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# A CRITIQUE OF JOHN HART ELY'S QUEST FOR THE ULTIMATE CONSTITUTIONAL INTERPRETIVISM OF REPRESENTATIVE DEMOCRACY

*James E. Fleming\**

DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW.  
By *John Hart Ely*. Cambridge, Mass.: Harvard University Press.  
1980. Pp. viii, 268. Cloth \$15; paper \$6.95.

*"We . . . suffer ourselves . . . to be  
transported to [E]lysian regions."  
— Samuel Johnson<sup>1</sup>*

Contemporary constitutional theory, John Hart Ely argues in *Democracy and Distrust*, is dominated by a false dichotomy between "clause-bound interpretivism" and "noninterpretivism." Clause-bound interpretivists, such as the late Justice Hugo Black, believe that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution" (p. 1). Noninterpretivists, such as the Supreme Court that produced the majority opinion in *Roe v. Wade*,<sup>2</sup> contend that "courts should go beyond that set of references and enforce [substantive] norms that cannot be discovered within the four corners of the document" (p. 1). The genius of Ely's approach is that it leads to a middle ground, a "third theory" (p. vii) that seeks to avoid the pitfalls and incorporate the strengths of these falsely dichotomous opposites (pp. 12, 88 & n.\*), in the form of a structure-bound "ultimate interpretivism" (p. 88). According to this "participation-oriented, representation-reinforcing approach to judicial review" (p. 87), "the Court should enforce the 'specific' provisions of the Constitution" (p. 76). Moreover, it should set aside decisions of elected representatives when the process of representative democracy is undeserving of

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I would like to thank Sotirios A. Barber, William E. Harris, II, Richard F. Hayden, Gregory C. Keating, and Walter F. Murphy for their insightful comments on a still earlier version of the Essay.

1. THE RAMBLER, No. 36 (1750). Cf. Ely, *Democracy and the Right to be Different*, 56 N.Y.U. L. REV. 397, 397 n.2 (1981) (rejecting the adjectival form "Ely-ish").

2. 410 U.S. 113 (1973).

trust — namely, “when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically dis-advantaging some minority . . .” (p. 103). In terms of the titles of Ely’s chapters 4, 5, and 6, the proper function of the Supreme Court in American representative democracy is that of “policing the process of representation” by “clearing the channels of political change” and “facilitating the representation of minorities.”

Ely’s provocative book already has elicited a considerable critical literature.<sup>3</sup> Rather than undertaking a comprehensive examination of Ely’s theory or a thorough survey of this literature, I shall set out a critique of his quest for the ultimate constitutional interpretivism. His failure to succeed in this quest derives from his resistance to the implications of his own criticisms of clause-bound interpretivism, which in turn stems from his incomplete recognition that the *structure* of the American constitutional system is one of constitutional democracy instead of representative democracy. To succeed, Ely’s representation-reinforcing mode must be supplemented with a “structural fundamental value mode,” a mode that draws inferences from the concept of constitutional democracy. Only then can the ultimate interpretivism of constitutional democracy be realized.

#### I. ELY’S QUEST FOR CLOSURE OF THE OPEN-ENDED PROVISIONS OF THE CONSTITUTION AND THUS FOR THE ULTIMATE INTERPRETIVISM

In chapters 1 and 2, “The Allure of Interpretivism” and “The Impossibility of a Clause-Bound Interpretivism,” Ely argues that clause-bound interpretivism, notwithstanding its allure, dispositively fails on its own terms. The reasons for the theory’s failure, Ely claims, are surprisingly simple: “[T]he constitutional document itself, the interpretivist’s Bible, contains several provisions [the ninth amendment and the equal protection and privileges or immunities clauses of the fourteenth amendment] whose invitation to look beyond their four corners — whose invitation, if you will, to become at

3. See, e.g., Barber, *The Constitutionalism of John Hart Ely* (paper delivered at the Annual Meeting of the American Political Science Association, New York, Sept. 1981); Symposium, *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259 (1981) (especially Dworkin, *The Forum of Principle*, *id.* at 469); Symposium, *Judicial Review versus Democracy*, 42 OHIO ST. L.J. 1 (1981) (especially Brest, *The Substance of Process*, *id.* at 131, and Parker, *The Past of Constitutional Theory — And Its Future*, *id.* at 223); Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659; Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980); Levinson, *Judicial Review and the Problem of the Comprehensible Constitution*, 59 TEXAS L. REV. 395 (1981) (book review); O’Fallon, *Book Review*, 68 CALIF. L. REV. 1070 (1980).

least to that extent a noninterpretivist — cannot be construed away” (p. 13).

