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BOOK REVIEW

DEMOCRACY AND DISTRUST. By JOHN HART ELY.* Cambridge: Harvard University Press, 1980. Pp. viii, 261. \$15.00.

*Andrew L. Kaufman***

My opinion of John Ely's new book, *Democracy and Distrust*, is revealed by the fact that I agreed to write this review. I do not ordinarily review books by friends or colleagues; criticism would be indelicate and praise suspect. Ely's book is so wonderful and so important and it issues such a challenge to scholarly debate that I have made an exception. This is the rare book that lives up to its dust-cover raves. It must be read by anyone who has any interest in the role of courts in our constitutional scheme. And it can be read easily. Ely is that rare modern legal scholar who knows how to present the most subtle and complex thought in simple English, with charm and often with humor. Beg, borrow, or better yet buy this book, for you will want to have it in your library. The subject is timeless.

* * *

The book has several major themes. It begins with a discussion of the major alternative views of the appropriate method of constitutional adjudication. Ely uses the currently popular labels of interpretivism and noninterpretivism:

the former indicating that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution, the latter the contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document.¹

Addressing interpretivism first, Ely points to its obvious attractions. Our usual conception of a court's role in interpreting a

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1. J. ELY, *DEMOCRACY AND DISTRUST* 1 (1980) (footnote omitted) (citing Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703 (1975)).

writing is that it limits itself to the express or implicit purposes of the language. Any other theory has enormous difficulty "reconcil[ing] itself with the underlying democratic theory of our government."² He distinguishes two kinds of interpretivism. The first is a "clause bound" interpretivism that seeks to interpret a constitutional provision on the basis of its language and any relevant legislative history. The second is a broad form of interpretivism proceeding from a realization that a more open-ended constitutional provision cannot be sensibly interpreted solely on the basis of its language and legislative history, and so looks beyond these criteria. It derives meaning, however, from "general themes of the entire constitutional document and not from some source entirely beyond its four corners."³ I am sure that no one will accuse me of the premature revelation that "the butler did it" if I say that a broad-form, process-oriented interpretivism is Ely's choice.

First, however, Ely demolishes the contenders. Clause-bound interpretivism is easy. Moving from the somewhat open-textured provisions of the Constitution, such as the first and eighth amendments, to the extremely open-ended equal protection clause, privileges or immunities clause, and ninth amendment,⁴ Ely demonstrates quite persuasively that these important provisions cannot sensibly be interpreted within their four corners. While their language and history indicate general concerns, their more specific contents are simply not apparent. I am delighted to see the powerful support he gives to arguments for a major substantive role for both the privileges or immunities clause and the ninth amendment,⁵ for I have long thought that they were the appropriate um-

2. *Id.* at 4.

3. *Id.* at 12.

4. Ely argues that the privileges or immunities clause and the ninth amendment, and not the due process clause, should have been the vehicles for consideration of constitutional issues, other than those relating to fair procedures, that are not specifically dealt with elsewhere in the Constitution. *Id.* at 22-41. His argument, based on the language and history of the ninth and fourteenth amendments, is quite powerful, except that it becomes marred to some extent by his rather expansive notions of process.

His argument is not made for the esthetic purpose of tidying up the Court's historically muddled treatment of the fourteenth amendment. Ely sees the Court's faltering protection of so-called "procedural" due process in *Paul v. Davis*, 424 U.S. 693 (1976), and its progeny as attributable, at least in part, to its fear of the unconfined nature of the due process clause after "substantive" due process was reinvigorated. *J. ELY, supra* note 1, at 19.

5. *J. ELY, supra* note 1, at 22-30, 34-41. Ely quotes with approval Justice

brellas under which much of substantive due process should have been sheltered.

