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Book Review: Democracy and Distrust: A Theory of Judicial Review

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BOOK REVIEW

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

*Reviewed by Eric M. Freedman**

Those who read book reviews in order to determine whether to read the book under review need go no further: Read it. Professor Ely's[1] exposition of constitutional theory is both deceptively simple in its approach and satisfyingly rich in its applications, and has already become a book which anyone who wishes to work seriously in the field needs to have read.

Ely's work contains a number of implications for the field of public interest law, highlighting some enduring issues for those interested in using the law as an instrument of liberal reform. In particular, it highlights the painful quality of the basic political choice which public interest law needs to make if it is to have a coherent strategy—whether to take the maximum one can get out of the courts for one's client at any given moment, accepting the roller-coaster ride of favorable and adverse decisions as part of the natural order of things, or whether to attempt to build new legal structures more slowly but more surely.

Unlike others who have focused on the legitimacy of judicial power,[2] Ely does so in a way which should cause public interest lawyers to ask themselves serious questions, not about the moral validity of their goals, but about the practical consequences of their methods.

The central problem presently facing academics and practicing public interest lawyers alike is what to do about the Bur-

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[1] Professor Ely teaches at Harvard University Law School, and has been a professor since 1973. Professor Ely served as law clerk to Chief Justice Warren from 1964 to 1965.

[2] *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

ger Court.[3] The distressing substantive outcomes often reached by the Court and the highly questionable nature of the procedures sometimes used to get there are seriously intensifying questions of legitimacy which were far more easily ignored when they were leveled at a Court with which both academics and public interest lawyers found themselves in substantial sympathy. Now, both groups must deal with the explosion of the comfortable assumption, discussed by Ely (p. 44), that the judges will be people like themselves.

The record of the Burger Court poses questions as serious for its supporters as for its critics. Indeed, the question of legitimacy is even more vital to its supporters, who, because of their agreement with the substantive outcomes reached by the Court, would like to ensure a long life for its work. But such flagrant abuses of the judicial process as took place in *Snepp* v. *United States*[4] call into question their ability to achieve this result. For whether or not want of judicial integrity will lead to a popular rebellion against the Court,[5] it will certainly lead to decisions which are more vulnerable to the hands of a later Court.

The interest of the liberal camp in maintaining the legitimacy of the Court is, at first blush, considerably less clear. But this writer hopes to show that it is, nonetheless, a real one.

One reason is psychological. As noted again below,[6] it is impossible to make sense of the field of constitutional interpretation unless one understands the degree to which Constitutionalism is America's civic religion.[7] The result of this phenomenon is not only that the judges feel bound to behave in legitimate

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[3] *See* Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 5 (1979). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW V (1978).

[4] 444 U.S. 507 (1980). *See id.* at 524-526 (Stevens, J., dissenting). *See also* Cooper v. Mitchell Bros' Santa Ana Theater, 102 S. Ct. 172 (1981); Lewis, *A Rage to Judge*, N.Y. Times, Jan. 18, 1982, at A19, Col. 5.

[5] Ely expresses skepticism on this point. J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW, 47-48 (1980). *But see* A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 157 (P. Bradley ed. 1945). It may well be that the Court's political position is not endangered by being ahead of public opinion only so long as its position is ultimately consonant with the American people's sense of right.

[6] *See* notes 31-37, and accompanying text *infra*.

[7] *See* Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1294-95 (1937); Levinson, *Taking Law Seriously: Reflections on "Thinking Like a Lawyer"*, 30 STAN. L. REV. 1071, 1073-74 (1978). *See also* Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1247. *See generally* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1307 (1976).

ways,[8] but also that all lawyers believe, rightly or wrongly, that craftsmanlike adjudication is in itself a substantive good.[9]

Another reason is political. While liberals may wish to eradicate totally the work of the Burger Court, it does not take a great deal of detachment to understand that this simply sets the stage for a new cycle of reaction at some later time. The significant contribution of Ely's work is that it is a thoughtful attempt to break this cycle and to provide a basis for slow, but enduring, progress in generally desirable directions.

The question of judicial legitimacy is political in a far more profound sense than that of merely affecting the transient political causes of the day. It goes directly to a central problem which, for different reasons, liberals and conservatives share: how much faith is to be placed in democracy.

