The Substance of Process

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I. INTRODUCTION

John Hart Ely's *Democracy and Distrust*[1] culminates a tradition of scholarly attempts to establish modes of judicial review that leave the choice and accommodation of values to legislatures and limit judicial intervention to assuring that legislatures go about their business efficiently, representatively, and (in a quite limited sense) fairly.[2] Like others before him, Professor Ely derives this judicial role both negatively—from the incompetence of courts to discover fundamental values and measure legislative policies against them—and affirmatively—from a theory of representative democracy and judges' asserted competence to engage in what he calls "representation-reinforcing" modes of judicial review.

In this essay I do not wish to challenge either Professor Ely's political premises or his belief that judges are unable to derive and enforce fundamental values. Rather, I wish to question a central claim of *Democracy and Distrust*: that courts are *more* competent to engage in representation-reinforcing judicial review, which Professor Ely embraces, than in fundamental values review, which he scorns.

Contrariwise, I think that these modes of adjudication are inseparable siamese twins, and that if Professor Ely has dealt a fatal blow to one, the other must succumb as well. My argument can be phrased in either of two ways. First, most instances of representation-reinforcing review demand value judgments not different in kind or scope from the fundamental values sort. Second, the parties' claims in fundamental values cases are often directly translatable into representation-reinforcing claims. The lawyer's or judge's choice of fundamental values or representation-reinforcing rhetoric is often a matter of preference, happenstance, or tradition. Of course, the very existence of alternative rhetorical traditions might indicate a genuine difference between these two kinds of claims. But the real contribution of *Democracy and Distrust* consists in its going behind or beyond tradition to establish the conditions for judicial review in functional and theoretical terms. And it is just in these terms that the choice between the language of representation-reinforcing and fundamental values becomes arbitrary.

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

2. *See, e.g.*, L. LUSKY, BY WHAT RIGHT (1975); Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L.L. REV. 269 (1975).

II. THE THESIS OF *DEMOCRACY AND DISTRUST*

Before coming to my own arguments, let me outline Professor Ely's. He begins by demonstrating that the clauses in which courts and commentators have most often located fundamental values were not designed for that purpose or, in any case, do not provide guidance concerning what values they protect.[3] He then turns to the question whether judges can discover fundamental values without guidance from the text and original history.[4] Here he demonstrates the flaws inherent in a number of possible approaches—reliance on the judges' own values, natural law, neutral principles, reason, tradition, consensus, and "predicting progress." Although the discussion is quite abstract and does not focus on particular cases, it is clear both from the book and Professor Ely's other writings[5] that the two *bêtes noires* in his freak show are *Lochner v. New York*[6] and *Roe v. Wade*[7]—the exemplary cases of the two eras of "substantive due process."

The second part of *Democracy and Distrust* argues for an alternative judicial function of "policing the process of representation."[8] Here Professor Ely elaborates and supports Justice Stone's almost off-hand suggestion, in footnote four of the *Carolene Products* case,[9] that the Court should play an active role in scrutinizing legislation (1) "which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" or (2) which is based on "prejudice against discrete and insular minorities, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities. . . ."[10] The burden of *Democracy and Distrust* is that

> unlike an approach geared to the judicial imposition of "fundamental values," the representation-reinforcing orientation . . . is not inconsistent with, but on the contrary is entirely supportive of, the American system of representative democracy. It recognizes the unacceptability of the claim that appointed and lifetenured judges are better reflectors of conventional values than elected representatives, devoting itself instead to policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent.[11]

Paralleling Justice Stone's two categories, Professor Ely argues that democratic "[m]alfunction occurs when the *process* is undeserving of trust"—when

> (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or

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3. ELY, *supra* note 1, ch. 2. The very notion of "substantive due process" is, of course, linguistically self-contradictory; and the ninth amendment and the privileges or immunities clause of the fourteenth amendment do not indicate what rights are reserved to the People or of what the privileges and immunities consist.

4. ELY, *supra* note 1, ch. 3.

5. *See* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

6. 198 U.S. 45 (1905).