Ely's demonstration of the "impossibility of a clause-bound interpretivism" ends on a curious note that sets the tone for the rest of the book. He states: "If a principled approach to judicial enforcement of the Constitution's open-ended provisions cannot be developed, one that is not hopelessly inconsistent with our nation's commitment to representative democracy, responsible commentators must consider seriously the possibility that courts simply should stay away from them."⁶ There are, of course, other possibilities. If there is a clash between the words of the open-ended provisions and some theory of "representative democracy," Ely's common sense insistence that we focus heavily on the words of the document points to the conclusion that the words should prevail. After all, "representative democracy" is not constitutional language. Any potential theory of "democracy" that is to be given constitutional status by inference should be inferred from *all* the provisions of the Constitution, including the very important open-ended provisions. Such a prospect might cause one with Ely's concerns to reexamine the institution of judicial review itself. Short of that, however, a new amendment—e.g., the fourteenth amendment—ought not to be viewed as judicially unenforceable because judges or scholars think its judicial enforcement to be inconsistent with their view of "our representative democracy." That would be the height of anti-constitutionalism.

Ely does not pursue this hypothetical problem. Instead, he next considers an alternative theory of constitutional adjudication, noninterpretivism, by which the content of open-ended constitutional clauses is provided by identifying those principles that seem "fundamental" at any given time. He identifies several methodologies for selecting those principles: The judge's own values, natu-

Field's dissent in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), which observed that if the privileges or immunities clause

only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage.

Id. at 96 (Field, J., dissenting), *quoted in* J. ELY, *supra*, at 22. As to the ninth amendment, Ely's point is simply that to reject its open-textured provision of rights and yet accept substantive interpretations of the due process clause "puts the world exactly upside down, . . . for whereas the Due Process Clause speaks of process, the Ninth Amendment refers to unenumerated rights." J. ELY, *supra* note 1, at 34.

6. J. ELY, *supra* note 1, at 41.

ral law, neutral principles, reason, tradition, consensus, and predicting progress. The judge's own values⁷ is Ely's bugaboo for, although that methodology is seldom advocated openly, he believes that judges who adopt the noninterpretivist position often reach decisions based simply on their own values. Natural law⁸ is quickly dismissed as either providing such general or abstract principles as to be useless in adjudication or as losing its universality if specific content is sought. Herbert Wechsler's neutral principles⁹ also fail the test because they "do not provide a source of substantive content."¹⁰ Reason,¹¹ that is, moral reasoning, also fails because it provides too much substantive content. One person's moral right is so often another's moral wrong. Tradition¹² has a similar problem: Whose tradition? Moreover, tradition, which is backward looking, seems an odd source of values for an open-ended provision capable of growth.

Consensus¹³ is viewed more seriously because it ends up as the touchstone for arguments based on tradition and neutral principles. Ely first takes note of the growing literature that indicates the lack of real societal consensus on most issues, and then argues the difficulty of establishing what the consensus is, assuming there is one. Thus, consensus turns out to be as useless as natural law—too general or controversial. Moreover, acting on the basis of consensus is more appropriate for legislators than for courts, and, however true it is that legislatures may not be wholly democratic, they are certainly more so than courts. Finally, if the purpose of providing content to the Constitution's open-ended provisions is to "protect the rights of individuals and minority groups against the actions of the majority . . . it makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority."¹⁴ It is interesting to note that "individuals and minority groups" at the beginning of the thought becomes "minorities" at the end. Ely's argument becomes less compelling if one thinks in terms of "individuals" instead of "minorities." For in protecting specific individuals in particularized

7. *Id.* at 44-48.

8. *Id.* at 48-54.

9. *Id.* at 54-55.

10. *Id.* at 55.

11. *Id.* at 56-60.

12. *Id.* at 60-63.

13. *Id.* at 63-69.

14. *Id.* at 69 (footnote omitted).

situations, the more generalized views of the majority may well be an appropriate reference. Indeed, many would say that that is the spirit in which the Bill of Rights and other individual-rights provisions of the Constitution were passed. We shall return to this theme shortly.

