumstances. But the Court emphasized, repeatedly, that it would not accept post hoc justifications for sex discrimination; sex-based classifications could be upheld only on the basis of justifications that were the actual reasons for the enactment of the classification. It was for this reason that the Court rejected Virginia’s argument that VMI provided the benefits of single-sex education as part of a diverse menu of educational opportunities. That was an after-the-fact justification constructed for purposes of litigation, the Court said; it was not the reason that VMI was established as an all-male school.

This is a very Ely-like—and modernizing—way to deal with the question of when single-sex education is constitutional. The Court did not simply reach its own conclusion about whether and when same-sex education is a good idea. That would have been the kind of value-laden conclusion that Ely would have deplored. It also would have required the Court to address difficult empirical questions about the effect of a single-sex educational environment on men and women. Instead, the Court signaled that it might uphold sex-segregated education, but only if the decision to segregate men and women were made by a present-day legislature (or other government body) in accordance with present-day values, and only if the Court were satisfied that that government body had reached a self-conscious, well-considered conclusion about the desirability of same-sex education.

The Court would not uphold same-sex education at VMI because the decision to admit only men to VMI was made in an earlier time, for reasons

21. Id. at 535-36.
22. United States v. Virginia was somewhat complicated by the fact that after a lower court had held that VMI’s exclusion of women violated the Constitution, Virginia established—as a “remedy” for the violation—an all-female school. The Court in Virginia held, without difficulty, that that school was not the equal of VMI and therefore could not possibly remedy the violation. But before even considering this remedy, the Court had concluded that the exclusion of women from VMI itself “violated the Constitution’s equal protection requirement.” Id. at 547-51.
that did not reflect modern views of sex roles. The persistence of sex segregation at VMI might have been the result of inertia, not a considered decision by the political branches. That is why the Court emphasized that post hoc justifications were unacceptable: if it accepted such a justification, it might be perpetuating a practice of sex segregation that was not in fact supported by a current majority.

There is another conspicuous feature of the Virginia opinion that seems at first hard to justify but that becomes quite understandable when seen as a form of modernization. VMI claimed that the exclusion of women was needed to make an "adversative" education viable. The Court did not simply conclude that existing empirical evidence demonstrated that the premise—that admitting women would make "adversative" education impossible—was factually false. Indeed, it is not clear how the Court could have reached that conclusion, in light of a district court finding to the contrary. Nor did the Court say (as Chief Justice Rehnquist did, in a concurring opinion) that maintaining an adversative form of education was simply not an important enough state objective to justify sex discrimination.

Instead, the Court's principal argument was that this defense of VMI was of a piece with discredited views about women's capacities—such as the view that women were unsuited to be admitted to law school or to be practicing lawyers.23 "The notion that admission of women would downgrade VMI's stature, destroy the adversative system and, with it, even the school," the Court said, "is a judgment hardly proved, a prediction hardly different from other 'self-fulfilling prophec[ies],’ once routinely used to deny rights or opportunities."24 At first glance, this seems to be an odd argument, a form of guilt by association. The fact that some people misguidedly thought that women could not be lawyers does not mean that the proponents of same-sex education at VMI were mistaken in thinking that the presence of women would destroy the adversative system of education. The two questions are different, and they could have different answers.

The Court's point, however, is that while the questions were different, they were answered in the same era: VMI's exclusionary policy was the product of the same era that discriminated against women in ways that are now universally repudiated. Even if the Court was not itself prepared to make a factual evaluation of VMI's claim, it was prepared to insist that that claim be evaluated by today's political processes, reflecting today's norms about men's and women's roles. Because there was no current, considered decision by the political branches to adopt sex segregation at VMI—only an old decision, rationalized by today's lawyers—the Court would not go along.