The three open-ended provisions of the Constitution that make clause-bound interpretivism incomplete, Ely grants, seem to raise the question of fundamental values that, along with the ghost of Felix Frankfurter, haunted Alexander Bickel’s career:

Which values . . . qualify as sufficiently important or fundamental or whathaveyou to be vindicated by the Court against other values affirmed by legislative acts? And how is the Court to evolve and apply them? [P. 43.] (quoting Bickel)

Having raised this question in an epigraph to chapter 3, “Discovering Fundamental Values,” Ely undertakes a “search for an external source of [fundamental] values with which to fill in the Constitution’s open texture . . . — one that will not simply end up constituting the Court [as] a council of legislative revision” (p. 73). In this search, he runs “the gamut of fundamental-value methodologies” that was “the odyssey of Alexander Bickel” (p. 71). He rejects on skeptical and democratic grounds the following extra-constitutional sources of fundamental values that noninterpretive theorists have proffered: the judge’s own values, natural law, neutral principles, reason, tradition, consensus, and the predicted values of the future. Bickel’s odyssey, Ely contends, “testifies to the inevitable futility of trying to answer the wrong question” (p. 71), and leads him to conclude:

[N]ow I can see how *someone who started with Bickel’s premise*, that the proper role of the Court is the definition and imposition of values, might well after a lifetime of searching conclude that since nothing else works — since there isn’t any impersonal value source out there waiting to be tapped — one might just as well “do the right thing” by imposing one’s own values. It’s a conclusion of desperation, but in this case an inevitable desperation. No answer is what the wrong question begets. [P. 72.]

And so, noninterpretivism fails because it cannot explain why one should prefer any given set of “fundamental” values over another.

Thus, Ely declines to embrace both clause-bound interpretivism and noninterpretivism. He also refuses to accept “the usual assumption that these are the only options” (p. 73). He insists instead that “[a] quite different approach is available, and to discern its outlines we need look no further than to the Warren Court” (p. 73). The outlines to which Ely refers are those prefigured in footnote four of *United States v. Carolene Products Co.*:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . .

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . national, . . . or racial minorities . . . ; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.<sup>4</sup>

Ely elaborates upon this footnote, especially the relationship between the themes of paragraphs two and three, in chapter 4, "Policing the Process of Representation: The Court as Referee." He notes that

both *Carolene Products* themes are concerned with participation: they ask us to focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted. [P. 77.]

Ely argues that the majoritarian theme of paragraph two and the egalitarian theme of paragraph three, despite their apparently inconsistent impulses, fit together in a coherent political theory of representative democracy — a republican theory of representation of the whole people, with actual representation of the majority and "virtual representation" of minorities (pp. 77-88). He then goes on to elaborate upon paragraph two in chapter 5, "Clearing the Channels of Political Change," and paragraph three in chapter 6, "Facilitating the Representation of Minorities."

Ely claims that the participation-oriented, representation-reinforcing mode of judicial review based on these theoretical underpinnings provides the content necessary to close the open-ended provisions of the ninth amendment and the equal protection and privileges or immunities clauses of the fourteenth amendment, that is, the provisions that make clause-bound interpretivism incomplete. Through the notions of virtual representation and "process writ large" (p. 87), I shall grant for the sake of argument, he succeeds in closing the equal protection clause. Ely then seeks guides to construction of the "inscrutable" (p. 98) ninth amendment and the privileges or immunities clause through an exploration of the nature of the Constitution as a whole. This exploration reveals that

contrary to the standard characterization of the Constitution as "an enduring but evolving statement of general values," . . . in fact the

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

selection and accommodation of substantive values is left almost entirely to the political process and instead the document is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with what might capaciously be designated process writ large — with ensuring broad participation in the processes and distributions of government. An argument by way of *ejusdem generis* seems particularly justified in this case, since the constitutional provisions for which we are attempting to identify modes of supplying content, such as the Ninth Amendment and the Privileges or Immunities Clause, seem to have been included in a “we must have missed something here, so let’s trust our successors to add what we missed” spirit. On my more expansive days, therefore, I am tempted to claim that the mode of review developed here represents the ultimate interpretivism. [Pp. 87-88.]

In this manner, via an argument by way of *ejusdem generis*, Ely closes the ninth amendment and the privileges or immunities clause, and thereby achieves the ultimate interpretivism. Or so he believes.

## II. ELY’S FAILURE TO ACHIEVE THE ULTIMATE INTERPRETIVISM

Ely’s argument that the ninth amendment and the privileges or immunities clause of the fourteenth amendment can be closed with processual values alone instead of with processual along with substantive values fails for several reasons. First, in “Constitutional Interpretivism: Its Allure and Impossibility”<sup>5</sup> (the article on which chapters 1 and 2 of the book are based), Ely had contended that these open-ended provisions are *sui generis*: unlike the other provisions of the Constitution, each is “a general mandate to evaluate the substantive validity of governmental choices”<sup>6</sup> or “a mandate for general and textually unbounded [or “untethered”<sup>7</sup>] substantive review.”<sup>8</sup> Provisions of the Constitution that are *sui generis* on the matter of substance versus process are not susceptible to an argument, by way of *ejusdem generis*, that since the rest of the constitutional document is concerned overwhelmingly with process (whether it be writ large or small), they too must be so concerned.

