Vanderbilt Law Review

Volume 34
Issue 1 *Issue 1 - January 1981*

Article 7

1-1981

Democracy and Distrust: A Theory of Judicial Review

Michael Conant

BOOK REVIEW

DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW. By John Hart Ely. Cambridge, Massachusetts: Harvard University Press, 1980. Pp. viii, 268. $15.00.

*Reviewed by Michael Conant**

I. INTRODUCTION

This review is a critique of the major themes in *Democracy and Distrust: A Theory of Judicial Review*,[1] by Professor John Hart Ely of Harvard Law School. Ely primarily addresses the amount of discretion exercised by Supreme Court justices in deciding constitutional cases, a fundamental issue since few scholars today would contest the actual existence of the judicial review power of the Court. Ely's thorough scholarship presents a fine discussion of the Court's legitimacy when it extends its discretion beyond the base of the actual constitutional language. Professor Ely misses the mark, however, in his argument that certain open-ended constitutional provisions exist and are necessary for the judicial safeguarding of important substantive rights. Contrary to Ely's contention, strict construction of constitutional language can be consistent with the need of the Court both to adjudicate those rights and at the same time to remain mindful of its countermajoritarian nature.

II. INTERPRETIVISM AND THE COURT

Ely's first chapter is entitled, "The Allure of Interpretivism." "Interpretivism" is the new term for legal positivism or strict construction.[2] Ely notes that despite the towering position of Justice Black as a fundamentalist in the theory of interpretivism, Black was not its creator. Instead, this methodology of construction, centering on constitutional language and contemporary rules of documentary interpretation, was asserted early on by Chief Justice

* Professor, School of Business Administration, University of California at Berkeley. B.S., 1945, University of Illinois; A.M., 1946, Ph.D., 1949, J.D., 1951, University of Chicago.

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

2. *See* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

Marshall in *Marbury v. Madison*.[3] It also was explained in detail hy Justice Story[4] and summarized by Justice Holmes.[5] The express foundation of interpretivism is the constitutional separation of governmental powers and the reservation of the amending power to the people,[6] and Justices Holmes and Black are prime examples of those who emphasized this foundation and assured us that the Constitution did not give unlimited discretion to justices to impose their personal value judgments on society.[7] Ely points out that interpretivism recognizes the undemocratic character of judicial review. The philosophical principle is that an appointed elite in the judiciary should abnegate expansion of broad judicial review power in favor of the power of the elected legislatures, which are the centers of democratic responsibility.

Ely rejects interpretivism when it is defined in extreme terms. His second chapter, entitled "The Impossibility of a Clause-Bound Interpretivism," denounces any approach that considers each clause as a self-contained unit to be interpreted on the basis of its language and legislative history. The strict construction of Justices Story and Holmes, however, also rejected such a narrow approach to interpretation.[8] In fact, the Justices argued that the documents should be interpreted in their total context, and that the Constitution must be understood as a unified whole within the English constitutional and common-law legal environment of its adoption.[9] Under eighteenth-century rules of documentary interpretation, for example, preambles were given great weight.[10] For this reason, the breadth of the spending power of Congress can be understood only in the framework of the language of the preamble.[11] By ignoring the accepted broad principles of construction for constitutions, as outlined by Justice Story, Ely creates a straw man to destroy. Upon this foundation he builds his later arguments for interpreta-

---

3. 5 U.S. (1 Cranch) 137 (1803).

4. 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §§ 397-456 (2d ed. Boston 1857).

5. O.W. HOLMES, *The Theory of Legal Interpretation* in COLLECTED LEGAL PAPERS 203 (1920).

6. U.S. CONST. arts. I, II, III, V.

7. *See* Griswold v. Connecticut, 381 U.S. 479, 522-24 (1965) (Black, J., dissenting); Calder v. Bull, 3 U.S. (3 Dall.) 386, 399 (1798) (Iredell, J.); O.W. HOLMES, *supra* note 5.

8. *See* notes 4 & 5 *supra*.

9. *Ex parte* Grossman, 267 U.S. 87, 108-09 (1925); United States v. Wong Kim Ark, 169 U.S. 649, 668-72 (1898). On the English constitutional context in which the state and national constitutions were drafted, see authorities cited in note 42 *infra*.

