

*Spring 1981*

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#### Recommended Citation

Paul N. Cox, *John Hart Ely, Democracy and Distrust: A Theory of Judicial Review*, 15 Val. U. L. Rev. 637 (1981).

Available at: <https://scholar.valpo.edu/vulr/vol15/iss3/6>

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## ***DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW***

By John Hart Ely. Cambridge, Mass.:  
Harvard University Press, 1980. Pp. 268.

I begin with three introductory premises concerning discourse on the role of the Supreme Court in the American polity which, although commonplace, may serve at least as background to my view of Professor Ely's contribution<sup>1</sup> to that discourse. First, the central dilemma posed by the institution of judicial review in a democracy is that the institution is undemocratic and, therefore, at least facially incongruous with the predominant political commitment. Second, legal realism's devastating attack upon the notion that judges "find" law permanently impaired the credibility of that notion as a basis for legitimizing the institution, at least in the sense that rule-skepticism, and particularly constitutional text-skepticism, has become generally obligatory for post-realist accounts of the institution.<sup>2</sup> Third, legal scholarship, in the post-realist era, has been fixed, then, upon discovering bases for moderating the realists' attack and formulating alternative grounds for legitimacy.

The theory building suggested by the third observation has taken diverse forms. We have defenders of original understandings as a means of confining the Court to the historical roots of constitutional text;<sup>3</sup> advocates of neutral judicial method, most often tied to a preference for judicial restraint, as a counterweight to recognized and accepted judicial discretion;<sup>4</sup> unabashed defenders of one or another moral theory as the basis for enduring values that may in turn be used as measuring sticks for gauging judicial adherence to a limited role;<sup>5</sup> and advocates of structure and process as textually

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1. J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

2. I do not mean that text has been wholly jettisoned. What Ely terms the "interpretivist" position, *id.* at 1-9, is clearly both legitimate and widespread. But even the interpretivists rely on more than mere words. *See id.* at 12, 109; note 9 *infra*.

3. R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977).

4. *See, e.g.*, A. BICKEL, *THE LEAST DANGEROUS BRANCH* 58-72 (1962); A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 99-118 (1976); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). For an historical view of the elaborationists and their successors, see G. WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT* 136-63 (1978).

5. *See, e.g.*, R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 149 (1978); Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 310 (1973).

ascertainable values from which decisions may be derived and, therefore, by which discretion may be imprisoned.<sup>6</sup>

In *Democracy and Distrust*, Professor Ely undertakes the construction of the last of these theories and the demolition of its competitors. The undertaking is no mean task, but the result is one of the most important contributions to an understanding of the dilemma of judicial review in recent times. Having paid Professor Ely that obeisance, it is nevertheless possible to retain reservations, and it is those reservations upon which I will seek here to concentrate. It would, however, first be well, despite the intrinsic injustice of summarization, to outline Ely's argument.

#### ELY'S ARGUMENT IN CAPSULE FORM

Ely describes competing theories as falling within one or the other of two general positions regarding the question of appropriate judicial reference point: the interpretivist<sup>7</sup> and noninterpretivist (or fundamental value)<sup>8</sup> positions. Both, in Ely's view, are inadequate. Interpretivism limits judicial discretion by insisting that constitutional text has discoverable meaning and that judicial decision is legitimate only to the extent that it is traceable to that meaning. It is a plausible approach in the case of many constitutional provisions—a class of provisions in which Ely includes some of the relatively more specific guarantees of the Bill of Rights<sup>9</sup>—but the stance wholly fails in the case of such content-resistant provisions as the privileges and immunities and equal protection guarantees, and

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6. See, e.g., Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978); Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); McCormack, *Bakke to Basics, Race and Politics In The Supreme Court*, 1978 UTAH L. REV. 491; Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977); Shapiro, *Judicial Modesty, Political Reality, and Preferred Position*, 47 CORNELL L.Q. 175 (1962). See also L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1137-46 (1978).

7. J. ELY, *supra* note 1, at 1-9. See also Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978).

8. J. ELY, *supra* note 1, at 43. See also Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978).

9. J. ELY, *supra* note 1, at 13-14. Ely would also include the due process clause, *id.* at 14-21, but only in its procedural aspect. Ely's partial endorsement of interpretivism is clearly not, however, of the sort that relies either upon original understandings or a facile reading of text. He merely points out that at least some constitutional provisions clearly enshrine some values, and that one may reason from them. *Id.* at 14. See also Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 936 n.97 (1973). Cf. R. DWORKIN, *supra* note 5, at 134-37 (distinguishing concepts and conceptions).

the deliberately open-ended ninth amendment.<sup>10</sup> Moreover, a possible interpretivist response to such provisions—that the absence of a readily ascertainable meaning requires that they be ignored—fails to account for the presence of the provisions in the document.<sup>11</sup> Indeed, the provisions seem rather clearly to invite importation of values not otherwise specified in the document.<sup>12</sup>

Ely's attack upon "fundamental values" simultaneously seeks to demonstrate both that substantive fundamental values are inherently subjective and that a reliance upon them is a prescription for unbridled judicial discretion hopelessly inconsistent with a commitment to representative democracy. Natural law is chimeric;<sup>13</sup> neutral principles and judicial method lack content and disguise discretion;<sup>14</sup> reasoning about morality, although possible, does not produce either consistent results or a basis for choice between moral results separable from personal predilection;<sup>15</sup> history and tradition are too ambiguous to be useful guides;<sup>16</sup> consensus concerning values is better discovered by legislatures than judges;<sup>17</sup> and prophesying future values requires an undemocratic leap of faith.<sup>18</sup> Each such basis for "discovering fundamental values" turns out, says Ely, to constitute but a disguised means of appealing to the judge's own values; and that "realistic" conclusion does not warrant an additional conclusion that the judge's own values should be appealed to.<sup>19</sup>

Having thus cleared the ground for his own theory, Ely proposes an interpretation of the era of the Warren Court consistent with a view of judicial review tied to discoverable constitutional meaning. The thesis is that the Warren Court's activist decision-making may be viewed as extended exposition of Chief Justice Stone's *Carolene Products* footnote<sup>20</sup>—that is, as a consistent judicial effort to reinforce representation and enhance participation<sup>21</sup>

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10. J. ELY, *supra* note 1, at 14.

11. *Id.* at 28, 32, 39-41.

12. *Id.* at 28, 32. For criticism, see Berger, *Government By Judiciary: John Hart Ely's "Invitation"*, 54 IND. L.J. 277 (1979).

13. J. ELY, *supra* note 1, at 48-54.

14. *Id.* at 54-55.

15. *Id.* at 56-60.

16. *Id.* at 60-63.

17. *Id.* at 63-69.

18. *Id.* at 69-70.

19. *Id.* at 44.

20. *United States v. Carolene Products Co.*, 304 U.S. 114, 152-53 n.4 (1937).

21. J. ELY, *supra* note 1, at 87.

in both the processes of democratic government and in the government's distribution of benefits.<sup>22</sup>

The Warren Court was, then, engaged in a judicial review concerned with the process of decision. Participation and representation, although values, are values of process, not substantive values.<sup>23</sup> Such a review is, for Ely, consistent with the overwhelmingly process-oriented nature of the Constitution.<sup>24</sup> It is, moreover, consistent with representative democracy because concerned explicitly with the reinforcement of the processes of representative democracy.<sup>25</sup> And it is well suited to judicial institutions because the isolation of such an institution from the political process permits objective assessment of claims of malfunction in process.<sup>26</sup>

Under Ely's scheme the Court's appropriate role in interpreting the Constitution's open-ended provisions is that of referee.<sup>27</sup> It is to serve two related functions. First, it is to police the political process by preventing existing holders of power from obstructing that process in service of the status quo.<sup>28</sup> The Warren Court performed that function most clearly in the apportionment cases,<sup>29</sup> and the current Court should continue to perform the function by insisting upon accountability and upon congressional decision where substantial policy issues are in question.<sup>30</sup> Second, because the risk of a tyranny of the majority is inherent in representative democracy, the Court is to prevent representative government from withholding from minorities the protection it affords the majority.<sup>31</sup>

The risk of majority rule is hardly novel. What is insightful in Ely's contribution to the problem is that he ties his anti-majoritarian interpretation of open-ended constitutional provisions explicitly to his emphasis upon process. Mere political access for minorities is, for Ely, insufficient, for political access is an inadequate counterweight to the prejudice of the majority in both the senses of prejudice Ely postulates: outright hostility<sup>32</sup> and unconscious gen-

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22. *Id.* at 74.