7. 410 U.S. 113 (1973).

8. ELY, *supra* note 1, ch. 4 (title).

9. United States v. Carolene Products Co., 304 U.S. 144 (1938).

10. *Id.* at 152–53 n.4.

11. ELY, *supra* note 1, at 101–02.

> a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.[12]

I shall skip over Professor Ely's discussion of the first of these—in which he justifies the Court's reapportionment and other voting-rights decisions and urges the vigorous protection of political expression—and focus instead on the book's longest and, I think, most important chapter, on "facilitating the representation of minorities."[13]

Professor Ely begins by describing the so-called "suspect classification" doctrine, under which laws that classify based on certain characteristics, of which race is the paradigm, receive a rigorous and typically fatal scrutiny. (Looks *can* kill.) After showing why various factors—such as disenfranchisement, immutability, stereotyping, and being a "discrete and insular" minority—are neither necessary nor sufficient conditions for suspectness, Professor Ely puts forward alternative justifications for the doctrine, justifications which also help to determine which classifications should be suspect under what circumstances. One basis for suspicion is "first degree prejudice":[14]

> If the doctrine of suspect classifications is a roundabout way of uncovering official attempts to inflict inequality for its own sake—to treat a group worse not in the service of some overriding social goal but largely for the sake of simply disadvantaging its members—it would seem to follow that one set of classifications we should treat as suspicious are those that disadvantage groups we know to be the object of widespread vilification, groups we know others (specifically those who control the legislative process) might wish to injure.[15]

The alternative basis proceeds from the observation that, although legislation inevitably involves overgeneralization, we should be suspicious of "a generalization whose incidence of counterexample is significantly higher than the legislative authority appears to have thought it was":[16]

> [T]o disadvantage—in the perceived service of some overriding social goal—a thousand persons that a more individualized (but more costly) test or procedure would exclude, under the impression that only five hundred fit that description, is to deny the five hundred to whose existence you are oblivious their right to equal concern and respect, by valuing their welfare at zero.[17]

"The rub comes in how the Court should go about identifying such situations."[18] Courts are incompetent to review the law's substantive merits, but not necessarily to scrutinize the *process* of enactment for prejudice. Building

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12. *Id.* at 103.
13. ELY, *supra* note 1, ch. 6 (title).
14. *Id.* at 162.
15. *Id.* at 153.
16. *Id.* at 157.
17. *Id.* (emphasis omitted).
18. *Id.*

on the observation that "prejudice is a lens that distorts reality,"[19] Professor Ely writes:

> In deciding how much presumptive credit to extend a given generalization in our everyday lives, we would want to know where it came from—who came up with it and whether it is one that serves their interests. This commonsense insight . . . seems relevant to the constitutional inquiry as well. The choice between classifying on the basis of a comparative generalization and attempting to come up with a more discriminating formula always involves balancing the increase in fairness that greater individualization will produce against the added costs it will entail. Where the generalization involved is one that serves the interests of the decision-makers, however, certain dangers that are inherent in any balancing process are significantly intensified. Where it tangibly enhances their fortunes, the dangers may be most obvious. . . . But even where no tangible gain can be identified, there are psychic rewards in self-flattering generalizations. . . . "[T]he easiest idea to sell anyone is that he is better than someone else," and it's a rare person who isn't delighted to hear and prone to accept comparative characterizations of ethnic or other groups that suggest the relative superiority of those groups to which he belongs. . . .
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> Thus generalizations to the effect, say, that whites in general are smarter or more industrious than blacks, men more stable emotionally than women, or native-born Americans more patriotic than Americans born elsewhere, are likely to go down pretty easily . . . with groups whose demography is that of the typical American legislature. . . . By seizing upon the positive myths about the groups to which they belong and the negative myths about those to which they don't, or for that matter the realities respecting some or most members of the two classes, legislators, like the rest of us, are likely to assume too readily that not many of "them" will be unfairly deprived, nor many of "us" unfairly benefitted, by a classification of this type.[20]