10. *See* J. STORY, *supra* note 4, at §§ 451-517.

11. *See* U.S. CONST. art. I, § 8.

tion beyond the constraints of constitutional language.

As pointed out correctly in this book, constitutional provisions range on a spectrum from specific denotation to very general connotation.[12] The age requirement to be President is an example of the former,[13] while the word "commerce" is an example of the latter. In 1789, commerce connoted all transactions, such as the purchase and sale of all land, goods, services, and legal rights.[14] Although certain types of commerce did not exist in 1789, no one doubts the power of Congress to regulate transactions in such things as light bulbs, airline travel, and copyrights of videotapes. Due process is another term of general connotation. In 1791, it meant required or appropriate procedure, the main components of which were adequate notice and full and fair hearing.[15] Its content, however, cannot be limited to specific acts found unfair in 1791. The creative genius of prosecutors, police, and other administrative officers to devise novel procedures that are unfair to litigants under any generally accepted value standards means that the specific content of fair procedure must be an evolving aggregate.

Ely recognizes the overwhelming evidence that *substantive* due process, as an open-ended vehicle for constitutional interpretation, is an unwarranted judicial fabrication that cannot provide a rational basis for extending judicial review.[16] In fact, he has published an incisive article showing that abortion decisions based on substantive due process are incorrect.[17] Having rejected due process as a technique for the judiciary to create unenumerated substantive rights, however, Ely suggests that two other clauses—the "privileges or immunities" provision of the fourteenth amendment, and the ninth amendment—can perform that same unwarranted function.[18] According to Ely, these parts of the Constitution are open-ended and *can* serve as the basis for the antidemocratic exercise of judicial discretion beyond the limits of express constitutional language. A critical review shows that while Ely understands the true meaning of due process, he joins a large body of courts

---

12. *See* M. BLACK, CRITICAL THINKING 192-94 (2d ed. 1952).

13. *See* U.S. CONST. art. II, § 1, ¶ 5.

14. *See* 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, ch. 4 (1953).

15. *See* 2 *id.* at 1102-10; Graham, *Procedure to Substance—Extra-Judicial Rise of Due Process, 1830-1860*, 40 CALIF. L. REV. 483 (1952) and sources cited therein.

16. J. ELY, *supra* note 1, at 14-21.

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

18. J. ELY, *supra* note 1, at 22-30, 34-41.

and scholars in failing to realize that the privileges or immunities clause and the ninth amendment each have discoverable meanings to which the courts should adhere. How is the content of these constitutional provisions to be discerned? Ely realizes that correct methodology in constitutional interpretation cannot be based on legislative history, the alleged intents of the many differing framers.[19] What Ely recognizes but does not pursue, however, is that historical linguistics should be the basis of constitutional interpretation. The language of the Constitution in total context at the time of its adoption and contemporary rules of documentary interpretation are the proper tools. Using these tools, an argument can be made about the meanings of the privileges or immunities clause and of the ninth amendment that would allow the Court to protect certain rights without violating its duty in a democratic society to adhere strictly to the language of the Constitution.

III. THE PRIVILEGES OR IMMUNITIES CLAUSE

The word "privileges," when referring to the relationship of citizen to government in the interstate privileges and immunities clause of article IV, section 2 of the Constitution, was a synonym for the words "liberties" or "franchises."[20] It represented affirmative or active liberties that government had no legal right to restrain. The word "immunity," when used in the context of the relationship of citizen to government, meant "exemption."[21] It designated negative or passive liberties, the citizens' freedom in certain areas from the legal power of intervention by the government, such as the immunity from unreasonable searches and seizures.

Privileges and immunities, or synonymous terms, had their American law origins in the charter of Virginia of 1606[22] and in the charters of many of the other colonies.[23] The terms appear in Dec-

19. *Id.* at 16-18. *See* Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119; Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964). *But see* C. CURTIS, LIONS UNDER THE THRONE 2 (1947).

20. *See* 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 37 (1765); 8 C. VINER, A GENERAL ABRIDGEMENT OF LAW AND EQUITY 508 (2d ed. 1791).

21. *See* G. JACOB, LAW DICTIONARY 389 (1811).

22. The charter declared that all colonists "shall *have* and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all intents and purposes, as if they had been abiding and born, within this our Realm of *England*, or any other of our said Dominions." 7 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS 3788 (F. Thorpe ed. 1909).

