

Moral Philosophy and the Search for Fundamental Values in Constitutional Law

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I. INTRODUCTION

John Hart Ely's *Democracy and Distrust*¹ and Jesse H. Choper's *Judicial Review and the National Political Process*² share a broad common ground—namely, that an adequate constitutional theory should focus on function and process, in particular, on the broad concern whether nonjudicial institutions fairly represent diverse interests and, in those cases in which they do not, on the special role of judicial review in securing that representation. Choper uses this general proposition to defend his principal substantive proposal: the Supreme Court should review neither federalism disputes between the states and the national government³ nor separation of power disputes between Congress and the executive.⁴ In these contexts, Choper asserts, relevant interests are already fairly represented. Indeed, Choper affirmatively argues that in adjudicating these disputes the Court depletes its “exhaustible institutional capital,”⁵ and undermines its essential role—the defense of individual rights that, he assumes, are precisely marked as interests not well represented in the democratic political process.⁶ Ely's book is a detailed defense of his assumption that the essential justification for judicial review is protection of groups and interests not fairly represented in the democratic political process.⁷ Since I wish here to examine this assumption, I focus largely on Ely's book and its arguments. In particular, to establish the defensibility of his analysis, Ely makes a frontal attack on alternative conceptions of judicial review, including conceptions involving appeal to what he calls “fundamental values.”⁸ Since these negative arguments are an important foundation for his constructive alternative, their invalidity may cast doubt on his enterprise. In this essay, I argue that his arguments are invalid, indeed startlingly specious. Nonetheless, I urge that we not regard their invalidity as a defeat of Ely's constructive argument, which makes a solid contribution to understanding certain doctrines in constitutional law—notably, suspect classification analy-

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1. J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) [hereinafter cited as ELY].

2. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980) [hereinafter cited as CHOPER].

3. See generally *id.* at 171–259.

4. See generally *id.* at 260–379.

5. For Choper's elaboration of this idea, see *id.* at 129–70.

6. See, e.g., *id.* at 64, 75, 79, 223.

7. See ELY, *supra* note 1, at 73–183.

8. See *id.* at 43.

sis under the fourteenth amendment. But even this constructive contribution turns out, on examination, to rest upon the kind of substantive moral analysis against which Ely appears to rebel in his earlier negative arguments.

II. ELY ON FUNDAMENTAL VALUES

While Ely's attack on the role of fundamental values in the supposed vindication of judicial review is multifaceted, it also is unified by its focus upon the work of Alexander Bickel, who, at different points in his career as a constitutional theorist, appealed to different forms of this mode of vindication: first, in *The Least Dangerous Branch*,⁹ to the method of moral philosophy in explicating fundamental values; second, in *The Supreme Court and the Idea of Progress*,¹⁰ to the values revealed by historical progress; and, finally, in *The Morality of Consent*,¹¹ to Burkean tradition. Ely finds indefensible each of Bickel's forms of the argument in support of the role of fundamental values,¹² and criticizes other forms of it as well, including the legal realist appeal to the values of an enlightened judge,¹³ the appeal to natural law,¹⁴ the ideal of neutral principles,¹⁵ and the invocation of consensus.¹⁶ No form of the argument is valid, Ely argues, because the values to which appeal is made are always deeply controversial, because there is no method reasonably to resolve them, and because—in any event—the judiciary is no better, and may be worse, than the more democratic branches of government in giving expression to these values.

A. *Controversial Nature of Value Questions*

Ely's initial attack on the role of fundamental values in judicial review—that the values to which appeal is made are deeply controversial—does not appear to rest on any subjectivist conception of value questions as such. Ely concedes: "There *are* ethical positions so hopelessly at odds with assumptions most of us hold that we would be justified in labeling them (if not with absolute precision) 'irrational'."¹⁷ In addition, while Ely appears to recognize that contemporary moral philosophy has decisively repudiated the moral subjectivism that was in fashion¹⁸ (briefly and without ever attaining dominance¹⁹)

9. A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

10. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).

11. A. BICKEL, *THE MORALITY OF CONSENT* (1975).

12. On moral philosophy, see ELY, *supra* note 1, at 56–60; on progress, see *id.* at 69–70; on tradition, see *id.* at 60–63, 71–72.

13. *Id.* at 44–48.

14. *Id.* at 48–54.

15. *Id.* at 54–55.

16. *Id.* at 63–69.

17. *Id.* at 52.

18. For examples of recent moral philosophy that inquires into a determinate structure of moral reasoning, see K. BAIER, *MORAL POINT OF VIEW* (1958); R. BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* (1979); A. DONAGAN, *THE THEORY OF MORALITY* (1977); C. FRIED, *RIGHT AND WRONG* (1978); D. GAUTHIER, *PRACTICAL REASONING* (1963); B. GERT, *THE MORAL RULES* (1973); A. GEWIRTH, *REASON AND MORALITY* (1978); G. GRICE, *THE GROUNDS OF MORAL JUDGMENT* (1967); R. HARE, *FREEDOM AND*

during his undergraduate years,²⁰ he thinks it important to distinguish the very general and abstract character of moral argument, which character no reasonable person would dispute (citing, without attribution, but familiar from Dworkin,²¹ the “jejune maxim . . . ‘No one should profit from his own wrong’ ”),²² from the level of concrete controversy relevant to the work of the Supreme Court in deciding hard constitutional cases. For Ely, the force of the distinction appears to be that the former class of moral values, which might be appropriately enforced by a countermajoritarian court, is irrelevant to judicial work, while the latter class, though relevant, is too controversial to be a proper guide to judicial decision.