These, then, are the factors and circumstances that render laws "suspect." A court should invalidate a suspect law unless "the state come[s] up with a goal of substantial weight and . . . show[s] that the classification fits that goal with virtual perfection. . . ."[21] These "fit" and "weight" requirements are not penalties for being suspect but "ways of extending the initial inquiry, of determining whether the initial suspicions aroused by the classification are well founded or rather on fuller exploration can be allayed."[22]

III. From Process to Substance

The asserted virtue of the representation-reinforcing mode of review is its responsiveness to comparative institutional authority and competence. The legislature's task is to choose and accommodate values; the court's is to assure that the legislative process is not infected or distorted by prejudice. Professor Ely emphasizes that a court faced with a suspicious classification may not inquire "whether there exists *unjustified* widespread hostility toward

19. *Id.* at 153.
20. *Id.* at 158–59.
21. *Id.* at 146.
22. *Id.* at 147.

the group disadvantaged by the official act in issue—that would constitute a straightforward invitation to second-guess the legislative judgment—but simply whether there exists widespread hostility."[23]

Let us consider Professor Ely's analysis of laws directed against burglars ("certainly a group toward which there is widespread social hostility"[24]) and homosexuals ("victims of both 'first degree prejudice' and subtler forms of exaggerated we-they stereotyping"[25]). With respect to the former, he writes:

> [L]aws making burglary a crime . . . plainly should survive [judicial scrutiny]. . . . There is so patent a substantial goal here, that of protecting our homes by penalizing those who break and enter them, and the fit between that goal and the classification is so close, that whatever suspicion such a classification might under other circumstances engender is allayed so immediately it doesn't even have time to register.[26]

The criminal punishment of homosexual acts may analogously be defended on the ground that they are immoral. There is nothing unconstitutional "about outlawing an act due to a bona fide feeling that it is immoral,"[27] and a court engaging in the value-neutral representation-reinforcing mode of review must accept the legislature's moral judgment whenever "the claim is credible that the prohibition in question was generated by a sincerely held moral objection to the act. . . ."[28]

The cost of accepting this judgment is high—ultimately too high, I think, for the representation-reinforcing mode to pay. It was not many years ago that racists justified antimiscegenation and segregation laws on the ground that racial intermarriage and intermingling were immoral. And protective sex discrimination laws continue to be defended on the essentially moral ground that men and women have different natural domains and destinies.[29]

Perhaps these claims are seldom sincerely made today. But they once were. More to the point, it is just when such claims about blacks, women, and homosexuals are *most* sincere that the judgments based on them are most suspect. Automatically to exempt discriminatory legislation based on sincerely held moral beliefs ignores a fundamental feature of the psychology of (first degree) prejudice—the facility with which we find justifications, including the label of "immorality," for proscribing the behavior of a group, or the very existence of a group, we find threatening. It also fails to respond to a central characteristic of second-degree prejudice: just as "we" may overestimate the social benefits or underestimate the costs of legislation that affects only "them," so too are we apt to characterize as immoral conduct which they

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23. *Id.* at 153–54.
24. *Id.* at 154.
25. *Id.* at 162.
26. *Id.* at 154.
27. *Id.* at 256 n.92.
28. *Id.*
29. For an early judicial assertion of this view, *see* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring), *quoted in* ELY, *supra* note 1, at 51.

engage in but which we don't. In his classic work on *The Nature of Prejudice,* Gordon Allport noted that such "moralistic views" are a common feature of prejudice.[30]

A "conscientious objection" exemption for sincere moral beliefs thus subverts the very purpose of the representation-reinforcing mode.[31] Yet, of course, the exemption cannot be categorically denied—for it is entirely proper for the legislature to prohibit burglary and any number of other behaviors for reasons that ultimately rest on their immorality. The alternative is to be *selective* in determining which beliefs to accept and which to deny. But this, of course, requires judicial judgments of social values.