23. Charter of New England (1620), 3 *id.* at 1822, 1839; Charter of Massachusetts Bay

larations of Rights made by colonists pursuant to their power to make law consistent with their charters.[24] These words are also in the Resolutions of the Stamp Act Congress of 1765[25] and in the Declaration and Resolves of the Continental Congress of October 14, 1774.[26] Thus the words had established meaning when they were included in article IV of the Articles of Confederation.[27] As Professor Howard's comprehensive study shows, "privileges and immunities" was a summary phrase to connote all constitutional rights of citizens against government, the constitutional limitations on government.[28]

For purposes of the subsequent discussion of the ninth amendment, it is important to note that the privileges and immunities of citizens in article IV of the Articles of Confederation were primarily those of the English Constitution. This fact is clearly seen in the first committee draft of July 12, 1776, in which clause VI read: "The Inhabitants of each Colony shall henceforth always have the same Rights, Liberties, Privileges, Immunities and Advantages, in the other Colonies, which the said Inhabitants now

---

(1629), 3 *id.* at 1846, 1856-57; Charter of Maryland (1632), 3 *id.* at 1677, 1681; Grant of the Province of Maine (1639), 3 *id.* at 1625, 1635; Charter of Connecticut (1662), 1 *id.* at 529, 533; Charter of Carolina (1663), 5 *id.* at 2743, 2747; Charter of Rhode Island and Providence Plantations (1663), 6 *id.* at 3211, 3220; Charter of Carolina (1665), 5 *id.* at 2761, 2765; Charter of Massachusetts Bay (1691), 3 *id.* at 1870, 1880-81; Charter of Georgia (1732), 2 *id.* at 765, 773.

24. *See, e.g.*, The Massachusetts Body of Liberties of 1641, which spoke of "the free fruition of such Liberties, Immunities, Privileges as Humanity, Civility and Christianity call for . . . ." THE COLONIAL LAWS OF MASSACHUSETTS 1 (W. Whitmore ed. 1889).

25. "II. That his Majesty's liege subjects in these colonies, are entitled to all the inherent rights and liberties of his natural born subjects, within the kingdom of Great-Britain." A. SUTHERLAND, CONSTITUTIONALISM IN AMERICA 135 (1965).

26. *Resolved*, N.C.D. 2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England.

Resolved, N.C.D. 3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.

1 JOURNALS OF THE CONTINENTAL CONGRESS 68 (reprint ed. 1904).

27. Art. 4. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively . . . .

9 JOURNALS OF THE CONTINENTAL CONGRESS 908 (reprint ed. 1907).

28. A. HOWARD, THE ROAD FROM RUNNYMEDE 1-215 (1968).

have, in all Cases whatever, except in those provided for by the next following Article."[29] Since this language was written before most states had adopted constitutions, the phrase "which the said inhabitants now have" had to refer to the English constitutional limitations. In other words, the Declaration of Independence discarded those parts of the English Constitution that imposed a framework of government but not the constitutional rights of Englishmen that the colonists had for so long argued were theirs.

The interstate privileges and immunities clause of the Constitution, article IV, states: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." In light of the English constitutional background, this language seems ambiguous. As the Republicans argued at the time of the Civil War, it could have more than interstate application.[30] The phrase could connote all constitutional rights of Americans including those in state and federal constitutions. They argued that "in the several states" meant in the United States and was not the same as "of the several states." The majority interpretation, however, asserted the limited, interstate character of the clause. Thus, citizens of one state, visiting a second, are entitled to all the *constitutional* protections found in the law of the second. Visitors are not, however, entitled to privileges created by ordinary statutes of the second state, such as the collection of oysters in its waters.[31] The distinction, then, is between ordinary law and law that is fundamental. As used by Justice Washington in *Corfield v. Coryell*,[32] following eighteenth-century usage, the word "fundamental" is a synonym for "constitutional."[33]

This English and American legal-linguistic history gives a

---

29. 5 JOURNALS OF THE CONTINENTAL CONGRESS 546, 547 (reprint ed. 1906). Article VII of the first draft reads as follows: "The Inhabitants of each Colony shall enjoy all the Rights, Liberties, Privileges, Immunities, and Advantages, in Trade, Navigation, and Commerce, in any other Colony, and in going to and from the same from and to any Part of the World, which the Natives of such Colony . . . enjoy."