23. *Id.* at 87.

24. *Id.* at 88-101.

25. *Id.* at 102.

26. *Id.* at 103.

27. *Id.* at 73. Compare Ely's view of "referee," *id.*, with Dworkin's view, R. DWORKIN, *supra* note 5 at 125-30. See also note 50 *infra*.

28. J. ELY, *supra* note 1, at 103.

29. *Id.* at 116-25.

30. *Id.* at 131-34.

31. *Id.* at 103.

32. *Id.* at 153-54.

eralization.<sup>33</sup> What is needed as counterweight to prejudice is, then, judicial review explicitly concerned with the "psychology of decision."<sup>34</sup> Direct judicial concern with identifying illicit legislative and administrative motive is the tool by which the psychology of decision is to be reviewed. In the equal protection context, the suspect class designation is the judicial device expressive of that tool.<sup>35</sup> It is not, however, substantive legislative results with which the review of psychology of decision is concerned. A "wrong result" analysis implicates our problems with judicial overruling of the political process because it suggests precisely a concern with substance.<sup>36</sup> Rather, it is the process of decision—its trustworthiness in the sense that prejudice has not caused it to malfunction—that Ely thinks is the appropriate target of judicial analysis.<sup>37</sup>

ON THE MEANING OF DEMOCRACY AND OF THE  
DISTINCTION BETWEEN PROCESS AND SUBSTANCE

My summary does not, of course, do the argument justice, but I think it adequate to suggest the attractiveness of Ely's claim to reconciliation of representative democracy and judicial veto. The claimed reconciliation is that a judicial review properly focused upon process reinforces representative democracy.<sup>38</sup> The initial questions raised by the reconciliation are two: first, what does Ely mean by democracy, and second, where does process end and substance begin?

What Ely means by democracy may only be gleaned by inference, for he fails to precisely define his terms or to explore the rather complex alternatives. It is clear that he rejects pluralism as explanation, at least to the extent that it is inconsistent with his assertions that the majority is often monolithic and that some minorities are excluded from the "political marketplace."<sup>39</sup> He

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33. *Id.* at 157.

34. *Id.* at 153.

35. *Id.* at 146.

36. *Id.* at 168.

37. *Id.* at 156-57.

38. *Id.* at 102. There is, in Ely's claim, a rather radical premise—radical, I think, despite the precursor of separation of powers doctrine. It is that the judiciary has the ultimate authority to tell us what democracy means. I think that is a premise qualitatively more radical than the proposition that the judiciary may authoritatively tell us that it does not agree with what democracy has done in a particular case. I am willing to accept this premise, but not without some fear and trembling. See note 39 and text accompanying notes 112, 114-19 *infra*.

39. *Id.* at 135. It is not clear whether Ely rejects pluralism as an explanation of American democracy, or merely thinks it an inadequate device for protecting

recognizes that government by bureaucracy is inconsistent with political accountability and urges more democracy as a cure,<sup>40</sup> so it is clear at least that legislative bodies are to decide policy. It is clear, finally, that majority rule is to be at least generally respected.<sup>41</sup> But Ely's version of the means by which the majority asserts its will through representative bodies is at best unclear. The mechanism appears at times to be in Ely's view relatively direct, in the form of the vote or of an identity of interests,<sup>42</sup> and at times to be in his view wholly psychological—in the sense that the legislator reflects the foibles of his constituency.<sup>43</sup>

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minorities. With respect to the latter possibility, see R. DWORKIN, *supra* note 5, at 143, 158; Tribe, *Seven Pluralist Fallacies: In Defense of the Adversary Process—A Reply To Justice Rehnquist*, 33 *MIAMI L. REV.* 43, 46-50 (1978); Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 *HARV. L. REV.* 769, 789 (1971). It appears to have been assumed by Ely's earlier critics that he takes the former position. See Posner, *The DeFunis Case and The Constitutionality of Preferential Treatment of Racial Minorities*, 1974 *SUP. CT. REV.* 1, 26-31, 28 n.51; Sandalow, *Racial Preferences In Higher Education: Political Responsibility and The Judicial Role*, 42 *U. CHI. L. REV.* 653, 694 (1975). Certainly Ely's repeated references to "the majority," his failure to analyze the meaning of the term, and his rather off-handed rejection of pluralism, J. ELY, *supra* note 1, at 135, suggest that he views the majority as fairly consistently monolithic. That view is perhaps consistent with his general theme, for Dworkin's version would require the Court to distinguish moral rights from other kinds of "political disputes," R. DWORKIN, *supra* note 5, at 143—a task that might give Ely some difficulty.

There is another possible explanation of Ely's view—perhaps he thinks the majority ought to be monolithic, at least in the sense that democracy should take a form other than pluralism. Cf. Linde, *Judges, Critics, and the Realist Tradition*, 82 *YALE L.J.* 227, 229-31 (1972) (criticizing critics of the apportionment decisions on the ground that the critics incorrectly perceived those decisions as enforcing a view of "majority rule" inconsistent with pluralist realities).

If, however, Ely merely means that pluralism is not an accurate description of the process, the stance points out a potential flaw in his theory, for the theory rests in some measure upon our choosing between conflicting descriptions of actual political behavior. The attractiveness of Ely's theory is in its recognition that, if there is a judicially discoverable consensus, it is a consensus about procedural means, not, in any but very transitory senses, substantive ends. The reconciliation of judicial review and democracy Ely postulates is a court acting merely as the instrument by which the logic of our commitment to democratic means may be fully played out, even where consensus about means disintegrates over the playing out. The trick is in deciding, however, precisely what the consensus is about, and in relating one's conclusions to some empirically viable explanation of the system as it stands. If we cannot achieve agreement about the explanation, we will encounter some difficulty in playing out the logic of the commitment. Indeed, we may encounter some difficulty in defining the commitment.

40. J. ELY, *supra* note 1, at 131-34, 205-06 n.9.

41. See *id.* at 7-8, 43-72, 133, 156-57.

42. See *id.* at 133, 135, 158.

43. See *id.* at 158, 168, 253 n.76.

I do not question the proposition that majority rule is a value to be preserved. I do, however, question Ely's view of the mechanism of majority rule. When Ely argues that policy decisions should be made by Congress rather than the bureaucracy and that obstacles to access to the machinery of political power should be judicially invalidated, he at least implicitly assumes that majority rule means some version of the present, observable, and textually ascertainable system of political decision. That assumption I think warranted, however questionable the proposition that it is the majority that rules by means of that system. The political system is at least a system susceptible to popular influence; the reforms he advocates would make it more so, and Ely is right in suggesting that the Court is less susceptible to such influence.<sup>44</sup> But Ely also seems to think that the majority rules by *Weltanschauung*—by the world view it shares with its representatives.<sup>45</sup>

It is not clear whether Professor Ely views majority rule by *Weltanschauung* an element of the majoritarianism he wants preserved, but it is clear that he is willing to rely on the phenomena in deciding when the majority may and may not be legitimately overruled. Although Ely initially insists that he is primarily concerned with judicial review of legislative decision,<sup>46</sup> he is not adverse to granting administrators deference on the ground that a shared world view is a version of majority rule.<sup>47</sup> Moreover, the claims of minorities who run the risk of majority tyranny are, in Ely's scheme, evaluated in terms rather directly linked to majority rule by *Weltanschauung*. Because the monolithic prejudice of the majority is directed against the group status that defines the minority, Ely conceives of the minority as a group. The minority's claim to protection from the majority is, for Ely, a group claim, the legitimacy of which is to be evaluated by gauging the power the group wields.<sup>48</sup>

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44. *But see* Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952). Compare Professor Farago's argument that majoritarianism is not an end in itself—particularly given the antimajoritarian nature of the Constitution. Farago, *Function Without Form: The Asymmetrical Hermeneutics of Jesse Choper*, 15 VAL. U.L. REV. 605, 609-13 (1981). I have less difficulty than Professor Farago (even, perhaps, less difficulty than Professor Ely) with an assumption that majority rule—defined operationally as decision by the politically responsible branches—is a major value to be preserved.

45. *See* J. ELY, *supra* note 1, at 158-59, 170-71, 176, 248 n.52.

46. *Id.* at 4 (footnote).

47. *Id.* at 258-59 n.109.

48. *See id.* at 135, 164-69.



