

# Symposium

## The Coherentism of *Democracy and Distrust*

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## INTRODUCTION

A quarter of a century after its publication, *Democracy and Distrust*<sup>1</sup> remains the single most perceptive justificatory account of the work of the Warren Court and arguably of modern constitutional law more broadly. Yet the continuing influence of John Hart Ely's process theory of American constitutional law may seem surprising, given that the account has been incisively criticized as both too limited and too sweeping. Beginning with Laurence Tribe's *The Puzzling Persistence of Process-Based Constitutional Theories* and culminating in the work of Ronald Dworkin and others, critics have argued that the representation-reinforcing approach to interpreting the Constitution is no less laden with controversial value judgments than other, more openly substantive methods and, therefore, that judicial review ought not be restricted in the way Ely thought it should be.<sup>2</sup> From the other side, those whom Ely called "interpretivists" have invoked the same set of arguments as a basis for concluding that the Constitution's open-ended provisions should be given neither substantive nor procedural content apart from what is narrowly entailed by the original understanding of its Framers and ratifiers.<sup>3</sup>

In light of these mirroring critiques, what accounts for the staying power of *Democracy and Distrust*? The answer, to which Ely himself points in the opening pages of the book, is the popularity of representative democracy.<sup>4</sup> "We have as a society from the beginning," he writes, "and now almost instinctively, accepted the notion that a representative democracy must be our form of government."<sup>5</sup> By making representative democracy the centerpiece of his account of judicial review, Ely trades on this deeply rooted instinct. Throughout *Democracy and Distrust*, he invokes

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

2. See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 76-81 (1996) (arguing that the distinction between enumerated and unenumerated rights, which is central to Ely's theory, is incoherent); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063, 1067-72 (1980).

3. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143-60 (1990).

4. Following Ely himself, in these pages I use terms such as "democracy," "representative democracy," and "democratic participation" somewhat interchangeably. I recognize that these and other terms such as "majority rule" may convey important differences in meaning in various contexts and that Ely may be legitimately criticized for underspecifying exactly what form of government he had in mind when he used them. Because I am less interested in applying Ely's method than in understanding the overall nature of his project, these differences are largely irrelevant to my purposes here.

5. ELY, *supra* note 1, at 5.

“the basic democratic theory of our government”<sup>6</sup> as the standard against which an approach to judicial review should be measured.

Although Ely ultimately attaches weight to the value of representative democracy because of its longstanding and continuing acceptance by the people, the core of his affirmative argument—which appears in chapter four—purports to derive that value principally from the constitutional text and structure. In barely fourteen pages he establishes that most of the Constitution consists of structural provisions about offices, elections, and so forth, going on to explain that even some of the relatively few provisions setting forth individual rights might also best be understood as structural or procedural.<sup>7</sup> Having apparently derived the democratic criterion from the Constitution’s text and structure, Ely devotes the balance of *Democracy and Distrust* to explaining how that principle can be used to guide judicial interpretation of open-ended provisions like the Ninth Amendment and the Fourteenth Amendment’s Equal Protection and Privileges or Immunities Clauses.<sup>8</sup>

In getting the project off the ground, however, the text and structure do not bear the weight that Ely appears to place on them in chapter four. Given the Constitution’s manifest interest in fracturing the authority of any actor or institution to speak on behalf of the people as a whole, one might at least as readily infer the opposite master principle of limited government, a principle that is also furthered by the document’s substantive rights provisions. If representative democracy were really the guiding principle that Ely claims, there would seem to be little need for a written constitution at all, except perhaps to specify, as in pre-Human Rights Act Great Britain under the classical Diceyan conception, that the national legislature is sovereign.<sup>9</sup>

In any event, no master principle—not representative democracy, limited government, individual liberty, equality, free enterprise, or any other principle—can plausibly be made to stand for the whole of the Constitution. It is the purpose of the document to frame a government that serves multiple, often conflicting aims.

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6. *Id.* at 45.

7. *See id.* at 88-101. Ely nonetheless acknowledges that it “would be ridiculous” to assert that the Constitution is devoted entirely to matters of process and structure. *Id.* at 92.

8. *See id.* at 101-83.

9. And of course, Great Britain seemed to get along fine without even that sort of ultraminimalist written constitution. I say “seemed” because one can question whether Great Britain ever truly had a system of parliamentary (as opposed to popular) sovereignty. *See* Rivka Weill, *Dicey Was Not Diceyan*, 62 CAMBRIDGE L.J. 474 (2003). One can also question whether Dicey himself believed in the simpler account. *See id.* at 492-93.

If *Democracy and Distrust* thus sets forth an implausible positive account of the Constitution, it nonetheless seems to provide an attractive normative account of judicial review. The central principle of the Constitution is not democracy, but the central problem facing life-tenured judges charged with enforcing open-ended language like that found in the Bill of Rights and the Fourteenth Amendment is one of reconciling their job with democracy. That is not because the very concept of democracy requires that all important decisions be made entirely by politically accountable bodies. It is because in the absence of some set of limiting principles to govern interpretation of the Constitution's open-ended provisions, there would be nothing to stop courts from entirely supplanting politically accountable bodies. Such a state of affairs would be inconsistent with a Constitution that makes representative democracy a very important principle.

The normative argument I have just sketched on Ely's behalf is nonetheless still partly positive. If a constitution manifested no concern with self-government—if, for example, it set forth judicially enforceable limits on government power without empowering the people, as in, say, a system of limited benign dictatorship—then a theory of representation reinforcement would have little purchase as an account of how the judiciary ought to enforce that constitution. So the fact that the actual Constitution embraces a considerable measure of popular rule does indeed play a substantial role in the argument for representation-reinforcing, and only representation-reinforcing, judicial review of open-ended provisions.

But, to repeat, the argument ultimately succeeds because of the widespread normative appeal of democracy. As Ely explains in the book's opening passages, in the modern world we almost reflexively value self-government. Thus, for constitutional lawyers, the Court has a countermajoritarian difficulty; Congress does not have a "counterindividual" difficulty. If we took limited government as our starting point, we might well see matters differently. Yet democracy comes first. To be sure, we as a people greatly value limits on government power as well as representative democracy, but, to use Madison's phrase, judicial delineation and enforcement of these limits is at best "auxiliary" to government's "dependence on the people."<sup>10</sup> So democracy turns out to be

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10. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). I say "at best" because when Madison wrote these words he was still committed to the view that, given the strategy of enumerated powers, the Constitution did not need to include a Bill of Rights. The "auxiliary" precautions to which he referred in *Federalist No. 51* were the structural mechanisms limiting democracy that comprised the original Constitution. In the course of the ratification debate, however, Madison came to see how individual rights could serve the same purpose. See LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 6 (1991).

important both for its own sake—so that the people can carry out their projects—and for limiting government’s potential excesses.

That is the largely unspoken piece of Ely’s argument: that representative democracy is good. Stated that way, the point sounds banal, and it is. But is it even true? Is democracy good? *Democracy and Distrust* argues that representative democracy is not—or at least is not inevitably—self-sustaining; it may need the aid of an unelected judiciary armed with a broadly worded constitution. The book takes for granted the more basic point that democracy is worth sustaining.

I am not suggesting that *Democracy and Distrust* is a flawed work for its failure to make an argument for the value of democracy. Ely was perfectly justified in assuming that his audience would see its value. But the value of democracy—as opposed to monarchy, autocracy, theocracy, and other systems of government—is not universally acknowledged.<sup>11</sup> More importantly, even among those who value it, there are substantial differences about how and how much to value the popular will. Other than the fact that most of his audience would share his view, what justified Ely—and Alexander Bickel and others—in casting democratic participation as central to our constitutional system, such that the framing of *Democracy and Distrust* as a response to a countermajoritarian difficulty seemed and still seems perfectly natural?

This article suggests a tentative answer by forging a link between Ely’s work and that of coherentists like Ronald Dworkin and John Rawls. Critics of Rawls’s *A Theory of Justice*<sup>12</sup> argued that, where Rawls purported to derive universal principles of political justice, he in fact simply affirmed principles of liberal democracy common to the twentieth-century West.<sup>13</sup> In his successor volume, *Political Liberalism*, Rawls acknowledged the socially and historically contingent character of his political principles but

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11. See AMY CHUA, WORLD ON FIRE: HOW EXPORTING FREE-MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY 262 (2003) (citing an infamous champion of so-called Asian values for the proposition that one man, one vote is merely one of many possible forms of government that meet human needs).

12. JOHN RAWLS, A THEORY OF JUSTICE (1971).

13. See, e.g., ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (2d ed. 1984) (questioning the possibility of rational argument absent agreement on a conception of the good); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 28-47 (2d ed. 1998) (disagreeing with the picture of human identity that Rawls’s theory purportedly assumes—a human identity artificially isolated from community influences and obligations); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 79 (1983) (rejecting, as unhelpful in the real world, the Rawlsian effort to root political justice in a very small number of abstract principles). For the feminist version of the argument, see, for example, SEYLA BENHABIB, SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS 2-3 (1992) (critiquing Rawls along with Enlightenment reasoning more generally); and Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1713 (1990) (associating the values advanced by Rawls with masculinity).

denied that this contingency rendered these principles any less principles of justice.<sup>14</sup>

Ely could have made a parallel maneuver. He might have argued that, although representation reinforcement is not simply entailed by the Constitution as a matter of text and structure, it is nonetheless the best account of our collective understanding of the function of judicial review in a constitutional democracy. Indeed, there are many passages in *Democracy and Distrust* that suggest that Ely understood his account of American judicial review as contingent in just the same way that Rawls came to acknowledge that his account of liberal democracy was. This article pulls together these “contingentist” strands to fashion—and then critique—a prolegomenon to a work that would be to *Democracy and Distrust* what *Political Liberalism* is to *A Theory of Justice*.

Part I describes how, under the conventional reading, *Democracy and Distrust* trades on the reader’s sympathy for democracy. It concludes that someone who does not come to the book with that sympathy will not find enough in the Constitution itself for Ely’s argument to be successful.

Part II sets forth a coherentist version of Ely’s argument along the same lines as, albeit with content that differs from, the sort of account of constitutional practice given by Dworkin. By “coherentism” I mean simply a method of understanding a practice, such as constitutional law, that aims to make the best sense of that practice as a whole.<sup>15</sup> In arguing that Ely’s theory is best read as coherentist, I make no claim to novelty; I have little doubt that Ely himself would have readily accepted that his account was intended to be coherentist.<sup>16</sup> My claim is simply that recognizing the coherentist character of Ely’s argument enables us to see how widespread public acceptance of democratic principles can count in favor of those democratic principles in a noncircular fashion. However, calling attention to the coherentist character of Ely’s argument also calls attention to some

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14. See JOHN RAWLS, *POLITICAL LIBERALISM*, at xx (paperback ed. 1996) (rejecting “the so-called Enlightenment project of finding a philosophical secular doctrine, one founded on reason and yet comprehensive,” in favor of “work[ing] out a conception of political justice for a constitutional democratic regime that the plurality of reasonable doctrines [held by its diverse citizens] might endorse”).

15. Dworkin typically refers to his own approach as “interpretive” rather than coherentist, see RONALD DWORKIN, *LAW’S EMPIRE* 46-49, 68-73 (1986), but I use a different terminology here to avoid confusion with Ely’s use of the term “interpretivism” to mean something like “textualism” or “originalism,” see ELY, *supra* note 1, at 1. For simplicity, I also use “coherentist” to refer to what Rawls and others call “constructivist” claims. For a discussion of the similarities and differences between reflective equilibrium in the constructivism of Rawls and the principle of integrity in Dworkin’s version of interpretation, see James E. Fleming, *Constructing the Substantive Constitution*, 72 *TEX. L. REV.* 211, 227 (1993) (fitting Ely into this pattern).

