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## Review, Democracy and Distrust

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**DEMOCRACY AND DISTRUST.** By John Hart Ely.\* Cambridge: Harvard University Press, 1980. Pp. viii, 261. \$15.00.

*Reviewed by Richard S. Kay\*\**

Judicial review is both the most necessary and the most dangerous institution in a constitutional regime, one in which the powers of government are defined by law. It is needed to effectuate the legal limitations on the power of government. But as the ultimate legal authority on those limitations it is by definition without legal limits. The extent to which we admire the kind of constitutional government we have is often a function of the extent to which we trust the Supreme Court to refrain in some principled way from exploiting its unique position of legal power. In fact, however, the Court's history cannot be described plausibly as one of self-restraint. From *Dred Scott v. Sandford*<sup>1</sup> to *Lochner v. New York*<sup>2</sup> to *Roe v. Wade*<sup>3</sup> the Court has been accused of abandoning the narrow role of constitutional policeman for that of an active, independent, and most critically, final policymaker for the nation.

Constitutional law scholarship has consisted of a long series of suggestions as to how to deal with this basic problem. "Interpretivism," the idea that the Supreme Court's authority begins and ends with enforcement of rules directly inferable from the constitutional document and its framers' intention, has had to contend with a variety of "noninterpretivist" suggestions that the Court derive its constitutional decisions, at least in part, from nontextual sources. These latter models have usually attempted to accommodate their authors' simultaneous attachment to both the restrained and active aspects of the Court's history. They have sought a definition of the Court's function that would preclude the perceived abuses of its authority without jettisoning its ability to correct morally or politically outrageous decisions made elsewhere in the government. But the formulas de-

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1. 60 U.S. (19 How.) 393 (1857).

2. 198 U.S. 45 (1905).

3. 410 U.S. 113 (1973).

vised to do this work have proven inadequate to define a line so thin. They have tended to be expansive enough to sanction significant activity by the Court in the imposition of substantive values rejected by the other branches and unsupported in the language of the Constitution.<sup>4</sup>

In a series of articles, and now in *Democracy and Distrust*, John Hart Ely has made a qualitative break with this tradition of theoretical constitutional law writing. His contribution is the freshest breeze to come along in decades. Ely rejects the notion that the only alternative to slavish adherence by the Court to the unchanging rules of the Constitution (one form or another of interpretivism) is the formulation and application of extraconstitutional values discovered or manufactured by the Court itself (noninterpretivism). Ely chooses a middle path, not out of compromise, but out of conviction that it best comports with the nation's legal and historical values.<sup>5</sup>

Ely first explains what he finds wrong in the theories he has rejected. The judicial imposition of values rooted in extraconstitutional sources—natural law, neutral principles, tradition and so forth—is shown, in each case, to depend on propositions so general as to provide no answers in specific cases. When specific inferences are drawn from those propositions, they are endlessly controversial and therefore still provide no clearly correct results.<sup>6</sup> These models of adjudication, therefore, come down to the almost unrestricted choices of the judges—the imposition of substantive values, “generate[d] . . .

4. E.g., A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* (1976); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 131-49 (1977); Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 *NW. U.L. REV.* 417 (1977); Wright, *Professor Bickel and the Scholarly Tradition and the Supreme Court*, 84 *HARV. L. REV.* 769 (1971). Of course, those who would pay careful attention to the intended meaning of constitutional provisions have hardly been swept from the field. Indeed, “interpretivism” of one form or another has recently acquired some particularly important defenders. E.g., R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); Linde, *Judges, Critics and the Realist Tradition*, 82 *YALE L.J.* 227 (1972); Monaghan, *The Constitution Goes to Harvard*, 13 *HARV. C.R.-C.L. L. REV.* 117 (1978). Furthermore, the Supreme Court itself has, in form at least, almost never departed from the interpretivist position. See R. BERGER, *supra*, at 367-68.

5. J. ELY, *DEMOCRACY AND DISTRUST* at vii (1980) [hereinafter cited by page number only].

6. Pp. 43-72. The assumption of indeterminacy in the results of a judicial model having recourse to sources of value outside of positive law entails necessarily the embrace of moral skepticism. See Leff, *Unspeakable Ethics, Unnatural Law*, 1979 *DUKE L.J.* 1229. Cf. Dworkin, *No Right Answer?*, 53 *N.Y.U. L. REV.* 1, 30-32 (1978).

out of the stomach."<sup>7</sup> And, of course, it is this unlimited judicial veto which is the very problem which is to be resolved.