23. See id. at 542-45.
One other aspect of the *Virginia* decision, less emphasized in the opinion, is also consistent with the modernization approach. VMI was an outlier; only one other public institution of higher education—the Citadel, in South Carolina—had a similar exclusionary policy toward women. And the Court explicitly mentioned "[w]omen's successful entry into the federal military academies." It might plausibly be argued—as Justice Scalia did argue, in his dissent—that VMI's outlier status was a reason to uphold its policy. VMI (and the Citadel) offered an option (to men) that would otherwise not be available anywhere, and the fact that those institutions were outliers, it could be argued, meant that the effect on women was relatively slight.

The Court, however, does not seem impressed by arguments of this kind. If a form of regulation is unusual, the Court is more likely to see that as a reason to find the regulation unconstitutional—rather than to conclude, as one plausibly might, that the unusual nature of the regulation makes it relatively unthreatening, a possible response to specific local issues, and a potentially valuable source of diversity. The Court's view of outliers may not be right. But it is consistent with the modernization idea: if an institution or a form of regulation is a national outlier—and particularly if the national trend has been toward abolishing that kind of institution—that suggests that popular sentiment may no longer support the institution, and that a decision invalidating it will reinforce, not defeat, the democratic process.

There is one final complexity in the modernization idea that is illustrated by the VMI case. It is really not plausible to suppose that the Court would have allowed Virginia simply to reinstate VMI's exclusionary policy, accompanied by sanitized legislative findings that reflected present-day sensibilities. The Court did leave the door open for some forms of sex-segregated higher education, but not the form VMI had been practicing. Perhaps if there had been a national reaction against the VMI decision—national legislation authorizing sex-segregated public military academies, or legislation in many states creating such institutions—the Court would have retreated (if that is the right word). But reenactment by Virginia alone would not have been enough.

How can that be squared with the idea that the Court was engaged in representation reinforcement? The answer, I think, is that modernizing representation reinforcement can take different forms. Sometimes, existing laws and institutions do not reflect popular sentiment because of some form of inertia. But sometimes laws may reflect local sentiment more or less faithfully but be out of keeping with national sentiment. Modernization can take the form of bringing the local jurisdiction into line with national sentiment; the Court

25. Id. at 544; see id. at 542 n.11.
26. Id. at 577-79 (Scalia, J., dissenting).
will be receptive to the charge that it is misestimating national sentiment, but it will not necessarily be responsive to local sentiment. That is, apparently, how the Court thought of the situation in Virginia, and in many of the other instances of modernization that I will discuss.

B. Substantive Due Process

"Substantive due process" is the name given to the idea that the courts may recognize rights under the Due Process Clause that do not have an explicit textual basis in the Constitution. It was, of course, Ely’s bête noire. The establishment of rights not based in the text seemed to him to involve the worst kind of judicial value choice and disregard of democracy. But at least some of the substantive due process decisions, I believe, can be seen as examples of modernizing representation reinforcement. I will discuss two examples—Lawrence v. Texas,28 which upheld a substantive due process claim; and Washington v. Glucksberg,29 which rejected such a claim while purporting to establish a framework in which such claims should be considered.

In Lawrence, the Supreme Court relied on the Due Process Clause to invalidate a Texas statute that made consensual same-sex sodomy a crime. Much of the reasoning of that opinion is devoted to elaborating the contours of the term “liberty” in the Due Process Clause; for the Supreme Court to limit representative government on the basis of that kind of reasoning is antithetical to the principles of Democracy and Distrust. But substantial parts of the opinion suggest that the Court was modernizing and trying to implement a popular consensus, not just elaborating a conception of liberty.

Before Lawrence, most of the Court’s substantive due process decisions had said that substantive due process protected rights established by tradition.30 In Bowers v. Hardwick—a decision, overruled by Lawrence, that had upheld a Georgia sodomy statute—the Court had emphasized its view that homosexual sodomy, far from being a traditional right, had traditionally been condemned.31 The Court in Lawrence took issue with the Bowers Court’s account of tradition but, in the end, could assert only that “the historical grounds relied upon in Bowers are more complex” than the Bowers Court had suggested.32 In other words, the Court in Lawrence essentially conceded that tradition, while not perhaps foreclosing the conclusion that the Texas statute was unconstitutional, did not really support that conclusion.