16. See *Commentary*, 56 *N.Y.U. L. REV.* 525, 527-28 (1981) (remarks of John Hart Ely) (describing the interpretive process as one that aims for reflective equilibrium).

familiar objections to coherentism. Through principal reliance on the work of Rawls, Part II concludes by exploring how coherentists can respond to what I regard as the most powerful of these objections—namely, that an account of some practice (such as judicial review) can be coherent but wrong, at least as measured by some external normative yardstick.

Part III points to, and then elaborates, a further link between Rawls and Ely: Both advocate a system of government in which the basic political framework—for Rawls the “basic structure” and for Ely simply the Constitution—contains largely procedural guarantees that are thinner than the substantive values individual members of the society hold. As I elaborate, Ely believes that a well-constructed constitution should be almost entirely procedural,<sup>17</sup> principally on democratic grounds. Even today’s supermajority, he claims, has no right to enshrine against future legislative revision those values that we deem fundamental. Although I raise doubts about whether it is ever truly possible for constitution *writers* entirely to avoid giving expression to the substantive values they hold most fundamental, I conclude that Ely’s argument may work better at one remove. In a book about judicial review, Ely need not persuade us that We the People lack the authority to enshrine our substantive values in the Constitution, but if he can make that claim even plausible, then he has gone a long way toward demonstrating that politically unaccountable judges interpreting ambiguous texts lack the authority to enshrine their substantive values in their reading of the Constitution.

#### I. IS DEMOCRATIC PARTICIPATION A PRINCIPLE TO GUIDE CONSTITUTIONAL INTERPRETATION?

The core of *Democracy and Distrust* appears to consist of a two-step argument: (1) The central value of the Constitution is democratic participation, and, therefore, (2) in searching for limits on how to interpret the open-ended provisions of the Constitution, judges should be guided by the principle of democratic participation. It hardly takes a professional logician to notice that (2) does not follow inexorably from (1). Even if we grant that the Constitution is mostly or almost entirely concerned with establishing the ground rules for self-government in the American republic, it would still be possible that the few open-ended provisions should be interpreted more substantively.

But I want to put that objection aside for now, partly because Ely has a response to it. Sure, he might say, there is no *logical* inconsistency between

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17. See ELY, *supra* note 1, at 99-101.

establishing a basically democratic system with substantive side constraints whose content is to be found by Platonic Guardians, but if over time the Guardians, pursuant to their ostensibly limited role of enforcing the side constraints, increasingly remove the most vital questions from the domain of the voters and their representatives, then the point of the Constitution's democratic provisions will be lost, and accordingly, we ought to reject at the outset an interpretation of the open-ended provisions that authorizes the Guardians to proceed down that path. Even if we assume this response is persuasive,<sup>18</sup> however, there remains the problem of establishing proposition (1)—that the Constitution's central value is democratic participation.

I noted in the Introduction that Ely attempts to establish proposition (1) in a brief fourteen pages in chapter four. That was an exaggeration. He actually devotes exactly one sentence to the matter, albeit a longish sentence punctuated with dashes and a semicolon. He says,

I don't suppose it will surprise anyone to learn that the body of the original Constitution is devoted almost entirely to structure, explaining who among the various actors—federal government, state government; Congress, executive, judiciary—has authority to do what, and going on to fill in a good bit of detail about how these persons are to be selected and to conduct their business.<sup>19</sup>

The rest of the argument in chapter four explains how even most of the seemingly substantive provisions in the original Constitution and subsequent amendments can be seen as essentially procedural (and democratic).<sup>20</sup>

Its brevity aside, what should we make of Ely's argument from text and structure? Not much, I'm afraid. For one thing, the point is a non sequitur. Ely seems to be saying that because nearly all of the words of the Constitution are used to set the ground rules for democracy, that's what the Constitution is fundamentally about. Yet that hardly follows. Suppose that a constitution went into great detail specifying all the offices of government, their powers, and so forth and then included, as its final provision, the following: "The fundamental principle of this government is respect for the

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18. I tend to think it is not persuasive, or at least not fully persuasive. In the post-*Lochner* era, even the most ambitious programs of judicial review still leave in the hands of elected officials such decisions as the size and distribution of taxes, whether and when to go to war, and most questions of macroeconomic policy. For an unelected judiciary to take questions like abortion, affirmative action, and school prayer off the public agenda thus hardly renders elections pointless.

19. ELY, *supra* note 1, at 90.

20. *See id.* at 90-101.

dignity of all persons, and the High Court shall accordingly void all laws and other official acts inconsistent with dignity of the person.” In the face of such language, it would be hard to argue that the prolix provisions establishing the ground rules implicitly set forth an even more fundamental principle than the express fundamental principle of human dignity. Yet, given that something like my imaginary “dignity provision” is on offer as an interpretation of the Ninth Amendment and the Fourteenth Amendment’s Privileges or Immunities Clause, Ely cannot establish the greater fundamentality of the procedural provisions simply by pointing to their greater numerosity.<sup>21</sup>

Indeed, I am tempted to think that the opposite is true—that to the extent that the procedural provisions go on at length, they “partake of the prolixity of a legal code,”<sup>22</sup> which, if Chief Justice Marshall is to be believed, makes them less rather than more fundamental. The notion that brevity, not prolixity, connotes fundamentality permeates our legal culture.<sup>23</sup> The short, plain statements of principle, like the First Amendment and Section 1 of the Fourteenth Amendment, have the ring of fundamentality because of, not despite, their brevity.

In any event, even if we count the length and number of procedural provisions as making out a *prima facie* case for their importance, it hardly follows that what they make fundamental is democratic participation. I am certainly not the first person to notice that the form of representative government that these provisions establish seems designed to frustrate, rather than facilitate, the ability of a national majority to enact its will into law; bicameralism, separation of powers, federalism, and the difficulty of constitutional amendment are all essentially permanent features of American government that make the enactment of new national policies in the United States much more difficult than in parliamentary systems of government.<sup>24</sup> If we want a single master principle to guide constitutional

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21. One might also note that the Constitution’s Preamble lists, as the document’s goals, unity, justice, domestic tranquility, national security, the general welfare, and liberty but not self-rule. Even if one takes the Preamble’s invocation of “We the People” as tacitly including representative democracy on the list, it would only count as one of seven aims. For an argument that the Constitution’s primary value is human dignity, see Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 745 (1980).

22. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

23. Thus, the terse Sherman Act “has long been analogized in its generality and flexibility to the Constitution.” Thomas E. Kauper, *The Report of the Attorney General’s National Committee To Study the Antitrust Laws: A Retrospective*, 100 MICH. L. REV. 1867, 1871 (2002); see William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1231-37 (2001) (explaining why the Sherman Act is a “super-statute,” or a fundamental norm against which other laws are measured, and how it came to be understood that way).

24. See, e.g., CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 189-216 (photo. reprint 1998) (1913) (arguing that the difficulty of

interpretation, the text and structure of the Constitution point at least as strongly toward the fragmenting of political power as they do toward its consolidation in the people's representatives in Washington.

To be sure, in its time, the original United States Constitution established the world's most democratic system of government for a national polity, and, over time, American government has become more democratic in two ways. Provisions like the Seventeenth Amendment (substituting direct election of senators for state legislative appointment) have tied the people's representatives closer to the people, while provisions like the Fifteenth and Nineteenth Amendments have greatly widened the scope of the franchise. But all of this simply shows that whatever sorts of questions are committed to decision by popularly elected officials, using whatever means of making such decisions the Constitution establishes, the officials have become more accountable to a more broadly defined people. It is not at all clear that a widespread franchise and direct elections have any bearing on the question of what issues the people may properly decide.

Thus, democratic participation as an interpretive über-principle cannot be derived from the Constitution's text and structure standing alone. But perhaps we should view "the Constitution" as including the interpretive gloss that has been placed on it over the years. After all, judges and constitutional lawyers routinely consult constitutional doctrine, evidence of the original understanding, postenactment history, and ethical and prudential considerations along with—indeed sometimes *before*—text and structure.<sup>25</sup> At least with respect to original understanding and doctrine, Ely

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lawmaking under the Constitution was a deliberate product of fiscally conservative counterrevolutionary forces at the 1787 Convention); ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 143-46 (2001) (answering, in essence, "not very" to the question posed by the book's title); WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS (n.p. 1885) (preferring parliamentary government to separation of powers under the Constitution because of the former's greater flexibility). To say that the Constitution's structural provisions frustrate national policymaking is not to say that they are necessarily undemocratic. On the contrary, one might think that the original purpose of the structural provisions was to facilitate and protect representative government at the *state* level. That view might then lead one to adopt a strategy of representation reinforcement when state laws are challenged but not when federal laws are, although a fully specified approach would have to integrate the substantial changes in the relation between the states and the federal government effected by the Reconstruction Amendments and the Seventeenth Amendment. For an illuminating attempt to integrate the Founding and the Reconstruction commitments to state and national democracy respectively, see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998).

25. For examples of such pluralist or "eclectic" approaches to constitutional interpretation, see, for example, PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 11-22 (1991); and Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987). For a mildly critical assessment, see Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1788-

himself seems to adopt this strategy. He reproduces an extended quotation from *Federalist No. 51* to show Madison's commitment to interest group pluralism;<sup>26</sup> he presents much of the work of the Warren Court as exemplifying his own representation-reinforcing approach to constitutional interpretation,<sup>27</sup> which he acknowledges was prefigured by Justice Stone's *Carolene Products* footnote;<sup>28</sup> and he enlists the tail end of Chief Justice Marshall's opinion in *McCulloch v. Maryland*<sup>29</sup> to establish the venerable roots of a representation-focused constitutionalism.<sup>30</sup>

But if the point of all of these citations is to establish democratic participation as the dominant or main theme of American constitutionalism, the effort is in vain. At least since *Calder v. Bull*,<sup>31</sup> natural law theories of constitutional interpretation have vied for supremacy with theories like Ely's (and others, such as originalism). There are, of course, valid criticisms of natural law theories, and Ely makes many of them. To say that an approach or a line of decisions is wrong, however, is not to say that it does not exist or is marginal. Accordingly, the relevant question is not whether cases like *Roe v. Wade*<sup>32</sup> are correct, but whether they have a place—rightly or wrongly—in the constitutional canon. And because the whole purpose of *Democracy and Distrust* seems to be to banish such cases from the canon, it is hard for Ely to deny that they currently have a place there. Simply put, it makes no sense to argue that representation reinforcement is a better approach to constitutional interpretation than fundamental values solely by pointing out that our traditions of constitutional interpretation give representation reinforcement a large role; if they also give fundamental values a substantial role, as they do, then victory for representation reinforcement does not mean defeat for fundamental values.

Accordingly, Ely probably should not be read to advance the sort of argument I have been discussing. As I explain in the next Part, the strategy of *Democracy and Distrust* is instead best viewed as a kind of coherentism of the sort practiced by Rawls and Dworkin. Before coming to that explanation, however, I need to consider three other possible paths by

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96 (1997) (arguing that eclectic approaches fail to integrate disparate and seemingly inconsistent theories of legitimacy).

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

27. See *id.* at 105-79.

28. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); ELY, *supra* note 1, at 75-77.

29. 17 U.S. (4 Wheat.) 316 (1819).

30. ELY, *supra* note 1, at 85-86.

31. 3 U.S. (3 Dall.) 386 (1798).

32. 410 U.S. 113 (1973).

which democratic participation could be thought to be validated as the master principle of the Constitution.

One possibility is that representative democracy simply is the best form of government on utilitarian grounds: The greatest preponderance of votes serves as a rough-and-ready proxy for the greatest good for the greatest number. How rough and how ready? The philosophical literature of utilitarianism is haunted by “utility monsters,” persons who derive so much utility from satisfying their own desires—or worse, from inflicting suffering on others—that a straightforward additive calculus would weight their preferences more highly than others’.<sup>33</sup> But the principle that each person’s utility counts for equal weight is usually thought to translate neatly enough into majoritarian democracy in the political realm.<sup>34</sup> Exactly *why* this is so is unclear. Perhaps the process of gauging and then assigning voting values to individuals’ varying capacities for pain and pleasure is so difficult in practice that a principle of equality is the only workable one; perhaps the principle that “each [should] count for one, and none for more than one”<sup>35</sup> is an axiomatic side constraint to the principle of overall utility maximization. The details of the argument need not concern us here because Ely is estopped from invoking a comprehensive moral view like utilitarianism.