The burglary and homosexuality examples illustrate a rather different quandary in which the representation-reinforcing mode finds itself. So far, we have focused on laws that directly prohibit injurious or immoral conduct. But what of other regulations aimed at burglars, homosexuals, and similar victims of social hostility and prejudice? Because they are suspect they must be scrutinized, with these results:

> At first blush a statute providing that anyone who has been convicted of a burglary cannot ever be licensed to practice medicine seems to present a very different question [from the prohibition of burglary itself]. The fit between the classification and the goal, say, of assuring competence or trustworthiness is obviously a good deal looser than refining the classification . . . could make it. The problem is that the fit, again, is very close with the goal of discouraging burglars. (The party in question may be fully reformed, but it will help deter others to know that convicted burglars remain forever subject to this additional deprivation.)[32]

Similarly, "laws denying homosexuals certain benefits, most likely, occupational opportunities, must be defended in terms of a virtually perfect fit with a legitimate and substantial goal." By contrast to laws disadvantaging burglars, however, "[t]his will seldom, if ever, be possible."[33]

As an initial matter, I confess that I don't understand why these two sets of laws fare differently under strict scrutiny. If society can express its fear or moral condemnation of burglars by forbidding them certain jobs—and I think the licensing legislation reflects this more than any fanciful hopes for incremental deterrence—why can't it do likewise with respect to homosexuals?

Whether or not the "fit" is all right in these instances, however, suppose that convicted felons complain about the plethora of regulations and practices that encumber their daily lives from the moment of conviction, if not before—lengthy incarceration, poor prison conditions, severe restrictions on their liberty in prison and on parole, and so forth. There is every reason to suspect that these degrading burdens reflect both first- and second-degree prejudice

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30. G. ALLPORT, THE NATURE OF PREJUDICE 30 (Anchor ed. 1954).

31. It also assumes that judges, who typically are members of the "we" group, ELY, *supra* note 1, at 168, can engage in the tricky task of determining whether beliefs are truly moral and sincerely held—a task that Ely implies cannot be done. ELY, *supra* note 1, at 67 n*.

32. *Id.* at 250 n.65.

33. *Id.* at 255 n.92.

against criminals. And the fit between many of these means and any legitimate end is seldom *very* close: with respect to almost any treatment of convicted felons it is easy to imagine less burdensome alternatives that serve society's interests about as well. The result of strict scrutiny of these laws would, thus, be quite striking:

> Where a law is suspect because of what I have been calling first-degree prejudice, or indeed where it has been infected by a subtler form of stereotyping . . ., the only appropriate remedy is to void the classification. . . . The obvious alternative to this is to have the judiciary restrike the substantive balance, attempting not to let the prejudices that apparently influenced the legislature play a part, and invalidate the classification only if in some sense it still ends up unacceptable on its merits. . . . I regard that approach as quite inappropriate.[34]

Wholesale invalidation of the criminal justice system seems rather draconian, and obviously is not what Professor Ely intends. Yet this seems the inevitable result of the attempt to avoid value judgments about the justifiability or perniciousness of particular prejudices and a value-laden balancing of interests.

IV. From Substance to Process

So far I have focused on representation-reinforcing analysis, showing why it cannot succeed in its mission of avoiding substantive value choices. I shall now show that issues which have traditionally been thought to be substantive can just as easily be phrased in representation-reinforcing terms.

Actually, we have already considered one such issue, for the constitutional attack on homophobic legislation usually has been premised on a substantive due process claim of "privacy." Consider some other challenges of this sort—for example, against the prohibition of marijuana and against school dress and hair-length codes. In Professor Ely's terms, these are suspect "we-they" distinctions, for (even today) most legislators do not smoke pot, most male school administrators do not wear their hair at shoulder-length, *and* many of these officials and their constituents are hostile toward and prejudiced against those who engage in these practices.[35]

No instrumental justifications (genetic damage, getting one's hair caught in a lathe) can rescue these proscriptions from the scourge of strict strutiny.

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34. *Id.* at 168.

35. The suspectness of classifications based on these practices is not mitigated by the observation that, symbolically or literally, the officials may be legislating against their own children. Indeed, this only exacerbates matters by implicating an element of age discrimination as well. Professor Ely remarks in passing that

> it is at least arguable that the fact . . . that all of us once were young . . . should neutralize whatever suspicion we might otherwise entertain respecting the multitude of laws (enacted by predominantly middle-aged legislatures) that comparatively advantage those between, say 21 and 65 vis-a-vis those who are younger . . . . [All legislators once] were young . . . . a fact that may enhance their objectivity about just what the difference entails.