30. See id. at 722; Reno v. Flores, 507 U.S. 292, 303 (1993); Michael H. v. Gerald D., 491 U.S. 110, 122 (1989); Moore, 431 U.S. at 503; see also Glucksberg, 521 U.S. at 710 (“We begin, as we do in all due-process cases, by examining our Nation’s history, legal traditions, and practices.”).
32. Lawrence, 539 U.S. at 571.
The Lawrence Court then shifted the focus from tradition to current understandings: "In all events," the Court said, "our laws and traditions in the past half century"—rather than those of previous centuries—"are of most relevance here."33 Those more recent developments, according to the Court, "show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."34 The Court then reviewed a variety of sources that supported its claim about the "emerging awareness": the Model Penal Code; the Report of Britain’s Wolfenden Commission, which called for the repeal of laws punishing homosexual conduct; Parliament’s favorable response to that Commission; a decision of the European Court of Human Rights holding that laws forbidding homosexual conduct were a violation of the European Commission on Human Rights; and, in the United States, the fact that, according to the Court, of the twenty-five states that criminalized sodomy at the time of Bowers, only thirteen still had such prohibitions, and only four "enforce their laws only against homosexual conduct."35

The Lawrence Court’s emphasis on an “emerging awareness” is an explicit commitment to modernization. The problem with the Texas statute was not that it deprived people of a right “deeply rooted in this Nation’s history and tradition.”36 Rather, the Texas statute was, if anything, too much the product of old ways of thinking; it was out of touch with current sentiment.37

33. Id. at 571-72.
34. Id. at 572.
35. Id. at 573; see id. at 572-73.
37. Cass R. Sunstein, What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage, 2003 SUP. CT. REV. 27, argues powerfully that the Lawrence opinion, while in many ways obscure, is probably best understood as resting on “a kind of due process variation on the old common law idea of desuetude.” Id. at 49. While desuetude alone might not be enough to condemn a statute, the nonenforcement of the Texas statute “stemmed from the particular fact that the moral claim that underlay it could no longer claim public support,” and the statute infringed on interests that were, arguably at least, protected under established Supreme Court precedent. Id. at 59.

Desuetude, or the infrequent enforcement of a statute, can be very good evidence that a statute is the product of an earlier era—that it is out of keeping with current sentiment and in need of modernization. But a lack of enforcement seems to be neither a necessary nor a sufficient condition of the need for modernization. Some statutes are infrequently enforced for other reasons besides their lack of support; in fact, some restrictions may be unenforced because they are so universally accepted that they are hardly ever violated, such as laws forbidding practices like slavery or—even more extreme example—cannibalism. On the other hand, the fact that a restriction is vigorously enforced does not mean that modernization is unwarranted. Virginia vigorously enforced the exclusion of women from VMI. A locally popular measure, condemned by national sentiment, might be vigorously enforced; or the enforcing agency’s decisions may not reflect popular sentiment, just as the legislature’s failure to repeal a measure might not reflect popular sentiment.
The *Lawrence* Court also left the door open for the political branches to repudiate its decision, but it did so in a different way than the *Virginia* Court. *Lawrence* invited a response from the political branches by deciding the case very narrowly—or, rather, by writing an opinion that committed the Court only to a narrow principle. The only thing that seems clear after *Lawrence* is that it is unconstitutional to impose criminal penalties for sodomy. The Court of course did not decide whether there is a constitutional right to same-sex marriage, and it did not decide whether states could discriminate against homosexuals in other ways. A newly enacted law that flatly forbade homosexual sodomy would, it is clear, fare no better than the Texas law, which had been enacted recently. But the Court reserved judgment on a host of other measures that might penalize and isolate gays and lesbians. To that extent, the Court, true to the representation-reinforcement model, invited the political branches to tell it that it had misjudged popular sentiment. So while there is no basis for thinking that the Court would repudiate *Lawrence*, the Court might be prepared to acquiesce in a political response that reduced the decision to relative insignificance.

