BOOK REVIEW

DEMOCRACY AND DISTRUST. By John Hart Ely.* Cambridge: Harvard University Press. 1980. Pp. viii, 268. $15.00.

*Reviewed by Ralph U. Whitten***

The central question in contemporary American constitutional law is how to develop a workable theory of constitutional interpretation without becoming impaled upon the horns of an interpretive dilemma. Those who argue that the Constitution's clauses should be applied *only* in the ways the framers and ratifiers would have applied them must justify why it is appropriate to permit past generations to bind current majorities with a governmental structure which can be altered only by an extraordinary majority of the governed. They must also explain how to interpret the Constitution when there is no evidence of how the framers and ratifiers would have applied it to a particular issue. On the other hand, those who argue that it is appropriate to apply the Constitution in ways that would have been rejected by its framers and ratifiers must explain the propriety of departing from the usual course of legal change—i.e., following established substantive rules until they are modified in accord with established procedural rules. For those who make the latter argument, the task of justification is made more difficult due to the position of the Supreme Court of the United States as the primary interpreter of the the Constitution. For the Court to depart from the applications of the framers and ratifiers of the Constitution to strike down the actions of the other institutions of government opens it to the charge that it is merely substituting its own value choices for those of the elected branches, as well as departing from the past-established rules of the game.

In *Democracy and Distrust* Professor John Hart Ely attempts to articulate a workable theory of judicial review consistent with the underlying democratic assumptions of our system. Ely labels the traditional methods of constitutional exposition "interpretivism" and "noninterpretivism."[1] "Interpretivism" is distinguished from "noninterpretivism" by its insistence that the work of the political branches not be invalidated except in accord with an inference whose starting point or underlying premise is fairly

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1. J. ELY, DEMOCRACY AND DISTRUST 1 (1980).

discoverable in the Constitution.[2] "Interpretivism" has great appeal because, according to Professor Ely, it "better fits our usual conceptions of what law is and the way it works."[3] By contrast, "noninterpretivism" appears inconsistent with democratic theory: by definition it appeals to notions "to be found neither in the Constitution nor . . . in the judgment of the political branches."[4] The problem for the "noninterpretivists," argues Ely, is to develop ways of protecting minorities from the tyranny of untrammeled majority rule without abrogating the principle of majority rule.[5]

Ely points out that "interpretivism" is incompatible with democratic theory, because it permits "the voice of people who have been dead a century or two" to control contemporary majorities.[6] The "interpretivism" to which Ely objects is a "clause-bound interpretivism," that is, the theory that constitutional clauses should be interpreted *only* on the basis of their language, with such help as legislative history can provide.[7] To Ely, it is impossible to be such an interpretivist, since the Constitution contains a number of clauses which indisputably invite one to look beyond their four corners.[8] Among the constitutional clauses which Ely says constitute "quite broad invitations to import into the constitutional decision process considerations that will not be found in the language of the amendment[9] or the debates that led up to it,"[10] are the due process,[11] privileges or immunities,[12] and equal protection clauses[13] of the fourteenth amendment, and the ninth amendment.[14]

"Noninterpretivism" is represented, in diverse forms, as a concept by which the Supreme Court must give content to these

2. *Id.* at 1-2.
3. *Id.* at 3.
4. *Id.* at 4-5.
5. *Id.* at 7-8.
6. *Id.* at 11.
7. *Id.* at 12-13.
8. *Id.* at 13.
9. Some of Ely's references to the language of a constitutional provision can be read in the abstract to mean "language without regard to context." However, other references make it clear that he means that the constitutional language *should* be read in light of its generally accepted usage at the time of framing and ratification. "Since the constitutional language (considered in light of its contemporary usage) does not generate a clear answer, responsible recourse must be had to the overall policy informing the Due Process Clauses." *Id.* at 19 n.28. Thus when Ely speaks of "open-ended" clauses, he must be read as saying that the language of these clauses, *read in context*, invites recourse to sources outside the Constitution.
10. *Id.* at 14.
11. *Id.* at 14-21.
12. *Id.* at 22-30.
13. *Id.* at 30-33.
14. *Id.* at 34-41.