ELY, *supra* note 1, at 160. But he adds in a footnote, "On the other hand an attitude of 'I had it rough—it made me what I am—so why shouldn't you?' is one we all have seen. . . ." *Id.* at 255 n.83. With respect to legislation against countercultural deviance, the latter attitude, combined with an aversion based on the fact that legislators aren't young anymore and won't be again, seems far more plausible to me.

The fit is too loose. At best, the dress and hair-length codes could be defended as matters of good taste. But even if a court must defer to the legislature's sincere moral judgments, it cannot do likewise with respect to aesthetic tastes: it may be old-fashioned to condemn racial intermarriage, women occupying "men's" roles, and even homosexuality on moral grounds, but there is, unfortunately, nothing archaic about many legislators' aesthetic aversions to these things. Perhaps the laws *should* be struck down, and perhaps Professor Ely has provided a better rationale than the usual substantive due process-personal autonomy argument. But one would be hard pressed to say that the court was not engaging in substantive value choices.

I do not assert that all substantive due process claims are so readily translatable into representation-reinforcing terms. But many are,[36] including the constitutional attack on statutes prohibiting abortions. Professor Ely, of course, vehemently condemns the Supreme Court's decision in *Roe v. Wade* striking down the Texas anti-abortion law.[37] Ironically, it is doubtful whether the law can survive judicial scrutiny under the representation-reinforcing mode. To see why, we must first understand his analysis of gender classifications.

Professor Ely finds the issue of sex discrimination complicated. Although women are rarely the victims of first-degree prejudice, they are frequently the objects of stereotyping. Women are not a minority, however, let alone a discrete and insular one. They have the potential political strength to prevent the enactment of discriminatory legislation. Although it is conceivable that our society "has been so pervasively dominated by men that women quite understandably have accepted men's stereotypes . . . ,"[38] this does not describe the reality of 1980:

> It is true that women do not generally operate as a very cohesive political force, banding together to elect candidates pledged to the "woman's point of view." Constitutional suspiciousness should turn on evidence of blocked access, however, not on the fact that elections are coming out "wrong." There is an infinity of groups that do not act as such in the political marketplace, but we don't automatically infer that they have a "slave mentality." The cause, more often, is that (sensibly or not) the people involved are not in agreement over the significance of their shared characteristic.[39]

That does not end matters, however, for most laws classifying by sex were enacted long ago—many of them before women were allowed to vote. The Court should, therefore, treat the discriminatory remnants of earlier eras

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36. Depending on how far one is willing to go beneath the surface of the law to examine the prejudices that underlie it, *see* ELY, *supra* note 1, at 136–45, the regulations in such cases as Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), and Moore v. City of East Cleveland, 431 U.S. 494 (1977), would also have rough going under representation-reinforcing review. The single-family zoning regulation in *Belle Terre* was aimed at hippies; the one in *Moore* was likely mostly to affect the poor and those in deviant living arrangements.

37. *See* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

38. ELY, *supra* note 1, at 165.

39. *Id.* at 166.

as suspect and (typically) invalidate them. If, however, the laws are reenacted and "women don't protect themselves from sex discrimination in the future, it won't be because they can't. It will rather be because for one reason or another . . . they don't choose to."[40]

Consider, then, the constitutional status of anti-abortion laws under the representation-reinforcing approach. The Texas statute struck down in *Roe v. Wade* was enacted in the mid-nineteenth century; it classifies based on gender and is therefore suspect.[41] The question, then, is whether it can survive strict scrutiny—whether it is necessary to achieve an important state interest. And that depends on how the court deals with the state's asserted interest in protecting the life or potential life of the fetus.