*Glucksberg*, decided before *Lawrence*, upheld a Washington statute forbidding assisted suicide against a challenge raised on behalf of a terminally ill patient. The decision itself obviously did not modernize anything. But there are clear indications that the case came out the way it did because the Justices were convinced that the Washington statute, and other state statutes like it, actually did reflect current sentiment, not a bygone era, and did not need to be modernized.

The Court in *Glucksberg* used the rhetoric of many other substantive due process decisions: it emphasized that the courts should recognize only “fundamental rights found to be deeply rooted in our legal tradition.”³⁸ And the Court asserted that there was “a consistent and almost universal tradition that has long rejected the asserted right”³⁹ to assisted suicide. But that was not really an adequate answer to the claim that was being made in the case. The claim was that individuals who are nearing the end of their lives are entitled to determine the manner and time of their own deaths. To refer to this simply as “assisted suicide” is obviously too crude a characterization. Indeed, it is not clear that a majority of the Court accepted the characterization; five Justices indicated their willingness to accept a qualified right to physician-assisted suicide in certain circumstances, notwithstanding the traditional prohibitions that the majority stressed.

Moreover, ancient prohibitions on assisted suicide, as applied to end-of-life situations, seem to be prime candidates for modernization. The problem that gives rise to the claim of a right to die is a product of modern medicine; the problem simply did not exist, in anything remotely like the same form, until

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³⁹. *Id.* at 723.
relatively recently. This could easily be an area where the laws on the books do not reflect current, considered judgments on the disputed issue.

The Court, to its credit, seemed to realize as much. It did not stop with the irrefutable but too-simple claim that it has long been illegal to assist a suicide. The Court emphasized, at several points in its opinion, that state legislatures, including Washington’s, had reconsidered the old statutory prohibition against assisted suicide and had reaffirmed its application to the new end-of-life situations. At the outset of its opinion, the Court noted that Washington had addressed the issue in 1979. And the Court gave a lengthy explanation of why modernization was not needed:

Though deeply rooted, the States’ assisted-suicide bans have in recent years been reexamined and, generally, reaffirmed. Because of advances in medicine and technology, Americans today are increasingly likely to die in institutions, from chronic illnesses. Public concern and democratic action are therefore sharply focused on how best to protect dignity and independence at the end of life, with the result that there have been many significant changes in state laws and in the attitudes these laws reflect. . . . At the same time, however, voters and legislators continue for the most part to reaffirm their States’ prohibitions on assisting suicide. . . .

Thus, the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues.

The Court did not say that it would have established a right to die if there were no evidence of modernization. But by the same token, the Court was plainly influenced by the fact that this was an issue that the political branches were seriously addressing. The Court thus invited arguments in future cases that might distinguish Glucksberg, and urge that statutes be invalidated, on the ground that circumstances and attitudes have changed in a way that makes the old statutes, whatever their traditional pedigree, outmoded.

C. Capital Punishment

In 1974, in Furman v. Georgia, the Court declared that capital punishment, as then practiced in the United States, was “cruel and unusual” and therefore unconstitutional under the Eighth Amendment. There was no majority opinion, and only two Justices concluded that the death penalty was cruel and unusual in all circumstances. The other members of the majority emphasized, in varying ways, that the death penalty was applied in an unpredictable and arbitrary way.

The reaction from the states was overwhelming. Within four years, thirty-five states had reenacted death penalty statutes. The new statutes were drafted specifically to address the concern about excessive discretion and arbitrariness

40. Id. at 707.
41. Id. at 716, 719 (citations omitted).
42. 408 U.S. 238 (1972).
that had led the decisive members of the Court to vote as they did in *Furman*.43 In 1976, the Court upheld some of these statutes, effectively reinstating capital punishment in the United States.44