"open-ended" clauses by identifying and forcing upon the political branches those values that are truly important or fundamental.[15] Ultimately, however, Ely rejects as deficient all the traditional formulas whereby "noninterpretivism" seeks to justify judicial establishment of fundamental values. In many cases, he argues, the various formulas for discovering such hidden constitutional values simply disguise the unjustifiable use of a judge's personal values in adjudication.[16] Such a method is impossible to reconcile with democratic theory: "In America it would not be an acceptable position that appointed judges should run the country."[17]

Ely finds unsatisfactory the various "checks" on the court's power that purport to limit its authority to undermine the judgments of the political branches. The idea that the judiciary, possessing neither the power of the "sword or the purse," is the branch least dangerous to political rights has been disproven by experience; the Court has demonstrated the capacity to delay the will of the political majority for decades, even if it cannot permanently thwart it.[18] Nor have the formal checks on the Court's power, such as congressional control over the budget of the federal judiciary, impeachment, withdrawal of jurisdiction from the courts, court-packing, and constitutional amendment, proved to be very significant limitations.[19] Finally, Ely labels as simply false the argument that the Court will ultimately destroy itself by frequent intervention in the political process. Because it can and has intervened in the political process without a resulting material loss of strength, the Court knows differently.[20]

Likewise, Ely rejects as unsatisfactory value sources such "noninterpretivist" theories as "natural law,"[21] "neutral principles,"[22] "reason,"[23] "tradition,"[24] and "predicting progress"—i.e.,

15. *Id.* at 43.
16. *Id.* at 44.
17. *Id.* at 45.
18. *Id.*
19. *Id.* at 46-47.
20. *Id.* at 47-48.
21. "Natural law" is an unsatisfactory source, because our society correctly does not accept the idea that there exists a discoverable and objectively valid set of moral principles that may "plausibly serve" to overturn the decisions of the political branches of government. *See id.* at 48-54.
22. Ely accepts Herbert Wechsler's argument that the Supreme Court should adjudicate constitutional disputes according to "neutral principles," that is, principles which transcend the immediate result in the case at bar and are then rigorously applied to future cases. *See* H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3-48 (1961). However, Ely correctly points out that Wechsler's theory tells us nothing about the content of the principles that should be selected; thus it is an inadequate *source* of constitutional values. *See* J. ELY, *supra* note 1, at 54-55.

predicting what the future will view as progress.[25] Ely also rejects "consensus," which he identifies as the most common of the "noninterpretivist" value sources. "Consensus" is defined as the idea that society's "widely-shared values" should give content to the Constitution's "open-ended" provisions.[26] Theoretically, "consensus" solves two problems present in the other "noninterpretivist" sources: it is complete (i.e., it can be discovered), and it is not undemocratic.[27] However, Ely argues both claims for consensus are wrong: there is no widely-shared consensus to be discovered, and as between courts and legislatures, the latter are clearly in a superior position to discover what consensus exists.[28] Furthermore, a more fundamental problem with "consensus" is that it makes no sense as a source of constitutional values for the protection of minorities.[29]

As an alternative to a "clause-bound" interpretivism and the various "noninterpretivist" methods of judicial review, Ely argues for a third approach, one which he says the Warren Court followed, albeit sometimes unconsciously. Ely styles his method a "participation-oriented, representation-reenforcing" approach to judicial review.[30] Building on the famous footnote in *United States v. Carolene Products Co.*[31] and the concept of "virtual representa-

23. "Reason" as a source of values is defined as the application of a "correct" method of moral philosophy to constitutional issues. As such, it is also unsatisfactory, because it is either an empty source, there being no single correct method of moral philosophy, or it is flagrantly "elitist and undemocratic," because it results in a selection of values biased in favor of the upper-middle professional class from which most lawyers and judges are drawn. *See* J. ELY, *supra* note 1, at 55-60.

24. "Tradition" is rejected as a deficient source of constitutional values for a number of reasons: (i) it can be invoked in aid of almost any cause, because of the room it leaves to maneuver "along continua of both space and time"; (ii) a relevant tradition's level of abstractness can be varied "to make it come out right"; and (iii) tradition is essentially backward-looking, which renders it unsatisfactory as a source of values for "open-ended" constitutional clauses which look to the future. *See id.* at 60-63.

25. "Predicting progress" as a source of constitutional values is unacceptable for a variety of reasons: (i) there is no reason to suppose that judges are good at predicting future public opinion; (ii) the method is "undemocratic" on its face; (iii) the imposition of the values of even a future majority is a mindless way of going about protecting minorities; and (iv) because today's judicial decisions will have an important effect on the values of tomorrow's majority, the technique has the effect of a self-fulfilling prophecy that allows the judges simply to impose their own values on the society. *See id.* at 69-70.