It is difficult to see how the distinction can be given the force that Ely supposes it to have. If we grant the existence of reasonable general premises of the kind that Ely concedes, it does not follow that because there exists disagreement about how the premises apply in concrete cases, these disagreements may not be reasonably adjudicated. Indeed, it is surely an important datum in such cases that persons take themselves to be in significant disagreement about something, and then suppose the others wrong and themselves right. It is natural, in such cases, to think that if each party were more impartial (less personally involved, more broadly capable of weighing other points of view, more free from pressure and other demands, more fully reflective on underlying facts and other contexts in which the premises in common apply, and the like), they could lessen and perhaps even resolve their disagreement. Certainly, persons acting on their own sometimes cultivate this impartiality. In serious matters, parties often appeal to others who are supposedly independent and impartial to resolve the matter. This common sense moral phenomenon is, I believe, continuous with what we see in and hope to achieve from formal adjudication. Thus, Ely is surely wrong to think that the impartiality that is so importantly promoted by an independent federal judiciary has no natural institutional place in resolving disputes.²³

Ely may not, however, understand what he has conceded in granting the existence of general premises which reasonable persons could not deny. There is some evidence for this in the interpretation he gives to the shift in

REASON (1963); R. HARE, *THE LANGUAGE OF MORALS* (1952); J. MACKIE, *ETHICS* (1977); J. RAWLS, *A THEORY OF JUSTICE* (1971); D. RICHARDS, *A THEORY OF REASONS FOR ACTION* (1971). These philosophers differ on many issues. Some, for example, are utilitarians (Hare, Brandt). Others are militantly anti-utilitarian (Gewirth, Rawls, Richards). Some are noncognitivist (Hare, Mackie) in the sense that they do not analyze ethical statements on the model of statements about the world. Still others are cognitivist (Gewirth, Rawls, Richards). All, however, regard ethics as establishing determinate forms of reasoning, subject to critical assessment in terms of canons of validity and adequacy.

19. The classic statements of subjectivist ethics are in A. AYER, *LANGUAGE, TRUTH AND LOGIC* (1936) and C. STEVENSON, *ETHICS AND LANGUAGE* (1944). For a very useful summary of the classic difficulties with this position, see R. BRANDT, *ETHICAL THEORY* 203-40 (1959).

20. ELY, *supra* note 1, at 53.

21. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 23-28 (1977).

22. See ELY, *supra* note 1, at 65.

23. For a further elaboration of this theme, see Richards, *The Theory of Adjudication and the Task of the Great Judge*, 1 *CARDOZO L. REV.* 171 (1979).

philosophy from his undergraduate years. For, interpreting these arguments as moving from principles the reader accepts to others not clearly accepted prior to the argument, Ely concludes that "reasoning about ethical issues is not the same as discovering absolute ethical truth,"²⁴ as if the method of contemporary philosophers in exploring ordinary moral judgments somehow means that the valid moral arguments thus developed are true only in virtue of being accepted. This is nonsense. The method used is not novel; it has been inherited from a philosophical tradition in ethics begun by Socrates,²⁵ and many of its classic and contemporary practitioners expressly reject Ely's positivistic interpretation of the theories their method yields. Classic moral philosophers who have used this method (Plato,²⁶ Aristotle,²⁷ Kant,²⁸ Sidgwick,²⁹ for example) regard it as a way of discovering the more basic principles and concepts on which ethical reasoning rests; none of these philosophers (who, of course, argue for quite different moral theories) suppose the principles thus articulated to be anything but valid arguments, and often criticize ordinary moral judgments in terms of them. Contemporary moral philosophers are to similar effect: when moral theorists like Hare³⁰ or Gewirth³¹ or Rawls³² develop comprehensive theories of ethical concepts and substantive moral principles of complexity and sophistication, they suppose their theories to determine the structure of valid moral argument.

Perhaps Ely has meant to grant the existence of general premises, while at the same time noting that there are so many of them in such degrees of possible conflict that committing resolution of their concrete applications to the "first-rate lawyers"³³ who man the federal judiciary is fraught with special dangers of ideological distortion. Following a long American legal realist tradition initiated by Holmes,³⁴ Ely's criticism of Natural Law³⁵ certainly harps on its socially regressive uses, for example, to justify the subjection of women,³⁶ the enslavement of blacks,³⁷ and, of course, *Lochner*.³⁸ It is, how-

24. See ELY, *supra* note 1, at 54.

25. Consider, for example, Socrates' method of questioning Euthyphro about "the essential form of holiness which makes all holy actions holy." PLATO, *Euthyphro*, in PLATO: THE COLLECTED DIALOGUES 174 (E. Hamilton & H. Cairns ed. 1961).

26. See note 25 *supra*.

27. Aristotle observes: "Therefore, we should start perhaps from what is known to us. For that reason, to be a competent student of what is right and just, and of politics generally, one must first have received a proper upbringing in moral conduct." NICOMACHEAN ETHICS 1095a3-6 (1962).