Given the skeptical tone of *Democracy and Distrust*, some readers may be surprised to learn that Ely himself approved of democracy on utilitarian grounds, as he explained at some length in articles written both before and after *Democracy and Distrust*.<sup>36</sup> The book itself, however, makes only two passing references to utilitarianism, and then only in the endnotes.<sup>37</sup> Ely writes there “that the appeal of democracy can best be understood in terms of its connections with the philosophical tradition of utilitarianism,” adding

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33. See, e.g., Samuel Scheffler, *What Is Egalitarianism?*, 31 PHIL. & PUB. AFF. 5, 16 (2003). The utility monster problem nicely connects a standard criticism of utilitarianism with a standard criticism of pure majoritarian democracy—that each would allow the victimization of minorities.

34. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 13 (J.H. Burns & H.L.A. Hart eds., The Athlone Press 1970) (1780); JAMES MILL, *Government*, in ESSAYS ON GOVERNMENT, JURISPRUDENCE, LIBERTY OF THE PRESS, AND LAW OF NATIONS 3, 5 (photo. reprint 1986) (1825); Thomas Philip Schofield, *Economy as Applied to Office’ and the Development of Bentham’s Democratic Thought*, in 1 HISTORY OF IDEAS COLLOQUIUM: OCCASIONAL PAPERS 48 (Michael Sutton ed., 1987), reprinted in 1 BENTHAM: MORAL, POLITICAL AND LEGAL PHILOSOPHY 407 (Gerald J. Postema ed., 2002).

35. JOHN HART ELY, ON CONSTITUTIONAL GROUND 14 (1996) (quoting John Stuart Mill).

36. See *id.* at 11-14; John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 405-08 (1978); John Hart Ely, *Professor Dworkin’s External/Personal Preference Distinction*, 1983 DUKE L.J. 959, 979-81 (defending the connection between democracy and utilitarianism). For an excellent explanation of Ely’s views on utilitarianism and democracy, see Fleming, *supra* note 15, at 227-28 & n.76.

37. ELY, *supra* note 1, at 187 n.14, 237 n.54.

that “[s]ince nothing in the . . . analysis [in *Democracy and Distrust*] depends on this claim, it is omitted” from the book.<sup>38</sup>

Ely is correct that his utilitarian basis for prizing representative democracy is unnecessary to the book’s main argument in the sense that a reader who values democracy on nonutilitarian grounds could nonetheless find Ely’s account of constitutional interpretation appealing. But what of the reader who comes to *Democracy and Distrust* without a deep commitment to democracy, or perhaps with a commitment to democracy but no special reason to see democratic participation as an overriding principle of constitutional interpretation? Because the Constitution itself does not make democratic participation the master principle of interpretation, this reader will need to look outside the Constitution for that master principle.

Looking beyond the Constitution, could Ely draw support for a representation-reinforcing approach to constitutional interpretation from utilitarianism? He could not, because even if utilitarianism is correct, it is hardly uncontroversially so. Ely’s whole brief against the fundamental values approach to constitutional interpretation is that fundamental values are in the eye of the beholder. Complex and controversial philosophies cannot, he complains, be the basis for judicial review. Ridiculing the idea, he writes, “We like Rawls, you like Nozick. We win, 6-3. Statute invalidated.”<sup>39</sup> It hardly needs saying that “I like Bentham” is equally ridiculous. Accordingly, although Ely believed in democracy on utilitarian grounds, he properly excluded those grounds from *Democracy and Distrust*, not so much because they are unnecessary but because they are inconsistent with the book’s basic argument.

I have already adverted to the penultimate reason that *Democracy and Distrust* seems to offer for treating democratic participation as the master principle of constitutional law: In its early pages and repeatedly throughout the book, Ely asserts that We the People value representative democracy quite highly and have done so since the Founding. To the extent that these statements are true, they provide a reason why most readers of *Democracy and Distrust* will come to the book predisposed to agree with an argument that highly values democracy. But if these statements are meant to provide normative grounds for why an agnostic reader should treat democratic participation as the central principle of our Constitution, the argument

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38. *Id.* at 187 n.14.

39. *Id.* at 58 (internal quotation marks omitted).

appears to be circular.<sup>40</sup> It amounts to saying that we should do what the majority says because the majority believes we should do what the majority says. Well, we might equally say—in a military dictatorship—that we should do what the dictator says because the dictator believes we should do what he says. Of course, widespread belief in a proposition can, under certain circumstances, count as a reason for belief in the truth of that proposition, but it cannot noncircularly count as a reason for belief in the truth of the proposition that widespread belief is a valid criterion of truth.

Finally, one might think that skepticism provides a basis for believing in democracy. As his belief in utilitarianism indicates, Ely was not a skeptic in the sense of a person who denied the existence of moral truths. But *Democracy and Distrust* might be called *epistemically* skeptical: Given that We the People disagree about both the content of moral truth and the best means for arriving at moral truth, the book seems to say, we may as well just vote and let the majority decide.

But this argument is no less conclusory than the prior one. Why is majority vote the default decision procedure? We can stipulate that, *ceteris paribus*, it is better for the majority than the minority to rule. But what if the minority has some special quality that the majority lacks? Why isn't the default procedure rule by the best educated, or the wisest, or the most powerful, or the least powerful? There may well be good reasons to prefer majority rule to any other decision procedure, but our mere inability to agree on important matters is not, by itself, one of them.

Thus, although most readers bring a strong preference for representative democracy to *Democracy and Distrust*, taken at face value the book does not provide grounds for agnostic or skeptical readers to treat democratic participation as the master principle of constitutional interpretation.

## II. COHERENTISM IN ELY, DWORKIN, AND RAWLS

All is not lost, however, because most of the grounds I have just rejected for treating democratic participation as the Constitution's master principle turn out to support Ely's argument if we understand that argument somewhat differently from its usual formulation. As I indicated at the beginning of the prior Part, Ely appears to be making a two-step argument: (1) a positive claim about the democratic nature of the Constitution and

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40. I call this a mere appearance of circularity because, as I explain in the next Part, Ely is best read as providing a different sort of argument, in which the popular will remains relevant but not simply on self-referential majoritarian grounds.

(2) an inference from the positive claim that results in a prescriptive claim about constitutional interpretation, namely, that the Constitution's open-ended provisions ought to be interpreted in a way that reinforces democratic participation. In this Part, I want to suggest a different account of Ely's project: *Democracy and Distrust* actually offers a coherentist account—one that combines descriptive and prescriptive elements, but not in the two-step fashion that appears on the face of the argument.<sup>41</sup>

#### A. A Coherentist Reading of Democracy and Distrust

I can best explain what I have in mind by a coherentist account by reference to interpretation outside of law. Suppose you much prefer baroque to romantic music; if asked to explain why you like Bach and Vivaldi better than Brahms and Mahler, you might refer to the almost mathematical precision of the former, or you might just shrug your shoulders and say there's no accounting for taste, but in any event, you are certain of the fact of your preference. Now suppose further that you are asked to conduct a performance of a Mahler symphony. Notwithstanding your preference for baroque over romantic music, you might nonetheless concede that the best interpretation of the music is in the romantic style. In saying so, you do not deny that it would be possible to perform the symphony in a different style, perhaps transcribed for a harpsichord; you might even say that to your own ear the Mahler symphony would sound better if rescored in the baroque style, or that someone else with very different tastes might think it would sound best of all if performed as hip hop. But you acknowledge that the best interpretation of the Mahler symphony, as a Mahler symphony, is in the original romantic style. To borrow Dworkin's language, you would say that the romantic style best "fits" the symphony.<sup>42</sup>

Likewise with the Constitution. You might think that the best form of government is a benevolent dictatorship, but upon reading the Constitution's text and familiarizing yourself with the cultural understandings that have grown up around it, you recognize that the document is best interpreted as the charter for a representative democracy. In saying so, you do not deny that it would be possible to read the Constitution as making the President a virtual dictator, at least in certain

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41. For an insightful understanding of Ely's work that proceeds in a similar vein, albeit in a different ultimate direction, see Fleming, *supra* note 15, at 220-40.

42. This is not much of a stretch. Dworkin develops his account of interpretation for practices other than law. See DWORKIN, *supra* note 15, at 46-49, 68-73 (describing interpretation of the social practice of courtesy).

spheres,<sup>43</sup> or that someone else with very different views about political theory might prefer to read provisions like the Equal Protection Clause as guaranteeing a right to minimum welfare.<sup>44</sup> But you acknowledge that the best interpretation of the Constitution, as a constitution that plays the role in our society that the actual Constitution plays, is as a charter for a representative democracy.

If you take this coherentist attitude toward interpretation, then the fact of popular commitment to democracy can make a difference as to whether democratic participation should be seen as a master principle to guide resolution of particular ambiguities. To show why, let me press the music analogy a bit further.

What do we mean when we say that a romantic performance of a Mahler symphony best “fits” the symphony? We might mean that this is what Mahler intended. But this kind of “originalism” in musical interpretation is highly controversial.<sup>45</sup> To be sure, over the last generation, there has been keen interest in performances on period instruments, but even the most avid musical originalists do not insist on performance spaces with poor acoustics or other limitations from the original period. More to the point, much of what we mean by characterizing a Mahler symphony as romantic rather than baroque, classical, or hip hop is that the typical audience for Mahler symphonies expects them to be performed in the romantic style. Thus when you, my hypothetical baroque music aficionado, say that even you concede that the romantic style better fits Mahler than does the baroque style, you do not deny that you would be happier to live in a world in which most people’s expectations had changed, so that people preferred, and came to expect, Mahler symphonies performed on harpsichords. Alas, however, you don’t live in that world, and so you concede that in light of our existing social practices, the romantic style in fact best fits Mahler’s music.

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43. See U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .”).

44. See generally Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9 (1969) (proposing that “minimum welfare,” rather than equality of resources, explains the Warren Court rulings invalidating state failures to waive fees or provide free services for criminal defendants and others); Edward B. Foley, *Interpretation and Philosophy: Dworkin’s Constitution*, 14 CONST. COMMENT. 151, 171-73 (1997) (reviewing DWORKIN, *supra* note 2) (advocating judicial recognition of a fundamental right to a living wage and criticizing Dworkin’s apparently textualist reading of the Constitution).

45. For an interesting comparison between such originalism in music and in constitutional interpretation, see Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1366-67 (1990).

Again, likewise with the Constitution. You, my hypothetical believer in benevolent dictatorship, can imagine the day when permanent war has led Congress to suspend the writ of habeas corpus indefinitely, when the notion of a theater of war has been so far expanded by the fact of stateless terrorists that it applies everywhere, and when the conception of inherent presidential authority as Commander in Chief has been nearly universally accepted. In such an imaginary world, it would be quite consistent with popular understandings of the role the Constitution plays in our society for the President to be a benevolent dictator, albeit an elected one. But, you ruefully acknowledge, we don't live in such a world, and so in the actual here and now, you accept that the Constitution is best interpreted as a fundamentally democratic charter that limits presidential power.

I contend that *Democracy and Distrust* is best read as making an argument of this type. Yes, originalist and fundamental values approaches to constitutional interpretation cannot be logically ruled out. But to read the Constitution in these ways would be out of step with both its text—the musical notes, if you will—and the cultural understandings that surround the Constitution. So even if you're the kind of person who would rather downplay the democratic character of the Constitution—akin to the kind of person who wants to hear Mahler performed on a harpsichord or by a hip-hop artist—you'll have to acknowledge that your interpretation doesn't fit with the Constitution as generally known and understood.