Ely also finds an interpretivist model of judicial review unacceptable. Criticism of such interpretivism is usually premised on one of two positions. The first is that the language and history of the Constitution simply make impossible any substantial degree of certainty in discovering the intended meaning of the document.<sup>8</sup> The second is that even if they could be understood, reliance on one- or two-hundred-year-old notions of government is unacceptable given the changing needs of society.<sup>9</sup> Ely's objection is different. He reads the language and history of several constitutional provisions to affirmatively, indeed emphatically, direct the reader outside of the document to "considerations that will not be found in the language of the [Constitution] or the debates that led up to it."<sup>10</sup> Interpretivism thus contains an internal contradiction. One cannot simultaneously be faithful to the Constitution and limited to its explicit rules because those very rules demand consultation of extraconstitutional values. The burden of this conclusion rests on Ely's reading of the privileges or immunities clause of the fourteenth amendment and of the reservation of "rights . . . retained by the people" in the ninth amendment.<sup>11</sup> His analysis, primarily of the texts, but also of the legislative and ratification history, leads him to conclude that the former provision amounts to "a delegation to future constitutional decision-makers to protect rights that are not listed either in the fourteenth amendment or elsewhere in the document."<sup>12</sup> And the latter "signal[s] the existence of federal constitutional rights beyond those specifically enumerated."<sup>13</sup> As a matter of interpretation, therefore, the Constitution contains the equivalent of brackets with footnote directions to the appropriate governmental authorities which might be understood

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7. A. BICKEL, *THE MORALITY OF CONSENT* 26 (1975). Throughout Ely's work, as in every sensitive consideration of constitutional law, Bickel's influence is evident—to be elaborated as well as to be contended with.

8. E.g., Anderson, *The Intention of the Framers: A Note on Constitutional Interpretation*, 49 AM. POL. SCI. REV. 340, 341-46 (1955).

9. E.g., Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029, 1033 (1977).

10. P. 14.

11. See pp. 22-30, 34-41. Ely also suggests that a similar, if somewhat narrower delegation, is properly inferable from the due process and equal protection clauses of the fourteenth amendment. See pp. 20-21, 31-32.

12. P. 30.

13. P. 38.

as follows: "Here, include some other proper limitations on the power of the government."

The balance of Ely's argument is his own suggestion of the right way to fill in the brackets. His plan rests on one overriding assumption—the goodness of representative democracy. Given this concern with democratic decisionmaking, he opposes any use of the open-ended constitutional directives to impose on society the particular substantive values of the judges. But his understanding of the principles of representative democracy is such that he is still able to develop a model of judicial review with considerable breadth. His thesis holds that judicial intervention is appropriate to remedy the effects of certain breakdowns which threaten any representative government. Representative democracy, premised on the idea that each citizen will have an opportunity to influence government decisions through his elected representative, assumes that the representative will be responsive to each citizen because to do so is in the interest of his own reelection. But this system is subject to two kinds of structural defects. First, it is possible for representatives to use the very governmental power granted to maintain themselves in office without regard to the desires or interests of some of their constituents—by excluding those constituents in whole or in part from the electoral process. This might be done crudely by limiting the franchise, or more subtly, for example, by reducing the opportunity for participation in the political debates that are necessary to implement their political goals and to elect officials congenial to their interests.<sup>14</sup> Second, even when technical access to the political process is maintained, the objective of an equal opportunity for each person to influence the government may not be achieved. For some groups, a combination of such characteristics as numerical minority, hostile prejudice, irrational stereotyping and social isolation, might relegate their members to such political impotence that representatives can easily ignore their interests without any risk of adverse consequences.<sup>15</sup> Judicial review should, without reference to particular textual authorization, correct the results of these inherent defects in the machinery of representative democracy.<sup>16</sup>

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14. P. 103.

15. *Id.*

16. Ely also quite emphatically believes the Court ought to enforce the specific and comprehensible limitations found in the constitutional text. He finds these three concerns—specific limits, political participation, and protection of minorities—neatly and conveniently catalogued in Justice Stone's famous footnote in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938), *quoted at* pp. 75-76.