The final methodology is called predicting progress.¹⁵ That was Alexander Bickel's characterization of the Warren Court's philosophy.¹⁶ Ely quickly disposes of the notion that such a goal should inform interpretation of the open-ended provisions of the Constitution by noting that all the difficulties of predictability, protection of minorities with the majority's values, and subjectivism are present in more aggravated form.

This brief summary does justice to neither the completeness nor the nuances of Ely's argument. An outline of his conclusions was necessary, however, because his rejection of the arguments for noninterpretivism prepares the way for his alternative methodology—broad-form interpretivism.

* * *

Ely's broad-form interpretivism, which he views as having been the approach of the Warren Court, sees a Constitution that ensures that the processes protecting particular individuals are scrupulously observed, that the broader political processes are kept open, and that society's habitual unequals are treated equally. None of these goals involves "announcing that good or value X [is] so important or fundamental [that] it simply [has] to be provided or protected."¹⁷ Rather, they indicate a coherent theory of representative government that clears the channels of political change and corrects certain kinds of discrimination against minorities. Ely reviews the language of the Constitution and attempts to demonstrate that it is overwhelmingly concerned with process issues as he has defined them. He then concludes that his "representation-reinforcing approach to judicial review"¹⁸ is supportive of the underlying premises of representative democracy, and that it involves the courts in tasks they are better qualified to perform than political officials.

Assigning a primarily process-oriented task to the Constitution is complementary to Ely's rejection of a substantive, value-oriented

15. *Id.* at 69-70.

16. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).

17. J. ELY, *supra* note 1, at 74.

18. *Id.* at 87.

model of judicial review. I will focus on the latter aspect of his discussion for two reasons: Justification of a substantive, value-oriented model is more difficult; and the analysis of his process-oriented Constitution has already been done, at least to my satisfaction. Normally when asked to review a book, I do not read other reviews before writing my own. This time, however, I had already read Laurence Tribe's criticism of Ely's process theory¹⁹ before being asked to write this review. Tribe demonstrates quite persuasively that not only is the Constitution itself concerned with substantive values to a greater extent than Ely admits (although Ely tries quite hard to admit some concern), but more importantly that the choices to be made in facilitating the operation of the political process and in protecting minorities involve substantive-value choices. I will not spend time repeating Tribe's analysis. To get the flavor of Ely's argument, however, it is worth noting that he applauds the Court-created constitutional rights of freedom of association and right to travel, notwithstanding their heavy substantive content, because they are important to his process-oriented theory of representation.²⁰

If Tribe is right, and I think he is, then we must face the task that Ely faced in addressing the most difficult question of constitutional law: What are the appropriate sources of law for fashioning substantive choices for the open-ended clauses of the Constitution? Judges who were met with these clauses for the first time faced the same task that faced the early English common law courts or, perhaps a better example, the justices of the Supreme Court in 1789 with respect to the whole Constitution. What does one do when the slate seems so clean? The task is much easier, and much harder, in our day. Much easier because the slate is not so clean. A great deal of history and learning about the business of judging is available. Much harder because there are so many sophisticated critics who earn their living by criticizing, and because there is so much interest in finding "answers" or building models that the eclecticism that has been the hallmark of judging for so long may not be satisfying, at least to the critics.

Judges creating the common law and interpreting statutes, especially vague statutes, have long faced the same problems of identifying the proper sources of law. The best of them have used a

19. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

20. J. ELY, *supra* note 1, at 105, 177-79.

blend of the subjective and the objective to respect the past and yet avoid imprisoning the law in it. In the world of statutes, judges have used a similar blend to avoid a mindless literalism that ignores their context and purposes. Sometimes logic, sometimes history, sometimes tradition, sometimes a consensus, sometimes a consensus with a conscious effort to adopt an emerging view, sometimes a combination of some or all of these factors has seemed to be the touchstone, although in view of Ely's properly noted objection to the word "consensus,"²¹ perhaps "dominant view" would be a better term. It is no easy task for judges to know which method or blend of methods to use, but they have managed to perform their responsibility to create common law and to interpret statutes for over 750 years in Anglo-American law (and longer, albeit in different circumstances, in other cultures). Perhaps one reason they have been thought successful is that they have by and large managed to combine a policy-making role with a sense of the nonsubjective limitations imposed on that role by notions of reason, history, tradition, and consensus. So far, at least, society has not concluded that the judicial task is impossible to perform and should be abolished.