26. *Id.* at 63.

27. *Id.*

28. *Id.* at 63-67.

29. *Id.* at 68-69.

30. *Id.* at 87.

31. 304 U.S. 144 (1938). The footnote reads:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific

tion,"[32] Ely argues that two American ideals which are sometimes thought to be conflicting—the protection of popular government and the simultaneous protection of minorities from denials of equal concern and respect—can in fact be understood as arising from a common duty of representation.[33] Ely demonstrates that the original Constitution was devoted mainly to structure and left the evolution of substantive values almost entirely to the political process.[34] The general strategy of the document has not been to establish a set of substantive rights entitled to permanent protection, but rather to structure decisional processes at all levels to ensure that everyone's interests will be actually or virtually represented at the point of substantive decision-making and that the processes of individual application will not be manipulated "so as to reintroduce in practice the sort of discrimination that is impermissible in theory."[35] Further, Ely believes his "representation-reenforcing" mode of judicial review to be consistent with the American system of representative democracy[36] and to involve tasks that courts are more qualified to perform than political officials.[37]

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prohibition of the constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth . . . .

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . .; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. at 152-53 n.4. Ely states that the first paragraph is "pure interpretivism" and, as such, incomplete, because there are "open-ended" provisions in the Constitution that call for more. J. ELY, *supra* note 1, at 76. The second paragraph suggests that it is a proper function of the Court to keep the machinery of democratic government running as it should. *Id.* The third paragraph suggests that the Court should concern itself with what majorities do to minorities. *Id.*

32. The idea of virtual representation is to tie the interests of those without political power to the interests of those with it, to insure that laws enacted by the latter do not unfairly discriminate against the former. *See id.* at 77-84. Ely gives examples to demonstrate that even before the equal protection clause of the fourteenth amendment, the Constitution contained clauses, such as the privileges and immunities clause of Article IV and the commerce clause, which the Supreme Court interpreted to protect minorities by tying their interests to majorities. *See id.* at 84-86.

33. *Id.* at 86-87.

34. *Id.* at 87-100.

35. *Id.* at 100-01.

36. *Id.* at 88, 101-02.

37. *Id.* at 88, 102.

In demonstrating the consistency of his approach with representative democracy, Ely utilizes examples from decisions involving first amendment rights, voting rights, and the currently defunct doctrine of nondelegation of legislative power.[38] Ely argues that rights not explicitly mentioned in the Constitution, such as freedom of political association, have been read into the first amendment because they are essential to the functioning of the democratic process.[39] After canvassing the various approaches taken by the Supreme Court under the first amendment,[40] Ely concludes that adequate judicial review in the area should employ two complementary approaches: (i) where the evil the state seeks to protect against is not in the content of the message (e.g., a prohibition of sound trucks in residential areas after midnight), an approach which balances the costs and benefits of suppressing the communication is the only "intelligible way" of dealing with the cases; (ii) where the evil the state seeks to avert arises from the dangers of the message being conveyed, however, an "unprotected messages" approach, or one which insists "that the message fall within some clearly and narrowly bounded category of expression we have designated in advance as unentitled to protection," is proper.[41] Together, these approaches will assure performance of the minimum function of judicial review in the first amendment area: "the elimination of any inhibition of expression that is unnecessary to the promotion of a governmental interest."[42]

Regarding the "voting rights" cases, Ely insists that unblocking stoppages in the democratic process is what judicial review is all about.[43] Thus, intervention by the Court in the voting rights area is justified because the right to vote is "the quintessential stoppage," and the dimension of the rights involved cannot be trusted to our elected representatives.[44] To those, such as Justice Harlan, who argued that the equal protection clause of the fourteenth amendment was not intended to apply to voting rights,[45] Ely states that the design of the framers and ratifiers of the four-

38. *Id.* at 105-34.
39. *Id.* at 105.
40. *Id.* at 105-11. Ely discusses the "clear and present danger" test, which he labels "the specific threat" approach, and the absolutist approaches, which include the approach of Justices Black and Douglas that all speech is immune from governmental regulation and the approach which immunizes all expression except that which falls within a few clearly and narrowly defined categories, which Ely labels the "unprotected messages" approach.
41. *Id.* at 11-12.
42. *Id.* at 105.
43. *Id.* at 117.
44. *Id.*
45. *See also* R. BERGER, GOVERNMENT BY JUDICIARY 69 (1977).