I think it quite legitimate for a sociologist or a political scientist to postulate *Weltanschauung* as phenomena and even legitimate for a Court to take judicial notice of the hypothesis, but I am at least skeptical of the proposition that the Supreme Court, by relying on the proposition, may formulate a picture of the operation of government that will enable it to distinguish between legitimate and illegitimate anti-majoritarian claims. I intend to explore my skepticism, by way of example, shortly, but it is first necessary to answer the second question I have asked.

The second question was whether Ely's insistence upon process values adequately distinguishes process from substance. The question assumes, for present purposes, that Ely is right in arguing that process values are superior to substantive values because more in keeping with ascertainable constitutional meaning.<sup>49</sup> Upon that assumption, judicial insistence upon government decision by means of a particular process generates little difficulty. The notion that it is the Court's legitimate role to insist upon unobstructed political representation and the belief that it is the Court's legitimate role to insist upon political accountability appear clearly to focus judicial attention on process. But Ely's argument goes substantially beyond political representation and non-delegation. He has in mind, as well, a Court actively engaged in psychoanalysis. Ely's process values include, in short, that government decision be made on the basis of particular guiding assumptions about appropriate government role, assumptions Ely believes to be procedural.

The fundamental guiding assumption Ely advocates appears at bottom to be a limited version of "equal concern and respect."<sup>50</sup> Representative government must represent both the majority and minorities, and the Court is to enforce that duty. Perhaps more accurately, the Court is to enforce the duty where, in its judgment, a minority lacks the power to enforce the duty itself.<sup>51</sup>

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49. *Id.* at 88-101.

50. *Id.* at 82 (citing R. DWORKIN, *supra* note 5, at 180). Despite Ely's disagreement with Dworkin's prescription for a Rawlsian constitutional law, *see* J. ELY, *supra* note 1, at 58 (criticizing R. DWORKIN, *supra* note 5, at 149), Ely's debts to Dworkin (and to Rawls via Dworkin) seem rather substantial. The equal concern and respect notion, albeit limited by Ely to a precept only of "process," is the clearest example. J. ELY, *supra* note 1, at 82, 157. Indeed, Ely's concern with eliminating the distortions of prejudice seems quite like Dworkin's notion that individual rights are responses to defects in the utilitarian democratic process caused by the inability of the process to control for "external preferences." R. DWORKIN, *supra* note 5, at 277.

51. J. ELY, *supra* note 1, at 169.

Ely distinguishes judicial enforcement of equal concern and respect from judicially imposed substantive result by emphasizing a judicial analysis carefully limited to the identification of prejudice, and then only for the purpose of preventing distortion. Prejudice is not to be precluded because prejudice is, in the Court's judgment, immoral or unjustified.<sup>52</sup> It is to be precluded, rather, because the relevant right is a procedural right to equal concern and respect.<sup>53</sup> Where the majoritarian political process is hostile to a minority and seeks therefore to harm, its objective is illicit because it has not equally valued the minority.<sup>54</sup> Where the process acts under a misapprehension about a minority, its objective may be licit and substantial. But the majority cannot be permitted to achieve the objective by an ill-fitting classification founded upon such a misapprehension because the misapprehension constitutes a mistake in valuation of the minority.<sup>55</sup>

Judicial concern with prejudice limits judicial discretion in interpreting open-ended constitutional provisions by making only prejudice relevant. Prejudice is, however, an issue of "process" only because Ely has defined process as embracing equality of representation in the sense of concern and respect. Process is, under the definition, a great deal more than formal procedure or even of formal access to procedure.

I have no difficulty in principle with the definition. A litigant's right to an unbiased judge and jury may legitimately be labeled a right to a particular process, and, although a neutral and detached legislature is surely a fanciful notion, an unprejudiced one may without difficulty be thought a procedural ideal.<sup>56</sup> My difficulty, rather, is with Ely's apparent belief that the analysis he advocates as flowing from the definition somehow precludes judicial tampering with substantive results for substantive reasons.

Ely's claim that the Court's legitimate concern is with process and not with substantive policy is not a claim that his theory is value free. Ely is advocating, however, textually ascertainable values, and ascertainability is the basis for his further claim that his values are superior to the competing values he derides. Upon the assumption that process—and more particularly equal concern and

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52. *Id.* at 153-54.

53. *Id.* at 157.

54. *Id.*

55. *Id.*

56. *Cf. R. DWORKIN, supra* note 5, at 142 (majority cannot fairly judge itself).

respect—is the predominant constitutional principle, the Court may reason from that principle. If the Court's reasoning is sufficiently disciplined in the sense that it is true to the principle, it has a defense to the charge of judicial license.

But the defense is dependent upon more than the accuracy of one's identification of predominant principle and the discipline with which the principle is manipulated; it is dependent, as well, upon the breadth of the principle and the Court's ability to find the facts necessary to its application: The more abstract the principle, the more license the Court has to overrule the political process in service to the principle; the more intractable the facts necessary to a disciplined application of the principle, the more likely it is that the Court's preferred result will influence its characterization of those facts.

Ely's emphasis upon prejudice may be viewed as an attempt at avoiding the first of these difficulties by making equal concern and respect more concrete. It does, in degree, but in so doing runs directly into the second difficulty: prejudice is not a "fact" easily found. It is, indeed, not a fact at all but a characterization, and a characterization itself dependent upon value judgments which distinguish between justified and unjustified generalizations and between instances in which generalization has occurred and instances in which it has not. In specific terms, those judgments are essential to determining who has and who has not been represented in the political process and to determining who has and who has not done the representing.<sup>57</sup>

The fact that characterization is difficult is not necessarily a reason for rejecting an analysis dependent upon characterization. There are, of course, data on the basis of which judgments may be made. But difficulty in characterization does suggest caution, and suggests particular caution where one wants not to make general judgments about the likelihood of prejudice but wishes, instead, to make rather precise judgments about the likelihood of prejudice. The irony in that cautionary note is that general judgments—judgments that are over-inclusive in the sense that they preclude an

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57. With respect to the charge of value imposition generally, see Garety, Book Review 42 U. PITT. L. REV. 35, 42-44 (1980); Lynch, Book Review 80 COLUM. L. REV. 855, 862-64 (1980); O'Fallon, Book Review 68 CAL. L. REV. 1070, 1083-84 (1980); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1076 (1980). But see Cox, Book Review, 94 HARV. L. REV. 700, 709 n.19 (1981).

entire category of government conduct on the ground that some part of the conduct is illicit—leave less room for judicial policy preference than a precise judgment that purports to reach only conduct that is in fact illicit.

It is precision Ely demands. He is willing, in an effort, I think, to avoid an overinclusive judicial veto, to characterize some government conduct as unprejudiced even where it may be prejudiced. In so doing, he risks an underinclusive judicial veto, a risk made troublesome, I submit, by the difficult and value-laden nature of characterization.

What is the justification for accepting the risk of underinclusiveness? It is, presumably, that the risk gives the benefit of the doubt to the majority. That is bad news if one believes that the elimination of prejudiced decision is primary; but the elimination of prejudice is not, as I view *Democracy and Distrust*, Ely's sole objective. At least one of Ely's primary objectives is preservation of majority rule. His concern with prejudice is, at least on occasion, subordinate; so subordinate that he may be read as concerned in fact only with the efficiency of majority decision making in the sense that undervaluation of the minority produces an inaccurate cost-benefit balance.<sup>58</sup> On occasion, however, is not on all occasions, and I am aware that Ely may be read quite differently. Indeed, Ely's adoption of the equal concern and respect principle may be viewed as overwhelming majority rule. But I think that view deemphasizes too much Ely's preference for decision by politically accountable institutions of government, and I will attempt to illustrate what I believe to be the influence of that preference shortly.

#### SOME RESERVATIONS

It is perhaps time to tie these strands together, but I want to preface the attempt with a caveat. Much of what follows is a critique of Ely's application of his theory to concrete issues. Ely recognizes that a theory of representation and participation may, in different hands, produce differing results. To the extent that my critique criticizes application, it does not, then, challenge the theory

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58. See J. ELY, *supra* note 1, at 157. It is however apparent that Ely would preclude a legislative decision reached through even an efficient process if the decision was the product of "outright hostility." *Id.* I would agree with this result, but I am not convinced that Ely's process reasons for it are easily distinguished from substantive reasons for it. Contrast the view I have expressed with Professor Farago's view of Ely, Farago, *supra* note 44, at 610-11 n.24.

directly. It is nevertheless my hope that the critique does suggest something about the theory—that its reconciliation of majority rule and judicial veto is not, and cannot be complete.