30. L. SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (1845), and J. TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY: TOGETHER WITH THE POWERS AND DUTIES OF THE FEDERAL GOVERNMENT IN RELATION TO THAT SUBJECT (1849) are cited on the issue in J. TEN BROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 86-93 (1951).

31. *See* Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

32. *Id.* at 551-52. *See* J. ELY, *supra* note 1, at 28-30.

33. Though the term "fundamental law" was used in an earlier era to mean natural law, by the seventeenth century it had come to have a specific meaning in positive law as a synonym of constitutional. *See* J. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY (rev. ed. 1971).

clear meaning to the words "privileges or immunities" when ratified as part of the fourteenth amendment.[34] Since "privileges or immunities of citizens of the United States" was a synonym for constitutional limitations, the fourteenth amendment reference is to the national constitutional limitations. It can only refer to those rights of citizens against the United States found in the original Constitution and the Bill of Rights. The states are prohibited from making or enforcing any law that would abridge those classes of legal rights against government delineated in the national Constitution. Thus, traditional documentary interpretation confirms the view of Justice Black that the language of the fourteenth amendment incorporated the entire Bill of Rights as against the states.[35] In fact, the privileges or immunities clause is the only clause that can rationally incorporate the first, second, and third amendments—the substantive amendments—since the due process clause correctly refers only to procedural protections.[36]

The majority opinion in the *Slaughter-House Cases*[37] mentioned this issue only in dictum, since it held the claim against state grants of monopoly in the ordinary trades to be an issue of state constitutional law and not one of national privileges or immunities. Justice Miller did note that the clause included those privileges or immunities "which owe their existence to the Federal government" such as "the right to peaceably assemble and petition for redress of grievances."[38] Implicitly he thus recognized that the privileges or immunities clause incorporated first amendment rights against the states. Although some later courts misread this dictum and held that the privileges or immunities clause did not incorporate the Bill of Rights, the fourteenth amendment in fact contains a partial redundancy on the issue of incorporation. It in-

34. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1.

35. Adamson v. California, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting). The pursuit of the intent of the framers of the fourteenth amendment by Justice Black and Professor Fairman is a prime example of the futile search for history when the correct methodology requires search for the meaning of language. *See* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5 (1949). *But see* J. ELY, *supra* note 1, at 16-18. *See generally* Graham, *Our "Declaratory" Fourteenth Amendment*, 7 STAN. L. REV. 3 (1954).

36. The Supreme Court erroneously used substantive due process to absorb the first amendment into the fourteenth. *See* Cantrell v. Connecticut, 310 U.S. 296 (1940); DeJonge v. Oregon, 299 U.S. 353 (1937); Near v. Minnesota, 283 U.S. 697 (1931); Gitlow v. New York, 268 U.S. 652 (1925).

37. 83 U.S. (16 Wall.) 36 (1873).

38. *Id.* at 79.

corporates the procedural protections of amendments four through eight twice—once via the privileges or immunities clause and once via the due process clause.[39]

The conclusion to be drawn from three hundred and fifty years of legal history is that the privileges or immunities clause is not, as Ely contends, open-ended. It refers to established national constitutional rights of citizens that can be found in the original Constitution, the Bill of Rights, or in contemporary English constitutional law.

IV. The Ninth Amendment

The ninth amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[40] It sets forth a rule of construction for those courts and agencies that interpret the Constitution. The amendment notes that certain of the rights of citizens against government (privileges and immunities) have been enumerated in the Constitution and Bill of Rights and implies that others existent at the time these documents were adopted were unenumerated. The immediate question raised by this is where could one find the rights that were unenumerated? The only rational answer is that one must look to the substantive standing constitutional law of England and of the American states in 1791.[41] Many authors have detailed the English constitutional foundation of the civil rights (privileges and immunities) that are incorporated into the state and national constitutions.[42] Enumeration of some of

39. The due process clause of the fifth amendment, as noted by Justice Curtis, was a general requirement of fair procedure that included the procedural protections of the fourth through eighth amendments and all the rules for procedural protection having their origin in English legal history. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855). Since the language of due process in the fourteenth amendment was adopted from the fifth amendment, the rules of documentary interpretation require that they have the same meaning. Adamson v. California, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring). Fourteenth amendment due process thus must incorporate, *inter alia*, amendments four through eight. The whole framework of Anglo-American constitutional history demonstrates that Hurtado v. California, 110 U.S. 516 (1884), and its progeny are wrong.