I don't doubt for a moment that many people of both sexes sincerely believe that a fetus has a right to life and that abortion is therefore immoral. If Professor Ely is correct that the sincere assertion of a moral belief ends any further inquiry, the law must be upheld. But, as I mentioned above, this conscientious objection exemption undermines the very foundations of the representation-reinforcing mode. The danger, in this instance, is not that the legislature's view about the morality of abortion manifests first-degree prejudice, but that it reflects the insensitivity and misvaluing typical of second-degree prejudice. However sincerely *I* hold a moral view on abortion, it is—by contrast to the position of someone actually capable of choosing whether to have one—an essentially irresponsible view.[42]

A representation-reinforcing court may not, of course, accommodate the competing claims of the fetus and the pregnant woman who wishes an abortion, nor may it guess how a legislature would have accommodated them if women had not been excluded from the political process. In its value-neutral way, it may only invalidate.[43]

V. THE SUBSTANCE OF PROCESS

Certainly, this is not how Professor Ely wishes the Court had decided *Roe v. Wade*; and he surely does not approve of judicial scrutiny of marijuana and

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40. *Id.* at 169. It is clear, on Professor Ely's theory, that the courts have no business even *entertaining* a constitutional challenge to the limitation of draft registration to men, even though the limitation seems based primarily on stereotypical notions of "woman's place." *Cf. id.* at 253 n.75.

41. To be sure, the Supreme Court would hold otherwise—that the law merely classifies between pregnant women and nonpregnant persons of both sexes. *See* General Electric Co. v. Gilbert, 429 U.S. 125 (1976); Geduldig v. Aiello, 417 U.S. 484 (1974). I doubt that Professor Ely would adopt this view, which obtusely refuses to look beyond form to process to notice the "we-they" psychology infecting a legislative decision made by men and burdening only women. Imagine the status of a law enacted by the Mississippi legislature disadvantaging—without regard to race, of course—persons carrying a sickle-cell anemia gene.

42. For rather similar reasons, abortion laws are not rescued by the observation that they are designed to protect another discrete and insular minority that may be the object of second-degree prejudice. *Cf.* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 933–35 (1973). This surely *would* be a compelling claim *if* unborn children have legitimate claims to life or to potential life. But that is precisely the issue in dispute.

43. For the reasons mentioned above, however, Professor Ely would permit a contemporary legislature to reenact the prohibition if it wished.

hair-length regulations or the general treatment of convicted felons. That's just what the representation-reinforcing mode is designed to avoid. But how?

A court may not assess the "justifiability" of a prejudice and may not balance competing personal and governmental interests, because these require judicial value choices. To assure the close fit necessary to overcome the suspicion of prejudice, however, it must determine whether a discriminatory regulation is necessary to serve important state goals. Applied in a relaxed manner, this standard is indistinguishable from substantive "balancing." Applied as strictly as the Court has usually done, it amounts to virtually automatic invalidation. Whether one labels this a judicial value choice or the choiceless frustration of the legislature's values, it amounts to the same thing.

Physicists have their law of conservation of matter; economists have their law of no free lunch. The analogue in constitutional law may not yet have a name, but it amounts to the same thing: you can't get something out of nothing. The representation-reinforcing enterprise is shot full of value choices, starting with the decision of just *how* representative our various systems of government ought to be and who ought to be included in the political community,[44] and ending with (covert) choices about who is justifiably the object of prejudice and whether legislative goals are sufficiently important to warrant the burdens they impose on some members of society.[45]

This is not to say that there's nothing to the representation-reinforcing mode. Rather there's much more to it than Professor Ely would hope. The concerns articulated in the *Carolene Products* footnote are real, and many of the Court's best-regarded decisions have been responsive to them. But these decisions—including those, like *Brown v. Board of Education,*[46] that seem right beyond question—involved judicial value choices. The rightness of *Brown* lies in the fact that (we believe) the Court made the *right* choice.