This "participation-oriented, representation-reinforcing"<sup>17</sup> model of judicial review confines the Supreme Court's role in non-text-based adjudication to this limited set of concerns. The pursuit or suppression of substantive values, on the other hand, may safely be left to the legislatures which will now be assumed to be adequately representative. Translated into the specifics of modern constitutional adjudication, Ely's model strongly supports what he calls "clearing the channels of political change"<sup>18</sup> in the form of vigorous judicial intervention where claims involve freedom of expression and the right to vote. Similarly it calls for courts to correct the legislative misallocations that result from underrepresentation of certain minorities in the political process. By the same token, it would discourage the kind of intervention on behalf of favored social values that has been associated with "substantive due process" of either the old or new style.

This is an attractive, in fact, powerful model. Its appeal is even greater when the ramifications for particular constitutional questions are spelled out. He deals with such persistent problems as the role of illicit legislative motivation, the distinction between speech and action, and standards of review in equal protection law. I will not summarize those arguments here but I believe that, like the more general theory, they are put with an intelligence and insight that engages not just logic but instinct and common sense as well. But as recounted up to now there is a gap in the argument. Assuming that Ely is correct in interpreting the open-texture phrases of the Constitution as directing future constitutional decisionmakers to formulate non-text-based constitutional rules, what are the justifications for interpolating a theory premised on the maintenance of representative democracy? More broadly, what *kinds* of justifications are acceptable in arguing that choice? Much (though by no means all) of Ely's argument for this understanding of judicial review is, itself, textbased and historical.<sup>19</sup> That is, he presents evidence to show that the framers of the vague provisions were themselves devoted to representative democracy. At considerably greater length, he argues that this theory of government is consonant with the rest of the Constitution. By surveying the language and background of the more accessible provisions he makes a convincing case that the instrument, as a whole, evinces an

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17. P. 87.

18. P. 105.

19. *But see* notes 33-36 *infra* and accompanying text.

overwhelming concern "with procedural fairness in the resolution of individual disputes" and "with ensuring broad participation in the processes and distributions of government."<sup>20</sup> At the same time, he shows that the specification of protected substantive values, while not entirely absent, is relatively rare and that such attempts as have been made have often been historical failures in that the Court has narrowed or neglected these provisions.<sup>21</sup> This is a fairly accurate characterization of the 1787 Constitution and the Bill of Rights, and it fits particularly well with the subject matters of amendments twelve through twenty-six. These amendments, with very few exceptions, deal with expanding and perfecting representative democracy.

But why is it an argument in favor of utilizing in this way the broad open-textured clauses of the Constitution that it fits in so well with the *other* clauses?<sup>22</sup> Ely does not answer this question in a definitive way, but he does describe his position as "[a]n argument by way of *ejusdem generis*."<sup>23</sup> But this suggests that it is a way of understanding the *intentions* of the drafters of these open-textured provisions. "On my more expansive days," he says, "I am tempted to claim that the mode of review developed here represents the ultimate interpretivism."<sup>24</sup> This indicates that the model is itself interpretivist, based on the conclusion that the framers' intention was not entirely open-ended. Not, "Here, include any other limitations on the power of government," but, "Here include such other limitations of government as are necessary to assure that the kind of government set up here works the way it's supposed to—and no other limitations, please."

What difference does it make whether or not Ely's model is founded on the presumed intention of the framers? Ely does not "think this terminological question is either entirely coherent or especially important."<sup>25</sup> But it is clearly a matter which has given him some pause. His 1978 article, containing much of what are now Chapters 1 and 2 of *Democracy and Distrust*, was entitled "Constitu-

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20. P. 87. See also pp. 88-101.

21. Pp. 99-101.

22. He recognizes that the premise "that aids to construing the more open-ended provisions are appropriately found in the nature of the surrounding document . . . is not one with which it is impossible to disagree." P. 101.

23. P. 87.

24. Pp. 87-88.

25. P. 88.

tional Interpretivism: Its Allure and Impossibility."<sup>26</sup> When transposed to chapter titles, however, plain interpretivism still has its allure but it is only *clause-bound* interpretivism which is impossible.<sup>27</sup> Interpretivism based on the entire constitutional scheme is still available.<sup>28</sup>

I find this to be a matter of some significance. It is inevitable that the arguments for and against Ely's model of review will turn on the nature of the assumptions on which it is premised.<sup>29</sup> Thus, if Ely's connection of judicial review and representative democracy is a product of interpretation of the intended nature and scope of the delegation to later decisionmakers, it will be subject to counter-arguments based on the historical evidence. It will have to hold its ground in the kind of long and often inconclusive debates on the framers' intention which have been common in constitutional scholarship.<sup>30</sup> Much of Ely's argument seems plausible, though not conclusive, to me. But his arguments based on the intention demonstrated

26. 53 IND. L.J. 399 (1978).

