Princeton Legal Journal Forum

Volume 1 Summer 2021

FORUM

The Attractive Non-Sequitur of *Democracy and Distrust*

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When it comes to interpreting the Constitution, there is a critical and possibly irresolvable dilemma which lies at the crux of countless arguments: should justices remain rigidly faithful to the original intent of the document's writers at the risk of being anachronistic, or should they make substantive value choices at the risk of encroaching upon the legislature's right and duty to represent the will of the people? John Hart Ely, the late, pathbreaking scholar of constitutional law, famously rejected this stubborn question as a false dichotomy. In his pivotal work *Democracy and Distrust: A Theory of Judicial Review*, Ely posits a third, middle approach to judicial review oriented toward reinforcing representative democracy, advancing a thesis so original that when the sentient student of constitutional law first grasps its thrust, their heart skips a beat in response to what seems like the light of an escape route from the foregoing dichotomy between two undesirable jurisprudences: first, what Ely calls *clause-bound interpretivism*, the strict strand of originalism woefully unable to make neither heads nor tails of the document's open-ended provisions, and, second, what Ely calls *non-interpretivism* (and what might crudely be termed 'living constitutionalism'), unsatisfactory in its rank inability to explain why one collection of substantive values should be given preference over any other. (These terms will be further clarified shortly.)

Although Ely's theory is initially attractive, once the impression of the 'golden mean' fallacy fades, reservations about his argument arise, and along multiple fronts. These include the legitimacy of his conception of the Constitution, whether

his theory of judicial review validly or necessarily follows from his conception of the Constitution as he establishes, and whether the theory ultimately escapes the substantive value judgments he seeks to avoid. With respect to the power it affords justices, Ely's approach has simultaneously been criticized as too broad and too narrow. I will end by evaluating these arguments and making a closing note on the nature of Ely's theory.

First, an explanation of Ely's argument and terms is needed. The most natural way to start such an account, in accordance with the ordering of the chapters in *Democracy and Distrust,* is to begin with Ely's critical analysis of the two alternatives to his middle approach and the reasons for which he argues they ultimately fail. The more general dichotomy is that of *interpretivism* versus *non-interpretivism.* The former espouses the credo that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution," while the latter holds "the contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document" (1). The appeal of interpretivism is that it simultaneously supports judicial review but is not vulnerable to the criticism of being undemocratic. C*lause-bound interpretivism*, a more restrictive subset of interpretivism, contends that "the various provisions of the Constitution be approached essentially as self-contained units and interpreted on the basis of their language," and by an unwillingness to insert significant "content from outside the provision," only allowing for "whatever interpretive help the legislative history can provide" (12-13).

Things get trickier, however, when one considers that provisions in the Constitution run the gamut from precise to incredibly open-ended. Ely compares, for instance, the specific requirement that the President be at least thirty-five years old with the Eighth Amendment's prohibition of cruel and unusual punishments, whose imprecise language (consider that it did not specifically ban, say, flogging) seems written with the intention of providing at least some degree of interpretive breathing room. Even more jarring would be to consider the utter generalities of the Ninth Amendment.

The problem, therefore, is that the clause-bound interpretivist is caught in a stalemate. They are unable to refer exclusively to the text, for the text's open-ended provisions point to objects external to the document itself, and yet are unwilling, by definition, to grapple with what those objects may be. The mildly clever clause-bound interpretivist, if unsatisfied with this internal tension, might submit in defense that the tension evaporates if the open-ended text of, say, the Ninth Amendment is simply assumed to protect rights without which the enumerated Bill of

Rights' guarantees cannot accurately be said to exist. But what in the text justifies *that* interpretive move, which is arguably as arbitrary and substantive as any, and could not, again, find clear justification in the text (outside of question-begging arguments)?

The incompleteness of the clause-bound interpretivist's account then provides the motivation to consider extratextual sources from which a prudent judge might draw appropriately fundamental values, consistent with the non-interpretivist's approach. In Ely's third chapter, he analyzes leading contenders, including the judge's own values, Natural Law, neutral principles, reason, tradition, consensus, and predicting progress. His analysis levels a brutal attack on their legitimacy, showing all seemingly plausible sources to be so grossly insufficient that the reader feels like a sailor whose ship has been smashed on the rocks and is grasping for the wooden plank of Ely's novel theory as a final saving grace.

Having shown both clause-bound interpretivism and non-interpretivism to be both severely lacking, Ely advances his middle theory of judicial review, which importantly, is necessarily contingent upon a conceptualization of the Constitution as a fundamentally procedural document, and not as meant to protect particular substantive values. Ely writes "that the original Constitution was principally, indeed [he] would say overwhelmingly, dedicated to concerns of process and structure and not to the identification and preservation of specific substantive values" (92). Ely encourages the skeptical reader to read a few pages of the Constitution, as it would become clear that it was fundamentally procedural.