Whatever else might be said about this episode, it is about as clear an example of the modernization paradigm as one can find. In 1974, the Court had excellent reason to believe that capital punishment, in the United States, was no longer supported by popular sentiment. Between 1960 and 1966, an average of 15 people were executed each year, compared with an average of 166 in the 1930s, 128 in the 1940s, and 72 in the 1950s. A number of states abolished the death penalty in the 1960s and early 1970s; in 1972, the California Supreme Court held that capital punishment violated the Cruel and Unusual Punishment Clause of the state constitution.45 The U.S. Supreme Court itself, in 1968, had made a small move in the same direction, holding that states could not disqualify potential jurors who had reservations about the death penalty, unless they were unequivocally unwilling to impose it.46

These various developments gave the Supreme Court a reasonable basis to conclude that capital punishment was an anachronism. The holding of *Furman* reflected not an across-the-board opposition to capital punishment on the part of the Court, but rather the idea that capital punishment was unconstitutional because the nation was no longer committed to it: capital punishment had so little support that, the key Justices reasoned, its imposition was basically a matter of happenstance. When the representative branches reacted by reinstating the death penalty, and announcing their willingness to impose it more systematically, the Court upheld the death penalty.

Seen from one point of view, this series of events might cast the Court in a bad light. One might say that the Court—imposing its own values, in the way Ely would not have allowed—wanted to outlaw capital punishment but, perhaps aware of the questionable legitimacy of its action, did so in a halfhearted way. When the political branches reacted to this judicial usurpation, the Court backed down—either cravenly or belatedly, depending on one’s views.

That is not, however, the only way to understand what happened. One might also say that the Court, in a principled and good-faith decision, determined that capital punishment seemed no longer to enjoy popular support. On this view, the persistence of capital punishment statutes was the result of


inertia, or of local sentiment that was out of line with a developing national consensus, or of the fact that in some jurisdictions it was politically too difficult to bring about abolition even though popular sentiment generally favored it. In these circumstances, the death penalty was imposed arbitrarily on a few unlucky defendants. The Court held, quite reasonably, that that state of affairs violated the Constitution—not because of the Justices' own objections to capital punishment, but because the continued imposition of the death penalty did not reflect the considered judgment of the representative branches.

Then, when it turned out that the representative branches were indeed serious about imposing the death penalty, the Court, again in a principled way, deferred. This is, one might say, exactly the way the representation-reinforcing modernization approach should work. The problem with capital punishment was that it was not supported by a serious commitment. Once the states made their commitment clear, it was entirely proper for the Court, in the new circumstances, to allow the death penalty to be reinstated. Those who believe the Court should do more than modernize will not hold such a favorable view of this episode. But the Court's decisions can be easily understood as a reasonable effort to carry out the modernizing approach to judicial review.

D. Brown v. Board of Education

Whatever its practical impact, Brown v. Board of Education\textsuperscript{47} is a singularly important decision in shaping the role of the Supreme Court. Brown can be understood in many ways, and it would be a mistake to say it was simply an exercise in modernization. But the similarities between Brown and other modernizing decisions are noteworthy.

First, at the time of Brown, school segregation was, according to polls, opposed by a national majority; or at least, once Brown was decided, a narrow majority supported the Court's decision.\textsuperscript{48} Whether or not the Court was consciously influenced by the polls, it was certainly aware of many indications that, outside the South, segregation was increasingly seen as an anachronism. The federal government, in an amicus curiae brief, argued against the constitutionality of segregation, emphasizing the damage it was doing to the United States in the postwar world order.\textsuperscript{49} The Court itself, in a series of earlier decisions, had made segregation in public higher education increasingly untenable; those decisions seemed to precipitate little backlash.\textsuperscript{50}

\textsuperscript{47} 347 U.S. 483 (1954).
\textsuperscript{48} See Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 310 (2004).
\textsuperscript{49} Brief of the United States as Amicus Curiae at 2-8, Brown, 347 U.S. 483 (No. 1).
Second, there was a perception, on the part of several of the Justices, at least, that the political process was not able to implement the majority’s views. Civil rights legislation was repeatedly blocked in the Senate by a minority of Senators from segregationist states who held committee chairs or who engaged in filibusters. There is evidence in the records of the Court’s deliberations that this political situation was an important influence on the decision.\footnote{See KLARMAN, supra note 48, at 308 (quoting Justice Robert Jackson).}