I have suggested three reservations about Ely's theory. First, Ely's version of the meaning of majority rule includes a notion of shared world view that I believe leads him to inappropriately evaluate bureaucratic decision as if it was legislative decision and to oversimplify the dynamics of government process by relying upon group status as an explanation of that process. Second, Ely believes that the court is capable of accurately identifying prejudice and of assigning it as the cause of some substantive results and not of others without running a substantial risk that judicial policy preference<sup>59</sup> will play a significant role in the assignment. I am skeptical of that claim and think it at least possible that such judicial preferences would be better left in the open. Third, Ely, despite his evident willingness to uphold antimajoritarian claims to prejudice-free decision, nevertheless insists that majority rule takes precedence, in the sense, at least, that the risk of judicial error in identifying prejudice is allocated to the minority. I confess some value-laden disappointment in this result, but believe the more relevant criticism to be that Ely has not made clear what I suspect in his theory and believe is essential—that his concern with process is not limited only by its own logic, but is limited, as well, by countervailing (and unfortunately unexplored) principles. I will attempt to illustrate these doubts with three of Professor Ely's arguments: that the benign consideration of race is not suspect;<sup>60</sup> that sex, if used as a contemporary basis for decision, is not suspect;<sup>61</sup> and that a government failure to provide for the poor is not suspect.<sup>62</sup>

### *Race As A Suspect Classification*

Inquiry into legislative or administrative motivation may be viewed as inquiry into motive in the weak sense or as inquiry into motive in the strong sense. Motive inquiry in the weak sense is inquiry only into the basis for decision. Some bases for decision are

59. I mean, by judicial preference, what Ely seems to mean by it: the judge's "own values." I do not mean that such a preference is not justifiable on the basis of some argument from "principle," however self-selected the principle.

60. J. ELY, *supra* note 1, at 170-72. A conclusion that a classification is not "suspect" does not preclude further inquiry, but one may question the efficacy of such an inquiry in the absence of the presumption. *Compare id.* at 138 *with id.* at 145.

61. *Id.* at 164-70.

62. *Id.* at 162.

always at least presumptively illicit.<sup>63</sup> The task is only that of finding the basis.<sup>64</sup> The justification for characterizing some grounds for decision illicit may be conceived as moral<sup>65</sup> and therefore inconsistent with Ely's concern only with process, but that justification is not the sole justification available for inquiry in the weak sense. One may as easily suggest that the justification is prophylactic: some bases for decision reflect, more often than not, process tainted by prejudice, and are, therefore, to be prohibited altogether.<sup>66</sup> Inquiry in the weak sense risks, then, overinclusive judicial veto; the value it makes primary is unprejudiced decision.

Ely's claim, however, is that the Court should engage in an inquiry into motive in the strong sense,<sup>67</sup> using motive as a scalpel

63. See *New York Transit Authority v. Beazer*, 440 U.S. 568 (1979); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976). The standard wisdom is, of course, that some bases of decision are presumed illicit unless sufficiently justified. See *Korematsu v. United States*, 323 U.S. 214 (1944).

64. See *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979).

65. See A. BICKEL, *THE MORALITY OF CONSENT* 133 (1975).

66. See *Regents of the University of California v. Bakke*, 438 U.S. 265, 295-300 (1978) (Powell, J.).

67. J. ELY, *supra* note 1, at 156-61. It cannot be denied that the Court, in part in response to Professor Ely's earlier urging, Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205 (1970), has in fact focused upon motive in at least the equal protection context. It remains to be seen whether it will adopt the strong or the weak senses of the inquiry. See *Fullilove v. Klutznick*, \_\_\_ U.S. \_\_\_, 100 S. Ct. 2758 (1980). There have been two major objections made to the Court's focus, only one of which has force as an objection to motive inquiry in the strong sense. The objections are, first, that an insistence upon illicit motive is too confining and immunizes undesirable effect from constitutional scrutiny, and second, that motive is not ascertainable.

The first objection is an objection from a premise itself inconsistent with a belief in a limited judicial role, for judicial assessment of the impact of an otherwise legitimate decision assumes a judiciary legitimately concerned with substantive policy. See, e.g., Boyd, *Purpose and Effect in the Law of Race Discrimination: A Response to Washington v. Davis*, 57 *U. DET. J. URB. L.* 707 (1980); Karst, *The Costs of Motive Centered Inquiry*, 15 *SAN DIEGO L. REV.* 1163 (1978); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 *U. PA. L. REV.* 540 (1977); Perry, *A Brief Comment on Motivation and Impact*, 15 *SAN DIEGO L. REV.* 1173 (1978). The second objection, as an objection specifically to Ely's analysis, is more troubling, but not for the reason commonly assumed. The reason commonly assumed is that legislative purpose is largely a fiction judicially derived more often in spite of than from the conflicting motivations evident in the process of political compromise. See, e.g., Alexander, *Motivation and Constitutionality*, 15 *SAN DIEGO L. REV.* 925, 937-38 (1978); Miller, *If "The Devil Himself Knows Not the Mind of Man," How Possibly Can Judges Know the Motivation of Legislators?*, 15 *SAN DIEGO L. REV.* 1167 (1978). That reason, despite the force of the underlying observation, is not a sufficient basis for rejecting the in-

rather than as the blunt instrument of prophylaxis. The Court is to separate a decision that is the product of hostility toward or an overbroad generalization about minorities and made on the basis, for example, of race from a decision untainted by either of these forms of prejudice but made, as well, on the basis of race.<sup>68</sup> For Ely, the "suspect classification" notion is a tool designed only to identify decisions likely to have resulted from prejudiced process: a racial classification that adversely affects a minority historically the object of hostility or of generalization is suspect because our experience tells us that the classification is likely to be the product of a tainted process.<sup>69</sup> A racial classification that adversely affects the majority is not suspect because the risk of prejudice is substantially less: a majoritarian process is not likely to disadvantage members of the majority through either hostility or ignorance.<sup>70</sup> The difficulty with inquiry in the strong sense is, I submit, that it risks underinclusive judicial veto; it risks prejudice in its effort to preserve majoritarianism.

Although Professor Ely recognizes that the competence of an administrative body to adopt racial preferences under an affirmative action plan is itself an issue,<sup>71</sup> he suggests that such a preference is not "suspect" because a government decision maker in a society dominated by whites has presumptively neither sought to harm nor discounted the human value of whites adversely affected by the preference.<sup>72</sup> What is missing from Ely's analysis, however, is a critical examination of the relationship between the character of the institution making such a decision and the motive inquiry he advocates.<sup>73</sup>

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quity. The fiction is not wholly fiction; the art of statutory interpretation, albeit art, is not devoid of legitimate content. It is, moreover, a useful and essential fiction; without it, we must doubt the judicial process itself.

The troubling aspect of the impracticability objection, rather, is that Ely's claim that the Court should adopt motive inquiry in the strong sense may assume too great a judicial capacity. That is the difficulty discussed in the text.

68. J. ELY, *supra* note 1, at 170-71.

69. *Id.*

70. *Id.*

71. *Id.* at 258 n.107. Ely's specific reference is to the decision of a university faculty. At the level at which I wish here to challenge the application—a level that ignores the issue of delegation and the question of specificity in delegation—I assume that Ely would follow a similar course in the case of a federal bureaucracy. Indeed, the faculty's "isolation from political pressures," *Id.*, might be thought a reason for granting a federal bureaucracy greater deference than a faculty.

72. *Id.* at 258-60 n.109. *But see id.* at 4 (footnote).

73. I have attempted to suggest as much at greater length elsewhere. See Cox, *The Question Of "Voluntary" Racial Employment Quotas And Some Thoughts On Judicial Role*, \_\_\_ ARIZ. L. REV. \_\_\_ (1981) (forthcoming).

The hypothetical assumes an institution not itself politically responsible. In what sense, then, may it be said to represent the majority? Apparently, only in the sense of a judicial assumption about the probable prejudices of the decision maker<sup>74</sup>—an assumption that apparently requires judicial identification of the race of the decision maker. Aside from my distaste for that prospect,<sup>75</sup> the analysis assumes that representation of the majority, and non-representation of the minority, is a matter of the racial memory<sup>76</sup> of the decision-maker—an at least uncommon definition of representation and a definition suggesting the majority rule by *Weltanschauung* characterization I made here earlier.

