



Democracy and Distrust: A Theory of Judicial Review

John Hart Ely

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This powerfully argued appraisal of judicial review may change the face of American law. Written for layman and scholar alike, the book addresses one of the most important issues facing Americans today: within what guidelines shall the Supreme Court apply the strictures of the Constitution to the complexities of modern life?

Until now legal experts have proposed two basic approaches to the Constitution. The first, "interpretivism," maintains that we should stick as closely as possible to what is explicit in the document itself. The second, predominant in recent academic theorizing, argues that the courts should be guided by what they see as the fundamental values of American society. John Hart Ely demonstrates that both of these approaches are inherently incomplete and inadequate. *Democracy and Distrust* sets forth a new and persuasive basis for determining the role of the Supreme Court today.

Ely's proposal is centered on the view that the Court should devote itself to assuring majority governance while protecting minority rights. "The Constitution," he writes, "has proceeded from the sensible assumption that an effective majority will not unreasonably threaten its own rights, and has sought to assure that such a majority not systematically treat others less well than it treats itself. It has done so by structuring decision processes at all levels in an attempt to ensure, first, that everyone's interests will be represented when decisions are made, and second, that the application of those decisions will not be manipulated so as to reintroduce in practice the sort of discrimination that is impermissible in theory."

Thus, Ely's emphasis is on the procedural side of due process, on the preservation of governmental structure rather than on the recognition of elusive social values. At the same time, his approach is free of interpretivism's rigidity because it is fully responsive to the changing wishes of a popular majority. Consequently, his book will have a profound impact on legal opinion at all levels--from experts in constitutional law, to lawyers with general practices, to concerned citizens watching the bewildering changes in American law.

Democracy and Distrust: A Theory of Judicial Review Details

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Zahreen says

This is another book I had to read for Prof. Ackerman's class, which I recently re-read. I thought it was an interesting enough book to add to my GoodReads list. It's well written and not dense, like most legal texts are. I found it very engrossing, because of his colloquial style.

In this book, Ely is attempting to solve the countermajoritarian difficulty of judicial review (the idea that the Court, when exercising judicial review, that it is going counter to the will of the majority). He does this by stepping away from a values-oriented constitutional review (which most constitutional scholars have been advocating), but basing judicial review on representation-protection. In other words, the Court should protect the democratic process and people's access to the democratic process.

If you want a book to read that will increase your knowledge in general, that is not boring, this is a good book to pick up.

Vincent Li says

A rare book that combines brevity, wit, and powerful ideas. I was shocked by how accessible the book is, and I would recommend it even to non-lawyers. I am extremely impressed by how entertaining the book is, without losing the depth and clarity of Ely's very original ideas.

The book more or less introduces political process theory, a constitutional theory that the judiciary should intervene when the legislature cannot be trusted to properly represent the interests of the people. This is a response to the counter-majoritarian difficulty, which is the fact that every time a court strikes down a law as unconstitutional, the court in essence denies the legislature, which represents the people, from enacting their will. The legitimacy of judicial review is especially questionable since federal judges are unelected, and hold life tenure based on good behavior. The power of the court to strike down laws then appears to be in tension with the democratic belief that the people should rule. This book is essentially Ely's response to that tension.

Ely starts off by contrasting what he argues are the two dominant modes of constitutional theory, "interpretivism" and "noninterpretivism". Interpretivism purports to stay in the four corners of the constitution and essentially denies the judicial enforcement of unenumerated rights. Noninterpretivism seeks to enforce unenumerated rights judicially by looking at natural law, reason, neutral principles, consensus, and tradition. Ely argues that interpretivism is doomed because the constitution itself, particularly in the 9th amendment and even in the privileges and immunities clause of the 14th are open textured delegations to the future to look outside the text. Ely then refutes the noninterpretive sources of constitutional theory as either indeterminate, undemocratic, insufficiently protective of minorities, or unsuited for the judiciary to discover (this section is worth the read alone).