How convincing is this argument? If the Constitution and its surrounding cultural understandings were uncontroversially classifiable as democratic in the way that Mahler is uncontroversially classifiable as romantic, then it would be quite persuasive. But, in fact, the Constitution is more like Beethoven, whose music sits on the borderline of the classical and romantic styles, sometimes exhibiting the characteristics of each in different movements of the very same work, as in his Ninth Symphony. As Ely observes, most of the words of the Constitution deal with structures of governance, but as Dworkin observes, the best-known parts, like the Bill of Rights and the Fourteenth Amendment, at least provide support for a fundamental values approach.

Furthermore, the same problem arises at the level of popular understandings. Yes, Ely is right that the people expect the government to be democratic in order to be legitimate, but they also expect the courts to enforce substantive as well as procedural limits on majority rule. Particular decisions may draw fire, and when they draw sufficient fire popular

sentiment may for a time turn against the institution of judicial review,<sup>46</sup> but judicial review to enforce substantive limits on government has been part of the American system of constitutional government for so long that by now it almost certainly counts as part of what the people mean by representative democracy. To borrow Dworkin's somewhat question-begging language, there is a good case to be made for the proposition that the people hold a "constitutional" as opposed to a "majoritarian" conception of the concept of democracy.<sup>47</sup> Or perhaps public attitudes toward the Constitution are simply a confused jumble, amorphously valuing both "democracy" and "rights" without a clear conception of either concept, so that a very broad range of practices could be validated by showing their acceptability to the people.

At this point we may be tempted to say that the debate between Ely and Dworkin must come to a standstill. Neither can show that his approach—representation reinforcement versus fundamental values—finds definitive support in the text, structure, or cultural understandings of the Constitution, and so the argument ends in a draw. If so, that would appear to be bad news for Ely, because *Democracy and Distrust* aims not only to establish the bona fides of representation reinforcement but, except with respect to a very small number of clearly substantive constitutional provisions, to banish fundamental values as well. Representation reinforcement is offered as *the* method by which the Constitution's open-ended provisions should be interpreted.

Happily, though, Ely can turn to Dworkin's version of coherentism to resuscitate the argument. For Dworkin, rival interpretations should be measured along two dimensions: how well they fit the interpreted practice and how well they justify that practice.<sup>48</sup> Ely could grant that a reasonable case could be made for either a representation-reinforcing approach or a fundamental values approach on grounds of fit, but could go on to argue that representation reinforcement does a better job of justifying the practice

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46. See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 416, 415-18 (1998) (chronicling the "firestorm of criticism" and loss of public confidence in the Court in the wake of *Dred Scott*); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 3 (2002) (asserting that politics can both "threaten" and "protect" judicial independence); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1387 (2001) ("[I]f those familiar with the Court's decisions do not believe those decisions to be socially correct, the work of judges will be seen as illegitimate.").

47. DWORKIN, *supra* note 2, at 15-19.

48. See DWORKIN, *supra* note 15, at 90 ("General theories of law . . . try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice.").

of judicial review and that, therefore, as the law “works itself pure,”<sup>49</sup> fundamental values decisions will and should disappear, replaced by decisions rooted in representation reinforcement.

And in fact, that is more or less the strategy of *Democracy and Distrust*. Following Henry Hart and Albert Sacks and the other constitutional proceduralists of the generation that preceded him, Ely argues on institutional competence grounds that the courts ought not be in the business of discovering fundamental values.<sup>50</sup> Courts are competent to police the ground rules of democracy, the argument goes, but they should generally leave substantive policy judgments to elected officials. It is a little like saying that as between interpreting the music of some transitional composer—say C.P.E. Bach—in the baroque versus the classical style,<sup>51</sup> we should choose the baroque style if the only instrument we have available is a harpsichord.

Accordingly, Ely need not establish that democratic participation is the only plausible master principle with which to make sense of the Constitution and our constitutional practices. He can acknowledge that fundamental values provides a plausible rival principle.<sup>52</sup> Nor need Ely demonstrate as a matter of first-order moral philosophy that representative democracy is the best form of government on utilitarian or other grounds. He need only show that the principle of representation reinforcement is better suited for use by judges than a principle of fundamental values and thus that, all things considered, it provides a better justification for the practice of judicial review than having judges discover fundamental values and other alternatives.

That all-things-considered judgment is itself coherentist and not simply pragmatic, even though it takes account of relative institutional

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49. *Id.* at 400.

50. See ELY, *supra* note 1, at 88 (contending that representation reinforcement “involves tasks that courts, as experts on process and (more important) as political outsiders, can sensibly claim to be better qualified and situated to perform than political officials”); HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1311-13 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (envisioning judges as best suited to making decisions about which other institutions to grant deference). For Ely’s view of Hart and Sacks, see John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 838 (1991) (lamenting that the legal academic left, and then the legal academic mainstream, cast aside “the legal process school’s core methodological assumption” that courts are different from legislatures).

51. I recognize that this is not a perfect analogy, because the music of C.P.E. Bach could be classified as neither baroque nor classical but as rococo. Because I am more interested here in constitutional interpretation than in musical interpretation, I beg the reader’s indulgence in the admittedly unrealistic assumption that performers of the compositions of C.P.E. Bach must choose between the baroque and classical styles.

52. See ELY, *supra* note 1, at 43-72.

competence. Judgments about how a practice best hangs together can be perspectival. Thus, we could imagine that the best way to make sense of our constitutional practices as a whole is different for judges and for legislators. Or, to put the point more tendentiously, scholars like Lawrence Sager, who contend that the courts appropriately “underenforce” the Constitution relative to elected officials,<sup>53</sup> deploy a misleading terminology that privileges the perspective of elected officials. The Court and elected officials alike can be coherentist, each trying to come up with an interpretation that best hangs together, but how well a given interpretation does that job will vary depending on one’s institutional perspective.<sup>54</sup>

Understanding *Democracy and Distrust* as coherentist in Dworkin’s sense enables Ely to escape the objection that he has no adequate basis for selecting democratic participation as his master principle without requiring him to invoke the sort of controversial moral principles that the overall thrust of his argument rules out of bounds. That does not mean that Ely’s argument is necessarily persuasive, of course. One might still think, like Tribe, Dworkin, and others, that the courts are competent to make principled judgments about substantive values no less than procedural ones; or one might think—as Justice Frankfurter thought and as some commentators suggested in the wake of *Bush v. Gore*<sup>55</sup>—that institutional considerations render the Court incompetent to make controversial judgments with respect to the mechanics of democracy in the same way that courts are incompetent to make other, nominally more substantive controversial judgments.<sup>56</sup> These are the mirroring criticisms to which I

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53. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

54. See Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1183 (2003) (suggesting that constitutional law is perspectival in the sense that a single constitutional provision may mean different things to different institutional actors). I am not claiming that only coherentists can engage in perspectival or institutional analysis, only that such analysis is consistent with coherentism. Whether Ely himself would have endorsed perspectivalism, however, seems doubtful. As James Fleming observes, Ely “basically names as ‘the Constitution’ those values that are judicially enforceable, that is, procedural values, rather than arguing for a conception of the Constitution outside the courts that would include substantive values along with procedural values.” Fleming, *supra* note 15, at 239 n.126.

55. 531 U.S. 98 (2000).

56. For Frankfurter’s view, see *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion) (disavowing judicial intervention to redress malapportioned congressional districts as “a political thicket”). For a small sample of the criticism of *Bush v. Gore*, see Jeff Polet, *The Imperiousness of Bush v. Gore*, in THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 263, 272-79 (David K. Ryden ed., 2d ed. 2002); and David K. Ryden, *The Supreme Court as Architect of Election Law: Summing Up, Looking Ahead*, in THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS, *supra*, at 304, 306 (evaluating the Court’s record in recent election law cases and stating that the Court manifests “a disturbing proclivity for easy conclusions unaccompanied by explanation, elaboration, or elucidation” and that “[o]ne need not disagree with

adverted in the Introduction, and understanding Ely's claims as coherentist will not simply make them go away. What my coherentist interpretation of *Democracy and Distrust* is meant to suggest is that, despite the argument I put forth in Part I, Ely does offer considerable support for treating democratic participation as the master principle of constitutional interpretation.

Furthermore, understanding Ely's argument as coherentist enables his invocation of Americans' faith in democracy largely to avoid the charge of circularity. Ely does not rest his coherentist case for representation reinforcement simply on popular support for democracy. In a coherentist account, popular understandings of our institutions must be blended in some way with text, doctrine, and the other matters relevant to constitutional interpretation. Thus, even if a clear majority of the public thought that the Constitution were best read as a charter of, let us say, socialism,<sup>57</sup> that would not by itself make this the best reading of the document, given its text, history, and the fact that informed opinion overwhelmingly rejected that reading.

Still, a critic might say, if Ely's argument isn't exactly circular, it is nonetheless somewhat round: Counting popular understanding in the calculus, even just a little, loads the dice in favor of representation reinforcement. This criticism, however, incorrectly assumes that Ely adopts coherentism at the meta-methodological level in order to ensure that representation reinforcement falls out at the level of constitutional interpretation. The relation between meta-methodology—i.e., the method one uses to select a method of interpretation—and methodology is not nearly so straightforward as the critic assumes. After all, other accounts of constitutional interpretation, such as Dworkin's fundamental values approach, are equally coherentist at the meta-methodological level. Yet these rival accounts read the popular commitment to representative democracy as having different entailments at the level of constitutional interpretation.

Consulting the popular will at the meta-level does not, in other words, necessarily loop back to the popular will (via representation reinforcement) at the level of constitutional interpretation. The relation between the

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the outcome to be troubled by the Court's failure or refusal to at least acknowledge the larger issues involved").

57. Cf. Columbia Law Sch., Americans' Knowledge of the U.S. Constitution, [http://www2.law.columbia.edu/news/surveys/survey\\_constitution/index.shtml](http://www2.law.columbia.edu/news/surveys/survey_constitution/index.shtml) (last visited Mar. 21, 2005) (finding, in a random telephone survey of approximately 1000 Americans, that thirty-five percent answered "yes," thirty-one percent answered "no," and thirty-four percent responded "don't know" to the question whether the U.S. Constitution contains the statement "[f]rom each according to his ability, to each according to his needs").

popular understanding at the meta-level and the proper approach to constitutional interpretation is highly complex and context dependent. Consider a related phenomenon: There can be nondemocratic regimes that are or would be validated by consultation of the popular will, as in Nazi Germany, and, admittedly less commonly, there can be democratic regimes that are initially validated by reference to the will of an autocrat, as in the transition from fascism to representative democracy in post-Franco Spain under King Juan Carlos. Likewise, a coherentism that gives some role to popular understandings may lead to any number of approaches to interpretation—originalism, fundamental values, representation reinforcement, and so forth—depending on what the people think about how their government should be organized and how those thoughts fit with other relevant data.

Of course, the choice of a meta-methodology such as coherentism will affect the approach one takes to interpretation; a choice to count popular understandings at the meta-methodological level may even make it likely that democratic participation will figure into the account one ends up giving at the level of constitutional interpretation. However, if we have good reasons for thinking that popular understandings should play some role in our meta-methodological analysis, as coherentists typically think we do, then that is a sufficient answer to the critic's charge of circularity or roundness. To be sure, whether we in fact do have good reasons for taking account of popular understandings at the meta-methodological level is a legitimate question, and we should address that question directly.

If one sets out to be a meta-methodological coherentist, then it is hard to imagine how one could avoid counting popular understandings of the nature of our constitutional regime as among the data that must be made to cohere. Suppose someone argues today that the Constitution is invalid because its adoption violated the amendment procedure of the Articles of Confederation, that the Fourteenth Amendment is invalid because it was ratified under conditions of coercion, or that the modern administrative state is invalid because its adoption during the New Deal contravened fundamental principles. We might try to persuade that person that he or she is wrong in all three instances because the circumventing of the formal procedural requirements in each instance satisfied the deeper requirements for constitutional change.<sup>58</sup> But it would also count as a sufficient answer to these concerns that the Constitution's status as law derives in part from the fact that the people today accept it as law, and that what they accept includes the Fourteenth Amendment and the administrative state. Figuring

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58. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

out exactly how to weigh such popular views relative to other sorts of data may be a difficult task for the coherentist, but it is not difficult to show that they count for something.