28. See I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 20 (1969).

29. See generally H. SIDGWICK, THE METHODS OF ETHICS (7th ed. 1962).

30. See R. HARE, THE LANGUAGE OF MORALS (1952); R. HARE, FREEDOM AND REASON (1965).

31. A. GEWIRTH, REASON AND MORALITY (1978).

32. J. RAWLS, A THEORY OF JUSTICE (1971); D. RICHARDS, A THEORY OF REASONS FOR ACTION (1971).

33. See ELY, *supra* note 1, at 59.

34. Holmes' famous appeal to wash the law in cynical acid derives from *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897). Cf. Holmes' derogatory reference to viewing the common law as "a brooding omnipresence in the sky" rather than as "the articulate voice of some sovereign or quasi sovereign that can be identified." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). For an example of the application of the method, see O. HOLMES, THE COMMON LAW (DeWolfe ed. 1963).

35. ELY, *supra* note 1, at 48-54.

36. See *id.* at 50-51.

37. *Id.* at 51.

38. See *Lochner v. New York*, 198 U.S. 45 (1905).

ever, a *non sequitur* to argue that attempts to articulate fundamental values are misplaced in all cases merely because efforts to enforce fundamental values in some cases reflect a false, indeed evil, theory of justice. Holmes, after all, while critical of the Spencerian theory of economic justice³⁹ that is implicit in *Lochner*,⁴⁰ himself deployed against a hostile Court a Millian theory of justice in free speech matters.⁴¹ There are better and worse theories of justice, of human rights, of the social good. So why is the lesson of the Natural Law cases not that all appeals to fundamental values are misplaced, but that there are better and worse values, and that educators, in particular, had better start imparting this difference to the “first-rate lawyers”⁴² they train—to teach them to question and criticize their own values, to warn them against ideological distortion, and to cultivate in them a balanced and responsible moral impartiality? Why not, in short, look to the methods of moral philosophy? Understandably, Ely must direct his criticism against this possibility.

B. *The Method of Moral Philosophy*

The intellectual heart of Ely’s argument against a role for fundamental values in constitutional interpretation is and must be that there is no appropriate role for moral philosophy in assisting this task. It is surprising, then, that his argument here is so brief (about four pages),⁴³ and, as I shall argue, so bad. The argument is roughly this: contemporary moral philosophers (Rawls’ *A Theory of Justice*⁴⁴ and Nozick’s *Anarchy, State, and Utopia*⁴⁵ are adduced) disagree and therefore “[t]here simply does not exist a method of moral philosophy.”⁴⁶ In addition, since the “first-rate lawyers”⁴⁷ who, as judges, would implement these theories, are from “the upper-middle, professional class,”⁴⁸ their interpretation of them would be distorted by ideological motives.

As an initial matter, it is very puzzling, and not at all supportive of Ely’s argument, that he should cite Rawls and Nozick. It is true that Rawls and Nozick disagree about the substantive morality of redistributive justice (Rawls’ difference principle calls for considerable redistribution to the advantage of the worst-off classes;⁴⁹ Nozick’s theory forbids all compulsory redistribution, except when done to remedy past affirmative wrongs⁵⁰), but their

39. See *id.* at 75–76 (Holmes, J., dissenting). For a very useful analysis of the premises of Spencer’s theory of justice, see D. MILLER, *SOCIAL JUSTICE* 180–208 (1976).

40. See notes 38 and 39 *supra*.

41. See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); J. MILL, *ON LIBERTY* 15–54 (1946).

42. See ELY, *supra* note 1, at 59.

43. *Id.* at 56–60.

44. J. RAWLS, *A THEORY OF JUSTICE* (1971).

45. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

46. ELY, *supra* note 1, at 58.

47. *Id.* at 59.

48. *Id.*

49. J. RAWLS, *A THEORY OF JUSTICE* 65–108 (1971).

50. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 149–231 (1974).

disagreement over this issue is hardly one of much serious moment to American constitutional law. Nozick's theory is the theory of *Lochner*,⁵¹ and, as such, has little constitutional vitality in a period, such as today, when the *Lochner* approach appears historically anachronistic.⁵² Rawls and Nozick agree on much else that is relevant to current constitutional controversy. For example, both recognize the broad priority of the Bill of Rights guarantees to other political values⁵³ and interpret these rights in terms of Kantian values of autonomy and personhood;⁵⁴ and both make a broad commitment to the right of personal autonomy and thus to the defense and expansion of the scope of the constitutional right to privacy⁵⁵ and to a rights-based justification of judicial review to the extent necessary to preserve these fundamental values.⁵⁶ In short, the convergences between these quite anti-utilitarian, counter-majoritarian moral theorists powerfully support the role of judicial review to enforce fundamental values. Ely, in short, uses examples here that, if he studied their substance, would contradict his thesis.

But, let us grant, *arguendo*, that there are contemporary moral philosophers, besides Rawls and Nozick, whose general moral theories would contradict completely the defense of judicial review that Rawls and Nozick appear to endorse (for example, a utilitarian in Bentham's line of intransigent opposition to all ideas of human or moral rights).⁵⁷ Why should it follow from the fact that moral philosophers disagree, in ways of substantive moment to the disposition of hard constitutional cases, that moral philosophy, as such, may not aid judges in explicating fundamental values? Why, in particular, should this disagreement show, as Ely concludes, that there is not "a method of moral philosophy"?⁵⁸ Here the *non sequitur* is startling, for serious moral

51. See *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

52. For a useful critique of the moral confusions on which Nozick's argument depends, see Hart, *Between Utility and Rights*, in *THE IDEA OF FREEDOM* 77-98 (A. Ryan ed. 1979); R. DWORIN, *TAKING RIGHTS SERIOUSLY* 259 (1977); Nagel, *Libertarianism Without Foundations*, 85 *YALE L.J.* 136 (1975); Richards, *Book Review*, 1976 *DET. C. L. REV.* 675.