This is clearly illustrated by a recent article in which Professor Laurence Tribe raises a number of specific and general objections to what Ely has done.[10] Both works contain insights important to a complete understanding of judicial legitimacy, and neither can stand entirely by itself. After reading Tribe, one might conclude that his ideal government would be one of law professors, not of laws. Even if one happens to believe, for example, as Ely does not (p. 253), that laws barring women members of the military forces from combat positions are unconstitutional, it is not particularly useful to start, as Tribe does,[11] from the premise that such laws are unconstitutional and then look around for a justification for this belief. If one is to improve the procedural and substantive functioning of the existing system, it would seem that one would be better advised to begin from the realization that, under a system where legislative enactments more often than not reflect the will of the majority, there are likely to be many laws which are unanimously condemned by law professors and the writers of law review articles alike, but

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[8] *See* Levinson, *"The Constitution" in American Civil Religion*, 1979 SUP. CT. REV. 123, 147.

[9] *See generally*, Deutsch, *Law as Metaphor: A Structural Analysis of Legal Process*, 66 GEO. L.J. 1339 (1978). *Cf.* Leff, *Law and*, 87 YALE L.J. 989, 1001, 1004 n.35 (1978) (analogizing satisfaction of engaging in principled legal behavior to winning a game played by the rules).

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

[11] Tribe, *supra* note 10, at 1076-77.

which cannot, on that ground alone, be held unconstitutional.[12]

That Professor Tribe's article reflects so little awareness of this ineluctable fact suggests that he has not learned some of the more important lessons of the Burger Court, but is content to hope that in due course a new majority will render more desirable opinions.[13] Quite apart from its somewhat defeatist nature, such a program is necessarily based upon a view of judicial power which is irreconcilable with the concept that ultimate sovereignty is to reside in the people. For it is not just judicial review which is counter-majoritarian—so is the whole adjudicative process. All litigation is law reform, and in constitutional litigation the plaintiff makes the additional claim that his point of view should be inscribed in society's basic text.

The fact that such claims are addressed to unelected lawmakers requires, if we are to truly understand, and thus hope to influence, the distribution of power within the American political system, either a convincing articulation of the role of judges within the structure of our government or an alteration of that structure. Ely chooses the former course. Boiling down his compelling prose and cogent examples, the main themes of his argument are as follows:

The evolution of constitutional theory has been marked by a debate between "interpretivism," a term "indicating that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution," and "noninterpretivism," which espouses "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" (p. 1).

Both schools need to face up to the problem of protecting minority rights. In addition, the noninterpretivist school must explain the legitimacy of the imposition of value choices by

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[12] *See* Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1, 25 (1980).

[13] The real value of Ely's book is the opportunities it offers for those who share the hope to do more than simply wait for it to come to fruition. This certainly seems more productive than the publication of any demonstration, however logical, that judicial review cannot be legitimated. *See* Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980), which would seem to be proof that those who have hitherto regarded themselves as liberals have in logic no alternative but to suffer in silence or to become armed revolutionaries. While this may indeed be the case, the book which both Professor Tushnet and I claim to have under review sets forth a pragmatic plan of action, and deserves to be examined as such.

unelected judges (pp. 7-8). Ely examines the various formulae which have been set forth to this end; for example, that judges should apply "neutral principles" or articulate "fundamental values," or predict the progress of enlightened opinion, and concludes that none of them fulfill the legitimating task (pp. 43-72).

The interpretivists, on the other hand, must give content to constitutional provisions, such as the ninth amendment and the due process, equal protection, and privileges and immunities clauses of the fourteenth amendment, "whose invitation to look beyond their four corners . . . cannot be construed away" (p. 13). A "clause-bound" interpretivism is unable to meet this challenge (pp. 11-41).

Building on the often-cited *Carolene Products* footnote,[14] Ely elaborates a "representation-reinforcing theory of judicial review . . . that bounds judicial review under the Constitution's open-ended provisions by insisting that it can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack" (p. 181).

Ely argues that this approach, which he finds epitomized by the work of the Warren Court, will result in a form of judicial review which vigorously polices the processes of representation clears the channels of political change, and facilitates the representation of minorities so as to eliminate those malfunctions of the democratic process which occur when

> (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or
> (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system (p. 103) (footnote omitted).

Thus, Ely would, in addition to enforcing such "participational values" as freedom of speech and the right to vote, scrutinize legislative action closely for invidious motivation. To detect this, Ely would have judges require that legislative action take place to the maximum extent on the floors of legislatures, rather than in the offices of administrators.