To say that meta-methodological coherentism properly takes account of popular understandings of the Constitution is not to say that one ought to be a meta-methodological coherentist. One might instead think that the best way to choose an approach to constitutional interpretation is to ask what approach is most consistent with first-order axioms about what makes government legitimate. This would be a purely prescriptive meta-method, and it could lead, depending on how it was used, to a variety of different approaches to interpretation. A meta-methodological prescriptivist might land on originalism, fundamental values, representation reinforcement, or some other approach at the level of interpretive method, depending on what went into his or her account of legitimacy at the meta-methodological level. Or one might be a positivist at the meta-methodological level, but depending on how one described the constitutional regime one saw, that could lead to any number of approaches at the level of interpretive method. To use H.L.A. Hart's terminology, one's "external" descriptive perspective on our constitutional practices could lead one to conclude that actors, such as Supreme Court Justices, who are charged with applying the Constitution adopt fundamental values, originalism, or representation reinforcement at the level of their own "internal" approach to interpretation.<sup>59</sup>

I have listed three meta-methodologies: coherentism, prescriptivism, and positivism. How is one to choose among these? Must we now engage in a meta-meta-methodological discussion?<sup>60</sup> Won't it just be "turtles all the way down"?<sup>61</sup> Some pragmatist philosophers might answer these questions by denying that there can be a purely prescriptive or purely descriptive account of anything; in rejecting the fact/value distinction, they suggest that coherentism—combining as it does prescriptive and descriptive elements—

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59. See H.L.A. HART, *THE CONCEPT OF LAW* 243 (2d ed. 1994) (noting that "a morally neutral descriptive jurisprudence [may] record but not . . . endorse or share" the incorporation of moral principles into a particular legal system). As Hart's language indicates, whether judges *should* adopt the interpretive method to which meta-methodological positivism points is not the meta-methodological positivist's concern. Note, however, that a meta-methodological positivist who also thought, on whatever grounds, that there is a duty to obey the law would have little difficulty going from meta-methodological "is" to interpretive "ought."

60. If so, Yale Law School would seem to be the place to do so. See Arthur Allen Leff, *Unspeaking Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1230 n.2 ("Anything you can do, I can do meta.") (quoting Leon Lipson's characterization of a certain species of legal writing).

61. Roger C. Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 2, 1-2 & n.4 (1986) (internal quotation marks omitted) (attributing a familiar story about infinite regress to William James, who used rocks rather than turtles in his version).

is the only way to understand the world and our practices in it.<sup>62</sup> But I have no need to press that argument here. For my purposes, it suffices to show that coherentism is a legitimate meta-method that has certain advantages relative to pure positivism and pure prescriptivism.

Meta-methodological positivism is either not in competition with meta-methodological coherentism or, if it is, it loses the competition. The argument for noncompetition stresses the is/ought distinction: Positivists describe the law as it is; coherentists give an account that has at least some prescriptive elements. If this picture is accurate, then positivism and coherentism are simply different enterprises, the former perhaps best suited to the scholar and the latter to the judge. But if this picture is wrong, it is because positivism in the sense of a purely descriptive account of the law (what is sometimes called “hard positivism”) is impossible, in which case coherentism wins by default.<sup>63</sup> In either event, the possibility or impossibility of meta-methodological positivism would not supply a reason why someone who wants to know how to interpret the Constitution should reject coherentism.

Next consider purely prescriptive approaches. One might think that judges should always interpret the Constitution to conform with the original understanding or that they should always interpret the Constitution so as to achieve substantive justice, however defined. Although I have distinguished coherentism from pure prescriptivism, there is nonetheless an important sense in which coherentism is simply a subset of prescriptivism. The coherentist says that one cannot implement the original understanding or achieve substantive justice without asking how these purely prescriptive principles fit in with the legal regime we have.

For example, suppose that a Supreme Court Justice believes that originalism provides the correct approach to constitutional interpretation. This Justice thinks that all decisions departing from the original understanding are illegitimate and should accordingly be disregarded. What does she do with cases that are, by her lights, wrongly decided? One possibility would be to distinguish cases that were decided on other-than-originalist grounds—which would be disregarded—from cases decided on originalist grounds but wrongly, by the lights of our hypothetical Justice. Are decisions in the latter category to be wholly disregarded too? If not,

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62. See HILARY PUTNAM, *THE MANY FACES OF REALISM* 63-71 (1987); RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM: ESSAYS, 1972-1980*, at xvii-xxi (1982); RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 363-65, 387-88 (1979).

63. The distinction between hard and soft positivism can be found in HART, *supra* note 59, at 250-54, and tracks Jules Coleman’s distinction between “exclusive” and “inclusive” positivism, see JULES COLEMAN, *Negative and Positive Positivism*, in *MARKETS, MORALS AND THE LAW* 3 (Oxford Univ. Press 1998) (1988).

then our Justice is not a pure originalist; she is more like a coherentist.<sup>64</sup> And if the originalist is really prepared to reconsider every issue de novo, without any reference to previously decided cases, then she will have a devil of a time making her prescriptions work in the legal system as we know it. Accordingly, meta-methodological coherentism can be understood as the most practical version of meta-methodological prescriptivism.

Of course, there are legitimate objections to meta-methodological coherentism in constitutional interpretation. I address what I regard as the two strongest: first, that coherentism is unnecessary and, second, that it is amoral.

### B. *Why Can't We Just Muddle Through?*

Ely's version of meta-methodological coherentism aims to discover a master principle or guiding philosophy for constitutional interpretation of ambiguous texts. When he wrote, the leading candidates were textualism-originalism and fundamental values. Ely sold his process theory as a third way that avoided the pitfalls of these polar approaches. But much recent scholarship rejects the premise of the debate between Ely and his rivals. Sometimes using the opinions of the Rehnquist Court—and especially its median member, Justice O'Connor—as their standard, scholars have begun to question whether we need a master principle or philosophy to guide constitutional adjudication. Various forms of pragmatism as muddling through<sup>65</sup>—which I would distinguish from a somewhat different sort of philosophical pragmatism<sup>66</sup>—assert that abstract principles like fundamental values or representation reinforcement are at best unnecessary and at worst harmful to judges who must hammer out collective decisions dealing with the messy problems of real life. Justice Holmes's aphorism that “[g]eneral propositions do not decide concrete cases”<sup>67</sup> pithily sums up

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64. This is the reluctant conclusion of Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 772 (1988) (“[T]o accord status to stare decisis requires an acknowledgement that originalism plays a purely instrumental role by contributing to the establishment of legitimate government, which in turn promotes stability and continuity.”).

65. See Charles E. Lindblom, *The Science of “Muddling Through,”* 19 PUB. ADMIN. REV. 79, 80-88 (1959) (defending a method of problem solving that asks incremental questions rather than measuring various approaches by reference to some ideal solution).

66. Cf. Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 CAL. L. REV. 593, 595-96 (1999) (distinguishing between philosophical pragmatism and pure instrumentalism).

67. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

this attitude, which has been lately revived in the work of, among others, Daniel Farber and Suzanna Sherry, Richard Posner, and Cass Sunstein.<sup>68</sup>

Although there is much good sense in their prescriptions, the muddlers' fundamental objection is mistaken. The difficulty stems from what Dworkin calls the phenomenon of "justificatory ascent."<sup>69</sup> In our legal culture, courts cannot simply decide cases by saying something like "plaintiff loses." They must provide reasons for their decisions, and reasons are typically more abstract than the decisions they purport to justify.<sup>70</sup> For Dworkin, the requirement that the law exhibit integrity requires that reasons be reconciled with one another in what becomes a grand synthesis.<sup>71</sup> To be sure, one need not go so far in the direction of abstraction as Dworkin goes. Courts can, to use Sunstein's terminology, provide "shallow" or "narrow" reasons for a decision.<sup>72</sup> But they must still have a meta-reason for stopping at the shallow or narrow reason. Sunstein provides a persuasive one: Sometimes it will be impossible for a majority of Justices to agree on the rationale for a decision though they agree on the result, and for reasons of public acceptability, it is important that the Court speak with one voice. In such circumstances, it may well be perfectly appropriate for the Court to provide an "incompletely theorized" account of its decision.<sup>73</sup> But if so, then the justification for failing to provide a more completely theorized explanation is itself a theory of interpretation in the same way that Dworkin's principle of integrity or Ely's principle of representation reinforcement is.

Granted, one will not usually find in the Supreme Court's decisions themselves a statement to the effect that "we can't agree on a deep principle so we're providing a shallow one," but then neither will one find much in

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68. See DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 3 (2002) (opposing any single overarching theoretical framework and advocating a version of pragmatism that looks to multiple sources of meaning as guided by practical common sense); RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 59 (2003) (describing legal pragmatism as a form of consequentialism); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999) (defending the Supreme Court's failure to provide a theoretically satisfying account of its interpretive practices). Posner comes the closest of these scholars to developing an argument for judicial pragmatism that links up with the main themes of the leading pragmatist philosophers: John Dewey, William James, and Charles Sanders Peirce. See RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 99, 227-65 (1999).

69. Ronald Dworkin, *In Praise of Theory*, 29 *ARIZ. ST. L.J.* 353, 357 (1997).

70. See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 17-37 (1991).

71. See DWORKIN, *supra* note 15, at 225-38 (describing the interpretive project of "law as integrity" and comparing the task of the judge to that of an author attempting to contribute a chapter to a chain novel).

72. Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 *HARV. L. REV.* 4, 15-21 (1996).

73. See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 *HARV. L. REV.* 1733, 1735 (1995).

the U.S. Reports espousing other theories. The whole point of a book like *Democracy and Distrust* is to provide a justificatory account of what the Court has really been up to—an interpretation—just as the point of the muddlers' books is to provide a justificatory account for what they think the Court has really been up to. Upon inspection, "muddle through" turns out to be no less a descriptive and prescriptive, and thus meta-methodologically coherentist, account of judicial review than is "reinforce representation," "seek integrity," or "honor the original understanding."

Thus, if the muddlers mean to say that there is no need for a theory or philosophy of constitutional interpretation, their own arguments for interpretive muddling belie the claim. If, on the other hand, the muddlers mean that muddling, as a method of interpretation, is superior to more single-minded approaches like originalism or representation reinforcement, then they may have a point.

It should come as no surprise that the work of a Court whose members join it with different values and experiences will not be readily amenable to any description that emphasizes a single, overarching methodology. As a descriptive matter, therefore, the muddlers' account is likely to do a better job of capturing what actually drives the Justices in any given period than rivals like originalism, fundamental values, or representation reinforcement.

How does muddling fare on the normative dimension? One might think that muddling is normatively impoverished relative to other methods of interpretation because muddling seems to eschew any single normative framework. Yet once we understand that muddling is in fact a distinctive approach to constitutional interpretation, we may find that it has much to be said for it. The best arguments for muddling, like the best arguments for representation reinforcement, are institutional; the muddler calculates that in order for the Court to settle major disputes, over the long run it will do best by saying as little as possible about the likely controversial value judgments that drive particular decisions.

The muddlers may well have the best approach to constitutional interpretation. If so, however, that would be because meta-methodological coherentism points to muddling through as the method of constitutional interpretation that best fits and justifies our constitutional practices, all things considered. It would not be because there is no need for something like meta-methodological coherentism itself. Accordingly, if Ely's approach to constitutional interpretation loses to muddling through, both approaches at least get out of the starting gate. The complaint with which we began our present inquiry—that there is no need for any theory of constitutional interpretation—fails even on the muddlers' own terms.

