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THE STRAIGHT AND NARROW PATH

Gerald T. Dunne*

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.

Unfortunately, people who try to have it both ways wind up frequently having it no way at all. There is a corollary: the centerline is the most dangerous spot on the highway. The latter consequence was duly noted by the Irish satirist, Honor Tracy, as an epigraph to her *Straight and Narrow Path*: "What we have to do, my dear brethren, is stay on the straight and narrow path between right and wrong."¹

Professor Ely, whom another Irishman, Jimmy Breslin, might describe as a mighty smooth article when it comes to words, seems to have ignored the injunction in his pioneering effort to suggest a fresh theory of judicial review. Ely divides perceptions of that phenomenon into interpretivism and noninterpretivism, terms that are misleading and inadequate. Noninterpretivism is a solecism *par excellence*. Save in the sense of the Molière character who was surprised at speaking prose, how can anyone be a noninterpretivist of anything? The chasm is not terminological but historical. It separates those who cast the federal judicial function in terms of fidelity to the original understanding and the received text from those who think that the Constitution has given the federal courts what amounts to a roving commission to go forth and do good. Justice Harlan's ironic comment in *Reynolds v. Sims* "that every major social ill in this country can find its cure in some constitutional 'principle,' and that [the Supreme] Court should 'take the lead in promoting reform' when other branches of government fail to act"² well captures the spirit of the "roving commission" approach.

Two better terms for the opposing sides of the faultline through American constitutional history — variously tagged as strict and liberal construction, judicial activism and restraint, and (*mutatis mutandis*) positivism and natural law — would be glossators and gnostics. The first group would take its name from the great school at

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1. H. TRACY, *THE STRAIGHT AND NARROW PATH* 2 (1956).

2. 377 U.S. 533, 624 (1964) (Harlan, J., dissenting).

Bourges³ and at least presumes the existence of a text possessing nuclear meaning and for which contemporary glosses can be found. For the second category only "gnostic" will suffice, for it presupposes an infused knowledge derived from insightful faith alone. (Indeed, constitutionally, "illuminati" even though not alliterative might do even better.) Words aside, the verbal division overlays a political controversy, and a simple one: Does the Supreme Court of the United States sit as a judicial tribunal under article III of the Constitution or as a plenary constitutional convention under article V?

These binary possibilities seem to be reciprocally exclusive, but Professor Ely proposes a *via media* — that the Court should function as a convention and enlarge its own powers only to ensure opportunity and not result. In sum, it should operate as a referee, indifferent to winners and concerned only with fair play. The theory is persuasively and appealingly presented, the author proposing (indeed proving) that any debate on interpretivism versus noninterpretivism is something of an intellectual suicide pact with rebuttals on both sides far more devastating than positive arguments. Those, for example, who perceive the Constitution as once and for all delivered to the saints to be interpreted to the letter, even if the heavens fall, contend with Chief Justice Taney's *Dred Scott* opinion as a paradigm of inadequacy. Still more devastating to the gnostic cause and its inevitable presumption and moral superiority is a gagline from one of Peter Arno's *New Yorker* cartoons. The drawing shows a formally clad society couple on an emergency subway ride and lampoons their patronizing view of their fellow passengers: When the couple asks, "Who *are* these people?," one immediately thinks of the retort implicit in the title of Louis Lusky's angry anti-gnostic polemic, *By What Authority*.⁴ And on the other side of the controversy stands Hugo Black's unanswerable question of why the framers even bothered to give us a written Constitution at all.

Undeterred by these hazards, duly noted, Professor Ely in five tightly and delightfully written chapters states the case for confining judicial review to the tautology of procedural due process and avoiding the catachresis of the "substantive" variety. Here, doing justice at retail by ensuring fair settlement of private disputes imperceptibly blends into the larger task of doing it at wholesale by ensuring open communication and fair representation so that the democratic process may work its will. En route, Ely pauses at some fascinating way stations with engaging and provocative reflections on equal protection and the imposition of values. The one-liners are delicious. One jewel is the deadpan putdown of the straightforward requirement that the President be a natural-born citizen ("conceivably if improb-

3. See T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 296 (1956).

4. L. LUSKY, *BY WHAT AUTHORITY* (1975).

ably here, a requirement of legitimacy (or illegitimacy!) or non-Caesarian birth") (p. 13). Another should exorcise conservative suspicion that the author is a liberal *manque*: "The Constitution may follow the flag, but is it really supposed to keep up with the *New York Review of Books*?" (p. 58).