40. U.S. Const. amend. IX.

41. The due process clause of the fifth amendment was designed to incorporate all procedural protections of standing English constitutional law. *See* note 39 *supra*. Hence, the ninth amendment could only refer to the unenumerated substantive protections. *See* Van Loan, *Natural Rights and the Ninth Amendment*, 48 B.U. L. Rev. 1, 13-14 (1968).

42. "The Constitution of the United States is a modified version of the British Constitution; but the British Constitution which served as its original was that which was in existence between 1760 and 1787." H. Maine, Popular Government 253 (6th ed. 1909). *See* E. Corwin, Liberty Against Government (1948); A. Howard, *supra* note 28; R. Pound, The

them in absolute form, such as the first amendment, have made them more comprehensive than they were in the English constitution. There is no doubt, however, that most of them have English origins. Article I, section 9, of the Constitution, though procedural, is a good example of the derivation. It reads: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it."[43] This language implies the existence of a privilege of writ of habeas corpus before adoption of this clause preserving it. Justice Story's historical analysis establishes that the right derived from the English Habeas Corpus Act of 1679.[44]

The rules of documentary interpretation require that the classes of unenumerated substantive rights be defined as of 1791.[45] None of the meager literature on the ninth amendment has done this, and a project of such scope cannot be presented here.[46] The important point is that Professor Ely is incorrect to conclude that a technical rule of construction can authorize judicial creation of new substantive civil rights. The clause cannot be an open-ended vehicle for Supreme Court review, as Ely contends, unguided by the established English and state constitutional law of the time. Justice Goldberg's concurring opinion in *Griswold v. Connecticut*[47] is exemplary. He creates a new ninth amendment right from his personal values on statutes limiting birth control. There was, however, no class of English constitutional immunities against government in 1791 relating to privacy in the general sense under which a statute preventing birth control could be subsumed.[48]

DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY (1957); C. STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED STATES (1894); A. SUTHERLAND, *supra* note 25.

43. U.S. CONST. art. I, § 9.

44. 2 J. STORY, *supra* note 4, at §§ 1338, 1342.

45. 1 J. STORY, *supra* note 4, at § 405 (citing three Supreme Court opinions).

46. For the unfounded argument that the ninth amendment incorporates natural law as a tool of judicial decision, see B. PATTERSON, THE FORGOTTEN NINTH AMENDMENT (1955). *But see* note 51 *infra*.

47. 381 U.S. 479, 492 (1965). The development of a private-law tort remedy for invasion of privacy can have no bearing on public law, when new substantive rights and remedies against government must be created by statute or constitutional amendment. *See* Griswold, *The Right to be Let Alone*, 55 NW. U.L. REV. 217 (1960); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

48. A search through Sir William Blackstone's *Commentaries on the Laws of England* (1765-1769) and W. S. Holdsworth's *History of English Law* (1903-1938) reveals no such category.

V. ELY'S SOLUTION

Professor Ely's third chapter is a masterful disposition of the argument that five-person Supreme Court majorities can select fundamental values for society superior to those adopted by majorities in legislatures. Ely points out that, whatever the label, the selection of fundamental values is equal to the imposition by judges of their own personal values on society. The Supreme Court majority's use of suhstantive due process to hold unconstitutional many labor laws passed by almost unanimous votes of Congress or state legislatures is a prime example.[49] Ely notes that this imposition of personal values by judges can have many labels. Natural law, as demonstrated by Justice Holmes, is of this character;[50] and leading historians and legal scholars have demonstrated that the founding fathers rejected natural law as a judicial decisionmaking tool.[51] Ely also reviews judicial usurpations of governing power under such labels as neutral principles, reason, tradition, consensus, and predicting progress.