Second, Ely claims not that the Constitution is “entirely” con-

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5. 53 IND. L.J. 399 (1978). In *Constitutional Interpretivism*, Ely had been more generous in his concessions to noninterpretivism on the matter of substantive review than he is in *Democracy and Distrust*. Compare, e.g., the passage from the article quoted in the text accompanying note 6, *supra*, with its counterpart in the book: “a rather sweeping mandate to judge of the validity of governmental choices.” P. 32. The changes in the book may reflect a judgment on Ely’s part that he was too generous in the article on this matter. Even so, he does write in the book, as he had written in the article, that “the Fourteenth Amendment *does* contain provisions . . . that contain the sort of invitation to [general] substantive oversight that the Due Process Clause turns out to lack.” P. 18 (“general” appeared in the article but was omitted in the book).

6. *Id.* at 438.

7. *Id.* at 445 n.158.

8. *Id.* at 440.

cerned with process as opposed to substance, but that it is "almost entirely" (p. 87) or "overwhelmingly" (p. 87) so concerned; indeed, he admits of so much substance in the Constitution (pp. 88-101) that one might doubt whether he is a process theorist in any strong sense of the term (this despite his reduction of much of the substance to process writ large). Hence, even if Ely's *ejusdem generis* argument withstands my *sui generis* refutation, the discrepancy between "entirely" and "almost entirely" would require some substance to fill in the ninth amendment and the privileges or immunities clause. That is to say, these provisions would mandate some substantive judicial review even if "the selection and accommodation of substantive values is left almost entirely to the political process" (p. 87).

Third, Ely's proposal to give substantive content to the ninth amendment and the privileges or immunities clause by means of the political process instead of judicial review evinces an error concerning the nature of constitutional rights. This error is manifest in his discussion in "Constitutional Interpretivism" of the notion of democracy as applied utilitarianism,<sup>9</sup> and of American democracy as applied utilitarianism qualified by rights ("side constraints"<sup>10</sup>) and equity ("distributional corrections"<sup>11</sup>). Anticipating the central thesis of *Democracy and Distrust*, Ely writes of the relationship between these two qualifications and judicial review:

I shall be suggesting later in the book of which this is a part that the correction of . . . problems of inequitable distribution [*Carolene Products* paragraph three] is what judicial review ought in large measure to be about. The call for side constraints . . . will not figure in the constitutional scheme I shall be suggesting, save only when the right involved is guaranteed by the positive law of the Constitution [paragraph one] or is necessary to the successful functioning of the democratic process [paragraph two]. Even assuming further side constraints on a utilitarian morality are appropriate [ninth amendment and privileges or immunities clause], their content should be determined, I shall argue, by the democratic process rather than in accord with a philosophical system one or more commentators may find appealing.<sup>12</sup>

In view of Ely's contention that democracy is an applied utilitarian morality, his claim that "[e]ven assuming further side constraints on a utilitarian morality are appropriate, their content should be determined . . . by the democratic process" is tantamount to the claim that "even assuming further side constraints on democracy are appropriate, their content should be determined by the democratic process," which in turn is tantamount to the claim that "even assuming

9. *Id.* at 405-08. Ely omits this discussion in *Democracy and Distrust*, see p. 187 n.14, but he refers to it in *Democracy and the Right to be Different*, *supra* note 1, at 401-04.

10. *Id.* at 406.

11. *Id.* at 406.

12. *Id.* at 406 n.29.

further side constraints on the majority are appropriate, their content should be determined by the majority." Such claims are inconsistent with the character of "side constraints" or rights: rights, since they place limitations upon the majority, cannot in fairness be determined by the majority itself, lest the majority be judge in its own cause and the alleged right be no real side constraint at all.

In the foregoing paragraph, I have conceded, for the sake of argument, that Ely is correct in characterizing American democracy as applied utilitarianism, rather than as applied constitutionalism or an applied hybrid of constitutionalism and democracy. Now I should like to call this concession into question, and to insist most emphatically that it is the morality of constitutional democracy or liberal democracy, not that of utilitarianism, that underlies the American constitutional system. In this matter I generally agree with the arguments of Walter F. Murphy<sup>13</sup> and Ronald Dworkin.<sup>14</sup>

And so, Ely's process-oriented mode of judicial review does not succeed entirely in closing the open-ended provisions of the ninth amendment and the privileges or immunities clause. Complete closure would require a mode capable of supplying some measure of substantive content as well. But Ely's analysis of these provisions does show the way to their closure, and hence to the ultimate interpretivism of constitutional democracy.