teenth amendment was to state a "general ideal whose specific applications would be supplied by posterity."[46] Thus, in "voter qualification" cases, the function of judicial review is similar to its function in first amendment cases—to ensure that no one is denied the vote for no reason and that when a reason exists it is a good one.[47] On the other hand, the "reapportionment cases," to be understood, must be considered a joint product of the equal protection clause and the republican form of government clause, to the latter of which, Ely argues, it is "most comfortable" to assign "certain assumptions about the sort of representative government the Constitution contemplates."[48] The one man, one vote standard is justified as the vehicle for eliminating malapportionment, on the grounds that it is the principle least likely to get the Court involved in the "political thicket," that is, the problem of attempting to enforce an unadministrable standard.[49]

Ely agrees that popular choice means little, if we do not know what our representatives are up to.[50] However, he criticizes a standard of judicial review that would require the legislature to articulate its purposes in enacting laws, on the ground that no method exists for the Court to force the articulation whose costs do not exceed its benefits.[51] The real problem exists, he says, where the legislature refuses to draw the legally operative distinctions itself; in sum, the problem is to get legislators to legislate.[52] Essentially, therefore, Ely argues that we need to resuscitate the doctrine prohibiting nondelegation of legislative powers, in order to restore legislative accountability to the electorate.[53]

Yet the duty of representation that lies at the core of our system requires "more than a voice and a vote" to secure the protection of minorities, because the majority is always in a position to vote itself advantages at the expense of a minority or to refuse to take the minority's interest into account. At the same time, the equal protection clause cannot mean that everyone is entitled to equal treatment by every law, and the Constitution cannot "coherently be interpreted" as outlining a particular distributional pattern which will allow the Court to judge the constitutionality of a distribution merely by looking to see "who ended up with what."[54]

46. J. ELY, *supra* note 1, at 119.
47. *Id.* at 120.
48. *Id.* at 122.
49. *Id.* at 122-25.
50. *Id.* at 125.
51. *Id.* at 125-31.
52. *Id.* at 130-31.
53. *Id.* at 131-34.
54. *Id.* at 135-36.

Rather, Ely argues, a system of judicial review that is oriented to the process that brought about the distributional pattern is what is needed.[55] Such a "process oriented" mode of judicial review can be developed by focusing upon legislative and administrative motivation for governmental actions. Despite the Supreme Court's vacillations on the question whether governmental action can be invalidated because undertaken for an unconstitutional motive, Ely argues persuasively that the usual reasons for failing to examine legislative motivation are not very convincing.[56] He notes that real cases exist where unconstitutional motivation on the part of lawmakers is blatant or can readily be inferred.[57]

The doctrine of suspect classifications,[58] says Ely, serves as a handmaiden of motivation analysis.[59] The goal that a statutory classification is likely to fit most closely is the goal that the legislature had in mind; where that goal is an unconstitutional one, it cannot be urged in support of the law. Some other goal, which fits the classification less well, will have to serve as support for the law. However, suspect classifications are given "special scrutiny," which means that the legislative classification must fit the goal urged in support of the law more closely than any alternative classification, and this is unlikely where the real goal is unconstitutional.[60] Indeed, Ely demonstrates that the prevailing

55. *Id.* at 136. Ely clearly means to limit this "process oriented" system to cases where the Constitution does not give a "presumptive constitutional entitlement," such as the right to vote. *Id.* In the latter case, the right cannot be denied except in accord with principles discussed earlier in the book, for example, unless the state can show a good, or "compelling," reason for denial of the right. *Id*; see text accompanying notes 43-49 *supra*.

56. Ely describes the usual reasons as: (i) that it is very difficult to determine the legislative motivation for an action and (ii) that it is futile to invalidate a law on the ground that it was unconstitutionally motivated, because the legislature can repass it for a legitimate reason. Difficulty of determining motivation is not a good reason, because: (a) one need not determine that the *sole* or *dominant* motive for passage was unconstitutional, only that an unconstitutional motive materially influenced the legislative choice, and (b) in any event, difficulty of assigning unconstitutional motives will simply mean that it will not often be possible to conclude that a law was unconstitutionally motivated. With regard to the futility point, Ely observes: (a) that the reasons that led a court in the first instance to conclude a law was unconstitutionally motivated will cause it to be skeptical of claims of a subsequent change of heart, (b) such a change-of-heart claim will be plausible only where there exists a plausible legitimate explanation, and the existence of such an explanation will in all likelihood have precluded a finding of unconstitutional motivation in the first place, and (c) in any event, "[w]e don't regard the system as having failed when a person whose conviction was reversed because the jury was biased is reconvicted by an unbiased jury on remand: indeed we regard it as vindicated." J. ELY, *supra* note 1, at 137-39.