Having concluded that certain constitutional clauses are open-ended, but that overly broad discretion in the Supreme Court to create new substantive rights is inappropriate, Ely faces the problem of finding standards for judicial decisions that go beyond the enumerated clauses. His argument is first based upon the importance of policing the processes of legislative representation. From

---

49. *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525 (1923), *overruled*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Lochner v. New York, 198 U.S. 45 (1905). *See also* R. HALE, FREEDOM THROUGH LAW, 430-60 (1952).

50. O.W. Holmes, *Natural Law*, in COLLECTED LEGAL PAPERS 310 (1920).

51. Throughout the colonial period and right down to the last months before the Declaration of Independence, politically conscious Americans looked upon the British Constitution rather than natural law as the bulwark of their cherished liberties. Practical political thinking in eighteenth-century America was dominated by two assumptions: that the British Constitution was the best and happiest of all possible forms of government, and that the colonists, descendents of freeborn Englishmen, enjoyed the blessings of this constitution to the fullest extent consistent with a wilderness environment.

C. ROSSITER, SEEDTIME OF THE REPUBLIC 270 (1953).

It was, however, in the task of "constituting" the states and the federal union that eighteenth-century Americans disclosed how deeply ran their constitutional positivism and how sharply they perceived its implications for the judiciary . . . . [T]hose giants who managed the awesome transition from revolutionaries to "constitutionaries"—men like Adams and Jefferson; Dickinson and Wilson; Jay, Madison, Hamilton, and, in a sense, Mason and Henry—were seldom, if ever, guilty of confusing law with natural right. These men, before 1776, used nature to take the measure of law and to judge their own obligations of obedience, but not as a source for rules of decision.

R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 26-27 (1975).

the famous footnote in the *Carolene Products*[52] case, he suggests that legislation that restricts voting and the political processes is to be subjected to the most exacting judicial scrutiny. Ely adopts what he labels a participation-oriented, representation-reinforcing approach to judicial review. Some strict constructionists would argue that this approach coincides with their own in that many specific clauses of the Constitution combine to prescribe representative government in the United States.[53]

Ely elaborates on his main theme in chapter five, "Clearing the Channels of Political Change." Here he emphasizes the importance of the first amendment and notes that strict constructionists such as Justice Black reach conclusions similar to his. He notes that rights to expression are not absolute, but he fails to realize that the English common-law environment of the Constitution set the main constraints. "Freedom of speech" does not include every use of the voice.[54] Speech may not be used to defame others or to disturb the peace of the neighborhood because the common-law context of the constitutional protection defines the wrongs to others that one can accomplish by voice.

A major concern within Ely's representation-reinforcing theory of judicial review is the breadth of one substantive constitutional limitation, the equal protection clause. He pursues this topic in chapter six, entitled "Facilitating the Representation of Minorities." Although he points out that "prejudice" is a "mushword," Ely uses it because he favors Justice Stone's phrase "prejudice against discrete and insular minorities."[55] Like many courts, he also uses the word "discrimination" without rigorous definition. Given the moral overload that large numbers of persons attach to the words prejudice and discrimination, many social scientists suggest that competent analysis of interpersonal contacts is more likely to be achieved if neither term is used.[56]

Equal protection is concerned with treating people who are in like circumstances in exactly the same way. The legal issues center on what are like circumstances. Ely presents a long section entitled

---

52. United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

53. *See* U.S. CONST. arts. I, §§ 2, 4, IV, § 4; amends. XIV, § 2, XV, XVII, XIX, XXIV, XXVI.

54. On the limited definition of speech in 1791, see G. ANASTAPLO, THE CONSTITUTIONALIST 92-129 (1971); A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 19-28 (1960).

55. J. ELY, *supra* note 1, at 153-54.

56. *See* T. SHIBUTANI & K. KWAN, ETHNIC STRATIFICATION: A COMPARATIVE APPROACH 17-18 (1965).

"Suspicious Classification," in which he only incidentally mentions the fountain of error on this topic, *Plessy v. Ferguson.*[57] The Republican framers of the fourteenth amendment chose broad and unconditional language for the equal protection clause in order to incorporate, *inter alia,* the ideal of making ex-slaves full citizens in every sense by terminating all vestiges of slavery. The dissent of Justice Harlan in *Plessy* analyzed the antislavery origins of the equal protection clause.[58] Unfortunately, Justice Harlan's dissent was the only opinion that analyzed the amendment's language in its total context. Justice Harlan concluded that when applied to racial issues, the equal protection clause made racial classification more than suspect; it was totally barred: "Our Constitution is color-blind. . . ."[59] Thus, *Brown v. Board of Education*[60] was the correct interpretation for 1868 as well as 1954. The disabilities of racial classification had not changed in eighty-six years; only recognition of this fact had changed.[61] The delayed realization, in fact, is all the more reason to apply in 1954 the remedies that should have been available in 1868.