### C. *The Problem of Bad Coherence*

Nonetheless, understanding Ely to be making a coherentist argument still leaves him open to a second and more troubling general criticism of coherentism. As explained by Rawls, the measure of a coherentist doctrine or account of some practice—such as constitutional democracy or political justice—is

how well the view as a whole meshes with and articulates our more firm considered convictions, at all levels of generality, after due examination, once all adjustments and revisions that seem compelling have been made. A doctrine that meets this criterion is the doctrine that, so far as we can now ascertain, is the most reasonable for us.<sup>74</sup>

In *Democracy and Distrust*, the relevant “we” is We the American People, the doctrine is representation reinforcement, and the practice is judicial review.

The difficulty facing Ely the coherentist is the same as that facing all coherentists—namely, that a doctrine that is reasonable to us or that meshes with our firm considered convictions may nonetheless be wrong or unjust. De jure racial segregation and exclusion of women from most employment opportunities fit well with the considered convictions of the American republic circa 1900, but few would defend either practice today. Given the possibility of “bad coherence,”<sup>75</sup> coherentism thus seems to be a form of moral relativism.

I call this a “troubling” objection because most people, including me, don’t like to think of themselves as moral relativists. When we say that slavery is wrong we think we mean that it is *really* wrong, not simply that we don’t like it,<sup>76</sup> or that we as a society firmly believe today that slavery is wrong, although people in other times and places thought slavery was morally acceptable and our own society may come to think the same thing again in the future.

Some of us might be willing to root our objections to slavery and other practices we condemn as immoral in religious faith—it is not simply our

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74. John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 534 (1980). Rawls sets out his full account of reflective equilibrium in RAWLS, *supra* note 12, at 48-51.

75. See Radin, *supra* note 13, at 1705-11.

76. See, e.g., ALFRED JULES AYER, *LANGUAGE, TRUTH AND LOGIC* (1936) (offering a meta-ethical view in which moral statements convey no meaning and have no truth value); CHARLES L. STEVENSON, *ETHICS AND LANGUAGE* (1944) (arguing that moral statements only convey the speaker’s feelings).

own subjective convictions but God's law that makes slavery immoral. Some might even go further to say that this sort of argument from authority is the only way that one can establish moral truth, as opposed to refining our own fallible and subjective intuitions.<sup>77</sup> But even if most religious traditions now agree about the wrongfulness of slavery,<sup>78</sup> the diversity of religious beliefs about matters such as abortion, the death penalty, homosexuality, and the proper role of women in a society like the modern United States makes religion an inappropriate basis for collective moral reasoning. Accordingly, Rawls contends that arguments about political justice must be rooted in a form of "public reason" that holds religious convictions at arm's length.<sup>79</sup>

The task of *Political Liberalism*, Rawls says at the very outset, is to answer the question, "[H]ow is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?"<sup>80</sup> That might seem like an empirical question. By pointing to various actual liberal societies that are more or less just and stable, one could show the possibility of their persistence. But even apart from the fact that no human society appears ever to have adopted all of the principles Rawls espouses, this is not the way that he means the question. He means something more like this: "If it were possible for a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines, to persist over time, what characteristics would that society have?" That this is his question is evident from the methodology of both

77. Cf. MACINTYRE, *supra* note 13, at 36-61 (chronicling what the author deems the failure of the Enlightenment project of wresting moral argumentation from religious justifications).

78. Notwithstanding the important role that religious leaders played in the abolitionist movement of the nineteenth century and the civil rights movement of the twentieth century, and whatever the world's leading religions currently say about slavery, the original sacred texts of Islam and Judaism condone or tolerate some forms of slavery, *see, e.g.*, THE QUR'AN 33:50 ("Prophet, We have made lawful for you the wives whose dowries you have paid, and any slaves God has assigned to you through war . . . ."); *Leviticus* 25:44-46 (permitting the Israelites to enslave people of other nationalities), and a sacred text of Hinduism implicitly condones the existence of a caste system, *see, e.g.*, THE EARLY UPANISADS: ANNOTATED TEXT AND TRANSLATION 237 (Patrick Olivelle trans., 1998) ("People of foul behavior can expect to enter a foul womb, like that of a dog, a pig, or an outcaste woman."). As for Christianity, the Jesus of the Gospels does not endorse slavery, but neither does he condemn it, though he lives in a slaveholding society. *See Matthew* 10:24 (attributing to Jesus the statement that "[t]he disciple is not above his master, nor the servant above his lord"). Admittedly, Buddhism does criticize both slavery specifically and class-based distinctions more generally, *see* SUTTA-NIPĀTA 141 ("(Therefore) not by birth does one become an outcast, not by birth does one become a Brāhmana, but by deeds one becomes an outcast, by deeds one becomes a Brāhmana." (alteration in original) (internal quotation marks omitted)), but Buddhists have never accounted for more than a small fraction of the American population.

79. *See* RAWLS, *supra* note 14, at 224-25.

80. *Id.* at 4.

*A Theory of Justice* and *Political Liberalism*. Both begin with a set of intuitions that, Rawls claims, are widely shared by members of actual liberal democracies, and then offer coherentist accounts of these intuitions.

The contrast between *A Theory of Justice* and *Political Liberalism* highlights the coherentist nature of the account of value offered in both. Rawls explains in the introduction to the latter that the differences between the two works stem from his realization that “[a] modern democratic society is characterized . . . by a pluralism of incompatible yet reasonable . . . doctrines” regarding the basic institutional arrangements of political life.<sup>81</sup> The fact of pluralism is, of course, contingent. We might have found ourselves in a society in which all reasonable citizens accepted Rawls’s notion of justice as fairness; we might have found ourselves in a society in which nearly all citizens (whether reasonable or not) accepted the authority of a ruler who claimed legitimacy by divine right or through force of arms. Although Rawls clearly prefers to live in the sort of society that his books elaborate,<sup>82</sup> the burden he sets for himself is not to show, as a matter of first principles, that a politically liberal society is the best sort of society in which human beings can live. Instead, he simply aims to work out the institutional entailments of the shared premises of citizens in the sorts of liberal societies that actually exist.<sup>83</sup>

And what of Ely? If I am right that, in order for *Democracy and Distrust* to succeed, it must be understood as a coherentist account of democracy and judicial review, then it is no less nor more vulnerable to the general critique of coherentism than rival interpretations, like those of Dworkin and Rawls. How vulnerable are such accounts? Very much so and not at all. Because we ourselves, the members of the polity in question, are the persons whose convictions about political justice must be made to

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81. *Id.* at xviii.

82. *See id.* at lxii (contrasting a politically liberal society with one run by “power and coercion alone,” the dominance of which would raise Kant’s question “whether it is worthwhile for human beings to live on the earth”).

83. I might soften this assertion in two ways. First, nothing in my argument about how best to understand Ely turns on whether Rawls’s views are really as contingent as I say they are. Readers who insist on reading Rawls as setting forth universal rather than contingent claims should consider my discussion of Rawls as merely an illustrative example to set the stage for my discussion of Ely. These readers should imagine that I have described the works of a hypothetical philosopher—call him “Shmawls.” Second, even those readers who are generally willing to go along with my account of Rawls might be inclined to add the caveat that Rawls does build into his account what appears to be an axiomatic rather than an empirical picture of the person. *See id.* at 18-20. I would point these readers to Rawls’s statements suggesting that the conception of the person must at least be acceptable to, if not strictly derived from, the society whose basic features Rawls aims to describe, refine, and justify. *See, e.g.,* Rawls, *supra* note 74, at 518 (“In addressing the public culture of a democratic society, Kantian constructivism hopes to invoke a conception of the person implicitly affirmed in that culture, or else one that would prove acceptable to citizens once it was properly presented and explained.”).

cohere in reflective equilibrium, it is practically impossible that we will conclude that the result is bad coherence. If we did, we wouldn't be in reflective equilibrium. To be sure, it remains possible that the coherentist account of value will not satisfy or will even violate some individuals' religious or comprehensive moral views. But if—with Rawls and Ely—we rule out religious authority and other comprehensive moral views as impermissible bases for constructing the basic political institutions of our society, we see that coherentism provides us with all the normative truth we can reasonably demand. That doesn't mean that Ely's particular coherentist account is necessarily best, but it does mean that his account can vie on the merits with the alternatives.

### III. ELY'S IDEAL CONSTITUTION

The previous Part argued that Ely's account of American constitutionalism—which seems designed specifically to avoid having to endorse propositions of political philosophy of the sort that Ely attributes to Rawls—ironically ends up embracing at least implicitly a method of argument, coherentism, that is closely associated with Rawls. But wait, there's more. Ely also offers a normative vision that is in one key respect similar in its content to that offered by Rawls. Both Ely and Rawls argue that the basic framework of government should contain constitutional guarantees that are thinner than the substantive values that individual members of the society hold.

To see the similarity between Ely's vision and that of Rawls, we must see beyond the differences in the nature of their respective projects. Ely provides judges with a method for interpreting the U.S. Constitution. Rawls is not concerned with interpreting any particular constitution and thinks that the basic structure of a fair and just liberal polity could be guaranteed by a wide variety of constitutional arrangements.<sup>84</sup> But both Ely and Rawls nonetheless have views about what properly belongs in a constitution, and their views turn out to be quite similar. Seeing the similarities, as well as the differences, enables us to see that *Democracy and Distrust* is more ambitious than its subtitle—*A Theory of Judicial Review*—suggests. It enables us to see that Ely actually sets forth a theory of constitutionalism writ large and to see, finally, the substantial obstacles that Ely's theory of constitutionalism must overcome if it is to be persuasive.

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84. See RAWLS, *supra* note 14, at 415-16 (stating that “constitutional design is not a question to be settled only by a philosophical conception of democracy . . . in the absence of a case by case examination” but must instead take “into account the particular political history and the democratic culture of the society in question”).

What is Ely's account of constitution writing as opposed to constitution reading? To answer that question, we must begin by acknowledging that there is no necessary connection between a theory of interpretation for an existing constitution and a prescriptive theory for constitution writing. Suppose, for example, that our Constitution contained an Authoritative Construction Clause that said, "In construing this Constitution, the judges shall in all matters be guided by the coherentist theory of Ronald Dworkin." Even if a judge thought Dworkin all wet, she would be obliged to apply his methods under the Authoritative Construction Clause.<sup>85</sup> That same judge, however, if serving as a delegate to a constitutional convention, would be free to, and likely would, advocate the elimination or substantial modification of the Authoritative Construction Clause.

Our actual Constitution, of course, contains no Authoritative Construction Clause. Even if one is inclined, as I am, to read the Ninth Amendment as ruling *out* some methods of constitutional interpretation with respect to questions of rights, neither that Amendment nor any other provision authoritatively rules *in* any method of interpretation. And in choosing a method of constitutional interpretation, judges and scholars will be influenced by considerations not unlike those involved in constitution writing. Those who would be inclined to expressly bar capital punishment were they writing a constitution will be inclined to read the Eighth Amendment as implicitly barring capital punishment; those who would be inclined to give the central government plenary power will be inclined to give a broad reading to the enumerated powers of Article I and beyond; and those who would be inclined to give the people's representatives wide latitude in enacting substantive policy, so long as they do not erect barriers to everyone's equal participation, will be similarly inclined in reading the Constitution's open-ended language.

Accordingly, it is hardly surprising that in his brief remarks on what a constitution ought to contain, Ely espouses proceduralism.<sup>86</sup> Indeed, he goes so far as to suggest that it is in the very nature of a constitution to create a procedural framework rather than to resolve substantive issues. "The American Constitution," Ely states, "has . . . by and large remained a constitution properly so called, concerned with constitutive questions."<sup>87</sup> He

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85. To say that a judge would be obliged to follow the Authoritative Construction Clause and apply Dworkin's theory is not to say that every judge would in fact do so or do so honestly. A judge who thought Dworkin's theory nonsensical might, for example, treat the Authoritative Construction Clause as though it were obscured by an ink blot, and thus unenforceable. Cf. BORK, *supra* note 3, at 166 (proposing such treatment for the Privileges or Immunities Clause of the Fourteenth Amendment).