### III. TOWARD CLOSURE OF THE PRIVILEGES OR IMMUNITIES CLAUSE AND THE NINTH AMENDMENT

Ely's interpretation of the privileges or immunities clause and the ninth amendment put forward in "Constitutional Interpretivism," once again, is that each constitutes a mandate for general and textually unbounded or untethered substantive review. This interpretation might seem to imply that these provisions are textual warrants for virtually unfettered judicial discretion in evaluating the substantive validity of governmental choices — in other words, that they call for what Dworkin characterizes as discretion in the strong sense of virtually unlimited freedom as distinguished from the weaker senses of judgment and finality.<sup>15</sup> Ely's interpretation, however, does implicitly take into account an important distinction between "textually untethered" and "untethered" review: Substantive review may be *textually* untethered in the sense of not being bound by words and

13. Murphy, *The Art of Constitutional Interpretation: A Preliminary Showing*, in *ESSAYS ON THE CONSTITUTION OF THE UNITED STATES* 130, 133-35 (M.J. Harmon ed. 1978); Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 707-08 (1980); Murphy, *Constitutional Interpretation: Text, Values, and Processes*, 8 REV. AM. HIST. 7 (1981) (reviewing *Democracy and Distrust*).

14. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* at vii-xv, 131-49, 266-78 (1977); Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* 113 (S. Hampshire ed. 1978).

15. R. DWORKIN, *supra* note 14, at 31-33.



clauses as self-contained units but nonetheless *structurally* tethered. In William F. Harris's term, the open-ended provisions under consideration here, which indeed are mandates for textually untethered review, nevertheless may not call for transcendent freedom but rather for "transcendent structuralism."<sup>16</sup>

Furthermore, the very analysis that leads Ely to conclude that the privileges or immunities clause, and, by implication, the ninth amendment, are textually untethered points to their proper structural tether. In the following discussion of this analysis, I do not intend to imply that Ely's approach to the interpretation of the privileges or immunities clause is necessarily the best approach to take; that his explication of the text and framers' intent is not open to criticism and refutation by constitutional theorists and historians; or that transcendent structuralism would be illegitimate were it not for the existence of the open-ended privileges or immunities clause or some other such textual peg on which to hang it. My argument, in short, is that the implications of Ely's analysis of the privileges or immunities clause shows the way to its closure through a transcendent structuralist analysis of the concept of constitutional democracy.

Ely's analysis runs roughly as follows. Although the privileges and immunities clause of article IV, after which the similar clause in the fourteenth amendment was modeled, may have been originally intended to do nothing more than "keep states from treating outsiders worse than their own citizens" (p. 23), it had acquired a broader and independent meaning for the drafters of the fourteenth amendment. They had (rightly or wrongly) adverted repeatedly to an 1823 opinion of Justice Bushrod Washington. Sitting alone on Circuit, Justice Washington had held in *Corfield v. Coryell* that the privileges and immunities clause of article IV embraced "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments."<sup>17</sup> Ely comments:

This was the opinion of a single justice, it was *dictum*, and it is at least strongly arguable that Washington was mistaken in even purporting to limit to the "fundamental" . . . — those privileges and immunities to which the Article IV clause guarantees out-of-staters presumptively equal access. All this must tempt one so inclined to discount the discussion's relevance. That would be unfair, however. The fact that Washington's purported methodology respecting Article IV may have been mistaken suggests that perhaps it should not be followed with respect to that article, but it cannot erase the significance for a responsible interpretation of the Fourteenth Amendment of the fact that *that* amendment's framers repeatedly adverted to the *Corfield* discussion as the key to what they were writing. [P. 29.]

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16. Harris, *Bonding Word & Polity: The Logic of American Constitutionalism*, 76 AM. POL. SCI. REV. (1982) (forthcoming).

17. 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823).

According to Ely, then, the privileges or immunities clause of the fourteenth amendment should be similarly read to include certain rights not already set out elsewhere in the Constitution.

This argument prompts several observations. Ely argues that article IV's privileges and immunities clause was a general guarantee of equality between out-of-staters and locals (p. 23) and thus was a precursor of the equal protection clause and an expression of the concern with process writ large (pp. 83-84). The privileges or immunities clause of the fourteenth amendment, in contrast, was "a delegation to future constitutional decision-makers to protect rights that are not listed either in the Fourteenth Amendment or elsewhere in the document" (p. 30). Although the former, Ely concedes, "will bear an equality construction . . . , [t]he syntax of the Privileges or Immunities Clause of the Fourteenth Amendment seems inescapably that of substantive entitlement" (p. 193 n.45). This argument is difficult to reconcile with his *ejusdem generis* argument that the privileges or immunities clause must be concerned overwhelmingly with process writ small and process writ large: The "substantive entitlement" argument would appear to preclude an argument that the privileges or immunities clause "will bear an equality construction" and thus is concerned with process writ large to the exclusion of additional substantive entitlements. Furthermore, because process writ small is strictly procedural and does not involve protection of "rights that are not listed either in the Fourteenth Amendment or elsewhere in the document," it cannot supply the nontextual substantive entitlements protected by the privileges or immunities clause. Hence, neither singly nor taken together can process writ large and process writ small exhaust the privileges or immunities of citizens of the United States.