This framework, to be sure, does not cover all cases, not

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[14] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

even all constitutional cases. For example, I have recently served as counsel in a litigation[15] in which American citizens, who had been arrested and imprisoned in Mexico and then returned to this country pursuant to a prisoner exchange treaty between the United States and Mexico,[16] challenged their confinements here on the basis that the underlying foreign convictions were procured through brutal torture and farcical legal proceedings.

Nothing that I can see in Ely's book provides guidance as to how the court in reviewing this case should have weighed the petitioners' demonstration "that their convictions, under the laws of the sovereign state of Mexico, manifested a shocking insensitivity to their dignity as human beings and were obtained under a criminal process devoid of even a scintilla of rudimentary fairness and decency" against "the interest of those Americans who are currently, or may soon find themselves, caught up in Mexico's criminal justice system."[17] This sort of situation is not addressed in any helpful way by Ely's models.

In places, the book is also unhelpful in what it does say. For instance, despite Ely's protestation to the contrary (p. 231 n.16), I am unable to see in his treatment of the first amendment anything more than a reworking of the familiar distinction between content-based regulation and time, place and manner regulation. There is nothing particularly wrong with Ely's account, but there is nothing particularly new about it either,[18] and the regrettable fact is that the Burger Court has succeeded in using something like Ely's test for its own purposes (pp. 233-34 n.27).

Ely's courageous and long-overdue attempt to put some

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[15] Rosado v. Civiletti, 621 F.2d 1179 (2d Cir.), *cert. denied*, 449 U.S. 856 (1980), *rev'g* 474 F. Supp. 848 (D. Conn. 1979). *See* Abramovsky, *A Critical Evaluation of the American Transfer of Penal Sanctions Policy*, 1980 WISC. L. REV. 25; Comment, Rosado v. Civiletti: *The Mexican Transfer Treaty - Trick or Treat?*, 7 NEW ENG. J. PRISON L. 379 (1981).

[16] Treaty on the Execution of Penal Sentences, Nov. 30, 1977, United States - United Mexican States, 28 U.S.T. 7399, T.I.A.S. No. 8718.

[17] 621 F.2d at 1182, 1190.

[18] Moreover, there is no discussion at all of the serious first amendment problems raised in such modern cases as Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (right of access to trials); Gannett Co., Inc. v. De Pasquale, 443 U.S. 368 (1979) (right of access to pretrial proceedings); Herbert v. Lando, 441 U.S. 153 (1979) (protection of editorial process in libel cases); and Branzburg v. Hayes, 408 U.S. 665 (1972) (journalists' confidential sources). *But see* Kornstein, Book Review, N.Y.L.J., Apr. 18, 1980, at 2, col. 3 ("Ely proposes an extraordinarily simple and useful method for judicial review in the free expression field.").

meaning into the privileges and immunities clause is also less than satisfactory. The idea "that whatever else it did, the Privileges and Immunities Clause at least applied to the states the constitutionally stated prohibitions that had previously applied only to the federal government" (p. 196 n.59), is one which is not only historically correct, but also of considerable value in an era when the Supreme Court appears to hold the view that certain of the first ten amendments are not part of the Constitution of the United States.[19] Ely supports this position by a stimulating reexamination of the *Slaughter-House* cases,[20] and by a masterful summation of the historical record of the Court (pp. 22-30).

Following the trail blazed by Professor Alexander Bickel,[21] Ely goes on to argue that the clause should be taken "as a delegation to future constitutional decision-makers to protect rights that are not listed in the Fourteenth Amendment or elsewhere in the document" (p. 30).

While this idea appears sound, the problem is in giving content to these rights. When fit into his overall "representation-reinforcing" framework, Ely's idea resolves itself into one which the historical evidence shows to be of little practical use. The very same framework, a separation of the realm of law from that of politics, gave structure to the constitutional jurisprudence of Chief Justice Marshall.[22] Long before there was a fourteenth amendment it collapsed because the expression of political passions ultimately swept away the distinction. As a result, "the courts now practice judicial review under conditions quite different from those in which it may have originated."[23]

Ely rejects the notion of "contemporary value consensus," defined as the idea that "society's 'widely shared values' should give content to the Constitution's open-ended provisions" as a basis for constitutional interpretation (p. 63). However, in the case of the privileges and immunities clause, he gives us no other

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[19] *See* Stone v. Powell, 428 U.S. 465 (1976).