27. Pp. 1, "The Allure of Interpretivism," & 11, "The Impossibility of a Clause-Bound Interpretivism."

28. Ely acknowledges his intellectual debt in this regard to the insights of Charles Black. See C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969). While not free of the same ambiguity discussed here, Black seems more unabashedly nontextual in his approach. See *id.* at 23. This contrast emphasizes the extent of Ely's dependence on the constitutional document.

29. In drawing the prior and more general conclusion that the open-textured provisions themselves are to be read in some manner other than an exclusively interpretivist one, Ely seems to be more unequivocally interpretivist. See pp. 14-41. And here, too, he may be subject to historical, fact-based, counter-arguments. Ely's proof here is largely negative—an attempt to demonstrate that the clauses at issue cannot be plausibly understood to have a more narrow meaning. But the absence of any definite discernible meaning does not necessarily imply an intention that meaning be supplied by future decisionmakers. In any event, Ely's conclusion, that one may infer from these rather opaque provisions an intention to vest in the judges the power to write new constitutional rules is not the only one. It is at odds with much of what we know of the expressed attachment of the 1787-1791 drafters for a *fixed* constitution and preference for a limited judiciary. See R. BERGER, *supra* note 4, at 300-11, 363-66; G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 600-02 (1969). Ely's conclusions as to the meaning of the privileges or immunities clause have been vigorously contested by Raoul Berger. See R. BERGER, *supra* note 4, at 20-51, 99-116; Berger, *Government By Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277 (1979).

30. The intent of the framers of the fourteenth amendment is a subject of apparently unending controversy. Compare R. BERGER, *supra* note 4, with Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979). I am not suggesting Ely's position is right or wrong only that it, like any difficult historical argument, is always open to revision.

by the text and its legislative history do not appear invulnerable. Where inferences are drawn from the nature of the rest of the Constitution, Ely's conclusion that it stands for a government of representative democracy is not the only possible result. It is possible, for example, to read the document as providing, at least as a major subtheme, strict restraint on governmental interference with the right to hold private property.<sup>31</sup> Why should we not fill in the constitutional brackets with new rules drawn to protect that interest? Moreover, from an interpretivist standpoint, Ely would have to contend with counter-evidence of the extent to which the framers really were attached to participatory representative democracy and the broad ways in which they understood the scheme of government they were creating. Under an interpretivist model, the relationship between the intentions of the framers of the ninth and fourteenth amendments and the expansion of the franchise accomplished by the fifteenth, nineteenth, twenty-third, twenty-fourth, and twenty-sixth amendments would, at least, be more complicated. And the argument from *ejusdem generis* would have to contend with one from *expressio unius*. Again, the point is not to demonstrate Ely wrong, but to emphasize that to the extent he is resting on historical intention, he will have to stake its validity on a contest, the outcome of which is anything but clear.

But it would be unfair to label Ely an interpretivist. In addition to defending his model of judicial review on the grounds of consistency with the rest of the Constitution, he advances briefly two other arguments: first, that it is more in keeping with "the underlying premises of the American style of representative democracy"<sup>32</sup> and

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31. U.S. CONST. art. I, § 8, cl. 8 (protection of patents and copyrights permitted), art. I, § 10, cl. 1 (impairment of contract obligation by states prohibited), amend. III (quartering of soldiers in houses limited), amend. IV (right of security against unreasonable searches or seizures of persons, houses, papers and effects), amend. V (property not to be taken without due process of law or without just compensation), amend. VII (civil jury assured), amend. XIV (property not to be taken without due process of law), amend. XXI (repeal of constitutional ban on sale of intoxicating liquors).