It is difficult to comprehend Ely's thesis that open-ended constitutional clauses are needed to facilitate the representation of minorities. The equal protection clause in its correct, original sense should accomplish this goal. Ely discusses the fourth and eighth amendments as types of equal protection clauses,[62] which seems to contradict the argument that open-ended clauses are needed. A final facet of this topic is the "right to travel," which is not men-

---

57. 163 U.S. 537 (1896), *overruled,* Gayle v. Browder, 352 U.S. 903 (1956). Justice Brown for the majority noted that the prime objective of the equal protection clause "was undoubtedly to enforce the absolute equality of the two races before the law . . . ." 163 U.S. at 544. He upheld separate but equal facilities on a finding of fact that was clearly against the manifest weight of the evidence: that enforced separation of former slaves would not be a "badge of inferiority." *Id.* at 551. On the legislative capitulation to racism, see F. JOHNSON, DEVELOPMENT OF STATE LEGISLATION CONCERNING THE FREE NEGRO (1919); C. WOODWARD, THE STRANGE CAREER OF JIM CROW (3d ed. 1974).

58. *See* Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment* (pts. 1-2), 1950 WIS. L. REV. 479, 610.

59. 163 U.S. at 559.

60. 347 U.S. 483 (1954). The Court distinguished *Plessy* and failed to recognize that both *Plessy* and *Brown* turned on the general connotation of the words "equal protection" at the time of adoption of the fourteenth amendment.

61. As Judges Rives, Thomas, and Johnson recognized in a reapportionment case, "[i]f this court ignores the long history of racial discrimination in Alabama, it will prove that justice is both blind and deaf." Sims v. Baggett, 247 F. Supp. 96, 109 (M.D. Ala. 1965). *See* C. JOHNSON, PATTERNS OF NEGRO SEGREGATION (1943); G. MYRDAL, AN AMERICAN DILEMMA (1944).

62. J. ELY, *supra* note 1, at 96-97.

tioned specifically in the Constitution. Ely points to the argument from *Crandall v. Nevada*[63] that travel is necessary for the exercise of political rights under the Constitution. This right could be more solidly founded, however, on chapters forty-one and forty-two of the Magna Carta[64] and article IV of the Articles of Confederation,[65] which gnaranteed free ingress and egress to and from any other state. Surely these provisions are part of our constitutional protections implicit in the ninth amendment.

VI. CONCLUSION

This reviewer concludes that the goal of protecting certain rights, which spurs Ely to find open-ended sections of the Constitution, can be satisfied through strict construction of constitutional language. Ely concludes with concern that critics will think that his approach to open-ended constitutional clauses is actually too *narrow,* not giving broad enough discretion to five-member Supreme Court majorities to veto the legislative governance of the nation. In fact, Ely's solution is unnecessarily *broad* in granting discretion to the justices of the Court to go outside of the Constitution. There is room for flexible adjudication to safeguard many important rights within the constitutional language itself. This fact allows the Court to address the changing needs of the nation through strict construction, or interpretivism, without asserting an unfettered and antidemocratic power to create new substantive rights. The title of his book should remind Ely that most Americans are not prepared to hand over their fates to appointed elites, even to the Supreme Court. As he notes, they would prefer to rely on democracy and distrust.

---

63. 73 U.S. (6 Wall.) 35, 44 (1868).

64. *See* C. STEPHENSON & F. MARCHAM, SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 121-22 (1972). On the links between commerce and the right to travel, see Edwards v. California, 314 U.S. 160 (1941).

65. 9 JOURNALS OF THE CONTINENTAL CONGRESS 908 (reprint ed. 1904). *See* note 27 *supra.* Justice Field, for a unanimous Court, stated that the right of free ingress into other states and egress from them is implicitly incorporated in the interstate privileges and immunities clause of art. IV, cl. 2 of the Constitution. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869). *See* CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, 162-213 (1956).