To be sure, a spoonful of sugar makes the medicine go down, but some readers have swallowed hard. Archibald Cox, alarmed over a possible overthrow of *Roe v. Wade*,⁵ is apprehensive whether Ely's formula can reach a like result.⁶ Another reviewer, interpretivist guns blazing to the last, suggests that traditionalists have given up much too quickly on the historic specificity of privileges and immunities.⁷ Indeed there is no doubt that nonamendatory interpretivism is a stabilizing and conserving doctrine: "Maybe at bottom I'm a conservative," once observed Justice Black. "I couldn't add to a bill of rights."⁸

There are other irritants in the book. The suggestion for a suffocating judicial oversight of the legislative process may only exacerbate the majoritarian backlash that the work was presumably written to impede. Moreover, the comment on reverse discrimination ("I have trouble understanding the place of righteous indignation on either side of this wrenching moral issue") (p. 170) may well be read by many as the infuriating elitist insouciance of a tenured Harvard professor.

Indeed, sooner or later this suspect attitude may prompt a reviewer for the *National Review* (or perhaps the *Oral Roberts* or *Bob Jones Law Journal*) to pounce and proclaim the Ely formulation a two-steps forward, one-step backward liberal ploy to defuse the *kulturkampf* that judicial activism has unleashed and that currently finds expression in one-issue politics, withdrawal proposals, and suggested constitutional amendments. The commentators might well insist that the cat is out of the bag thanks to Archibald Cox's published anxieties on the future of *Roe v. Wade* under process-bound judicial review, accompanied as it is by Aesopian suggestions on how Ely's ideas could be reformulated to produce an unchanged result.⁹

If Cox's essentially critical reception of the book augurs dissatisfaction from the liberal left, literalists of the right are not without their own concerns. As noted, one reviewer suggests that resort to the historical linguistics, not to a new view of equal protection and fair representation, suffices to resolve the tension between majority

5. 410 U.S. 113 (1973).

6. Cox, Book Review, 94 HARV. L. REV. 700, 710 (1981).

7. Conant, Book Review, 34 VAND. L. REV. 233 (1981).

8. D. Berman, Transcript of Conversation with Justice Black (Mar. 22, 1956) (Berman Papers, Berman Residence, Chevy Chase, Md.).

9. Cox, *supra* note 6, at 710-11.

rule and minority rights, and does so without the extraconstitutional excursions that Ely would license.¹⁰ On this side of the spectrum persist the historic reservations about judicial review itself, an institution that minds as acute as those of Learned Hand and Hugo Black have found without explicit warrant in the constitutional text and justified only by necessity.¹¹

Since necessity knows no law, constitutional or otherwise, the centerline becomes a dangerous place. Perhaps by way of consequence, few reviewers announce their conversion to the Ely thesis, and at least one judge has seen the proposal as proof positive of the Supreme Court's elitist distrust of popular democracy.¹² The reasons are not hard to find. As Honor Tracy's Irish sermon suggested, half way between good and evil is still evil. For those who perceive judicial review as a monstrous fraud without warrant either in the original understanding or the received text (to borrow Justice Holmes's characterization of a judicial *putsch*), it is also beyond legitimation by any lapse of time or array of authority, even John Hart Ely's, and a little of it is as bad as a lot. And, similarly, those who cannot control the political process but who are riding high under raw judicial power will be reluctant to yield any area of it.

But beyond the circumstance of Ely *contra mundum*, there is another reason why the thesis fails. The American constitutional experiment is shot through with tension and contradiction. Federalism, separation of powers, and majority rule versus minority right may well constitute its vital essence. One does not let sunlight in on mysteries, warned the eminent Victorian, Walter Bagehot, and Holmes contemporaneously cautioned that where distinctions are vital rather than formal, the problems should be existentially endured rather than rationally reconciled.

10. Conant, *supra* note 7.

11. See, e.g., L. HAND, THE BILL OF RIGHTS 15 (1958); Cooper, *Mr. Justice Hugo L. Black: Footnotes to a Great Case*, 24 ALA. L. REV. 1, 5 (1971).

12. See *Wengler v. Druggists Ins. Co.*, 601 S.W.2d 8, 9 (Mo. 1981) (Donnelly, J., concurring).