Accordingly, Ely suggests that the judiciary adopt a role akin to that of a referee. Such a judge would leave substantive value judgments to the legislative branch and merely attend to the proper functioning of the *process* of representative democracy, guarding against two key threats: one, those in power blocking the channels of political change, and two, representatives denying protection to politically weak minorities that groups have it, especially for reasons of hostility. Ely thus bypasses the problem of non-interpretivism by leaving substantive value choices to the legislature, and he plausibly but perhaps not conclusively ties the open-ended clauses to the theme of reinforcing democracy, getting around the problem of the clause-bound interpretivist.

To the extent that the measure of what a document primarily concerns is to be graded by the number of words or clauses written in the document about that object, so far so good. To debate that point would simply be a linguistic distraction that focuses on what it means for a document to be "primarily concerned" with one thing. However, Ely's argument is precisely that because the Constitution is a fundamentally procedural document, judges should, when deciding how to interpret

the Constitution's open-ended provisions, be led predominantly by procedural considerations—namely, participation-oriented, representation-reinforcing tenets core to representative democracy.

So, there is an immediate soft spot here. Though I conceded that the Constitution can be said to be primarily concerned with procedure, depending upon how one wishes to define what it means for a document to be 'primarily concerned' with something, an unjustified leap appears to have been made; why should judges interpret open-ended provisions predominantly looking to the procedures of representative democracy? This conclusion relies on a conception of the Constitution as primarily concerned with procedure not just in the conceded sense that more clauses were written about procedure, but in the more expansive sense that the document's interpreters should look first and foremost to procedure. But this second, larger sense of what it means to be 'primarily concerned' with something has not been demonstrated or conceded, and so should be read as asserted.

To illustrate what I mean, consider a brief counterfactual. Imagine that, growing up, my brother and I sketched a paper outlining who does which chores around the house. Is the document primarily concerned with chores—about which more words are written—or with the unmentioned *fairness* as a substantive value which the document's procedures seek to protect? (Or, if I had more chores around the house, the substantive value may not be fairness but the responsibility that should—'should' implies a value choice—come along with growing older.) That's a semantic point, as I have said. If my brother and I had a dispute, however, and my mother stepped in, would her mediation be primarily concerned with the underlying substantive value or with chores? Clearly, it is not chores simply because more words were written about them.

Moreover, it hardly seems as though Ely's approach eliminates substantive value judgments by counseling a judge to only concern themself with reinforcing representative democracy. How might a judge decide on voter identification laws without making substantive value choices? Why, without appealing to substantive value, is it not the case, as John Stuart Mill notoriously advocated, that highly-educated individuals receive disproportionately weighted votes? It hardly seems plausible that such a question could be answered without appealing to substantive values like fairness.

Such considerations give credence to the concern that, under Ely's theory, judges are given too much power. The way in which justices are empowered involves giving them a mandate to strike down the products of an electorally accountable legislature, ironically, in the name of representing democracy. Also,

considering that these decisions, as I have submitted, are often difficult to disentangle from substantive value judgments, the result of adopting Ely's approach may simply be to produce a further emboldened judiciary who, under the guise of advancing democracy, would then be freed from having to justify—by way of appealing to an (at least semi-legitimate) extra-Constitutional source—the substantive value judgments they inevitably must make but have claimed to forego. It is not hard to see how this could serve as a Trojan horse for judges' personal predilections.

Those who criticize Ely's theory as one that renders justices unable to check the tyranny of the majority, on the other hand, miss something key to the theory, the discussion of which leads to the appropriately final remarks of an article of this scope. Tyranny of the majority occurs when the majority exclusively pursues its own goals *at the expense of* politically weak minority groups. Ely's theory expressly prohibits tyranny of the majority by assigning to the judiciary the role of guarding against acts of law which make it clear that the minority's interests are not being taken seriously, in large part by prohibiting laws motivated by prejudice, which fall disproportionately heavily on minorities or decrease their prospects for meaningful political participation. An invidious law can be passed, but it will be an invidious law passed of, for, and by the people as a whole, and not apply disproportionately to minorities. And it is telling that, for Ely, the judiciary carries out this role *in the name of representative democracy*. This can only be implied to mean that Ely's conception of representative democracy, as an ideal worth striving for, is not one of rank majoritarianism or of one faction oppressing another, but of a system in which equality of political opportunity and the dignity of its citizens are endogenous to the theory.

And this is revealing. It is generally thought that the American political system is a confluence of two great forms of government: representative democracy, which prioritizes the self-rule of the people via elected representatives, and constitutionalism, which emphasizes the necessity of protecting fundamental substantive rights (even if an electoral majority votes the other way). I suspect that Ely is not, as it might ostensibly seem, rejecting this characterizing framework, but rather precisely applying it insofar as the constitutional principles are internal to his conception of representative democracy to begin with. Ely's theory, then, is not just that of a pure representative democrat, but also that of a constitutional democrat. The presence of this duality reinforces the inevitability of substantive value choices justices must make, again demonstrating that Ely's argument, while intuitively attractive and useful to understand, is ultimately ineffective in its main aim of resolving the crucial dilemma initially posed.