Finally, while there does not seem to be any reason to think that the Court was prepared to reverse course in the face of popular opposition, the Court did—for better or worse—act in a way that showed great sensitivity to the response of the political branches and the population more generally. The evidence is well known. The remedial decision, Brown II, signaled a willingness to proceed slowly in bringing about the actual desegregation of schools;\footnote{Brown v. Board of Education, 349 U.S. 294 (1955).} this was a clear indication that the Court was willing to allow popular resistance to desegregation to influence how Brown I was enforced. The Court itself withdrew from the school segregation battle for almost a decade after Brown I, except for its intervention in the face of direct defiance in Little Rock.\footnote{Cooper v. Aaron, 358 U.S. 1 (1958).} The Court cautiously, and almost certainly lawlessly, refrained from deciding the constitutionality of antimiscegenation laws until 1967.\footnote{See the discussion of Naim v. Naim, 350 U.S. 985 (1956), in KLARMAN, supra note 48, at 321-23, and in Gerald Gunther, The Subtle Vices of the ”Passive Virtues”: A Comment on Principle and Expediency in Judicial Review, 64 COLUM. L. REV. 1, 11-12 (1964).}

In fact, there was very little actual desegregation of the schools until the political branches became involved.\footnote{See James R. Dunn, Title VI, the Guidelines and School Desegregation in the South, 53 VA. L. REV. 42, 43 n.8 (1967).} It might be said, in fact, that what the Court did in Brown was to make an essentially symbolic statement that segregation was unconstitutional; the Court then more or less waited for the political branches to bring about the actual desegregation of the schools. In this sense, the Court, consistent with the modernization approach, was concerned less with carrying out its vision of racial equality than with ensuring that the will of the national majority—however strong or weak it might be in its opposition to segregation—would be vindicated. There is, as I said, surely more to Brown than this. But the modernizing approach was at least a component of that decision.

II. IN DEFENSE OF THE MODERNIZING MISSION

If modernization is carried out in the way I describe, then it seems to be a form of representation reinforcement, quite consistent with the prescriptions of Democracy and Distrust. But is this a proper role for the courts? At least two important objections might be raised. The first is that it is inappropriate—
indeed, antithetical to the historic role of the judiciary—for the courts to
declare a constitutional principle and then retreat in the face of popular
opposition. The second is that the courts simply lack the competence to make
the kinds of determinations that the modernization approach requires—in
particular, determinations that particular laws are inconsistent with popular
sentiment when the laws remain on the books and elected officials support
them.

A. Unprincipled Retreats?

Sometimes, of course, it is unprincipled for the courts to backtrack when
their decisions encounter opposition. And if a court simply announced that it
would reverse itself if enough people disagreed with its decision, that would be
unacceptable, at least in ordinary circumstances. But in the modernization
decisions I have canvassed—some of them, anyway—that is not what the
Supreme Court did. Instead, it established reasonable, constitutionally
grounded principles that permitted or required it to change the outcome in a
particular case in response to the actions of the political branches.

There is, for example, nothing unprincipled about a rule that rejects post
hoc rationalizations; such a rule is a mainstay of administrative
law. But the
effect of that rule, in sex discrimination cases, might be that old laws will be
invalidated initially—because their stated rationale, at the time of enactment,
reflects outmoded views of gender roles—but then upheld if reenacted for
permissible reasons. The somewhat similar approach suggested in
Glucksberg—that legislation that has been recently rethought will be accorded
a greater presumption of constitutionality—need not be unprincipled. Nor, as I
argued earlier, was the Court’s sequence of decisions in the capital punishment
cases necessarily unprincipled.

In fact, doctrines that address procedural matters generally will require
courts to do something that looks like—but is not—backing down in the face of
intransigence. A court that reverses a criminal conviction for trial error will
uphold a conviction after a proper retrial. A decision that is overturned because
it was made with an improper motive—a discriminatory motive, for example—
must be upheld if it is legitimately remade with a proper motive. The
modernization approach is in the same category. It focuses on procedure, not on
the substantive decision: that is why it is consistent with Ely’s theory in
Democracy and Distrust. It is an approach designed to make sure not that
certain decisions are made, but that the decisions are made in accordance with
current views.