What grounds are there for an assumption that the government institution in issue in fact does represent the majority—even in the sense of racial memory? Recall that our concern here is that the institution's decision be unprejudiced. By the criterion of that concern, the institution may not miscalculate the value of those majority persons adversely affected or of the minority persons favored by the preference it adopts.<sup>77</sup> Are we justified in assuming that the potential for prejudice is exhausted by an assumption about the probable prejudices of the decision maker made on the basis of the race of the decision maker? I think not—not even if it is assumed that the “majority” may be adequately defined so that there are not subgroups of the white majority whose interests are sacrificed by white decision makers through prejudice.<sup>78</sup>

74. J. ELY, *supra* note 1, at 259 n.109.

75. See also Van Alstyne, *Rites of Passage: Race, The Supreme Court, and The Constitution*, 46 U. CHI. L. REV. 775, 800-01 (1979).

76. By racial memory, I intend to capture what I take to be Ely's notion of psychological identification on the part of the decision maker. J. ELY, *supra* note 1, at 259 n.109.

77. If a sophisticated inquiry into the psychology of decision is appropriate judicial technique, an important question is the distorting potential of guilt—both because it seems a likely basis for an undervaluation of some members of the white majority and because it seems an equally likely generator of paternalism. See generally, N. GLAZER, *AFFIRMATIVE DISCRIMINATION* 204-21 (1975).

78. See *United Jewish Organizations v. Carey*, 430 U.S. 144, 174-75 (1977) (Brennan, J., concurring). Ely clearly agrees that his argument is applicable to the white majority only where the white majority as a whole is disadvantaged. J. ELY, *supra* note 1, at 171-72, 258-60 n.109. See also Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 14 n.47 (1978).

The argument that there is no white majority but, rather, only a collection of minorities, *Regents of the University of California v. Bakke*, 438 U.S. 265, 295-97 (1978) (Powell, J.), is, for Ely, beside the point where the collection of minorities has behaved as a monolithic majority. J. ELY, *supra* note 1, at 258 n.105. Ely's argument fails, in my judgment, for two reasons: If applied to non-legislative decision, judicial determina-



The difficulty is that Ely assumes a judiciary capable of making accurate and, as a matter of substantive result, neutral distinctions in analyzing motive. That assumption is grounded upon a peculiarly narrow view of prejudice and of the capacity of race to generate prejudice<sup>79</sup>—a view that relies upon the group status of the decision maker. The relevant group status—that is, the group status that will trigger judicial suspicion—is arguably derivable from historical experience, but historical experience is not unambiguous. If historical experience indicates anything about race, it is that race is too volatile a consideration to be neatly limited by generalization.<sup>80</sup> If human psychology is to be a guide to decision, what is needed is a judicial sensitivity to the complexity of human psychology and, therefore, judicial modesty<sup>81</sup> about judicial capacity to fine-tune characterizations about the process of decision. Fine tuning relevant group status, one suspects, and I think not unfairly, too easily becomes a matter of one's substantive policy preference.<sup>82</sup>

If Professor Ely's notion that the institutions of government reflect the domination of the majority has validity, its validity lies in

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tions of precisely how monolithic the "majority" has behaved are in my view not possible. See *id.* at 260 n.110. Moreover, Mr. Justice Powell's point in *Bakke* is a point valid if viewed as a prospective point: once race is thought a viable basis for decision, the monolithic majority is not likely to behave monolithically. Cf. Days, *Concealing Our Meaning from Ourselves: The Forgotten History of Discrimination*, 1979 WASH. U.L.Q. 81, 90-91 (expressing fear of "dog fight" over scarce resources).

79. It is possible that the argument in the text is unfair, at least in the sense that Ely would apparently permit prejudice where he thinks the victims of the prejudice have sufficient power to overcome it in the political process. See J. ELY, *supra* note 1, at 166-67. The difficulties with that proposition are in the measurement of the power needed to achieve some unstated threshold beyond which special judicial solicitude is no longer essential, see text accompanying notes 99-105 *infra*, and in Ely's tendency to view power sometimes as a function of numbers, J. ELY, *supra* note 1, at 164, and sometimes as a function both of numbers and of the absence of prejudice in the sense of overgeneralization, *id.* at 152. Cf. Gottlieb, *Strife In The Carolene Garden*, 57 DET. J.U.L. 919, 941-48, 951-53 (1980) (criticizing Ely's narrow focus upon historically disadvantaged groups).

80. See, e.g., A. BICKEL, *THE MORALITY OF CONSENT*, *supra* note 65, at 133. Kurland, *Ruminations on the Quality of Equality*, 1979 B.Y.U.L. REV. 1, 10-20. Posner, *The Bakke Case and The Future of "Affirmative Action"*, 67 CAL. L. REV. 171, 177 (1979). Van Alstyne, *supra* note 75, at 778.

81. See Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 573-74 (1975). I do not mean by "modesty" a concern with judicial authority or power. See Shapiro, *Judicial Modesty: Down with the Old!—Up With the New?* 10 U.C.L.A. L. REV. 553 (1963). I mean a recognition of the limits of judicial ability.

82. *Compare Regents of the University of California v. Bakke*, 438 U.S. 265, 359-61 (1978) (Brennan, J., concurring and dissenting) with *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

those institutions in which the majority's political representatives may be found. I think that the judiciary is entitled to precisely parse motivation in reviewing a congressional decision and that motive inquiry in the strong sense is therefore appropriate—at least as a matter of deference—in reviewing congressional decisions.<sup>83</sup> It is, after all, democratic decision that Ely's theory purports to protect from the Court, and congressional decision would seem to have the strongest claim to that protection. It is at best very difficult to see why shared *Weltanschauung* warrants similar protection for any bureaucracy. Motive inquiry in the weak sense is a far safer approach to review of bureaucratic decision, and one that serves the procedural goal of forcing decision by a politically representative body.

### *Sex as a Suspect Classification*

Professor Ely's argument that sex should not generally be a suspect basis for decision is that although sexual classifications are often stereotypical,<sup>84</sup> it is difficult to conclude that the access of women to the processes of government is now blocked either directly, through hostility or indirectly, through ignorance.<sup>85</sup>

It is at least possible, however, that the group adversely affected by a sexual classification will be men.<sup>86</sup> Why, then, should we permit, as a matter of constitutional law, the classification? One possible answer is that men also have sufficient power to force respect for their interests in the process that produced the classification. The difficulty with that answer in my view is that the classification, particularly where the classification suggests a stereotypical view of women, is the probable product of a coalition of men and women, both influenced by the "prejudice" underlying the stereotype.

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83. See *Fullilove v. Klutznick*, \_\_\_ U.S. \_\_\_, 100 S. Ct. 2758 (1980). See generally Cox, *supra* note 73.

84. By stereotype Ely means only subjective overgeneralization in the sense that the decision maker thought the "incidence of counterexample" less than it in fact is. J. ELY, *supra* note 1, at 157. Ely believes this meaning is distinct from one that relies upon a judicially imposed threshold for incidence of counterexample. *Id.* at 156. Although I doubt that the distinction can be easily made in litigation, I intend by my use of the term Ely's limited definition. If one postulates a legislature that, on the record, accepted and understood that it was accepting a very high "incidence of counterexample" in the case of sex, the legislative decision would presumably be a candidate for a judicial finding of "outright hostility."

85. J. ELY, *supra* note 1, at 166-70.

86. See *Califano v. Webster*, 430 U.S. 303 (1977); *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

Professor Ely's answer to the question is, at least to me, ambiguous, for it is not clear whether he is skeptical about the influence of prejudice or thinks it irrelevant. Ely first argues that the answer has something to do with the nature of the prejudice involved:

A case like that of women, where access was blocked in the past but can't responsibly be said to be so any longer, seems different. . . . In cases of first degree prejudice, or self-serving stereo-typing where the access of the disadvantaged group remains blocked, the alternative of "remanding" the question to the political processes for a "second look" would not be acceptable: we don't give a case back to a rigged jury. Here, however, such a "second look" approach seems to make sense.<sup>87</sup>

Assuming that the legislature takes a second look and confirms its earlier decision, what is different about the reenacted classification that adversely affects men and the original classification that, although it too adversely affected men, was the product of an era in which a stereotypical view of women was dominant? Ely's answer, apparently, is the absence in the former case of the dominant stereotype: the "prejudice" that produced the original classification is not present in the case of the reenactment for reasons at least analogous to those which validate benign racial preferences.<sup>88</sup> The Supreme Court's answer is not dissimilar: at least some sexual classifications that adversely affect men are not stereotypical classifications, they are remedial classifications.<sup>89</sup>

Both answers assume a judicial ability to identify stereotype—that is, to determine whether prejudice did or did not influence current decision—without reliance upon the fact that decision in both instances was founded upon sex. Indeed, Ely appears to go even further: date of enactment is a sufficient proxy for prejudice, so we may ignore the risk of prejudice in contemporary enactments.