53. See J. RAWLS, *A THEORY OF JUSTICE* 195-257 (1971). See also R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 3-146 (1974).

54. See J. RAWLS, *A THEORY OF JUSTICE* 251-57 (1971). See also R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 32-33 (1974).

55. See J. RAWLS, *A THEORY OF JUSTICE* 251-57 (1971). For an interpretation of Rawls' perspective that lends clear support for the right to personal autonomy, see Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 *HASTINGS L.J.* 957 (1979). See also R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 28-35 (1974).

56. See J. RAWLS, *A THEORY OF JUSTICE* 195-257 (1971). See also R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

57. See Bentham, *Anarchial Fallacies*, in 2 J. BENTHAM, *THE WORKS OF JEREMY BENTHAM* 491-529 (1843). But, in fact, it should be emphasized that subsequently prominent utilitarians have insisted that Bentham is wrong in this doctrinaire opposition, and that, in fact, ideas of human and natural rights can be shown to rest on solid utilitarian foundations. The most notable and influential of these utilitarians is John Stuart Mill. See J.S. MILL, *UTILITARIANISM* 52-79 (1951). See also J. MILL, *ON LIBERTY* 15-54 (1946). There is every reason to believe that Mill (and, I suspect, many contemporary utilitarians) would try to use such arguments in the United States to support a mode of judicial review that would incorporate many of Rawls' recommendations. See, e.g., Bayles, *Morality and the Constitution*, 1978 *ARIZ. ST. L.J.* 561. Thus, the example in the text, made solely for purposes of argument, may be quite idle.

58. ELY, *supra* note 1, at 58.

philosophy today, as has been the case since Socrates,⁵⁹ shares a common method—namely, the attempt to explicate ordinary and considered moral judgments in a self-critical and reflective way.⁶⁰ Ely is simply wrong here. Even if the substantive theories thus generated were in conflict on all moral questions, their common method might be stimulating in a judge something that is sorely needed—a sense of self-criticism, of differing perspectives on the same issue, of the possibility of ideological distortion.⁶¹

There have, of course, been substantive moral theories that were in deep conflict in some such ways; the perfectionism of Aristotle and Nietzsche is, I believe, in such conflict with the broad egalitarian perspective of utilitarianism and Kantian natural rights.⁶² But contemporary moral theory is not thus divided; the two main contenders for basic normative perspective, utilitarianism and contractarian natural rights, both are rooted in the interpretation of treating persons as equals,⁶³ and contemporary exponents of these theories often, though not always,⁶⁴ converge in substantive recommendations.⁶⁵ But why must moral theories converge in all substantive recommendations before moral theory, as such, may aid the judicial search for fundamental values? Here, as in the former argument from the controversiality of values, Ely's idea appears to be that controversy must mean there is no right answer.⁶⁶ The argument was mistaken earlier and is wrong here. That moral philosophers disagree about ethical questions does not remotely imply that any of them supposes such questions are not rightly or wrongly decided; the whole premise of the discussion, indeed, is that this is *not* so.

The analogy to scientific theory and the philosophy of science is, I believe, apt.⁶⁷ Scientists debate their conflicting scientific theories and philosophers of science their conflicting views of the nature of those debates, but in

59. See note 25 *supra*.

60. For a very useful characterization of this method, see J. RAWLS, A THEORY OF JUSTICE 17–22 (1971). Rawls, *Outline of a Decision Procedure for Ethics*, 60 PHILOSOPHICAL REV. 177 (1951). See also D. RICHARDS, A THEORY OF REASONS FOR ACTION 3–10 (1971).

61. See Richards, *The Theory of Adjudication and the Task of the Great Judge*, 1 CARDOZO L. REV. 171 (1979).

62. See D. RICHARDS, A THEORY OF REASONS FOR ACTION 110–20 (1971).

63. I explore this thought further in *Justice and Equality*, which will appear in a forthcoming volume of essays edited by Don VanDeVeer and Tom Regan (Rowman and Littlefield).

64. See, e.g., the recent utilitarian theories of Jonathan Glover and Peter Singer, who take views on the permissibility of infanticide with which rights theorists might substantively disagree. See generally J. GLOVER, CAUSING DEATH AND SAVING LIVES 150–69 (1977); P. SINGER, PRACTICAL ETHICS 122–26, 131–38 (1979). For the opposing view of a rights theorist, see P. DEVINE, THE ETHICS OF HOMICIDE 46–73 (1979). See also Richards, *Constitutional Privacy, the Right to Die, and the Meaning of Life: A Moral Analysis*, WM. & MARY L. REV. (forthcoming).

65. Consider, for example, the many substantive convergences between the recent utilitarian theory of Brandt, and the anti-utilitarian theories of Rawls and Gewirth. See R. BRANDT, A THEORY OF THE GOOD AND THE RIGHT (1979); A. GEWIRTH, REASON AND MORALITY (1978); J. RAWLS, A THEORY OF JUSTICE (1971). See also note 57 *supra*.

66. For a general analysis of the fallacy that Ely's argument exemplifies, see Dworkin, *No Right Answer?*, in LAW, MORALITY AND SOCIETY 58–84 (1977).