Ely concedes that an appeal to consensus, perhaps filtered through the judge's own values, "may make some sense in a 'common law' context . . . or, perhaps, [where the court is] responding to a broad legislative delegation of decision-making authority."²² But he adds:

All too often commentators accustomed to working in fields other than constitutional law . . . seek to transfer their analytical techniques to the constitutional area without dropping a stitch. After all, the inference seems to run, law is law, isn't it, and if it made sense there it should make sense here. The problem is that the constitutional context is worlds away: the legislature has spoken, and the question is whether the court is to overrule it in a way that can be undone only by the cumbersome process of constitutional amendment. That is precisely what constitutional courts must do—quite often, I shall argue. But to do so on the theory that the legislature does not truly speak for the people's values, but the Court does, is ludicrous.²³

But the proposition is not that the courts should set themselves up willy-nilly to review what legislatures have done in the

21. *Id.* at 63-69; see notes 13-14 *supra* and accompanying text.

22. J. ELY, *supra* note 1, at 68.

23. *Id.* (footnotes omitted).

name of deciding who truly speaks for "the people's values." Typically, the legislature will have decided to achieve a particular purpose in a particular way, and the claim is that a constitutional provision prohibits either the purpose or the method. If we concede that the institution of judicial review is constitutionally sound, then the Constitution must be viewed as requiring judges to ascertain whether the legislature's choice violates more general principles whose guardianship has been committed to the courts. This is not because courts are necessarily better at ascertaining the people's values, but because their job requires them to focus primarily on long-range principles rather than on short-term objectives.

While it is true that the context of constitutional adjudication is different both because the legislature has acted and because it cannot, even with executive approval, overturn a constitutional decision, it is not really "worlds away." For one thing, the practicalities of lawmaking are such that while non-constitutional decisions are overturned more often than constitutional decisions, they are still not overturned very frequently. Moreover, a constitutional decision may be overturned by the amendment process. The mechanism is cumbersome;²⁴ it may take time; but it does work. After all, there are twenty-six amendments to the Constitution, and adopting the twenty-sixth amendment, overruling *Oregon v. Mitchell*²⁵ in part, took only slightly more than six months from the date of that decision.

Furthermore, it does seem appropriate that if substantive content can be given to those provisions, their amendment should be the outcome of a deliberative process that may be time-consuming. The constitutional justification in such cases is that the individual interests that have been recognized seem so important that a stronger expression of dominant popular will than legislative enactment is needed to infringe them. The sometimes lengthy process of constitutional amendment or the kind of change in constitutional climate that results in judges' changing their minds²⁶ is required in

24. There is a controversial procedure for using the legislative power over federal jurisdiction to avoid the necessity for invoking the amendment process. See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1868). There is substantial scholarly authority and stray judicial commentary casting doubt on the constitutionality of that procedure. See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 313-65 (2d ed. 1973).

25. 400 U.S. 112 (1970) (provision of federal statute lowering voting age from 21 to 18 invalid as applied to state and local elections).

26. Compare *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concur-

such situations. That is what the individual-protection provisions of the Constitution are all about.