Ely then puts forward his affirmative theory that the judiciary should essentially protect the political process from legislative malfunction. Ely argues that the constitution is primarily about process, not substance and that the substantive portions i.e. the contracts clause and the second amendment have been judicially read out of the constitution. (this section too, is novel and worth the price of admission). Even amendments that are at first blush substantive actually contribute to the proper functioning of representative democracy. Ely argues that the political process theory gives clear implications for the portions of the constitution that are related to

the political process. For example, Ely argues that first amendment doctrine takes two approaches to restricting speech, a balancing test approach and a categorical approach the protects per se or does not protect per se certain types of speech. Ely argues that legislators cannot be trusted with objectively balancing content based restrictions, so the per se approach should dominate for content-based restrictions but the balancing test approach should dominate for restrictions on the manner of speech. Ely similarly laudes the courts approach towards the right to vote cases (in particular the administrability of the one person one vote principle), since the current legislature could attempt to entrench itself.

Ely then discusses the Carolene Products footnote in relation his political process theory. In short, while the constitution and political process theory celebrate majoritarian rule there may be times that the minority cannot muster the electoral power to protect itself from the majority. Ely argues that in many cases, this issue can be resolved by tying the interests of minorities to the majority, and as an interesting example discusses Marshall's opinion in *Mcculloch*, which argued that Maryland cannot tax the federal branches with specific taxes that do not affect the Maryland banks because the Maryland legislature are likely to be unresponsive to the protests of non-Marylanders (Ely argues for the virtues of virtual representation, an irony he notes). But in some circumstances that cannot practically occur, so the court may have a role in examining closely under equal protection certain laws that have impacts on minority populations. What follows is a fascinating discussion of strict scrutiny. Ely does not think that strict scrutiny should force legislatures to declare their purpose, since the legislatures can always come up with vague purposes or laundry lists. Ely argues that immutability has been treated as a crucial ingredient to suspect classes because of the undeterrability of immutable characteristics. Ely also discusses the complexities of applying strict scrutiny to the categories of women and gay rights. In particular Ely argues that the defense of some gender-based laws by women means that no consensus amongst women have been formed over the issue, and the judiciary should not assume that one exists. However, Ely does argue that laws before the 19th amendment passed could be suspect and there is a colorable argument that they should be sent back to the voters (which now include women) for either rejection or ratification. I found Ely's discussion on stereotypes interesting. Ely argues that to a degree the use of stereotypes is inevitable where the legislators are making general laws. General laws rely on generalizations, but Ely argues that sometimes legislators cannot be trusted with balancing the veracity of the generalization against the costs of the general law to the "exceptions". This often occurs when the majority is making general laws that affect minorities, as majorities are prone to stereotypes that aggrandize themselves at the expense of the minority.

Part of the fun of reading the book is that it is also an interesting time capsule for the state of law at that time. For example, Ely does not anticipate the immediate scrutiny that will be applied to laws referring to gender. Ely expects the 27th amendment to be the ERA (which was rejected by the states. Ultimately the 27th amendment was an amendment proposed by the First Congress that was rediscovered by a bored college student who started a letter campaign). Ely also laments the rise of the administrative state. He argues that there is no point in forcing transparency in government if elected officials simply pass the buck of politically hard decisions by delegating to faceless bureaucrats. And as mentioned before, Ely argues that judiciary had read the second amendment out of the constitution.

The book is endlessly fascinating. But for the fact that Ely is a brilliant writer and his insights are interesting, the book can be accused of being disorganized (typical of legal theory books that start out as a series of articles). It is not a systemic treatment that marches down every avenue of possible objection and nuance. But it is a book that marches down the interesting avenues, and in a matter that leaves the reader in awe of the journey.

Paul Killebrew says

Do people other than law students read this?

B says

Much more in here than I think I got out of it. Not sure how much of this is considered "normal" today. Wonder what it was like when it came out.

Rory Foster says

Interesting and thoughtfully written, but for me the distinction between process and substance isn't as clear or helpful as Ely argues. Also, although many of the issues addressed are highly relevant today, many of the examples are starting to show their age.

Wes says

I'm about 68% in on the view espoused by this book

Soren Schmidt says

I think Ely unlocked the key to the judicial role in a democratic system in this book. It has forever changed how I think about the law. This is the real deal.