67. For the diversity of views on issues in scientific theory and the philosophy of science, see B. BRODY, READINGS IN THE PHILOSOPHY OF SCIENCE (1970); F. SUPPE, THE STRUCTURE OF SCIENTIFIC THEORIES (1977).

neither case do we or they suppose that their controversy means that no one can be right. The point is, of course, just the opposite. Moral theory and moral philosophy, we are beginning to understand,⁶⁸ are in no different position. Serious philosophical controversy, at the level of depth and subtlety of Sidgwick's utilitarianism in *The Methods of Ethics*⁶⁹ or Rawls' antagonist Kantian reconstruction in *A Theory of Justice*,⁷⁰ rests on the assumption that one or the other must be right. And, both may be useful.

Ely's mistake is a lawyer's mistake; he thinks of moral theories in the same way that he views legal precedents closely on point—two seemingly valid precedents cannot dictate contradictory legal results. But the existence of conflicting moral theories is not to be thought of in terms of their differences in substantive recommendation. Rather, a reasonable decision on conflicting recommendations can be coherently expressed only in terms of an examination of each theory's background arguments. Ely never thinks of or contemplates this kind of examination by judges because he focuses on substantive result, not philosophical method.

In the context of constitutional cases, this reflection is further constrained by the history of legal authority, by the need to fit the moral concepts, given philosophical analyses, into the texture of ongoing legal arguments, and by the ways in which, if at all, legal argument draws on moral argument.⁷¹ Quite apart from the relative merits of different moral theories in explicating ordinary, considered moral judgments, one moral theory may better fit than another the forms of legal arguments, and thus have a prior claim on judges seeking to understand the underlying moral concepts upon which legal controversy turns. In the understanding of constitutional cases, Dworkin's appeal to Rawls'⁷² theory is of this kind: whatever the abstract plausibility of Rawls' theory as a general moral theory, it fits characteristic forms of constitutional argument (for example, the priority of free speech and religious tolerance among political values) much more naturally and coherently than alternative moral theories, and thus, on this ground, may have a special claim on judicial attention.⁷³

Again, Ely notes that judges cannot grapple with it, for "commentators on Rawls' work have expressed reservations about his conclusions."⁷⁴ But

68. For an important expression of the continuity of moral and scientific theory, see H. PUTNAM, *MEANING AND THE MORAL SCIENCES* 83-94 (1978).

69. See note 29 *supra*. For commentary on this remarkable book and philosopher, see J. SCHNEEWIND, *SIDGWICK'S ETHICS AND VICTORIAN MORAL PHILOSOPHY* (1977).

70. See J. RAWLS, *A THEORY OF JUSTICE* (1971).

71. See generally R. DWORKIN, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY* 81-130 (1977).

72. See *id.* at 149.

73. See generally D. RICHARDS, *THE MORAL CRITICISM OF LAW* (1977). The most striking gap between Rawls' substantive theory and present constitutional practice is, of course, the difference principle. This is because the Court does not afford the right to an economic minimum the weight which the difference principle, on some views, requires. For criticism of constitutional practice on this ground, see Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973). See also Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

74. *ELY*, *supra* note 1, at 58.

what, precisely, is the nature of the reservations that Ely has in mind? Critics from the libertarian right, like Nozick, attack, as we have seen, the difference principle;⁷⁵ but, if we were just counting up points of agreement (as Ely appears to require before judges may consult moral theory), there is more than enough here to support the fundamental values approach to judicial review.⁷⁶ Critics from the socialist left attack the difference principle for not being egalitarian enough,⁷⁷ or for being, in all cases, secondary to the pursuit of liberty.⁷⁸ But, again, the points of substantive agreement are enormous,⁷⁹ certainly sufficient to satisfy Ely's requirement. And critics both from the right and left share various common premises with Rawls so that, again, Ely should be satisfied.

But, any philosopher would be appalled that moral theory's usefulness could be assessed in so unreflective and result-oriented a way. Philosophers are interested in cultivating self-reflective argument, in assessing conflicting views, and in this way, in cultivating a more encompassing and flexible moral impartiality. They are interested, in short, in argument, and their "reservations" about Rawls' "conclusions"⁸⁰ focus on general argument of such kind. Ely never inquires into such argument, citing, instead, another legal commentator's quite cursory statement⁸¹ about the enormous literature of philosophical commentary that followed Rawls' book, which statement does not even cite the literature, let alone discuss its arguments.

How can legal theorists thus suppose themselves to have adequately, let alone responsibly, done justice to a philosopher of Rawls' stature when they studiously refuse to discuss arguments, focusing instead on facts of disagreement? If they did so inquire, they would have themselves to engage in philosophical argument, for example, about whether Nozick is right that natural talents and their exercise are so irreducibly one with one's person that any redistributive taxation of income yielded from them is a violation of one's personhood,⁸² or whether Rawls is not more correct to argue, from Kantian premises of the moral irrelevance of everything fortuitous for which the person is not responsible,⁸³ that one's talents are no more ethically fundamental to one's person than one's race, and that special rewards for their exercise are just only if their benefits are equitably shared on the terms of the difference principle. Why is it assumed that American judges cannot engage in

75. See R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 149-231 (1974).

76. See notes 53-56 and accompanying text *supra*.

77. See, e.g., Nielsen, *Class and Justice*, in *JUSTICE AND ECONOMIC DISTRIBUTION* 225-45 (1978).

78. See, e.g., B. BARRY, *THE LIBERAL THEORY OF JUSTICE* 59-82 (1973); Daniels, *Equal Liberty and Unequal Worth of Liberty*, in *READING RAWLS* 258-81 (N. Daniels ed. 1975)

79. In particular, socialists often argue that the difference principle, correctly interpreted, expresses the moral ideals of socialism in a usefully precise way. See, e.g., Nielsen, *Class and Justice*, in *JUSTICE AND ECONOMIC DISTRIBUTION* 225-45 (1978).