One might argue that judicial declaration of substantive rights is a two-edged sword, that courts may give constitutional status to principles that deny as well as recognize individual rights. In the first place, the issue of judicial review relates to the question of the appropriateness of exercising power under our current constitutional scheme, not to the results of that exercise. Moreover, as a practical matter, we should remember that it is not often that a decision itself, under one of the open-ended provisions, restricts a liberty or denies equality. Usually when rejecting an individual claim, a court is only refusing to interfere with the action of some other branch of society that has already restricted a liberty or denied an equality. While the court's refusal to interfere adds an imprimatur, it does not inflict the original deprivation itself. If there were no court decision, the deprivation would exist anyhow.

* * *

Ely's thesis combines two issues: When is it appropriate to interfere with the legislative choice of substantive values and what are the sources of law by which a court must adjudicate? His conclusion collapses the two issues into one: Since the search for substantive values is illegitimate, only process-oriented goals should be sought in the open-ended provisions.²⁷ Because he does not admit that his process goals themselves sometimes involve substantive choices, he never faces the issue of how substantive choices are to be made.

Ely's own historical discussion²⁸ of the origins of the privileges or immunities clause points the way to the beginning of the elaboration of substantive values. He points out that the repeated refer-

ring) *with* *Gregg v. Georgia*, 428 U.S. 153, 158 (1976) (Stewart, J., writing for plurality); *compare* *Reid v. Covert*, 351 U.S. 487 (1956) (Harlan, J., member of majority) *with* *Reid v. Covert*, 354 U.S. 1, 65 (1957) (or rehearing) (Harlan, J., concurring in result); *compare* *Carter v. Carter Coal Co.*, 298 U.S. 238, 317 (1936) (Hughes, C.J., concurring) *with* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (Hughes, C.J., writing for Court).

27. In discussing the celebrated footnote in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938), Ely suggests the articulation there of a standard of judicial inquiry that addresses "not . . . whether this or that substantive value is unusually important or fundamental, but rather . . . whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted." J. ELY, *supra* note 1, at 77.

28. J. ELY, *supra* note 1, at 22-30.

ences by the framers of the fourteenth amendment to Justice Washington's dictum in *Corfield v. Coryell*²⁹ are the key to interpreting the privileges or immunities clause.³⁰ Here is what Washington said:

What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.³¹

Ely adds that the list was meant to be only representative, not exhaustive, and then quotes Bickel's statement that the framers were aware that they had chosen language capable of growth.³²

If Washington's language is to be taken as a starting point, judges are not writing on a clean slate. They have at least as good a starting point as they have when interpreting the contract clause or first amendment. Indeed, "the enjoyment of life and liberty . . . subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole" sounds rather like what has become known as substantive due process. But how does a judge proceed beyond Justice Washington's formulation? Here is where the common law tradition is useful. If one credits the drafters of the Constitution, especially its amendments, with

29. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

30. J. ELY, *supra* note 1, at 28-30.

31. 6 F. Cas. at 551-52, *quoted in* J. ELY, *supra* note 1, at 29.

32. J. ELY, *supra* note 1, at 30 (quoting Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 63 (1955)).

any sense about what they were doing, one would credit them with understanding that judges would behave like judges in performing their tasks. Judges who considered the text and legislative history and found general statements, conflicting principles, or ambiguity would use familiar techniques and additional sources of law: What rights have already gained constitutional recognition? What general statements of individual rights have established themselves? What analogies can be drawn between these two groups? How do these rights apply in the particular current context? There is no magic touchstone or formula. Reason, history, current consensus (or dominant view), and the judge's best guess on these issues are not separate arguments. They blend together in the process of judging. One of our better judges tried to sum it up as best he could some sixty years ago: "History or custom or social utility or some compelling sentiment of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law must come to the rescue of the anxious judge, and tell him where to go."³³ In constitutional matters, one may or may not like having that kind of judgment left to judges in a representative democracy. But once we established judicial review, and once our society became industrialized and then regulated so that government became pervasive, that is where our system has taken us. Thus, following the implications of Ely's own admonition to look at the language of the clause through the lens of its legislative history, it would seem that attempting to put the privileges or immunities clause in a process-oriented straight jacket, usable only by certain disadvantaged minorities,³⁴ is unnecessary and unwarranted.