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87. J. ELY, *supra* note 1, at 169.

88. *Id.* at 167, 169. Ely is, however, not entirely clear on the point. He may be read as suggesting only that the political power of women excuses prejudice, but his emphasis on determining whether the access of women to the process of decision is "blocked" suggests an inquiry into prejudice. *Id.* at 167-68. See note 103 *infra*.

89. Compare *Califano v. Webster*, 430 U.S. 313, 317 (1977) with *Califano v. Goldfarb*, 430 U.S. 199, 221-22 (1977) (Stevens, J., concurring).

Can we have confidence in the Court's ability to identify stereotype? I am inclined to answer no, but to grant the same deference to congressional decision in the sexual context I would grant in the racial context.<sup>90</sup> I am inclined to doubt the Court's capacity in part because the Court's reluctance to label sex "suspect" suggests not that prejudice is absent from contemporary sexual classifications, but rather, that prejudice is inseparable from values it wishes to preserve.<sup>91</sup>

The fact of the matter is that significant numbers of men and women view some sexual classifications—even some stereotypical sexual classifications—as legitimate.<sup>92</sup> Sexual classifications are not suspect in the sense of automatic invalidation because many of us (or, at least, many judges)<sup>93</sup> wish to retain some sexual stereotypes—particularly those reflected in heterosexual values<sup>94</sup>—and suspectness would make retention difficult. The Court must under such circumstances weigh those values against the risk of prejudice. The

90. See text accompanying note 83 *supra*. What then, would I do about non-congressional, sex-based decision? A prophylactic standard is attractive, both by analogy and from the standpoint of judicial administration. See Rutherglenn, *Sexual Equality In Fringe-Benefit Plans*, 65 VA. L. REV. 199, 248-56 (1979). The difficulty is that I, too, am prone to a value orientation, at least in the sense that I do not think the courts can or should eliminate all sexual distinctions. See *id.* at 213-16, 228-31. My inclination to distinguish between racial and sexual classifications may be explained in terms of distinctions in perceived risks (and, therefore, in terms of distinct forms of prejudice or judgments about prejudice in much the same way Ely seems to advocate) or in terms of competing values, see notes 91-94 *infra* and accompanying text, but I suspect the latter is the more accurate explanation and the former at least arguably a rationalization.

91. See *Geduldig v. Aiello*, 417 U.S. 484 (1974) (pregnancy is not a sex-based ground of decision). Compare *Michael M. v. Superior Ct.*, 49 U.S.L.W. 4273, 4276 (March 23, 1981) *with id.* at 4283 (Stevens, J., dissenting). Cf. *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (Sex is a bona fide occupational qualification under Title VII where women, because of their womanhood, are likely to be assaulted). *But cf.* *City of Los Angeles Dept. Power & Water v. Manhart*, 435 U.S. 702 (1970) (use of motive in the weak sense as prophylactic standard under Title VII).

92. The great bathroom debate in the context of the struggle for Equal Rights Amendment ratification suggests as much. See Brown, Everson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 900-02 (1971).

93. Cf. *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979) (homosexuals not protected under Title VII); *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084 (5th Cir. 1975) (sex-based grooming standards not illicit under Title VII); *Fesel v. Masonic Home of Del. Inc.*, 447 F. Supp. 1346 (D. Del. 1978) (hospital may employ only females for care of female patients—"privacy" rationale).

94. See Rutherglenn, *supra* note 90, at 209-12.

price paid for retention is the continued possibility of prejudice—counterbalanced I think, to an unknown extent by the political power of women.

A similar price for a dissimilar reason, I submit, is paid in the case of remedial sexual classification: despite assurances that stereotype is not present in the case of legislation enacted to overcome the effects of past discrimination, it is not clear to me that such a remedy is the product of a paternalism meaningfully distinguishable from the paternalism that protected women in earlier eras.<sup>95</sup> We are not entitled to be confident that reenacted, or newly enacted, sexual classifications are free of prejudice<sup>96</sup> even if we conclude that the Court should defer to congressional decision or to countervailing values.

But the argument that we cannot be certain that prejudice is absent in contemporary sexual classification is apparently not an argument that bothers Professor Ely, for he also contends that a contemporary sexual stereotype is a matter of judicially untouchable substance and therefore not the appropriate subject of judicial review.<sup>97</sup> The argument seems to be that sexual stereotyping is permissible where the victims of the stereotype have sufficient clout to prevent it, however “wrongheaded” their failure to prevent it.<sup>98</sup>

If stereotypical classification is now a matter of substance, what distinguishes sexual stereotype from racial stereotype? Presumably, it is Ely's judgment about relative clout, but I think it

95. See note 90 *supra*. One need not fully accept the political rhetoric of the women's movement, J. ELY, *supra* note 1, at 166, to nevertheless think the insight at least suggested by the rhetoric—that sex based decision is very often stereotypical—viable. See Builnager, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505, 526-33, 536-39 (1980). But see notes 84 *supra*, 104 *infra*.

96. Ely is, however, at least partly correct in suggesting that it is difficult to think of many federal, sex-based legislative classifications enacted since the New Deal. J. ELY, *supra* note 1, at 167. But see *Rostker v. Goldberg*, No. 80-251 (U.S., argued Mar. 21, 1981). From that premise, Ely concludes that we really do not have a contemporary problem. *Id.* The insight Ely's observation should disclose, however, is that we do not have much of a contemporary legislative problem. The classifications we should be worrying about are those generated by the institutions of government making contemporary decisions—and those institutions are more likely to be bureaucratic than legislative in contemporary America. See *id.* at 131-34. Upon that premise, worrying about judicial overruling of the political process would seem to constitute worrying about something of a side show.

97. *Id.* at 166-67.

98. *Id.* at 167.

possible to question that judgment and the Court's ability to make it. The political clout of racial minorities is, as Professor Ely recognizes,<sup>99</sup> difficult to deny.<sup>100</sup> The monolithic character of majority opposition to racial minorities in the political process is, despite Ely's suggestions to the contrary, difficult to swallow.<sup>101</sup> Neither of these observations invalidates the belief that race-motivated decision is likely to reflect prejudice, but both make judicial guesses about clout tricky matters. Moreover, the fact that women outnumber men<sup>102</sup> does not warrant a conclusion that women have sufficient clout to overcome prejudice, and the fact that there is a current and widespread public debate concerning the role of women<sup>103</sup> does not warrant an obituary for chauvinism. The complexities of the political process are far greater than Ely seems to suppose.<sup>104</sup>

I think Ely supposes that the political process is less complex than I believe it to be because he apparently conceives of the right at issue as the right of a minority group to unprejudiced process, and that conception—if one assumes that groups act cohesively—simplifies substantially one's task in explaining political behavior. It may be that I am misconstruing Ely's conception, for the right to unprejudiced process may be the majority's right as well. Indeed, the right may not be so much a right as a claim to be considered in evaluating the countervailing claim to majoritarian decision. But Ely's analysis does treat the power of the minority as

99. *Id.* at 152.

100. See Posner, *supra* note 39, at 30.

101. *Id.* See note 78 *supra*.

102. J. ELY, *supra* note 1, at 164.

103. *Id.* at 166. Ely seems to recognize this point by contending that the clout argument is really an inquiry into whether access to the process of decision is blocked. *Id.* at 167-68. But that contention is circular: it takes us back to the issue of prejudice and the use of date of enactment as a proxy for prejudice, and it ultimately takes us back to an assessment of clout as a means of measuring blockage. Compare *id.* at 167 with *id.* at 169.

104. It is possible to read Ely as relying upon an additional element in defining prejudice: that the legislative decision must in some objective sense actually harm or fail to benefit the deprived "minority." See *id.* at 153, 159, 253-54 n.75. Under that supposition, the sexual stereotype that objectively harms or fails to equally benefit men would not be the type of stereotype properly the object of judicial concern. See *id.* at 156-57. The difficulty is in the assessment of objective harm or deprivation, for it should be clear by now that purportedly benign disadvantaging of dominant groups in fact has harmed advantaged stereotyped groups. Pedestals have turned out to be unpleasant places. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 644-48 (1975). The further difficulty is that the "pedestal" harm to which I refer will likely be a subject of complaint on the part of subgroups (that is individual members) of the "minority." Ely's focus is upon the minority as a group.

if the minority was a cohesive entity whose claim to unprejudiced decision is to be discounted by its power as a cohesive entity.