80. See ELY, *supra* note 1, at 58.

81. The citation is to B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 284 n.47 (1977).

82. The able philosophical discussion of this argument is by H.L.A. Hart. See Hart, *Between Utility and Rights*, in *THE IDEA OF FREEDOM* 77-98 (A. Ryan ed. 1979).

83. See J. RAWLS, *A THEORY OF JUSTICE* 251-57 (1971).

or profit from such argument when, in fact, many of them (Holmes, Brandeis, Cardozo leap to mind) evinced real capacity for philosophical reflection?⁸⁴ Why is it not important, indeed vital, for judges to learn to see constitutional controversy in this deeper way? Why, as lawyers, should we acquiesce in the preposterous assumption that judges are incapable of profiting from any range of philosophical theories that happen to disagree, when it may be the point of the method of moral philosophy that it can see disagreement at some superficial level as the consequence of deeper levels of agreement, and thus, can cultivate balance and perspective?

In this connection, we should note a shift in Ely's tone in the short argument on which we have here fastened. While he is quite capable of engaging in arguments of enormous rigor and complexity and fairmindedness, his argument at this point becomes polemical and jazzily dismissive. The remarks about controversy over Rawls' book are followed by: "The Constitution may follow the flag, but is it really supposed to keep up with the *New York Review of Books*?"⁸⁵ Or, the use of differing philosophical theories by judges is parroted as: "We like Rawls, you like Nozick. We win, 6-3. Statute invalidated."⁸⁶ Why is Ely's dearth of good argument at this point wedded with this tone, which is, to a philosopher, contemptuously dismissive? I suggest it is because he is extremely uncomfortable with the discussion of these issues, that he would rather have found some way of not entering this hornet's nest of philosophical agon, and that, therefore, he relieves his ambivalence by dismissing what he thinks himself unable to examine properly. This will not do. Ronald Dworkin is correct that lawyers and constitutional theorists must come to grips with the "better philosophy . . . now available,"⁸⁷ one certainly better than in Ely's undergraduate years. Either that, or they must learn the grace of not discussing issues they do not want to discuss responsibly.

C. *The Capacities of Judges for Moral Reasoning*

Even if we grant that neither the argument from controversy nor the argument from lack of consensus in moral philosophy works, there remains the argument that, in any event, judges are no better suited to resolve such controversies or to deploy philosophical methods than other more democratically responsive institutions. Ely makes this argument in many guises, including the historic tendency of "first-rate lawyers"⁸⁸ to distort these moral judgments by their middle class bias, which includes notable distaste for substantive economic rights for the poor.⁸⁹ Now, this oft-repeated bromide should not

84. See generally Richards, *The Theory of Adjudication and the Task of the Great Judge*, 1 CARDOZO L. REV. 171 (1979).

85. ELY, *supra* note 1, at 58.

86. *Id.*

87. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 149 (1977).

88. ELY, *supra* note 1, at 59.

89. *Id.*

go unchallenged. Certainly, it is simply not true that a lower class background is either a necessary or sufficient condition for having a developed sense of the injustices to the poor; some poor people, for example, may be more imbued with a distaste for equality as a political ideal than people of more advantaged backgrounds.⁹⁰ And certainly, if we disqualify political theories that define injustices to the poor on the ground that their authors lack proletarian credentials, we would, absurdly, exclude the egalitarian social theory of Marx and the moral theory of Rawls.

But perhaps Ely means to speak of legal culture alone, emphasizing, for example, the regressive use of Natural Law by American "first-rate lawyers,"⁹¹ who are undoubtedly under the influence of class ideology. Certainly, this historical phenomenon, which is a constant tendency in legal analysis, requires very careful analysis. Ely is correct to identify part of the problem in the legal culture of "neutral principles,"⁹² which, while it may supply a necessary condition of proper adjudication in hard cases,⁹³ fails to emphasize how weak a requirement this is, how decisions in conformity to it may be deeply wrong, and how it may be—as it has been—abused to challenge prematurely humane evolutions of legal principle on the basis of unimaginative legalism.⁹⁴ Properly understood, the criticism is a criticism of legal education and the hermetic examination of legal principles in appellate decisions that it enshrines, without reference either to a broader social context or to underlying moral argument or political theory. The regressive uses of Natural Law and of neutral principles must remain constant examples of the costs that narrow legal analysis may impose. The answer, I believe, is not Ely's dismissal of moral reasoning as such, but criticism of an education and a culture that narrows lawyers' conception of legal reasoning in a way that deprives them of the self-critical capacity to detect and correct the ideological distortion that such a conception often sanctifies and that disables them from discerning the larger connections between legal argument, on the one hand, and social context and moral and political theory on the other. As I earlier suggested,⁹⁵ the answer, in short, is the deployment in legal education and legal culture of the methods of moral philosophy—methods that Ely irrationally dismisses. His dismissal is, I believe, a symptom of the problem of the enormous gap that exists between the legal and the larger intellectual culture.