The American Conservative says

"One of the most interesting liberal works of judicial philosophy, one that tries to grapple honestly with the countermajoritarian difficulty. I found it quite persuasive when I first read it, and probably even more so now."

- Noah Millman

Paul Gibson says

This book is a classic in its field, and for good reason. Surprisingly, this book (timely although written in 1980) picks up where my review of, "No State Shall Abridge" left off. Near the beginning of "Democracy and Distrust", Mr Ely talks about the 14th amendment and then proceeds to review the 9th amendment. I recall reading the portion on the 9th back in the 80's when this section was reprinted in the first volume of a collection entitled, "The Rights Retained by the People". I was so impressed I noted his name, John Hart Ely. I'm surprised it took me this long to get around to reading this fine book. This book is subtitled, "A Theory of Judicial Review". It stresses the importance of the democratic process while it considers as political issues as well.

Many people, scholars included, tend to enter arguments by defending their belief from an ideological standpoint. But then there are the few Like Ely who begin by examining difficult questions while researching and thinking their way toward well reasoned conclusions.

There is nothing simple about this book. The arguments are difficult but enlightening and fun! It is always wonderful when someone knocks me out of my complacency by making me consider things I hadn't given fair consideration.

For those who don't know me, I tend to read footnotes and often check them back through their sources. I seldom believe what I read even if I find myself agreeing with some aspects. And I have to say Ely's footnotes are some of the best around. He had me laughing my head off. As with contributors to the 9th amendment volumes I've read, and as with Micheal Kent Curtis' book on the 14th amendment, Ely takes on Raoul Berger (no less than 4 pages of notes!) and points out his misquotes, or I'll call them "disquotes" (I'll even put this in quotes :); even going as far as to quote and challenge misquotes of Shakespeare's Hamlet. Fun stuff. If you are interested in the US Constitution and concepts such as judicial review, don't miss this book.

Richard says

Referred to in the National Constitution Center podcast, Jeffrey Rosen answers your questions about constitutional interpretation.

Samir Salifou says

This book is very interesting for those that wish to understand the American constitutional system a little better. The author is detailed in his argument about the fallacy of a clause-bound interpretivism. He then analyses the different values-based approaches to constitutional interpretation by delving into theories such as "Substantive Due Process", "Natural Law", and Tradition. In the end the author attempts to highlight the ethos of the constitution and its evolution from a structural document, which laid out how the government is to function, to one that empowered the Courts to play the role of an arbiter that serves a counter majoritarian function in the American representative democracy, insofar as it allows for equal participation and protection of minority rights. At the same time the author rejects the notion that within this function the constitution grants the Courts a role in the substantive questions of the day.

This book is very detailed and well argued. The author was a well-respected legal theorist and took care to develop every point and counterpoint. I recommend this to all.

FiveBooks says

Lawyer Chibli Mallat has chosen to discuss John Hart Ely's *Democracy and Distrust* , on FiveBooks as one of the top five on his subject - Maverick Political Thought, saying that:

"Of the immense legal literature on US democracy and the role of the American Supreme Court this is the one book that has most profoundly affected my understanding of the rule of law, and of the role of the judges in compensating for the failures of democracy. Democracy is defined by majoritarianism – you win the majority of the vote and you rule. But there are minorities who don't have the means to counter the rule of the majority by definition, because they are a minority and don't have enough votes. This judicial counter-

majoritarianism started under Chief Justice Earl Warren, for whom Ely clerked, when the Supreme Court ruled to end bus and school segregation in 1954, sparking the Civil Rights movement which eventually led to Barack Obama becoming president.”

The full interview is available here: <http://five-books.com/interviews/chibli-mallat>

Kara says

If you are at all interested in the law, you must read this book. If you are at all interested in the constitution, you must read this book. If American jurisprudence and the politics of the Supreme Court interests you at all, you must read this book.

Professor Ely is a genius. Every single Supreme Court justice of the last thirty years or so respected him. He is one of the most quoted legal scholars ever. And a large percentage of those quotes come from this book.

So get it and read it.