As there is more to the representation-reinforcing mode than pure process, there is also more to the suspect classification doctrine than representation-reinforcement. To illustrate this, let me return to Professor Ely's handling of gender discrimination. After pointing out that women are no longer barred, either formally or psychologically, from political participation, he writes:

> [I]f women don't protect themselves from sex discrimination . . . it won't be because they can't. It will rather be because for one reason or another—

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44. The point is nicely illustrated by Justice Douglas' and Harlan's comments in Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), in which the Court struck down the state's poll tax. In dissent, Justice Harlan charged, "Property and poll-tax qualifications, very simply, are not in accord with current egalitarian notions of how a modern democracy should be organized." *Id.* at 686. In his opinion for the majority, Justice Douglas agreed: "[W]e have never been confined to historic notions of equality. . . . Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change." *Id.* at 669. *See also* C. WILLIAMSON, AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY, 1760–1860 (1960).

45. The latter choices are often reciprocal; if one decides that the prejudice is permissible (e.g., against criminals or homosexuals or counterculturists) one needn't inquire into the importance of laws directed against them.

46. 347 U.S. 483 (1954).

> substantive disagreement or more likely the assignment of a low priority to the issue—they don't choose to. Many of us may condemn such a choice as benighted on the merits, but that is not a constitutional argument.[47]

Until I read these sentences I never fully grasped what the Court meant when it said in *Shelley v. Kraemer*[48] that the rights established by the fourteenth amendment are "*personal* rights." I do now. Imagine, if you will, explaining to a woman who is excluded from a "man's job" for which she is qualified, "Well, you had a choice to vote down this regulation but you didn't choose to." *Who* didn't choose to? Suppose that *she* did what she could to vote it down, but other women embrace the stereotype it embodies. There is an uncomfortable similarity between lumping all women, or any class of people, together in this way and praising someone as "a credit to his race."

Laws of this sort, which treat people based on certain stereotypes, inflict a *dignitary* harm, an insult, a stigma. And this injury to the individual is not mitigated by the observation that most other women, or blacks, or whoever, accept the stereotype. If anything, this exacerbates the harm by making the victim feel even more powerless and frustrated.

The representation-reinforcing mode correctly recognizes that unjustified, hurtful stereotyping is most likely to occur when the victims lack political power. In its aspiration to value-neutrality, however, it refuses to treat the dignitary injury as an evil in itself.[49] The problem is not only that it does not, on that account, go far enough. To reiterate, in order to achieve acceptable outcomes, it implicitly depends on the value judgments that some insults to dignity are morally wrong while others are permissible or even desirable. The reason that homophobic legislation is so constitutionally troublesome is that our society is currently riven about which of these categories insults to homosexuals should be placed in.

VI. CONCLUSION

Professor Laurence Tribe entitles a short essay, occasioned by *Democracy and Distrust, The Puzzling Persistence of Process-Based Constitutional Theories*.[50] In fact, their persistence is not at all puzzling. They are to

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47. ELY, *supra* note 1, at 169–70.

48. 334 U.S. 1, 22 (1948).

49. Professor Ely's discussion of protective gender discrimination that materially advantages women illustrates another limitation flowing from this strategy:

> [A] law drafting men but not women for military service should be treated as initially suspicious since it incorporates the self-flattering generalization that men are physically tougher than women. However, it seems to be that the suspicion thus generated is almost immediately allayed by the fact that in tangible terms the law is one whose comparative disadvantaging of men is massive. A law exempting women from the possibility of being ordered to pay alimony seems, if anything, even more constitutional.

ELY, *supra* note 1, at 253 n.75. Leaving aside its assumptions about the male legislators' psychology—perhaps they value their egos more than their money or their lives—this analysis ignores the laws' insulting reinforcement of male-female stereotypes. *Compare* Orr v. Orr, 440 U.S. 268 (1979), in which Justice Brennan wrote for the Court, striking down the alimony exemption, that statutes of this sort "carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and the need for special protection."

50. 89 YALE L.J. 1063 (1980).

constitutional theory what the perpetual motion machine is to science. Hope springs eternal. But it is time for those of us who do constitutional law to move on. After *Democracy and Distrust*, there really isn't any excuse not to. For in his heroic attempt to establish a value-free mode of constitutional adjudication, John Hart Ely has come as close as anyone could to proving that it can't be done.