57. *Id.* at 139-45.

58. *Compare* note 34 *supra*.

59. J. ELY, *supra* note 1, at 145.

60. *Id.* at 145-46.

requirements of the suspect classification doctrine: (i) that the government have a goal of substantial weight and (ii) that it show that its classification fits that goal to perfection, make sense only "in proper context as a roundabout variation of motivation analysis."[61]

Ely speculates that the retreat by the Supreme Court from a large number of suspect classes to a relatively smaller number is due to a failure of theory: how to identify discrete and insular minorities deserving of suspect classification treatment without rendering the list of suspect classes overly broad or unduly narrow.[62] Ely argues that suspect classification status is deserved for classifications where the chances of legislative misapprehension about the relevant facts is high.[63] The Court should identify these types of classifications by focusing on the process that generated the legislation to determine whether factors were present that suggest a likelihood of legislative misapprehension, thus increasing the probability of errors in classification.[64]

The mutability of a classification can render it defensible, because mutability produces empathy. As Ely says, "the facts that all of us were once young, and most expect one day to be fairly old, should neutralize whatever suspicion we might otherwise entertain respecting . . . laws . . . that comparatively advantage those between, say, twenty-one and sixty-five vis-a-vis those who are younger or older."[65] However, because empathy can exist without mutability, we should be interested in whether a minority is "discrete and insular" in a "social sense," which diminishes the liklihood of social intercourse between the minority and majority groups to which most legislators belong. Ely's argument is that increased social intercourse between minorities and majorities teaches the latter that the minorities are not so different after all, while diminished social intercourse does nothing to counteract stereotypes which produce errors in legislative classification.[66]

Ely's system results in some interesting applications. Thus, for example, he suggests that laws passed prior to the nineteenth amendment containing sexual classifications should be invalidated because of the "block" which existed prior to that time on the polit-

61. *Id.* at 146-48.
62. *Id.* at 148-57.
63. *Id.* at 157. Ely also includes "first degree prejudice," or prejudice based on dislike of a minority, as deserving of suspect classification status, but this type of prejudice will obviously be easier to detect in a classification than the sort discussed in the text.
64. *Id.* at 157-60.
65. *Id.* at 160.
66. *Id.* at 160-61.

ical ability of women to counteract sexual stereotypes. However, if the same law is reenacted after invalidation, its validity should be sustained because women are now in a position to protect themselves politically.[67] On the other hand, affirmative action programs are not constitutionally suspect under the system, because there is no danger of the majority generally denying its own members of equal concern and respect, underestimating the needs and deserts of its own members, or overestimating the costs of devising a system of more individualized inquiry as a substitute for a classification.[68]

The most serious problem with Ely's theory is its treatment of the "open-ended" clauses of the Constitution. The "representation-reenforcing" mode of judicial review is used not only to resolve issues that were never foreseen by the framers and ratifiers of the clauses; it is also used to justify specific applications of the "open-ended" clauses that clearly would have been rejected by their framers and ratifiers. To perceive the problem with this theory, it is necessary to understand the distinction between the "meaning" or "general connotation" of a constitutional clause and "applications" or "specific denotations" of the clause.[69]

"The connotations of words define their meanings, whereas their denotations consist merely of specific instances falling within those meanings. Consequently, changes in connotation are changes in meaning, but changes in denotation are not."[70] Ely correctly argues that the use of general language in a constitutional clause is a delegation of authority to future constitutional decision-makers: it is designed to allow decision-makers to include within the clause specific instances that are within the meaning or connotation of the clause, but which were not foreseen at the time of framing and ratification. Stated simply, general language is used to cover a generic problem, even though some aspects of the problem are as yet unknown. Furthermore, even specific instances known to be within the scope of the language used at the time of framing and ratification can, under appropriate circumstances, change without violating the meaning of the language and exceeding the outer boundaries of the constitutional clause: for example, where the factual premises of a particular application have

67. *See id.* at 164-70. Again, Ely must here be read as referring only to classifications that may be based on legislative misapprehension, as opposed to cases of "first degree prejudice." *See* note 63 *supra.*

68. J. ELY, *supra* note 1, at 170-72.

69. *See generally* R. DIKERSON, THE INTERPRETTION AND APPLICATION OF STATUTES 76-77 (1975).