Second, Justice Washington's dictum, which, in Ely's view, shaped the framers' conception of the privileges or immunities of the fourteenth amendment, was that the privileges and immunities of article IV were confined to "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments . . . ." Since "free government" (a term many early Americans used and which Alpheus T. Mason has kept alive)<sup>18</sup> is synonymous with "constitutional democracy" (the expression Walter F. Murphy and others have used),<sup>19</sup> the privileges or immunities clause, if Ely's analysis is taken to its logical conclusion, would seem to require an elaboration of the concept of constitutional democracy. The courts would then enforce against the democratic

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18. A. MASON, *FREE GOVERNMENT IN THE MAKING* (3d ed. 1965); A. MASON, *THE SUPREME COURT FROM TAFT TO BURGER 9-10* (3d ed. 1979).

19. Murphy, *The Art of Constitutional Interpretation*, *supra* note 13, at 134.

branches of the government whatever "fundamental" rights a constitutional democracy necessarily established.

Herein lies the structural tether for the textually untethered privileges or immunities clause. Thus, we might accept Ely's argument that "substantive due process" is a contradiction in terms (p.18), point out the similarities between *Corfield v. Coryell*, on the one hand, and cases like *Meyer v. Nebraska*<sup>20</sup> and *Palko v. Connecticut*,<sup>21</sup> on the other, and conclude that the latter cases, which purported to interpret the due process clause of the fourteenth amendment, in fact elaborated on the privileges or immunities clause. My proposed interpretation of the privileges or immunities clause (and, by implication, the ninth amendment) would fill in its open texture, not only with process writ small and large but also with the substantive values inherent in the concept of constitutional democracy that Ely's analysis shows it to need for closure.

#### IV. ELY'S CONCEPT OF REPRESENTATIVE DEMOCRACY IN RELATION TO THE CONCEPT OF CONSTITUTIONAL DEMOCRACY

In response to the preceding argument, Ely undoubtedly would insist that his representation-reinforcing mode does fill in the open texture of the privileges or immunities clause; he most likely would contend that the concept of "free government" is coextensive with that of "representative democracy," and so his examination of the latter is also one of the former. Furthermore, despite his failure to state explicitly that the privileges or immunities clause, which mandates textually untethered review, is nonetheless tethered by structure, Ely certainly would maintain that "Policing the Process of Representation" (ch. 4) implicitly treats the clause as being so tethered. But the fundamental error in his analysis is that he considers this clause, and, for that matter, all open-ended provisions of the Constitution, to be tethered not by the structure of constitutional democracy but rather by that of representative democracy.

Ely's error, however, is not as great as the terms that I have used to express it suggest. It would be simplistic to say, "But America has a constitutional democracy, not a representative (that is, majoritarian representative) democracy; consequently, Ely's representation-reinforcing mode is wholly insufficient." Instead, we must examine his theory of representative democracy to determine the degree to which it is at the same time a theory of constitutional democracy.

In much of its usage, the term "representative democracy" im-

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20. 262 U.S. 390 (1923).

21. 302 U.S. 319 (1937).

plies "majoritarian representative democracy," or rule of the majority acting through elected representatives without let or hindrance. "Constitutional democracy," in contrast, is characterized by limitations upon what the majority acting through elected representatives may do. In view of the very existence of the American Constitution, which limits what the majority may do, it would seem remarkable that scholars or judges would contend that America has a majoritarian representative democracy as opposed to a constitutional democracy, if they were to employ these terms in any strict sense. Nonetheless, one might expect conceptions of constitutional democracy to range from the relatively unlimited to the relatively limited. At the former end of this spectrum, one could place proponents of judicial restraint such as Learned Hand, James Bradley Thayer, and (sometimes) Felix Frankfurter; at the other end, one could put many advocates of judicial activism, including most of the noninterpretivist fundamental value theorists. The latter theorists advocate subjecting governmental actions touching various kinds of rights to a judicial scrutiny more searching than that afforded by the "reasonableness" or "minimum rationality" standard of judicial review, which the former theorists propose for all categories of cases.

Scholars have often commented on the weakness of the minimum rationality standard. Most notably, Felix Cohen argued that it turned our courts into "lunacy commissions sitting in judgment upon the mental capacity of legislators" and that no legislature is so mad that it would enact or retain an utterly unreasonable (and therefore, under this test, unconstitutional) law.<sup>22</sup> And Gerald Gunther has written of two-tier (strict scrutiny-minimum rationality) equal protection analysis:

The Warren Court embraced a rigid two-tier attitude. Some situations evoked the aggressive "new" equal protection, with scrutiny that was "strict" in theory and fatal in fact; in other contexts, the deferential "old" equal protection reigned, with minimal scrutiny in theory and virtually none in fact.<sup>23</sup>

To the extent that Cohen's characterization of the deferential minimum rationality standard is apt, and that what Gunther wrote of the standard in the area of equal protection is true of it in general, theorists like Thayer who have advocated its use in all categories of cases are vulnerable to Dworkin's charge that they do not "take rights seriously."<sup>24</sup> This charge, in turn, is tantamount to an accusation that they do not take constitutionalism seriously, or that they do not recognize fully that America has a constitutional democracy in which

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22. F. COHEN, *Transcendental Nonsense and the Functional Approach*, in *THE LEGAL CONSCIENCE* 33, 44 (L. Cohen ed. 1960).

23. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *HARV. L. REV.* 1, 8 (1972).

24. R. DWORKIN, *supra* note 14, at 131-49, 184-205.

judicial review that protects constitutional rights is proper, not a majoritarian representative democracy in which judicial review is a "deviant institution."<sup>25</sup> If this is the case, perhaps the crucial difference between proponents of activism and restraint is that the former recognize that America has a constitutional democracy, while the latter, although they may see this dimly in theory, in practice treat it as if it were instead a majoritarian representative democracy.

Where does Ely stand on this spectrum from majoritarian representative democracy to constitutional democracy? He is at once less deferential to the democratic branches than are the majoritarian democrats and more deferential than are the constitutional democrats — less deferential as far as categories of cases embraced by the *Carolene Products* footnote are concerned, more deferential as regards cases outside the *Carolene Products* paradigm but embraced by the fundamental value methodologies. Ely's *Carolene Products* jurisprudence of representative democracy, however, is a jurisprudence of constitutional democracy rather than of majoritarian representative democracy. Although paragraph two would be compatible with the latter, paragraphs one and three place significant constitutionalist limitations upon majority rule.

But does Ely's jurisprudence fully embody the concept of constitutional democracy embedded in the structure of the American constitutional system? Constitutional democracy, as Murphy has argued, is a hybrid form that combines constitutionalism (or liberalism) and democracy, whose respective basic principles are liberty and majority rule along with equality — which forms and principles moreover are in tension with one another.<sup>26</sup> Ely, in developing his theory of representative democracy, explores the relationship between paragraphs two and three of *Carolene Products*, and therefore between the principles of majority rule and equality. In so doing, he takes up the question whether these principles "fit together to form a coherent theory of representative government, or whether, as is sometimes suggested, they are actually inconsistent impulses" (p. 74). His answer, which affirms the former, takes the form of a theory of representative democracy of the whole people (p. 79) that, unlike majoritarian representative democracy, combines *actual* representation of majorities and *virtual* representation of minorities. In this manner, Ely in part resolves, but still preserves, the tension between majority rule and equality in a theory that coheres notwithstanding this tension.

In merely elaborating on the relationship between majority rule and equality, rather than that among liberty, majority rule, and

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25. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* 18 (1962); cf. Parker, *supra* note 3, at 227 (criticizing the tradition of constitutional theorists).

26. Murphy, *The Art of Constitutional Interpretation*, *supra* note 13, at 133-35.

equality, Ely does not address the question that is central to the jurisprudence of a constitutional democracy: whether the latter three principles fit together to form a coherent theory of constitutional government, or whether they are actually inconsistent impulses. The truth is that they indeed are inconsistent impulses, and that there are and will remain tensions among them, but that they may nevertheless fit together to form a coherent theory of constitutional democracy. This theory would take all three principles into account, and would partially resolve and yet preserve these tensions. It is to the pursuit of such a theory of constitutional democracy, not to the articulation of a theory of representative democracy that fully considers only two of the three contending principles, that constitutional theorists should set their minds.

The concept of constitutional democracy, or rather the basic values implicit in that concept, would supply the content necessary to close the open-ended privileges or immunities clause, and, for that matter, the ninth amendment. Ely's representation-reinforcing mode, which might constitute the ultimate interpretivism in a representative democracy, is at best the penultimate interpretivism in the American constitutional democracy. The ultimate interpretivism of that constitutional democracy would supplement Ely's mode with a structural fundamental value mode that draws inferences from the concept of constitutional democracy itself.

#### V. ELY'S IMPLICIT RESPONSE TO THE INCOMPLETENESS OF THE REPRESENTATION-REINFORCING MODE OF JUDICIAL REVIEW

Unlike Justice Black, the quintessential clause-bound interpretivist (p. 2), whose response to the problems raised by the privileges or immunities clause and the ninth amendment was essentially to ignore them (p. 38), Ely has striven valiantly to close these open-ended provisions with the process writ small and process writ large of his theory of representative democracy. But their complete closure demands some measure of substantive values in addition to the large measure of processual values that the representation-reinforcing mode already provides. Since Ely leaves the ninth amendment and privileges or immunities clause unfilled, his predicament is somewhat like Black's. Ely's analysis of Black's predicament and Black's possible answers to open-endedness illuminates Ely's own situation and possible responses, which in fact are built into his representation-reinforcing mode.

First, Ely points out that Black ignored the two provisions because he opposed not their specific substantive implications but their institutional implications — the discretion that they vest in judges. Although Ely does not ignore the provisions, he backs away from the

substantive values that lie in the discrepancy between process and closure — perhaps because, like Black, he disapproves of their institutional implications, namely, the judicial imposition of substantive values upon the democratic branches.