B. Amateur Political Science or Common Law?

Perhaps a more telling objection to the modernization approach is that it calls on courts to do something that they have no competence to do—to estimate the state of current public opinion and determine when opinion has changed since a measure was enacted. Surely, it might be argued, if there is one thing that courts do not do better than elected officials, it is precisely this: determining the current state of public opinion. How can courts be facilitating the proper functioning of democracy when they second-guess elected officials on the very question that elected officials are uniquely well positioned to answer?

There is less to this objection than meets the eye, however. The modernization approach is intended to deal with situations in which public sentiment has changed and current laws are inconsistent with it. When such situations exist, judges would promote democracy if they invalidated the laws. The question is whether the probability that judges will misidentify such situations is great enough so that judges should stay out of the modernization business entirely. It is a partial response that the courts will retreat if their misidentification is severe enough to prompt a political reaction. But that is only a partial answer, because various inertial forces might also prevent a mistaken judicial decision from being overturned by the legislature.

Why should we have any confidence that judges will be able to identify situations that call for modernization? It is, of course, a familiar criticism of Democracy and Distrust that Ely's theory requires judges to be amateur political scientists: to determine when the channels of political change are blocked or a group is the victim of improper stereotyping, for example. This objection is of the same order.

The answer, I think, can be found in the sources that courts look to when they engage in modernization of the kind I describe. For the most part, these are relatively familiar common law sources: judicial decisions, in the court's own and other jurisdictions, and the pattern of legislative activity—whether a particular statute is an outlier and whether the trend has been toward repealing statutes of this kind. In the areas I have reviewed, the judgment that a particular law or practice was out of touch with current sentiment was based mostly on those sources, which are familiar materials in common law decisions. The modernizing decisions also examine the pattern of administrative decisions to determine, for example, whether a statute is generally not enforced. But that, too, is not much of a departure from how common law courts proceed. No doubt courts engaged in a modernizing mission are also relying, to a degree, on their own intuitive sense of how popular sentiment is developing. But it is a reasonable speculation that common law courts do this, as well.

57. See Sunstein, supra note 37.
As all of this suggests, modernizing constitutional law courts are engaged in an enterprise that is not so different from what common law courts have historically done. Common law courts establish principles that are not specifically authorized by the legislature, because they believe that those principles are consistent with emerging understandings of good policy. And just as the legislature can then overrule a common law court, the modernization approach allows the legislature to overrule a court that has reached a constitutional decision. The parallel is not exact, of course. But it is close enough to suggest that the modernizing mission is not an obviously inappropriate one for an institution that is considered competent to conduct common law adjudication.

In *Democracy and Distrust*, Ely explains that courts are appropriately in the business of making democracy function because lawyers have a special expertise in process. That explanation may not be fully satisfactory. Courts are institutions whose historic competence is in working with common law and statutory materials. Judgments about what democracy requires seem to be of a different order. They concern process, of course, but a different kind of process: they require courts to be amateur political scientists, not lawyers. But the modernization approach may fill this lacuna in Ely's account. The reason courts are in the business of modernization is that the judgments that are called for—judgments about the emerging trends in the law, subject to legislative reversal—are close to one of the core competences of the courts, the common law. And the reason the courts should do this task, as opposed to some other—such as the vindication of a set of moral values—is the reason Ely gave in his book: there is much reason to distrust judges' determinations of what values or principles are particularly important to our society.

It is certainly possible that the courts in a democracy should do more (or less) than Ely envisioned. But it is an especially great tribute that a quarter-century after it was written, in an era far removed from the Warren Court and the *Carolene Products* footnote that were Ely's inspiration, *Democracy and Distrust* is still enlightening, in unexpected ways, about the relationship between judicial review and democratic government.