70. *Id.* at 128.

changed, the application can also be changed without exceeding the limits of the clause.[71]

This last point is of special importance in assessing the legitimacy of an application that would have been rejected by the framers and ratifiers, even though it appears to fit within the general meaning of the language used. It is also common to speak of this situation as involving an "application" or "specific denotation" of language,[72] but it can be more clearly understood if it is viewed as an "exception" to the general rule established by a clause.[73] Such "exceptions" to the clause can also be changed or eliminated if the facts upon which they are predicated change or vanish.[74] Under Ely's theory, however, it is clear that "exceptions" to the general rule established by the framers and ratifiers of a clause can change *without* regard to changes in circumstances. This can be demonstrated by examining Ely's analysis of how the equal protection clause should be applied today to statutes prescribing the death penalty.

Ely argues that a plurality of the Justices in *Furman v. Georgia*[75] were correct in holding Georgia's death penalty unconstitutional on the grounds that its application by judges and juries was too discretionary.[76] This discretion, analyzed under Ely's system, permitted prejudice to operate in the decision process against politically powerless groups.[77] However, Ely argues that there is no system that eliminates discretion sufficiently to obviate the dangers of this sort of prejudice.[78] Thus, Ely concludes, the best solution is a "prophylactic equal protection" holding outlawing the death penalty altogether.[79]

It is obvious that this application of the equal protection clause would have been rejected by the framers and ratifiers of the fourteenth amendment. Indeed, Ely admits that there is no consensus

71. *See id.* at 127-29. *See also* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 157-58 (1975).

72. *See* the authorities cited in note 71 *supra*.

73. Because, all other things being equal, these specific instances will fall within the meaning or connotation of given language, but for their arbitrary exception from it, they do not seem to be applications of the language used at all. Rather, they are "nonapplications" of it, or "exceptions."

74. *See* the examples cited by the authorities in note 71 *supra*.

75. 408 U.S. 238 (1972).

76. J. ELY, *supra* note 1, at 173.

77. *Id.*

78. For example, mandatory death sentences for particular crimes will not work, because there still exists the discretion to convict for lesser-included offenses or to acquit in cases where the jury is confronted with a defendant who is a member of a favored group, but the jury will not exercise this discretion where confronted with a defendant who belongs to a disfavored group. *Id.* at 174.

79. *Id.* at 176.

in our society against the death penalty even today.[80] Furthermore, there have been no changes in the underlying factual circumstances between the date the fourteenth amendment was ratified and today that would justify a current acceptance of the application.[81] The question is, therefore, whether Ely's "representation-reenforcing" mode of judicial review may be justifiably applied in this fashion.

It is difficult to see Ely's justification for relying on connotation, or general meaning, to the exclusion of denotation, "exception," or specific meaning in this manner. If the ratification process is to be coherent, those denotations of words generally understood to be within the meaning of the language used must be considered a part of a constitutional clause until their legitimacy is altered by changes in circumstances. Similarly, where "exceptions" to the general scope of the language exist that would have constituted a part of the general understanding of a clause's effect, they must remain "exceptions" until changes in circumstances render their purposes obsolete. Both results follow from the necessity of establishing some common ground between the framers and ratifiers of a constitutional clause. "The doctrine of ratification premises that the principal knows what he is ratifying."[82] The key to the principal's knowledge of what he is ratifying, in turn, depends upon the "general understanding" of the language of the clause submitted to the states. This "general understanding" will surely extend to the connotation, or suggested meaning, of the language; but it will, practically speaking, also extend to denotation, or specific applications of meaning, and to what I have labeled "exceptions." Constitutional clauses, after all, are designed to operate as legal rules. To understand their operation as legal rules the ratifying bodies must be able to focus not only upon connotation, but also, to the extent that desire and foresight permit, upon existing denotations and "exceptions" as well. Separating the latter two elements of meaning from the constitutional clause after ratification would, therefore, pose a significant danger of defeating the expectations of the ratifiers about how a clause would operate.

Thus, to read into a constitutional clause applications un-

80. *Id.* at 173.