Aside from simply ignoring the incompleteness of clause-bound interpretivism, Ely argues that someone like Black has two possible answers remaining, one skeptical, the other democratic or deferential:

The first, which I've never heard, would go something like this. Suppose there were in the Constitution one or more provisions providing for the protection of ghosts. Can there be any doubt, now that we no longer believe there is any such thing, that we would be behaving properly in ignoring the provisions? The "ghost" here is natural law, and the argument would be that because natural law is the source from which the open-ended clauses of the Ninth and Fourteenth Amendments were expected to derive their content, we are justified, now that our society no longer believes in natural law, in ignoring the clauses altogether.

. . . .

The second answer is that even granting that clauses like those under consideration establish constitutional rights, they do not readily lend themselves to principled *judicial* enforcement and should therefore be treated as if they were directed exclusively to the political branches. [Pp. 38-39.] (emphasis in original)

Similarly, someone like Ely has two remaining possible reactions to the incompleteness of the representation-reinforcing approach. The first is a variation on the skeptical "ghost" answer, which substitutes substantive public values for natural law. The second is a more moderate version of the democratic, deferential answer. In effect, Ely builds both the skeptical and democratic responses into his representation-reinforcing mode.

Of relevance to the skeptical response is Owen Fiss's remark concerning the relationship between the resurgence of *Carolene Products* and the rise of skepticism about public values:

In my judgment, the resurgence of *Carolene Products* does not stem from doubts about the special capacity of courts and their processes to move us closer to a correct understanding of our constitutional values, but from the frail quality of our substantive vision. We have lost our confidence in the existence of the values that underlie the litigation of the 1960's, or, for that matter, in the existence of any public values. All is preference. That seems to be the crucial issue, not the issue of relative institutional competence.<sup>27</sup>

Regarding the democratic response, Ely takes the route that he intimated he might take if he failed in his quest for a closed, ultimate interpretivism: "If a principled approach to judicial enforcement of

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27. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 16-17 (1979).

the Constitution's open-ended provisions cannot be developed, . . . responsible commentators must consider seriously the possibility that courts simply should stay away from them" (p. 41). Ely undoubtedly would contend that he *has* developed a principled approach to judicial enforcement of the Constitution's open-ended provisions that is consistent with our nation's commitment to representative democracy. His approach, however, does not enforce these provisions in the manner that is required by our nation's commitment to constitutional democracy. In the end, through his development of the representation-reinforcing approach, Ely becomes one of those responsible commentators who conclude that the courts should stay away from the substantive values needed to close the ninth amendment and the privileges or immunities clause. But, just as Ely forbade Black the possible answers to the incompleteness of clause-bound interpretivism, so we must forbid Ely their counterparts to the incompleteness of his process-oriented, representation-reinforcing mode.

#### VI. AFTERWORD: TOWARD THE ULTIMATE INTERPRETIVISM OF CONSTITUTIONAL DEMOCRACY

Like the inadequacy of clause-bound interpretivism, the incompleteness of Ely's representation-reinforcing mode of judicial review raises the question of fundamental values with which Ely began chapter 3, although in somewhat altered form: What basic values are implicit in the structure of American constitutional democracy? This time, however, we have the benefit of Ely's critique of most of the sources of fundamental values that noninterpretivist constitutional theorists have proffered (the judge's own values, natural law, neutral principles, reason, tradition, consensus, and the predicted values of the future). His objections to the various fundamental value approaches are based primarily on grounds of skepticism and democratic deference. Another objection implicit in his critique, moreover, is that none of these methodologies can provide the closure necessary for an enterprise that one could properly term "constitutional interpretation." Put somewhat differently, none can afford a text or sufficiently close text-analogue for legitimate *constitutional* interpretation, as distinguished from necessarily illegitimate *nonconstitutional interpretation*.

With Ely's judgment that the fundamental value approaches examined in chapter 3 are illegitimate, I mostly concur. From his judgment that *no* theory can answer the question of fundamental values without simply constituting the Court as a "council of legislative revision" (p. 73) that "grinds whatever political ax it prefers on a



particular day,"<sup>28</sup> I dissent. A theory in point, which Ely does not discuss fully and which attempts to rebut skeptical and democratic objections of the sort that he raises against other fundamental value methodologies, is that put forward by Ronald Dworkin. I have argued in the first five Parts of this Essay that to close the open-ended provisions of the Constitution, we must supplement Ely's representation-reinforcing mode with a structural fundamental value mode that draws inferences from the concept of constitutional democracy. I shall consider briefly the possibility that Dworkin has articulated a methodology that meets this specification, that could achieve closure, and that therefore could move constitutional theory beyond Ely's penultimate interpretivism of representative democracy toward the ultimate interpretivism of constitutional democracy.<sup>29</sup> (A full treatment of this possibility would require an essay comparable in scope and length to the present one.)