86. See ELY, *supra* note 1, at 99-101.

87. *Id.* at 101.

then approvingly quotes Hans Linde for the proposition that ““a constitution must prescribe legitimate processes, not legitimate outcomes.””<sup>88</sup>

That is a remarkable view in light of the fact that, as far as I am aware, every constitutional democracy that has ever existed—including the United States and each of its states—has included within its constitution a fair number of what can only be described as substantive provisions. Linde and Ely should probably not be read, therefore, as making the semantic point that most so-called constitutions are “really” something else. Rather, their point is evaluative. If real constitutions inevitably end up with some substantive provisions, that is unfortunate. An ideal constitution, they argue, would be limited entirely to procedural matters.

What reasons can be given for such an austere view? One answer is institutional competence: If, as Ely contends, judges, as lawyers, are good at crafting and enforcing rules about fair opportunities but are not especially qualified to answer other, more substantive questions,<sup>89</sup> then it makes sense for constitution writers to assign them the former, but not the latter, sort of task.

The work of Rawls nicely makes the institutional competence point. In both *A Theory of Justice* and *Political Liberalism*, Rawls distinguishes between the sorts of comprehensive (thick), typically religious or religiously inspired moral views that people hold about the good, and the “political” (thin) conception of the good—really a conception of the right rather than the good—that informs social choices about the “basic structure” of a liberal democracy over the long haul.<sup>90</sup> But even the thin basic structure is remarkably thick, in the sense that it would seem to constrain policy choices on a wide range of matters. Thus, the basic structure must be constructed so as to satisfy the Rawlsian “difference principle”—which states that inequalities in the distribution of society’s resources are permissible only insofar as they serve to maximize the share available to society’s least fortunate members.<sup>91</sup> I say this feature of Rawlsian political justice makes the basic structure relatively thick because it means that matters like tax rates and social welfare spending are not left to interest group bargaining in the legislature but are in some sense fixed—

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88. *Id.* (quoting Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 254 (197[6])).

89. *See id.* at 56-60.

90. *See* RAWLS, *supra* note 14, at 303-04 (explaining how liberalism can accommodate the plurality of comprehensive doctrines in modern society); RAWLS, *supra* note 12, at 395-99 (discussing citizens’ “thin” and “thick” conceptions of the good). For critical discussion, see William Powers, Jr., *Constructing Liberal Political Theory*, 72 TEX. L. REV. 443, 447-48 (1993) (reviewing RAWLS, *supra* note 14).

91. *See* RAWLS, *supra* note 12, at 75-83.

if not directly by the constitution or by statute then at least by a procedural mechanism that is itself regarded as part of the basic structure.

Nonetheless, Rawls does not insist that every feature of the basic structure be enshrined in a judicially enforceable constitutional provision. In particular, the difference principle, though part of the basic structure, is not, for Rawls, a “constitutional essential[.]”<sup>92</sup> That means that if a liberal democracy chooses to make its constitution enforceable through judicial review, it can leave the difference principle to enforcement by some other mechanism. As Rawls explains,

[W]hether the aims of the principles covering social and economic inequalities are realized is . . . difficult to ascertain. These matters are nearly always open to wide differences of reasonable opinion; they rest on complicated inferences and intuitive judgments that require us to assess complex social and economic information about topics poorly understood.<sup>93</sup>

They are accordingly properly left out of a constitution, at least one that is enforceable through judicial review.<sup>94</sup> For Ely, the enforcement mechanism of judicial review likewise plays an important role in deciding what should go into a constitution.

Rawls and Ely are not twins in these matters, however. Rawls does not think that *all* substantive values must be kept out of a constitution. For example, he thinks that a just constitution should include a minimal guarantee of social welfare, even if the constitution is judicially enforceable.<sup>95</sup>

To be sure, this difference between Rawls and Ely could perhaps be explained by their different assessments of the ease with which judges can enforce a social minimum. Ely might think that the enforcement of all so-called positive rights entails the sorts of complex social and economic assessments that Rawls thinks plague enforcement of distributional but not minimum social and economic rights. But Ely goes considerably further still. As a putative constitution writer, he argues against inclusion of *any*

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92. RAWLS, *supra* note 14, at 228, 228-29 & n.10.

93. *Id.* at 229.

94. Rawls himself does not include this qualifier, arguing that it would be appropriate to omit the difference principle even from a constitution that is thoroughly nonjusticiable. Frank Michelman explains this puzzle by positing that for Rawls, the question whether a principle of political justice should be included in a constitution is only partly a matter of judges' institutional competence; it is also partly a matter of the principle's “urgency in relation to liberal legitimacy.” Frank I. Michelman, *Justice as Fairness, Legitimacy, and the Question of Judicial Review: A Comment*, 72 *FORDHAM L. REV.* 1407, 1418 (2004).

95. See RAWLS, *supra* note 14, at 230.

substantive rights, negative as well as positive, those that judges could enforce relatively easily as well as those that judges would have difficulty enforcing. Accordingly, although Ely invokes judicial competence as an important reason why, in interpreting our Constitution, courts should opt for representation reinforcement rather than some other, more substantive approach,<sup>96</sup> institutional competence concerns cannot explain Ely's hostility to all substantive constitutional guarantees.

The explanation lies, not surprisingly, in Ely's commitment to representative democracy and his concern about the dead hand problem. Ely thinks that except on matters of procedure as to which we need clear rules of fair play, today's majority should not be bound by yesterday's supermajority, and today's supermajority should not bind tomorrow's majority. Making the point with respect to Prohibition with characteristic pith, Ely states that the Eighteenth Amendment was repealed by the Twenty-First "because such attempts to freeze substantive values do not belong in a constitution. In 1919 temperance obviously seemed like a fundamental value; in 1933 it obviously did not."<sup>97</sup>

Ely makes a similar and more dramatic point with respect to slavery. Slavery, he observes, "must be counted [as] a substantive value to which the original Constitution meant to extend unusual protection from the ordinary legislative process."<sup>98</sup> Ely thus associates the notion of enshrining substantive constitutional values with two constitutional failures: Prohibition and slavery.

Yet, upon reflection, the slavery example would seem to undermine rather than support Ely's case for keeping substantive values out of the Constitution. After all, the Thirteenth Amendment does not simply undo the Constitution's protection for slavery. It affirmatively prohibits slavery. As Ely notes, "[N]onslavery is one of the few values [the Constitution] singles out for protection now."<sup>99</sup> But if, as Ely says of Prohibition, attempts to freeze substantive values do not belong in a constitution, then he must regard the Thirteenth Amendment as a mistake. Our Reconstruction Era forebears had no business going beyond saying something like "this Constitution shall not be construed to protect or prohibit the institution of slavery."

Interestingly, Ely does not deny (although he also does not acknowledge) this implication of his argument. In light of Ely's seeming inability to defend the adoption of the Thirteenth Amendment, is his

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96. See ELY, *supra* note 1, at 102.

97. *Id.* at 99.

98. *Id.* at 93.

99. *Id.* at 98.

substance-free approach to constitution writing simply wrong? Or is it the intuition that the Constitution properly prohibits slavery that is wrong?

One possibility with which Ely flirts would be to defend the Thirteenth Amendment as fitting the theme of representation reinforcement. Ely states that “[t]he Thirteenth Amendment can be forced into a ‘process’ mold” or justified on equality grounds,<sup>100</sup> but the emphasis here is on “forced.” Presumably, a just society would forbid slavery even if, say, slaves were permitted to vote and the institution of slavery were not racialized. The Thirteenth Amendment, most of us surely think, rightly prohibits slavery or involuntary servitude in satisfaction of a debt, for example.<sup>101</sup> And thus Ely himself acknowledges the substantive nature of the Thirteenth Amendment’s prohibition.<sup>102</sup>

So Ely needs an argument for why a generation that can write a clear, judicially enforceable constitutional prohibition against a practice that is widely regarded as monstrous should stay its hand. “Because that hand will someday die and rule from the grave” is not a very persuasive argument if the current generation is firmly convinced that its position is the correct one. After all, the whole point of enshrining substantive values in a constitution is to prevent a future, less enlightened generation from abandoning those values, perhaps in a time of peril when the people’s leaders claim that they must be sacrificed to preserve other substantive values, typically security.

Ely in fact credits exactly this argument when it comes to freedom of expression. Adopting what my colleague Vincent Blasi calls the “pathological perspective” on the First Amendment,<sup>103</sup> Ely argues against ad hoc balancing approaches to free speech, even forms of balancing that place a nominally heavy burden on the government censors. “[A] specific harm test of *any sort*,” he writes, “is likely to erode in times of perceived

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100. *Id.*

101. To be sure, that result does not inexorably follow from the text of the Thirteenth Amendment, which exempts from its prohibition “slavery [or] involuntary servitude . . . as a punishment for crime whereof the party shall have been duly convicted.” Suppose that a state or the federal government were to criminalize the nonpayment of debts. Could it not then impose slavery or involuntary servitude as punishment for persons duly convicted of the crime of failure to pay a debt? Almost certainly not, although that result would best be explained by reference to the principle that the Eighth Amendment’s prohibition on “cruel and unusual punishments” bars punishments that are grossly disproportionate to the offense, *see Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (“[I]t is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)) (second alteration in original)).

102. *See* ELY, *supra* note 1, at 98.

103. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 453 (1985).

crisis.”<sup>104</sup> In this account, the categorical approach to the First Amendment—indeed, the First Amendment itself—serves as a kind of Ulysses contract: In calm times, the people bind themselves to the mast of robust protection for free expression, calculating that in subsequent times of crisis they will be tempted by the siren song of alarmists urging measures to suppress speech that they would eventually come to regret when the crisis passed.<sup>105</sup> The argument is a good one, but it is hard to see that the phenomenon just described is confined to matters of free speech. Constitutional democracies appear to go through periodic paroxysms during which they temporarily lose faith in their fundamental values. During these periods, the people are prone to xenophobia, to suppression of dissident speech, and more generally to exaggerating the degree to which maintaining order requires the sacrifice of liberty.<sup>106</sup>

Ah yes, Ely would say, but these paroxysms have tended to fit the *Carolene Products* pattern: Germans, Japanese, Communists, and Muslims are targeted in the relevant periods; the rights sacrificed are procedural in that they involve either free expression or the due process protections of the criminal courts. A constitution that enshrines only procedural values of the representation-reinforcing sort will thus suffice to meet these challenges. We don't need general substantive constitutional protections.<sup>107</sup>

Maybe we don't, I'm tempted to reply, but where's the harm? Why not prohibit slavery against the off chance that in a less enlightened future age someone tries to enslave our debtor grandchildren? Or, if you think that example preposterous—as easily dismissed as Harry Wellington's

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104. ELY, *supra* note 1, at 115.

105. I largely put to one side the fact that constitutions are usually written in times of tumult—such as in the wake of a revolution—rather than in calm times. Perhaps it is only in or immediately after a crisis that the people (of any nation) focus attention on their fundamental commitments rather than the concerns of daily life. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) (distinguishing between “constitutional moments” of engaged citizenship and periods of “ordinary politics”). Suffice it to say that whatever the tenor of the times, constitution writers—if their work is to be regarded as ultimately successful—will view themselves as writing for the ages, even as they compromise some first principles to accomplish relatively short-term political aims.

106. For examples memorialized in the U.S. Reports (or soon to be), see *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (rejecting the government's claim that the courts must grant complete deference to a presidential assertion that a U.S. citizen is an unlawful enemy combatant and therefore subject to indefinite detention); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding Executive Order No. 9066 excluding persons of Japanese descent from a described portion of the Western United States); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating a World War I-era prohibition on the teaching of languages other than English); and *Schenck v. United States*, 249 U.S. 47 (1919) (sustaining a conviction under the Espionage Act of June 15, 1917 for the mailing of a pamphlet urging readers to resist conscription through lawful means).