[20] 83 U.S. (16 Wall) 36 (1873).

[21] *See* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955) (fourteenth amendment). *Cf.* Estelle v. Gamble, 429 U.S. 97, 102-105 (1976) (eighth amendment); Note, *The United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?*, 88 YALE L.J. 142, 162-165 (1978) (Articles of Confederation).

[22] *See* Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893 (1978).

[23] Nelson, *supra* note 22, at 956. *See also* Levinson, *supra* note 8, at 1034 n.49.

way to proceed.

Since there is certainly no more consensus in American society today than there was in Marshall's time, the result of Ely's deference to the political resolutions of contentious issues is to keep the judiciary out of a very wide area indeed. Although a casual reader could be forgiven for missing some of them, this central aspect of Ely's theory has important practical consequences.

For example, discussing the equal protection clause, Ely presents an excellent argument for inquiry into legislative motivation, refining the crude notion of invalidating legislation based on stereotypes "so as to separate, if you will, the acceptable stereotypes from the unacceptable" (p. 156). (He does, however, omit to explain how many legislators need to be members of groups disadvantaged by an enactment before we can be sure that the legislation was not passed on the basis of stereotypes.) But the concept of stereotyping has no application to the typical real-world situation, such as the Mexican-American treaty case noted above, in which the claim is that the outcome of a clash of legitimate value judgments was legislation imposing conditions beyond the powers of any legislature — however reasonable and properly constituted — to impose.[24]

Ely tells us that those are precisely the cases in which the legislative judgment must prevail. There is nothing wrong in logic with this theory, but applied, as Ely certainly applies it, in a disciplined way, it proves a great deal. Vindicating "outlawing an act due to a bona fide feeling that it is immoral" (p. 256 n.92),[25] it leads to the conclusion, for example, that *Roe v. Wade*[26] was incorrectly decided,[27] a conclusion which Ely reveals

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[24] *See generally,* Rostow, *The Democratic Character of Judicial Review,* 66 HARV. L. REV. 193 (1952). *See* text and accompanying notes 15-17 *supra.*

[25] The weakness in Ely's view of the proper role of morality in government, that it accords too little scope for the autonomy of the individual, has been evocatively sketched out in O'Fallon, Book Review, 68 CALIF. L. REV. 1070, 1091-92 (1980) and powerfully attacked in Brest, *The Substance of Process,* 42 OHIO ST. L.J. 131, 135-36 (1981). For example, Ely's framework requires him, against his own inclination, to approve of the result in Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976) (summarily rejecting challenge to consensual sodomy laws). ELY, *supra* note 5, at 255 n.92.

[26] 410 U.S. 113 (1973).

[27] For a more detailed, and more critical, analysis of the effect of the application of Ely's ideas on legislative motivation to the abortion cases, see Cox, Book Review, 94 HARV. L. REV. 700, 709-11 (1981). Ely's answers to this piece, and to the criticisms in a

by indirection in a footnote (p. 248 n.52).[28]

In other areas, however, Ely's work makes important contributions. His remarks on the Burger Court's conceptions of due process, and on the jurisprudence of that Court in general, are direct and telling (p. 19). He is similarly trenchant in demolishing Raoul Berger's tendentious concepts of the fourteenth amendment and in giving useful content to the ninth amendment (pp. 34-41, p. 198 nn. 64, 66).[29] But perhaps his most useful contribution is in setting forth a theory which both requires legislatures to legislate — rather than delegating their powers to unaccountable administrators — and to do so with non-insidious motivations (pp. 137-48).[30] If adopted, this would lead to less, but better, legislation.

It would be a mistake, however, for public interest lawyers to confine analysis of Ely's book to a review of his comments on specific issues of contemporary constitutional law. As has been indicated, the book also provides the framework within which to make decisions of more far-reaching significance, and the importance of this, in turn, must be seen in the context of the role that constitutional law plays in American political life— a role both religious and ludic, both delphic and comprehensible.

While he would readily confess to knowing as little about standing and justiciability as he does about assumpsit and trover, Everyman considers himself an expert on the Constitution.[31] For to him, the Constitution exists on a different plane than mere lawyers' gobbledygook; it epitomizes what is fair and just. All of us, lawyers and non-lawyers alike, not only find this attitude rhetorically useful, but hold it to a greater degree than we might like to think. Far more frequently than is consistent with thinking like a lawyer, our cry, "that's unconstitutional" pre-

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number of other articles commenting on his book, are to be found in Ely, *Democracy and the Right to be Different*, 56 N.Y.U. L. REV. 397 (1981).