I have argued that Ely has built into his representation-reinforcing approach both skeptical and democratic (or deferential) responses to incompleteness much like the responses to the inadequacy of clause-bound interpretivism that Ely forbade to Justice Black. From the perspective of Dworkin's *Taking Rights Seriously*, such responses as Ely's represent errors of skepticism and deference that are endemic to the constitutional sphere between Ely's *Carolene Products* jurisprudence and the complete, closed jurisprudence of constitutional democracy — that is, in the discrepancy between process and closure. Indeed, this sort of analysis reveals a triple parallelism that can serve as a basis for criticism of Ely's resort to a premature closure: (1) The skeptical and deferential responses to incompleteness are parallel to (2) the skeptical and deferential theories of judicial restraint that Dworkin showed to be untenable in a constitutional democracy as distinguished from a representative democracy,<sup>30</sup> both of which, in turn, are parallel to (3) Ely's skeptical

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28. Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978). Chapter 3 of *Democracy and Distrust* (Discovering Fundamental Values) is based on this article.

29. Dworkin and Ely are alike in their structuralist concerns for closure of the Constitution. In *Taking Rights Seriously*, *supra* note 14, at 14-45, 81-130, 279-90, as well as in *No Right Answer?*, in LAW, MORALITY, AND SOCIETY 58 (P.M.S. Hacker & J. Raz eds. 1977), Dworkin rejects Hart's theory of the open texture of law, *see* H.L.A. HART, THE CONCEPT OF LAW 121-50 (1961), in favor of his own idea of a closed system, or seamless web of law. Similarly, Ely rejects clause-bound interpretivism on the ground that it is incomplete because of the open-ended or open-textured provisions of the Constitution, and he seeks modes of supplying content for these provisions that will enable him to attain the closed, ultimate interpretivism. Moreover, both Dworkin and Ely attempt to achieve closure of the Constitution through structuralist justifying theories of the whole Constitution based on the constitutive right to equal concern and respect. Compare Dworkin, *Liberalism*, *supra* note 14, with *Democracy and Distrust*, pp. 73-104. *See* Commentary, 56 N.Y.U. L. REV. 525, 540-41 (colloquy between Dworkin and Ely).

30. R. DWORKIN, *supra* note 14, at 131-49.

and democratic objections to fundamental value modes. The third element of this parallelism calls for closer analysis here.

Even if Ely's skeptical and democratic objections to the various substantive fundamental value theories of constitutional interpretation occupying the undifferentiated sphere beyond the *Carolene Products* paradigm are sound, such objections may be invalid as against structural fundamental value modes that reside in the sphere between Ely's process-oriented interpretivism of representative democracy and the closed, ultimate interpretivism of constitutional democracy. Ely's objections apply only to theories that lie in the nether world beyond texts and text-analogues and hence beyond such structural fundamental value modes as Dworkin's. Ely might contend that Dworkin's methodology is vulnerable to objections of this sort. In fact, he could claim that although he did not criticize Dworkin's theory thoroughly in *Democracy and Distrust*, he nonetheless implicated it in the illegitimacy of the other fundamental value theories. But Dworkin's theory may be able to withstand Ely's objections. Here I shall merely suggest this possibility, leaving its fuller examination to a future essay. For now, I shall indicate briefly several of Dworkin's theses that implicitly or explicitly address skeptical and democratic objections of the type that Ely has to other fundamental value theories: (1) the distinction between policies and principles;<sup>31</sup> (2) the doctrine of political responsibility;<sup>32</sup> (3) the right answer thesis;<sup>33</sup> (4) the responses to political objections, such as the argument that Dworkin's theory involves judges imposing their own values in matters of political morality;<sup>34</sup> and (5) the notion of "our community's morality" as being not a source of fundamental values external to the Constitution, but a set of principles embedded in the legal materials (like the institutional and substantive rules) of the system and presupposed by this material by dint of their implicit justification of it.<sup>35</sup>

If Dworkin's methodology avoids the errors of skepticism and deference in the sphere beyond the *Carolene Products* paradigm and stands up to Ely's skeptical and democratic objections, he may be able to reach the closed, ultimate interpretivism of constitutional democracy. This end has eluded Ely because he was unable to close the open-ended privileges or immunities clause and the ninth amendment. Dworkin thus far has not written about these provisions. Nevertheless, it is plausible that the constructions Ely finds the wording of these provisions invites might be very much like the

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31. *Id.* at 82-84.

32. *Id.* at 87-88.

33. Dworkin, *No Right Answer?*, *supra* note 29.

34. R. DWORKIN, *supra* note 14, at 123-30.

35. *Id.* at 66-68, 105-30.

constructions an incumbent Dworkinian philosopher-judge Hercules would give them in the process of constructing his structural justifying theory of the whole, closed Constitution.<sup>36</sup>

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36. *Id.* at 105-30. See note 29 *supra*.