If we think of the use of moral reasoning by lawyers in ways disciplined by self-criticism and perspective of the kind that philosophy and other disciplines afford, there is reason to believe that, so understood, the judicial role

90. See, e.g., C. LINDBLOM, *POLITICS AND MARKETS* 208–13 (1977); Lane, *The Fear of Equality*, 53 *AM. POL. SCI. REV.* 35 (1959).

91. ELY, *supra* note 1, at 59.

92. *Id.* at 54–55.

93. See Richards, *Rules, Policies and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 *GA. L. REV.* 1069 (1977).

94. See *id.* at 1082–89, 1102–10.

95. See notes 33–42 and accompanying text *supra*.

with respect to certain kinds of moral argument may better express and preserve the integrity of this reasoning than would other branches of government. The reason for this, I think, has been made familiar by Ronald Dworkin:⁹⁶ the reasoning of judges in hard constitutional cases is a method of appeal to principle, and these principles in hard constitutional cases often deploy background moral concepts subject to reasonable elaboration in terms of self-reflective moral argument. In addition, the institutional independence of the federal judiciary secures a kind of impartiality in the elaboration of such legal, and underlying moral, argument.⁹⁷ The methods of reasoning of other branches of government are neither structured by requirements of an articulate consistency in the elaboration of underlying principles nor secured by institutional independence in their impartial exercise. Thus, to the extent that the underlying principles define basic human rights that the constitutional design may reasonably be regarded as rendering immune from political compromise and bargaining, those principles may be justifiably enforced by judicial review of the American form.

III. ELY ON FAIR REPRESENTATION

Ely's constructive theory is essentially a theory of fair representation:⁹⁸ groups or interests are to be accorded countermajoritarian judicial protection when decisions that compromise or prejudice them are not the products of a process in which they have had fair representation. The unfairness here is put by Ely in terms of not affording a process which guarantees that the persons who decide have been compelled institutionally to treat the persons affected in the way the persons who decide would want to be treated if they were in the position of those affected.⁹⁹ The idea is that groups or interests that are unfairly represented in a decision-making process lack the institutional capacity to assure that those who decide give weight to their interests in this required way.

In view of Ely's earlier negative arguments against fundamental values, it is quite puzzling that his constructive theory should so clearly be a form of moral argument that makes strong substantive moral claims. Put simply, the argument is that the basic justice of decision-making institutions must be assessed in terms of whether all affected are treated conformably with what philosophers call moral universalizability or reciprocity:¹⁰⁰ treating others as one would oneself want to be treated. Ely's special concern for stigmatized

96. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-130 (1977).

97. See Richards, *The Theory of Adjudication and the Task of the Great Judge*, 1 *CARDOZO L. REV.* 171 (1979).

98. See ELY, *supra* note 1, at 73-179.

99. See, e.g., *id.* at 158.

100. See, e.g., K. BAIER, *MORAL POINT OF VIEW* 187-213 (1958); D. GAUTHIER, *PRACTICAL REASONING* 81-94 (1963); G. GRICE, *THE GROUNDS OF MORAL JUDGMENT* 1-35 (1967); R. HARE, *FREEDOM AND REASON* 91-94 (1963); J. MACKIE, *ETHICS* 83-102 (1977); J. RAWLS, *A THEORY OF JUSTICE* 130-32 (1971); D. RICHARDS, *A THEORY OF REASONS FOR ACTION* 75-91 (1971).

groups, the subjects of racial or sexual prejudice (blacks, women to some degree, homosexuals), derives from the fact that decisions affecting these groups fail to treat them in the way that the decision-makers, if comparably situated, would wish to be treated, and from the role of judicial review to guarantee to such groups an equal concern and respect that democratic processes deny to them.

Ely may reply that this is a moral argument with a difference, that it rests on notions of procedural fairness, not substantive morality. First, this is not true; Ely's account rests on substantive values of treatment as equals, and forms of treatment that violate this substantive value are condemned. Second, and strikingly, if this account is procedural, many of the philosophers whom Ely cavalierly swept into the dustbin of illegitimate fundamental values must also be regarded as affording processual theories; Rawls, for example, surely assesses questions of basic justice from a not dissimilar perspective of whether the institutions, overall, treat persons as equals in a fair-minded way.

When we see Ely's constructive theory for what it is—a substantive moral theory of judicial review—we can see both its proper value and its limitations. Its value, which has led the Supreme Court to evolve the suspect classification prong of equal protection review, is its analysis of the underlying moral argument—namely, the immorality of forms of prejudice that treat persons not as persons but as stereotypes and that thus degrade moral personality.¹⁰¹ Ely takes seriously the social facts of racial prejudice against blacks or gender prejudice against women or homophobic prejudices against homosexuals, and morally interprets their constitutional condemnation in terms of background moral ideals of fairness that are violated by these prejudices. On his analysis, such prejudices isolate these groups, in varying degrees, from fair representation in the political process. As a result, Ely asserts that the task of equal protection is to secure fairer representation, both by striking down invidious uses of the stereotypes on which such prejudices rest and by forms of affirmative action that realistically take account of the force of such prejudices and endeavor reasonably to combat them.¹⁰² Much that Ely has here to say is true and important, combining, in a very unusual and probing way, what this form of equal protection analysis surely requires—both moral analysis of underlying wrongs and sensitive assessment of the social facts upon which the analysis must reasonably turn. Ely's book would be of enormous value alone simply for the light it casts on the justifiability of affirmative action programs, on which topic there has been enormous moral and intellectual confusion worked both by commentators and the Supreme Court of the United States.¹⁰³