My problem with judicial measurement of clout turns out, then, to be not dissimilar to my problem with judicial measurement of prejudice: the assumption I think erroneous in both instances is that the group behaves as a group. It is of course the case that the prejudice with which Ely is concerned is inherently a group-directed phenomena. But that concession does not, it seems to me, warrant the conclusions that group status defines both the locus of prejudice and the locus of the clout needed to counterbalance prejudice. In the case at least of clout, it is individuals who will seek to overcome prejudice, and I see no evidence that would warrant a conclusion that these individuals may assume the clout of others who share their group status.<sup>105</sup>

It may be objected that my doubts about the Court's ability to make judgments about the presence of prejudice and about relative clout, and my preference for prophylaxis in at least the case of non-congressional judgment founded upon race,<sup>106</sup> indicate that I am straying from Ely's premises: It is the *potential* for prejudice I want the Court to identify and eliminate; Ely is concerned with prejudice only to the extent that it *actually* causes inefficient process.<sup>107</sup> Perhaps I am injecting my values into the mix, but the clash of my values with Ely's reliance upon groups as the building blocks of his theory may at least serve to clarify what I take to be the limits of that theory. Because I view any right to untainted process as the right of individuals to such a process,<sup>108</sup> I am disinclined to assume that group clout excuses the risk of prejudice. Ely seems quite willing to take that risk. The interesting question is why. I suspect that the answer lies in my earlier suggestion that the right to untainted process may not be a right at all. It may be, rather, in the nature of a claim to be given weight, but not controlling weight. If that is the case, Ely may be giving controlling weight to a majoritarian principle, at least in the sense that the judiciary's effort to achieve untainted process cannot be permitted to too directly threaten that principle.

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105. Ely at one point seems to recognize something like this point, J. ELY *supra* note 1 at 166-67, but discounts it on the basis of an analysis that emphasizes both the group-directed nature of prejudice and group clout. *Id.* at 167, 169.

106. See note 90 *supra*.

107. J. ELY *supra* note 1, at 157. See Posner, *supra* note 39, at 21 and see note 84 *supra*.

108. See Farago, *supra* note 44, at 616-19.

An emphasis upon groups oversimplifies, as I have argued, both prejudice and clout. But if I am right in suspecting that Ely wants to avoid the possibility that prohibiting prejudice will overwhelm majoritarianism, the oversimplification permits sufficient maneuvering room in which to avoid it. Judgments about relative clout, in the absence of any objective basis for measurement, are judgments easily informed by a cautionary concern with majoritarian values. That concern may be well and good if one views majoritarian values primary, but it would seem desirable that they be articulated directly and not left in the unstated substructure of a judicial opinion purporting to objectively assess clout.

#### *Wealth As A Suspect Classification*

Professor Ely concludes that wealth is not a suspect classification both because government failures to provide for the poor are motivated more by parsimony than prejudice<sup>109</sup> and because a failure to provide goods and services is not often a problem of classification at all.<sup>110</sup> My initial difficulty is in the potential use of Ely's analysis to come to a precisely contrary conclusion. Indeed, Professor Michelman, albeit apparently without the benefit of *Democracy and Distrust*, has done precisely that on the basis of Ely's earlier exposition of his theory in the law reviews.<sup>111</sup> For Michelman, constitutional rights to the "basic ingredients of individual welfare"<sup>112</sup> are "transtextual rights"<sup>113</sup> which would reinforce representation and ensure participation.<sup>114</sup>

Ely's analysis postulates, as I have said, two fundamental process values—participation and representation. His analysis of prejudice may be viewed as flowing from the latter, but a claim to welfare rights may be viewed as flowing from the former. Ely's conclusion that poverty is not a suspect classification that threatens, through prejudice, representation, is therefore not necessarily a rejection of a positive right to welfare as a necessary condition to participation. Indeed, Professor Ely does not address the latter question. Michelman seems rather clearly to be postulating a right of the latter type, but he also relies on the notion of biased process<sup>115</sup> and

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109. J. ELY, *supra* note 1, at 162.

110. *Id.*

111. Michelman, *Welfare Rights In A Constitutional Democracy*, 1979 WASH. U.L.Q. 659, 666 n.34.

112. *Id.* at 659.

113. *Id.* at 676-79 (transtextual in Ely's open-ended sense).

114. *Id.* at 677-80.

115. *Id.* at 684.



makes the right dependent upon some initial government action as a triggering mechanism<sup>116</sup>—a dependence at least suggestive of an equal protection analysis.<sup>117</sup>

The interesting question arising from the differences between Ely's view of poverty and Michelman's view of poverty is why Ely addresses the question only in the context of prejudice. I suspect, with the caveat that my suspicion is mere speculation, that it is because Ely views the question only as one of classification on the basis of wealth: Absent some rather clear government conduct generating a classification founded on wealth,<sup>118</sup> there is no possibility of a welfare right. I confess that I am disappointed that Ely has not told us why there is no such right. Although I think such a right should not be recognized, I don't view Michelman's argument from Ely's participation value unwarranted.

Both Professor Ely's express conclusion that poverty is not a suspect classification and my speculation about the reason for his failure to discuss positive rights to welfare suggest, it seems to me, that participation and representation are in competition in Ely's scheme with his expressed but not adequately explored preference for majoritarianism. Ely, as I have stated, concludes that poverty is not suspect in part because parsimony, not prejudice, is the more probable motivation for a legislature's refusal to legislate. How do we know that some proposal to alleviate the plight of the poor is defeated merely because the legislature is unwilling to expend funds (and to impose the taxes needed for the funds)? Certainly political rhetoric about the indolence of the poor (or, at least, of the unemployed) may be described as "self-aggrandizing generalization." We do not know that prejudice is absent; Ely merely prefers, again, an underinclusive judicial veto. But I do not think this is the main reason poverty is not suspect. The main reason is the second reason Ely provides: There is no classification.

Classification, however, is a term of art. A legislature's refusal to fund a minimally adequate education while funding a municipal

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116. Michelman seems to recognize the difficulty by conditioning his Ely-based welfare rights upon some form of underinclusiveness in an existing government effort at meeting minimum needs—thus presumably creating the "classification" Ely finds generally missing in the context of poverty. Michelman, *supra* note 104, at 684-85. *But see* Appleton, *Professor Michelman's Quest for a Constitutional Welfare Right*, 1979 WASH. U.L.Q. 715, 724-30.

117. *See* Appleton, *supra* note 116, at 723.

118. *See* J. ELY *supra* note 1, at 162, 246 n.38. *See also* *Id.* at 141, 144-45.

concert hall generates a type of classification; it is merely not the sort of classification the courts are likely to treat as a classification under equal protection doctrine. The reason poverty is not suspect, then, is not so much a matter of classification as a matter of the distinction between a court overruling and a court compelling legislative action.<sup>119</sup> Underlying the distinction between negative and positive rights is a set of values at the heart of which is, again, majoritarianism as a limitation upon judicial role.<sup>120</sup>

Ely's failure to discuss the possibility of affirmative welfare rights is I think explicable on a similar basis, at least if one is tolerant of my speculation. A judicial recognition of welfare rights would, as Professor Michelman argues, further participation in the process of democratic decision, but such rights would fly in the face, as Michelman at least partially recognizes, of the values expressed by the negative rights—positive rights dichotomy.<sup>121</sup>

As I agree that that dichotomy must be preserved, one may legitimately ask what my reservation is. It arises from my perception that the majoritarian preference in Ely's theory influences and limits his characterizations about prejudice, his understanding of the political process, and his evaluations of the minorities entitled to claim special judicial protection.

Ely's claim, I repeat, is that there is no tension between democracy and a process untainted by prejudice because an insistence upon the latter reinforces the former. But there is a tension, I submit, between majoritarianism and untainted process—a tension I think Ely often resolves by evaluating threats to untainted process in the unexpressed light of the consequences the evaluation would have on majority rule—a majority rule apparently defined at least operationally as the fact that decision was reached by the political branches of government.