81. The same discretion to apply the death penalty in a prejudiced fashion existed in 1868 that exists today, with the possible exception that the feared prejudice was worse in 1868. To the extent that Ely himself has argued that increased social interaction between minorities and majorities diminishes majority prejudices, it would seem clear that such social interaction is more likely today, because of increased population density, the advent of mass media, increased ease of travel, and so forth.

82. R. BERGER, GOVERNMENT BY JUDICIARY 69 (1977).

known to its framers and ratifiers, but which are consistent with the connotations of its language, is to remain faithful to the purpose for which the clause was established. When, in addition, the applications are formulated by reference to a standard of judicial review that limits the power of the judges to substitute their value choices for those of the legislature, such as Ely's "representation-reenforcing" mode of review, the applications will also be consistent with the principles of majority rule and minority protection. By insisting that the starting point of judicial review be the language of the Constitution, Ely's theory thus preserves the benefits of "interpretivism," as he wishes to do;[83] and by permitting applications of the constitutional language unknown to the framers and ratifiers, the theory is not encumbered with "interpretivism's" disadvantages. However, when the theory is used to permit applications of the constitutional language that would have been rejected by the framers and ratifiers, especially where we strongly suspect that such "exceptions" to the language would have been essential to ratification of the clause, then the benefits of "interpretivism" have been discarded along with its advantages. The Constitution is no longer the starting point for judicial review, because its limits as understood at the time of framing and ratification have been ignored. In the absence of changed circumstances justifying the rejection of these understood limits, the judges have merely substituted their own values favoring "progress" for those of the persons who established the clause.

Despite this criticism, *Democracy and Distrust* must be ranked overall as a work of major importance in American constitutional thought. Ely's effort is no mere apology for some existing constitutional theory or for the work of a particular Court. It is a sincere and substantial effort to eliminate the existing flaws in the dominant constitutional theories of our time. Ely's criticism of the narrowest forms of "interpretivism" and of "noninterpretivism" alone make the work required reading for serious students of constitutional law. Even if I am correct about the flaws in Ely's approach to the "open-ended" clauses of the Constitution, these detract only slightly, if at all, from the work. Of far more general importance than his reading of these clauses is his "representa-

83. Ely states:

> It might even be hoped that this broad form of interpretativism is capable of avoiding the pitfalls of a narrower (or "clause-bound") interpretivism and at the same time preserving those comparative advantages of an interpretivist approach that we canvassed in Chapter 1. In fact, two chapters hence I shall be arriving at much that position and making much that claim.

J. ELY, *supra* note 1, at 12.

tion-reenforcing" mode of judicial review, which constitutes a valuable analytical tool at least in the many cases where there is little or no evidence about how the framers and ratifiers of a clause would have resolved a given constitutional issue.

Ely's method represents a major advance in constitutional thinking in several respects. First, it is a method that permits application of the "open-ended" clauses to cases of first impression, yet maintains definable limits on the judicial power to subvert majoritarian processes by substituting judicial value choices for legislative ones. Even though the major vehicle of Ely's theory is membership in politically dominant groups, producing a potential danger that the position of individuals within majority groups will not be adequately protected, it would be far better to live completely within Ely's scheme of judicial review than with any suggested alternative I have seen. In the long run I suspect that more individuals within majority groups would suffer from any "noninterpretivist" mode of review than would from Ely's scheme.

Second, the "representation-reenforcing" mode of judicial review is both a complete and a manageable theory. It thus provides discoverable sources for use by the judiciary and limits the judicial branch of government to the performance of tasks that fit its capabilities.

Finally, the method, as Ely promised, is principled. At the same time, it requires that the Court adhere to one of the most important traditional limits on the judicial power. Specifically, Ely's method requires resort to preexisting sources in the Constitution when "filling in" the content of "open-ended" constitutional provisions. In my view, this last requirement is an indispensable limiting element of judicial action within our system of separated powers.

An excellent argument can be made that the primary problem of modern democracies is the breakdown of the traditional system of separation of powers. In particular, the accretion of absolute or near absolute power to the legislative branch of government seems to be the main villan.[84] This breakdown may well require a major restructuring of the limits on legislative power in the future. Until the restructuring can be accomplished, however, Ely's "representation-reenforcing" mode of judicial review, especially with its suggested revitalization of the nondelegation of legislative powers doctrine, may offer the best practical means of living with the imperfections of the existing order.

84. *See* 3 F. HAYEK, LAW, LEGISLATION AND LIBERTY 20 *passim* (1979).