107. Cf. ELY, *supra* note 1, at 181-82 (arguing that a representation-reinforcing approach to constitutionalism would prohibit a genocidal regime, which could only come to power in a democracy by victimizing a discrete and insular minority).

hypothetical law forbidding the removal of gall bladders<sup>108</sup>—how about a constitutional amendment categorically prohibiting the torture of any person, even if ostensibly authorized by the President and undertaken for the purpose of obtaining information needed to avert grave harm to, or the death of, innocents? There may be reasons to think such a substantive prohibition unwise,<sup>109</sup> but, in light of recent revelations, the claim that it is useless cannot be seriously maintained.<sup>110</sup>

I think Ely's answer to this example would have to be that the people oughtn't write their most cherished substantive values into the Constitution because more often than not they will end up enshrining values that they will later come to reject—not just in times of crisis but in their considered sober judgment. For every prohibition of slavery, the people will enact a prohibition on alcohol or a Contracts Clause, which will then have to be either repealed or construed out of existence.<sup>111</sup> You may think with utter confidence that the value you hold—the immorality of abortion, say, or the immorality of substantial government restrictions on abortion in the early stages of pregnancy—ought to be permanently enshrined against backsliding, but when you reflect on the fact that earlier generations thought the same way not only about values you don't now hold but also about ones you find positively repugnant (such as slavery), you will hesitate to enshrine your chosen value in a constitution.

Whether it is practical to expect people to entertain this sort of doubt about their most deeply held values is itself doubtful. As Holmes was fond of saying, what it means to hold a value, or more generally, a belief of any

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108. *See id.* at 182-83.

109. For example, some people think nonlethal torture should be permitted when it is calculated to ascertain where a captive terrorist has planted a ticking bomb. *See, e.g.,* ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 131-63 (2002). For criticism of this view, see David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 *YALE L.J.* 1753, 1794-95 (2004).

110. For an indication of the extent to which torture is considered a valid (and perhaps valuable) tool in U.S. antiterrorism policy, see Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President 31-39 (Aug. 1, 2002), *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf> (stating that a federal statute imposing criminal penalties for acts of torture committed by persons acting under color of law is unconstitutional to the extent that it interferes with the President's power as Commander in Chief to direct interrogations of enemy combatants in wartime); *see also id.* at 3-4 (finding in that same statute a specific intent requirement that can immunize interrogators from prosecution, even if they "know" that severe pain will result from their actions). *But see* Memorandum from Daniel Levin, Acting Assistant Attorney Gen., to James B. Comey, Deputy Attorney Gen. (Dec. 30, 2004), *available at* <http://www.usdoj.gov/olc/dagmemo.pdf> (superseding and largely repudiating the August 2002 memorandum).

111. *See* ELY, *supra* note 1, at 99-100. As Rawls observes in a related context, this sort of claim "hinges on fundamental questions about how political institutions actually work and rests on our rough knowledge of these things." RAWLS, *supra* note 14, at 424.

sort, deeply is that one “‘*can’t help*’” but believe in it.<sup>112</sup> And if you can’t help but believe some substantive normative proposition—that slavery or torture is always wrong, say—you probably also can’t help but believe that a future generation that comes to disbelieve this proposition will simply be mistaken; you will see that potential departure as a fall from grace rather than as progress. If someone tells you that, over the long run, the values the people have tended to enshrine in the Constitution are ones that you now regard as misguided or immoral, you will take this cautionary tale as a reason to be very sure that you only work to enshrine in the Constitution your most deeply cherished values—only those values that you *really* can’t help but believe. But that just means that you may try to entrench fewer substantive values than you would have tried to entrench otherwise; the caution is unlikely to lead you to follow Ely’s austere advice that you entrench *no* substantive values in the Constitution.

And that’s probably just fine with Ely. In saying that an ideal constitution would be wholly procedural, Ely is not saying that we should cast aside the Constitution we have as impure. He thinks our actual Constitution, which by his own reckoning includes at least a handful of bona fide substantive provisions, is nonetheless a basically procedural document. Ely’s point about constitution writing is probably best understood as rhetorical. If he can make plausible the claim that even the people in their capacity as constitution writers, armed with the full legitimacy of a supermajoritarian mandate, ought not entrench what they firmly regard as fundamental substantive values, then the much weaker claim that unelected judges, armed only with ambiguous text adopted in different circumstances, ought not interpret that text to entrench what a bare majority of them regard as substantive values should seem like a no-brainer.

#### CONCLUSION

Judicial review, to be legitimate in a constitutional system that highly values rule by the people, must be sufficiently cabined to allow decisions of democratically accountable bodies to play the leading role in the day-to-day business of government. In principle, one could look to text, original understanding, or some other set of materials for limiting principles, but Ely’s principle of representation reinforcement more directly ties the solution to the problem. If our aim is to limit judicial review so that we preserve democracy, what could be better than a principle that says that

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112. SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 283 (1989) (quoting a letter from Holmes to John Gray).

judicial review should be limited to those circumstances in which it preserves democracy?

But should we aim to limit judicial review so as to maximize opportunities for democratic participation? Perhaps because Ely's readers already highly value democracy, it is easy to miss the fact that *Democracy and Distrust* does not provide a persuasive justification for that starting point. Nonetheless, if we see Ely's project as coherentist in the same way that other accounts of American constitutionalism are coherentist, then the value that the American people place on representative democracy can combine with its role in the constitutional text and the institutional limitations of the judiciary to make the case for a representation-reinforcing approach to constitutional interpretation.

Whether Ely's case is persuasive depends in part on the extent to which we share his view that constitutions ought to enshrine few if any substantive values. Like Ely, Rawls holds that the foundational principles of a liberal democracy are appropriately thinner than its full substantive commitments, but Rawls includes within his constitutional essentials "a fully adequate scheme of basic liberties"<sup>113</sup> that is not procedural in Ely's sense.<sup>114</sup> We do well to recall, however, that Rawls is not primarily concerned with the institutional mechanisms by which liberal democracies operationalize their foundational commitments. The principal focus of *Democracy and Distrust*, by contrast, is institutional. Ely may have strong views about what belongs in a constitution, but his burden of persuasion is only to establish the limits on the power of judges to find their values in the Constitution we have.

The persuasiveness of Ely's argument also depends on the answers he can give to two criticisms that I have not directly addressed in this article. First, Ely's picture of American law as the product of legislative deliberation is open to doubt in an age when administrative agencies subject only to presidential supervision, if that, play a very large lawmaking role. Ely anticipates and responds to this criticism by calling for a revival of the nondelegation doctrine,<sup>115</sup> but he may underestimate the degree to which even a nominally forgiving test such as the "intelligible principle" requirement could, if taken seriously by the courts, be used to throw sand in the gears of the administrative state. Ely reassures us "that the nondelegation doctrine, even at its high point, never insisted either on more

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113. RAWLS, *supra* note 14, at 334.

114. *See id.* at 335 (including within the basic liberties "the liberty and integrity of the person (violated, for example, by slavery and serfdom, and by the denial of freedom of movement and occupation)"). For an ambitious effort to translate Rawls's liberties into constitutional doctrine, see JAMES E. FLEMING, *SECURING CONSTITUTIONAL DEMOCRACY* (forthcoming 2006).

115. *See ELY*, *supra* note 1, at 132-34.

detail than was feasible or that matters be settled with more permanence than the subject matter would allow.”<sup>116</sup> One is left to wonder, though, whether the modern (near) death of the nondelegation doctrine might be due to the Justices’ recognition that they are poorly situated to say how much detail is feasible or how much permanence a given subject matter allows. Perhaps the best that can be said for Ely’s view of these matters is that the problem of delegation is irrelevant to judicial review of *legislation*, which, after all, is the primary focus of *Democracy and Distrust*.

That still leaves Ely vulnerable to a second, quite serious criticism, which applies to the whole of his theory. The core problem for Ely has always been the difficulty of distinguishing clearly between which constitutional rules of law can and cannot be defended as representation reinforcing. Our most socially divisive constitutional issues—including abortion, affirmative action, the separation of church and state, free speech rights involving the flag, gay rights, and racial profiling of suspected terrorists—all involve either the sorts of constitutional provisions that expressly qualify for special judicial solicitude under the *Carolene Products* framework or, as in the case of abortion, that can be plausibly re-rationalized in terms of such provisions.<sup>117</sup> Ely is left in the uncomfortable position of either allowing that a representation-reinforcing theory of judicial review excludes nothing and is thus indistinguishable from a fundamental values approach, or of having to declare by seeming fiat that some rights that can plausibly be rooted in equality or democratic participation are really about liberty and thus impermissibly substantive.

Although there is much to the foregoing criticism, at the end of the day it is hardly devastating. In a post-legal-realist world, any conceptual distinction can be deconstructed. The test of a coherentist account of some practice is not whether each of the terms it deploys can be defined with absolute rigor but whether the account makes sense as a whole. A coherentist account succeeds when insights at the wholesale and retail levels mutually reinforce one another.

Accordingly, we should define the scope of representation reinforcement in Ely’s work by how he uses the concept in his discussion of

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116. *Id.* at 133.

117. See Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199-207 (1992) (arguing that the abortion right should have been rooted in the Equal Protection Clause). Ely himself did not originally think that the abortion right could be successfully rooted in equality, see John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973), but by 1996 he conceded that “*Roe* ha[d] contributed greatly to the . . . general move toward equality for women, which seems to me not only good but also in line with the central themes of our Constitution,” ELY, *supra* note 35, at 305. As early as 1987, he expressed the view that, while *Roe* was a mistaken decision, it ought not be overruled. See *id.* at 304.

concrete constitutional problems like abortion, affirmative action, protection for dissident speech, and malapportionment. I cannot speak for other readers, but for me at least, even when I disagree with one of Ely's conclusions on these and other issues, I find his case analysis and his theoretical framework mutually illuminating. Even without a clear distinction between substance and procedure, Ely's retail-level analysis demonstrates the utility of his theory, while his theory provides the glue that makes his analysis hang together.

Ely's theory bears on today's retail-level problems no less than those that seemed most pressing in his day. Although the terrain of contestation in the Supreme Court has shifted somewhat from the question of when and how courts ought to recognize individual rights claims to the question of when and how Congress may, in an effort to protect individual rights of its own devising, override claims of states' rights, the underlying issue remains the same: What justifies the Court in insisting on its solutions given its peculiar institutional role and the ambiguity of the relevant constitutional text?<sup>118</sup> In an era when the opinions of the Warren Court, whose work *Democracy and Distrust* aims to justify, so often now read like period pieces,<sup>119</sup> the book itself remains fresh, even urgent.

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118. The issue is posed most cleanly in the Court's recent decisions by Justice Breyer's dissent in *Board of Trustees v. Garrett*, 531 U.S. 356 (2001). There the majority held that Congress overstepped its authority under Section 5 of the Fourteenth Amendment in creating a private right of action against state entities to enforce a right against disability discrimination in employment given that such discrimination, under the Court's own prior precedents, was only subject to rational basis review. *Id.* at 365-74. For Breyer and the three Justices who joined him, this approach stood the rational basis test—designed to give deference to elected bodies, not to subject their decisions to exacting scrutiny—on its head. *Id.* at 382-85 (Breyer, J., dissenting).

119. I have in mind especially the cases finding that the state's failure to provide free counsel or to waive fees for indigent criminal defendants amounts to discrimination against the poor. *See, e.g., Roberts v. LaVallee*, 389 U.S. 40, 42 (1967) (per curiam) (stating, in the course of finding a right of an indigent defendant to a free transcript of a preliminary hearing, that "[o]ur decisions for more than a decade now have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution"); *Douglas v. California*, 372 U.S. 353, 355 (1963) (finding that state failure to provide free counsel for direct criminal appeal works invidious discrimination against the poor). Such decisions from a largely bygone age made plausible, in 1969, Michelman's claim that the Court had found in the Constitution a state "duty to protect against certain hazards which are endemic in an unequal society." Michelman, *supra* note 44, at 9 (emphasis omitted); *see also id.* at 14-16 (finding Rawls's thoughts on distributive justice and minimum welfare central to a proper understanding of the relevant Warren Court decisions).