I earlier suggested that Professor Ely fails to explain precisely what he means by democracy, but that his view of the concept clearly

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119. See *Maher v. Roe*, 432 U.S. 464 (1977); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). But see A. COX *supra* note 4, at 91-98, 108-15.

120. See Bork, *The Impossibility of Finding Welfare Rights In the Constitution*, 1979 WASH. U.L.Q. 695, 699-700.

121. See note 116 *supra*. However difficult the invalidation/affirmative imposition of duty (or negative rights/affirmative rights) dichotomy may be to apply, it seems to me essential as a limitation upon the judiciary. Certainly it is at least crucial to Ely's hope that process will define the limited extent of judicial review; otherwise, as Professor Bork has argued, we are "back to *Lochner*." Bork, *supra* note 120, at 700.

includes the majoritarian value.<sup>122</sup> Ely's argument that his analysis of prejudice reinforces democracy may be viewed, however, as suggesting a definition of democracy: democracy is that system in which majority rule is fettered only by the sensitivity to risks of prejudice and to obstacles to participation Ely prescribes.<sup>123</sup> If I am right in my view that the majoritarian value acts as a brake in the drive for untainted process, this definition is not, however, quite accurate. Rather, democracy is the system that results from a balancing of the majoritarian value and untainted process—a balancing presumably requiring a guess about appropriate accommodation.

If I am right in thinking Ely is engaged in balancing, what is wrong with such a balancing? Both of the weights on the scales may be viewed, after all, as values of "process." I think there is nothing wrong with it. Indeed, I think it essential. What seems wrong with Ely's analysis of prejudice is that the need for rather constant accommodation is unexpressed. What seems wrong, moreover, is that it is not merely ascertainable values of process that are elements of the accommodation. The problem is not merely the notorious difficulty of distinguishing substance from procedure<sup>124</sup>—although that difficulty is surely illustrative as analogy.<sup>125</sup> The problem, on the pre-

122. See text accompanying notes 38-43 *supra*.

123. See J. ELY, *supra* note 1, at 82-83, 135-36.

124. Guaranty Trust Co. v. York, 326 U.S. 99, 108-09 (1945). *But see* P. BATOR, P. MISHKIN, D. SHAPIRO, H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 714-15, 747 (2d ed. 1973); Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724-38 (1974).

125. The substance-procedure distinction is not present in the form in which it often presents a problem. The issue, under Ely's analysis, is not which of two competing rules to apply. The distinction is present, rather, in the sense that a substantive decision is to be judicially overruled only where the procedure that produced it is tainted.

From the point of view of an observer of the Court who seeks to determine whether the Court has adhered to a limited role (and from the point of view of a Court committed to introspection for a similar purpose), the difficulties inherent in the distinction are nevertheless similar to those that arise in a choice of law context. In the latter context, the general inquiry is whether the rule in question regulates litigation or has as its underlying purpose some "substantive" objective independent of the litigation process. See generally Ely, *supra* note 123. In the context of DEMOCRACY AND DISTRUST, the general inquiry is whether the Court's analysis regulates representative process or has as its underlying purpose some substantive objective. I quite agree that the assignment of procedural or substantive labels in both contexts is not arbitrary. But the notion of representation in the broad senses in which Ely uses it seems to me to inevitably become a matter of substantive result.

The difficulty is suggested by Ely's distinction between a judiciary determining whether the legislature generalized too much and a judiciary determining whether the legislature thought its generalization more accurate than it is. See note 84 *supra*. In

judice side of the scales, is that a court though capable of deciding whether a minority interest has been undervalued in the political process (even undervalued through prejudice) is very likely to go about deciding that question by reference to what it believes would be an adequate valuation of that interest.<sup>126</sup> The problem, on the majoritarian side of the scales is similar. Some judicial valuation of the majority's interest (even if we define the majority operationally as the decision reached by existing political process) is, it seems to me, inevitable.

Such a valuation is at least probable in practice because the majority's interest—the public purpose served by challenged legislation—is a relevant consideration in assessing prejudice in Ely's scheme.<sup>127</sup> I think it inevitable, however, because a court that weighs the value of majority rule must have some understanding of the meaning of majority rule. A meaning limited merely to the fact that decision was reached by the political system (even if the definition of that system is limited to the legislature) amounts to no more than the standard presumption that what the system has done is legitimate, and that seems an inadequate meaning.

Ely's major claim, I think, is that it is an adequate meaning. I am contending that Ely's analysis of prejudice is influenced, through something like a balancing technique, by a felt need to preserve majoritarianism. I think that Ely would deny my contention because I think he believes that malfunction in process is, at least in substantial degree, objectively observable. Since he believes malfunction to be observable, he can assume that democratic decision is decision

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the absence of a litmus test for the latter, the judicial inquiry must necessarily rely on the former. Ely is quite frank about the problems evident in making that distinction, J. ELY, *supra* note 1, at 157, but I doubt very much that the distinction can be made at all in practice.

126. *But see* note 84 *supra*.

127. J. ELY, *supra* note 1, at 147, 154. *But see id.* at 138, 156-57. Although Professor Ely calls for an inquiry into legislative purpose and for consideration of the propriety of purpose in the sense of prejudice, he clearly rejects judicial second-guessing of the balances struck by legislatures. His view is apparently that the proper inquiry is only into whether prejudice materially influenced decision, *id.* at 138, not into whether, on balance, the legislative goal outweighs the possibility of prejudice (or, presumably, the harm to the minority that is evidence of prejudice). *Id.* at 153-54. My point is that I think inquiry into material influence, except perhaps in the rare case in which the legislature has been candid about its unconstitutional motivation, necessarily entails an inquiry into the substantiality of the legislative objective. Ely would make inquiry into substantiality an inquiry into the possibility of pretext, *id.* at 147, and that focus may be a viable way to phrase the question, but I think the distinction between pretext inquiry and second-guessing a very difficult line to draw.

reached by the political system and can conclude that the only proper inquiry is inquiry into malfunction. Legislative cost-benefit balances are not, on these premises, second-guessed by the Court, they are assumed.<sup>128</sup> If I am correct, however, in claiming that a malfunction characterization is itself influenced by the majoritarian value, second-guessing (even if deferential second-guessing) is precisely what is going on. Moreover, second-guessing is, if I am correct in believing that malfunction is not easily observed, essential. I have argued that prejudice characterizations are necessarily matters of judgment. Such a judgment requires, I think, an evaluation in particular cases of the substantiality of the majority's claim to the exercise of its prerogative. It may be preferable to frame the inquiry as an inquiry into malfunction,<sup>129</sup> for such a framing channels and narrows the analysis, but it is not in my view an inquiry that can deny a judicial assessment of the weight to be assigned the majority's claims.

#### CONCLUSION

I began this review with three premises to which I would like briefly to return. Their purpose was to suggest that there is, indeed, a rationale needed for judicial overruling of democratic decision; that the aspect of legal realism which was essentially right (even if essentially self-evident) and that has therefore survived at least as premise is that reliance merely upon constitutional text is not and cannot be what goes on in the Justices' chambers; and that these premises require, because they are ultimately in conflict, some substitute for text. Has Professor Ely provided us with an acceptable substitute?

Despite my reservations, I think that he has provided us at least with an acceptable direction. Many of those reservations are about particular applications of his theory reflecting, I hope, differences in judgment. Differences in judgment are not precluded by Ely's theory.<sup>130</sup> My main reservation—that the analysis Ely advocates cannot preclude a judicial weighing of conflicting interests and conflicting principles and that the weighing should not be camouflaged—is, I suppose, a kind of realist's reservation, but it is not a reservation that denies the relevance of principle or principle's

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128. *Id.* at 136. See A. Cox, *Book Review*, 94 HARV. L. REV. 700, 706-07, 709 n.19 (1981).

129. See A. Cox, *supra* note 128 at 709 n.19.

130. J. ELY, *supra* note 1 at 181.

potential for significantly influencing decision. The very considerable value of Ely's contribution, at least if his theory is not viewed as panacea, is that it invokes principles that speak rather directly to the dilemma of judicial review in what purports to be a representative democracy. Even if those principles turn out only to serve as cautionary boundaries to the role the Court conceives of itself as playing, they are to me a welcome relief from the view that the boundaries of that role are to be found through an unfettered examination of the substantive values that compete for the Court's favor.

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†Although the opinions expressed here are mine, I wish to thank my colleagues John Farago and Matthew Downs for their comments and helpful criticism. Responsibility for error is, of course, mine as well.