Unless. Unless there is some overriding constitutional imperative. One such imperative that Ely seeks to establish is restricting appropriate constitutional adjudication to various process-oriented goals, including protecting minorities by requiring equal treatment. Aside from the necessity of using substantive values to make process choices, a matter that we have already noted,³⁵ the argument also appears to be severely weakened by Ely's own account of the history of the fourteenth amendment.³⁶ Ely's argument for de-

33. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 43 (1921). For a more modern elaboration, see Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 *YALE L.J.* 221, 246-47 (1973).

34. Ely makes an interesting attempt to link the suspicious-classification doctrine with unconstitutional-motivation analysis. J. ELY, *supra* note 1, at 145-70.

35. See notes 19-20 *supra* and accompanying text.

36. J. ELY, *supra* note 1, at 15-18.

clining to give it substantive content, and limiting it to a process orientation, seems to be based on his theoretical conception of "representative democracy," and his desire that our constitutional history had given our judges a more restricted role. Had he not so honestly demonstrated the growth-content that the open-ended provisions were meant to embody, he could simply have enunciated a principle that a court should not overturn a legislative enactment without the aid of a specific constitutional directive. But despite his earlier suggestion, which we have already considered,³⁷ that the courts could simply ignore these provisions, his own evidence suggests that that would fly in the face of the purpose of those provisions.

* * *

It is now time to mention that there is not one problem, but two, in giving substantive content to the open-ended constitutional provisions. The first is the one we have just considered, that of identifying the rights to be protected under the provisions. With the help of Ely's evidence and analysis I hope that he and I have persuaded you that that task is not much more difficult than other tasks the Supreme Court has managed—for instance, the establishment of judicial review, the early elaboration of the contract clause, or the more recent elaboration of the first amendment. The second problem is how to choose between rights so identified and other individual rights or powers granted to government under different Constitutional provisions. Of course, you may say that once one has identified rights under the fourteenth amendment, the problem is the same as when rights under, say, the first amendment are involved. I agree. Is there, however, any alternative to the eclectic method of the common law, the blend of reason, history, current consensus or the judge's best guess? Ely does not really address the issue, but, having rejected the method as illegitimate for identifying substantive rights, he would not be likely to embrace it in resolving this constitutional problem. I would suggest, however, that historically judges have adopted the common law method in resolving this kind of constitutional conflict, and I know of no competitor. Is it also too much to suggest that if that method is appropriate for resolving conflicts among constitutional rights, that is an additional argument for suggesting its utility in helping identify rights in the first place?

37. See note 6 *supra* and accompanying text.

Perhaps I need mention *Lochner v. New York*³⁸ and *Roe v. Wade*³⁹ before ending what long ago became a book review that has gotten out of hand. A court has a difficult task whenever it must interpret a constitutional provision that does not contain the specificity of the age limit for various governmental positions. But, by this time, it should be no surprise that I think the task is just as difficult with those unmentioned rights that Ely sees as process oriented (freedom of association and the right to travel) as with those rights that he sees as involving a choice of substantive values, such as those involved in, say, *Meyer v. Nebraska*,⁴⁰ *Pierce v. Society of Sisters*,⁴¹ *Lochner*, *Griswold v. Connecticut*,⁴² and *Roe*. The problem is not only that of identifying a constitutional right, but also that of choosing between such a right and others concurrently being asserted. In each one of those cases, there was not only the question of deciding whether an individual right had constitutional status, but whether it should prevail over a legislative choice that also claimed a constitutional status. In choosing, a court may make a decision that will seem wrong in a later day. *Lochner* is such a case, but it was “wrong” as much, or perhaps more, because it overvalued the individual’s “freedom to contract” in the circumstances of that case as because it thought an individual liberty with constitutional status was involved.⁴³ Turning to *Roe v. Wade*, which was probably crucial to the development of Ely’s thesis, it is not at all clear to me that the decision in *Roe* will be the “*Lochner*” of a later day.⁴⁴ It was not a decision that came out of the blue. The bundle of rights created by the decisions from *Meyer* and *Pierce* through *Skinner v. Oklahoma*,⁴⁵ *Griswold*, and *Eisen-*

38. 198 U.S. 45 (1905).