The limitation of Ely's constructive account comes, I believe, in his

101. For a similar theory, see D. RICHARDS, *THE MORAL CRITICISM OF LAW* 162-78 (1977).

102. ELY, *supra* note 1, at 135-79.

103. With respect to affirmative action programs, both the Supreme Court and commentators have expressed enormous moral and intellectual confusion. See Richards, *Reverse Discrimination and Compensatory Justice: Constitutional and Moral Theory*, in *THE VALUE OF JUSTICE* 101-48 (C. Kelbley ed. 1979).

inadequate elaboration of his underlying moral premises. For if the underlying perspective is that of treating persons as equals and insuring that institutions reflect this basic moral equality, certainly more would be required from judicial review than merely protecting stigmatized minorities, or even than insuring the fairness of the representative structure (through protecting political speech, or securing equal voting rights, and the like).¹⁰⁴ Surely, treating persons as equals requires, at a minimum, not only their fair representation, but that—no matter how fair the representation—certain rights of the person remain inviolable.¹⁰⁵

There is an ambiguity in the underlying moral ideal upon which Ely's account rests. Fair representation may be understood at the level of political decision-making, as Ely indeed interprets it, as insuring open and responsive political access unclogged by obdurate prejudices. But, for its moral force, Ely's account also draws on a deeper level of moral values—namely, insuring that political and other institutions preserve and express the capacity of persons, as free and rational beings, to establish, on terms fair to all, a life of dignity and self-respect that is defined in terms of whatever vision of the good they choose and may, in the independent exercise of their judgment, revise. These values require fair representation in Ely's sense, but they also require much more—namely, respect for inviolable aspects of human personality that just institutions must preserve from political bargaining and compromise.

Ely's account stops at one level of fair representation and thus fails to express the deeper values of the equality of persons—values which, in fact, it assumes. This explains why his theory loses touch with the ideas of natural and human rights on which American constitutionalism builds, and on the conception of inalienable rights of the person, which cannot, no matter how fair the decision-making procedures, be transgressed.¹⁰⁶ The consequences of a commitment to such values, in contrast to Ely's view, are real and substantive: a much extended protection of both free speech and religious liberty (well beyond the political, or the arguably political)¹⁰⁷ and a concern with the elaboration of a right to personal autonomy in the form of the constitutional right to privacy.¹⁰⁸

A point of clear controversy here is the extension of constitutional privacy to abortion,¹⁰⁹ an extension that Ely's account appears to condemn

104. Such an insurance is promoted by protecting political speech, serving equal voting rights, etc. See ELY, *supra* note 1, at 105-34.

105. For a related form of criticism of Dworkin's theory of rights, which—whatever its validity as applied to Dworkin's quite complex views—clearly applies to Ely, see Hart, *Between Utility and Rights*, in THE IDEA OF FREEDOM 86-97 (A. Ryan ed. 1979).

106. See Richards, *Sexual Autonomy*, 30 HASTINGS L.J. 957, 958-72 (1979).

107. See, e.g., Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

108. See Richards, *Sexual Autonomy*, 30 HASTINGS L.J. 957 (1979); Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195 (1979). See also Richards, *Constitutional Privacy, the Right to Die, and the Meaning of Life: A Moral Analysis*, WM. & MARY L. REV. (forthcoming).

109. *Roe v. Wade*, 410 U.S. 113 (1973).

since, if there is here a discrete and insular minority, it arguably might be the fetuses.¹¹⁰ Certainly, this kind of approach to privacy analysis indicates that Ely has stretched his moral theory to the breaking point, requiring, as it does, always some powerless minority as the controlling predicate of judicial review. Privacy cases sometimes involve such minorities—homosexuals, for example¹¹¹—but not always. But the moral issue of these cases nonetheless remains urgently present: has the state, on the basis of arguments that cannot critically be sustained consistent with the constitutional morality of equal concern and respect for persons and their capacity to define the meaning of their own lives as free and rational beings, violated the rights of the person to determine personal identity and life direction?¹¹² Government criminalization of abortion in early pregnancy may violate this right, or, at least, a plausible moral argument might be offered to this effect.¹¹³ No one on either side of the abortion question supposes that the issue is not over such moral arguments. Ely's dismissal of *Roe v. Wade* sidesteps the entire question, which suggests that his theory has here lost contact with moral and human reality.

I have no doubt that, in reply, Ely would cry fundamental values, to which the reasonable reply is: your negative arguments against them don't work, your own constructive theory assumes them, and your application of your theory to the privacy cases arguably fails to square with a reasonable elaboration of your theory's own moral premises.

110. For a clear statement to this effect, see Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

111. Paradoxically, this group, which doubly requires protection (both on Ely's grounds and on independent privacy grounds), has received none. For criticism, see Richards, *Sexual Autonomy*, 30 HASTINGS L.J. 957 (1979); Richards, *Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory*, 45 FORDHAM L. REV. 1281 (1977).

112. See generally Richards, *Sexual Autonomy* 30 HASTINGS L.J. 957 (1979).

113. For attempts by philosophers which have the unfortunate consequence that young infants are not persons either, see Tooley, *A Defense of Abortion and Infanticide*, in THE PROBLEM OF ABORTION 51-91 (J. Feinberg ed. 1973); Engelhardt, Jr., *The Ontology of Abortion*, in MORAL PROBLEMS IN MEDICINE 318-34 (1976). For an attempt without this consequence, see E. KLUGE, THE PRACTICE OF DEATH 1-100 (1975).