32. Hamilton distinguished between the public good and the public will. The best government was concerned with the former:

The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they entrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion—or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests. It is a just observation that the people commonly *intend* the PUBLIC GOOD. This

second, that it assigns to the judges a role which, by virtue of their place largely outside the political system, they are in a particularly good position to fulfill.<sup>33</sup> According to Ely these "overtly normative"<sup>34</sup> arguments "are, if anything, more important"<sup>35</sup> than the first. And at another point he says,

What counts is not whether it [his position] is "really" a broad interpretivism or rather a position that does not fall in either camp, but whether it is capable of keeping faith with the document's promise in a way I have argued that a clause-bound interpretivism is not, and capable at the same time of avoiding the objections to a value-laden form of non-interpretivism, objections rooted most importantly in democratic theory.<sup>36</sup>

It will be noticed, however, that the noninterpretivist justifications for this particular prescription for judicial review take *as given* the necessity of reconciling the Court's role with the preservation of government by representative democracy. But the sufficiency of this political outlook as a basis for a model of constitutional law is not self-evident.

Since this aspect of the argument explicitly does not rely on prior constitutional authorization, the choice of democracy as a baseline assumption must compete with other proffered values. The possibility that the model stands or falls on such an "overtly normative" proposition is, for me, a critical aspect of the argument. First, it depends crucially on a persuasive justification of democracy on its own merits—not as intended by the framers or even traditionally accepted. It is unfortunate that Ely has not developed that argument

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often applies to their very errors. But their good sense would despise the adulator who should pretend that they always *reason right* about the *means* of promoting it.

THE FEDERALIST No. 71 (A. Hamilton) (emphasis in original). In the debates at the Constitutional Convention, he was more blunt. "Nothing but a permanent body [a senate for life] can check the imprudence of democracy," G. WOOD, *supra* note 29, at 554 (quoting A. Hamilton). The governmental structure established was designed to assure not only sensitivity to the public desires but also to channel public choice of representatives toward worthy, virtuous, talented men who were most fit to govern. *See id.* at 506-18.

33. P. 101.

34. Pp. 102-03.

35. *Id.*

36. Pp. 88-89 n.\*.

more fully.<sup>37</sup> More importantly, by basing the model on a moot question of political theory, his position is not justifiable in conventional legal terms—that is by reference to an accepted controlling norm.<sup>38</sup> Rather, the discussion must be cast in the realm of pure political discourse.

Ely's position must rest on a basic moral judgment that might be put this way: "Society is better off if its governmental decisions on questions of substantive values are almost always made by the politically accountable branches, the representative nature of which is to be assured by enforcement of its constitutional law." This is a reasonable position, but it is not obviously the only reasonable position. Someone else may assert, "Society is better off if its governmental decisions are usually made by the politically accountable branches, except insofar as their decisions impinge on important and personal aspects of people's lives in which case these decisions should be reviewable by the Supreme Court." I much prefer Ely's formulation, but on what grounds does the Court choose which is correct? I do not see how the choice can be made any more determinate than those which Ely has so forcefully criticized as inhering in recourse to fundamental values as a source of decision. Having weighed the anchor of constitutional interpretation we are necessarily "afloat on the wide ocean of whim and caprice,"<sup>39</sup> or at least upon the sea of moral and political choice. At some level in the argument it is hard to see how Ely can avoid the same kind of resolution he suggests may be necessary to choose among philosophical axioms in a model of review premised on "moral reasoning": "We like democracy, you like privacy. We win 6-3."<sup>40</sup>

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37. He makes a reference, p. 187 n.14, to a brief argument made in an earlier article which approves democracy as an institutional way of revealing and effectuating individual preferences in a utilitarian calculus. See Ely, *supra* note 26, at 405-08.

38. More precisely, it is not justifiable in positivist legal terms, according to which the validity of a rule of law is identified "by tests having to do not with their content but with their *pedigree* or the manner in which they were adopted or developed." R. DWORKIN, *supra* note 4, at 17. That Ely explicitly chooses not to label his proposal positivist or nonpositivist, p. 1 n.\*, underscores the ambiguity of the underlying basis for his model.