39. 410 U.S. 113 (1973).

40. 262 U.S. 390 (1923).

41. 268 U.S. 510 (1925).

42. 381 U.S. 479 (1965).

43. *Lochner* is one of Ely’s least favorite substantive due process cases. However, note Ely’s description of the just compensation clause as process-oriented because it doesn’t set up property as an untouchable fundamental interest. Property may be taken so long as compensation is paid. J. ELY, *supra* note 1, at 97. On that theory, the employer in *Lochner* might also have brought himself within the due process clause by asserting his employee’s interest not to have his property, i.e., his ability to earn money in the proscribed working period, taken without payment of compensation. Given the ingenuity of lawyers, one might imagine that they would eventually find a process-oriented formula for *Roe v. Wade*.

44. Ely has pressed this analogy at length. See Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 937-49 (1973).

45. 316 U.S. 535 (1942).

*stadt v. Baird*⁴⁶ provided a foundation of principles relating to individual decisionmaking in family and procreation matters that presage the recognition of the constitutional right asserted in *Roe*.⁴⁷

Recognizing such a right, however, is the beginning, not the end, of that case. Constitutional status was also sought for the rights of the unborn, and the legislature was asserting its own constitutional power of choice with respect to establishing rules governing conduct. Although Ely disagrees, I am less impressed by the legislature's claim to choose between the substantial constitutional assertions of two individuals. I view the conflict as essentially one between a woman and an egg-embryo-fetus at various stages of development. This was one of those agonizing choices between two enormously compelling claims where I do not think the decision should be made easier by denigrating the strength of the claim of the other side. I know of no case in constitutional history in which the constitutional claims were of greater magnitude. Yet I think it was appropriate and courageous for the Court to decide that whatever weight it would accord the legislative act, it, and not the legislature, was the appropriate forum for decision. It attempted to find a formula that protected each right when it seemed strongest—the mother's in the early period of pregnancy and the fetus' in the late stages—although my own sense is that even on the Court's own terms the fetus did not receive enough protection in the late stages. It is not, however, the purpose of this review to analyze *Roe v. Wade*, but only to demonstrate that the issue in that case was properly conceived as involving a clash of two constitutional claims, and hence appropriate for judicial resolution, rather than being a gratuitous excursion by the Court into legislative decisionmaking.

* * *

I began by expressing warm admiration for John Ely's book. I conclude the same way. Ely has contemplated both the difficult and controversial task that the dominant view of judicial review has placed on the courts and the alternative restricted notion of nonenforcement of the open-ended clauses. Accepting neither, he has reinterpreted the constitutional evidence relating to these

46. 405 U.S. 438 (1972).

47. See Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and its Critics*, 53 B.U. L. REV. 765 (1973).

clauses in the light of a well-thought-out theory designed to find a justifiable place for the judiciary in a constitutional democracy. The book is a *tour de force*. It reminds me of the first *tour de force* on constitutional law—Alexander Bickel's, *The Least Dangerous Branch*.⁴⁸ I admired that book too. But admiration is not the same as agreement and, as I disagreed with the essential thesis of that book,⁴⁹ so I disagree with the essential thesis of this one. But you should read it because it is a wonderfully intelligent and powerfully written book. John Ely will certainly make you think; perhaps he will even seduce you.

48. A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

49. Since I have incorporated Tribe's review of Ely by reference, *see* notes 19-20 *supra* and accompanying text, I will also incorporate Gunther's review of Bickel, Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 *COLUM. L. REV.* 1 (1964), with which I also agree.