[28] In DEMOCRACY AND DISTRUST, Ely refers the reader to an earlier article of his, Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973). ELY, *supra* note 5, at 247 n.52.

[29] Ely's view of the ninth amendment finds support and provocative expansion in C. BLACK, DECISION ACCORDING TO LAW 43-74 (1981). For Berger's response to Ely's remarks, see Berger, *supra* note 12, at 19-23 (1980) and his more detailed (and more intemperate) treatment of the entire book in Berger, *Ely's "Theory of Judicial Review"*, 42 OHIO ST. L.J. 87 (1981).

[30] *See generally* Fiss, *supra* note 3, at 32-35.

[31] *See* A. DE TOCQUEVILLE, *supra* note 5, at 173.

cedes, rather than follows, an analysis of what constitutional provision may be offended by the enactment in question. In this role, "the Constiution" has replaced "natural law" as a signal "for one's sense that the law [is] not as one [feels] it should be" (p. 50) (footnote omitted). But at the same time, such a sense is itself an important element in deciding what is or is not unconstitutional.[32]

This is perhaps the most enduring reason why history has been so important to the work of the Supreme Court.[33] While the historical quest may not be only manipulated in certain instances[34] but actually impossible as a matter of logic,[35] its pursuit satisfies deeply felt needs.[36]

Both of these features of the Constitution in American public life, its position of independent authority as a source of public morality and the reliance on tradition for its interpretation, are reflections of its tremendously powerful role as a political symbol.[37] This religious aspect of the Constitution is of immense practical importance. To one interested in law reform, it means that he need not have the public behind him so long as he has behind him the public's perception that he has the Constitution behind him.

It is by the observance of this distinction that minority claimants win political victories through litigation. The lesson such claimants should learn from Ely is that they ignore the distinction at their peril — at the peril that the majority will exercise the political power to impose its will, a power which, under

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[32] *See, e.g.*, International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (relying on "traditional notions of fair play and substantial justice" to sustain in personam jurisdiction); B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977) (discussing at length the merits of using views of ordinary laypeople to interpret the just compensation clause of the fifth amendment).

[33] *See* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 245 (1973) ("One must ask what . . . ideals have been to know what they are.").

[34] *See*, Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 89; Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

[35] This point has been made, through the use of clear and compelling examples, recently in Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980). *See also* Murphy, *Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?*, 87 YALE L. J. 1752 (1978).

[36] *See* Leff, *supra* note 9, at 1003.

[37] *See generally* Schechter, *The Early History of the Tradition of the Constitution*, 9 AM. POL. SCI. REV. 707 (1915).

our system of attenuated but real democracy, the majority always retains. If public interest lawyers chose cases to litigate on the assumption that judges would act as Ely would have them, the problem of "backlash" would virtually disappear.

Of course, this would mean that public interest lawyers would be bringing fewer cases. The fundamental dilemma Ely's book raises for these lawyers is whether that would be a bad thing; whether it might not be more conducive to long-term success to litigate only those cases which a "representation-reinforcing" judge would be likely to decide favorably. Such a strategy would, at the price of deferring immediate gratification in some instances, aim at gaining not only victory in the case at hand but also the longer-term political objective of insuring that the symbolic power of the Constitution stood behind the result.[38] Assuming the judges had read Ely correctly, this strategy could be implemented without any diminution of effort in pressing claims that a minority had been unfairly denied a voice in making the decision being challenged.

Just as it is sometimes necessary for those who think and write in the field of constitutional law to guard against the illusion that such buzzwords as "process" and "substance" have an intrinsic importance which outweighs their instrumental use towards the achievement of a more just society, so must those interested in the achievement of a more just society sometimes curb their impatience with theory and pause to reflect on the question of whether their zeal to win battles is not jeopardizing their possibility of a success in the war.

A reading of Ely's book is the ideal occasion for such reflection.

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[38] This approach has certain analogies to the system of government set up by the Constitution itself, a system which, keeping its postulates to the minimum, *see* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 643 (1943); Levinson, *supra* note 8, at 137-148, is designed to create surer rather than faster government action. *See* ELY, *supra* note 5, at 80.