39. Z. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 75 (1795).

40. Cf. p. 58 ("We like Rawls, you like Nozick. We win 6-3. Statute invalidated.") This is not to say that adherence to the intentions of the drafters of the Constitution does not involve a value choice. See Leff, *supra* note 6, at 1246-49. But that choice seems qualitatively different from all the other possibilities which have a direct and immediate reference to particular contemporary judgments as to social welfare. It is impossible in this review to elaborate this idea adequately. But I believe interpretivism in-

The ambiguity of Ely's model with respect to its interpretivist basis may thus be translated into a dilemma. As interpretivism it is subject to the discoveries and whimsies of linguistic analysis and historical research. As noninterpretivism its major premise rests on an explicit value choice which will not persuade those who already understand and are comfortable with constitutional law as an explicitly antidemocratic institution.<sup>41</sup> No combination of these two aspects will erase the individual difficulties.<sup>42</sup>

volves a decision to completely abdicate such choices, to refer entirely to impersonal and historical values. And, for the courts, the identification of the controlling values are determined solely by traditional legal means. See note 38 *supra*; Kay, Book Review, 12 HARV. C.R.-C.L. L. REV. 219, 227 (1977).

41. One commentator, for example, recently has taken issue with Ely's idea that judicial intervention is appropriate only in instances where the ordinary representative process has broken down:

The function of the judge is to give concrete meaning and application to our constitutional values . . . . What is the connection between constitutional values and legislative failures? If the legislative process promised to get any closer to the meaning of our constitutional values then the theory of legislative failure would be responsive to the puzzlement. But just the opposite seems true.

Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9-10 (1979). See also R. DWORIN, *supra* note 4, at 140-47.

42. The difficulties inherent in each resolution of the ambiguity can be illustrated by Ely's treatment of the constitutional protection accorded the right to vote in state elections. What is the license for judicial adjustment of the state franchise along the one person, one vote principle of *Reynolds v. Sims*, 377 U.S. 533 (1964)? It probably cannot be found in a "clause-bound" interpretation of the Constitution. Ely does present a mild argument that it is inferable directly from the equal protection clause, but the contrary evidence, principally the language of section two of the fourteenth amendment together with the general attitudes of the time, argues powerfully that the drafters and ratifiers of the amendment did not understand it to involve equality in the state franchise. See pp. 116-25; R. BERGER, *supra* note 4, at 69-98. (Ely also makes a brief argument based on the guaranty clause but not from evidence of the 1787 framers' intention. P. 118 n.°, 122-23.) A "full-document" interpretivism inserted into the space provided by the equal protection clause, also has significant problems. Such features of the Constitution as the composition of the United States Senate (art. I, § 3), the references to state prescriptions of possibly differing qualifications for different houses of the state legislatures (art. I, § 2, cl. 1; amend. XVII), the limitation of the ban on poll taxes to federal elections (amend. XXIV), and the explicit prohibitions of qualifications based on race, sex, and age, are all factors which militate against reading the whole Constitution as standing for a more general rule of equality overriding state choices.

On the other hand, if the imposition of equal electoral power is based on Ely's noninterpretivist view that it is socially preferable to have a government chosen by an electorate composed of persons with exactly equal political clout, he is clearly in for a lot of arguments. There are nontrivial political theories and systems in which not every individual is given equal rights of participation, which may lay plausible claim to the title "republican" or even "democratic." (The government of the United States is one example.) How (beyond the gut instincts of the judges) should the Court select among the

However, it would be a mistake to conclude that because Ely's model rests finally on controversial assumptions it is indistinguishable from other far fuzzier approaches to judicial review. I have noted that the most critical and most vexing issue in constitutional law is the definition of the limits of judicial authority both for the Court and for the rest of us. In that respect Ely's work is a striking advance. Once the basis of the model is accepted it provides a more precise and, for me, far more congenial articulation of the role of the Court than those prescriptions which put the judiciary in charge of enforcing one version or another of "fundamental values." For those who are concerned that constitutional rules limit the Court as well as the other branches, this is no small accomplishment.

I have taxed Ely's argument with questions that are inherent in any understanding of constitutional law that is not based in its entirety on prior authority accepted as legitimate. I hope this will not be taken as a failure to appreciate his achievement. This is a work of powerful intelligence and cogency as well as one of exceptional grace and wit. Of course, his approach admits of difficult, even obscure problems in application. But as Ely correctly reminds us, "it's a very bad lawyer who supposes that manipulability and infinite manipulability are the same thing."<sup>43</sup> With *Democracy and Distrust* we have moved a good deal closer to the goal of devising workable constitutional limits. Though, as I have indicated, his argument is not free of difficulties, even these help us lay bare the basic and perplexing problems involved in realizing our aspirations for a rule of law.

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various theories of representative democracy? It seems that neither justification—interpretivist or noninterpretivist—provides powerful support for the Court's reapportionment cases.

43. P. 112.