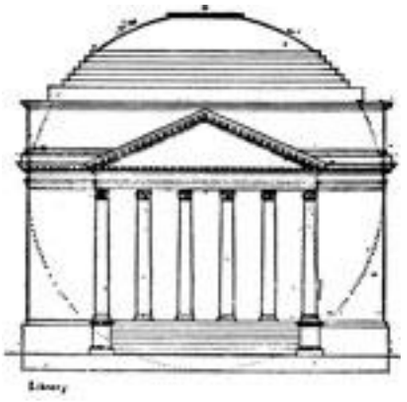

PURSUING A PERFECT POLITICS: THE ALLURE AND FAILURE OF PROCESS THEORY

*Daniel R. Ortiz**

FEW, if any, books have had the impact on constitutional theory of John Hart Ely's *Democracy and Distrust*.[1] Ely not only effectively criticized every brand of constitutional theory favored at the time, but also promised a new type of theory that would avoid all the pitfalls of the traditional kinds. Ely's ambition, if not his success, can be measured by the speed with which the book became the most controversial text in the field.[2] In some ways, *Democracy and Distrust* has proven the most influential as well. Although Ely has persuaded few theorists and gained few adherents,[3] he did change the territory and

---

* Professor of Law, University of Virginia. I would like to thank Michael Klarman, one of the few sheep remaining in Ely's flock, for his help in thinking through the problems and implications of process theory. Although we disagree on many issues in this area, his acuity and intelligence have constantly forced me to revise my opinions. I would also like to thank Lynn Baker, Mary Anne Case, Jim Goodrich, Pam Karlan, and George Rutherglen for their helpful comments on earlier drafts of this paper.

[1] J. Ely, Democracy and Distrust: A Theory of Judicial Review (1980).

[2] See, e.g., R. Bork, The Tempting of America: The Political Seduction of the Law 194-99 (1990); M. Tuschnet, Red, White, and Blue: A Critical Analysis of Constitutional Law (1988); Estreicher, Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture, 56 N.Y.U. L. Rev. 547 (1981); Judicial Review Versus Democracy, 42 Ohio St. L.J. 1 (1981); Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 Yale L.J. 1063 (1980); Laycock, Taking Constitutions Seriously: A Theory of Judicial Review (Book Review), 59 Tex. L. Rev. 343 (1981).

[3] For a contemporary proponent of one part of Ely's theory, see Klarman, The Puzzling Resistance to Political Process Theory, 77 Va. L. Rev. 747 (1991). The Supreme Court has followed Ely, too, but only occasionally and often in areas, like federalism, in which Ely does not much discuss the theory. See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-55 (1985). *Democracy and Distrust* has been cited by the Supreme Court only ten times. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989) (O'Connor, J., plurality opinion); McMillan v. Pennsyvania, 477 U.S. 79, 102 n.5 (1986) (Stevens, J., dissenting); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 796 n.5 (1986) (White, J., dissenting); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 317 n.10 (1986) (Stevens, J., dissenting); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 n.10 (1985); United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 231 (1984) (Blackmun, J., dissenting); Anderson v. Celebrezze, 460 U.S. 780, 793 n.16 (1983); Richmond Newspapers v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring); Industrial Union Dept., AFL-CIO v. American Petroleum Inst. 448 U.S. 607, 687 n.6 (1980) (Rehnquist, J., concurring); Carlson v. Green, 446 U.S. 14, 31 n.2 (1980) (Burger, C.J., dissenting).

define the arguments to which most constitutional theorists now feel obliged to respond.[4] If he did not win the game, he at least forced the play onto his own court. And despite the great amount of criticism the book has drawn, *Democracy and Distrust* still fascinates the academy. We find we cannot easily abandon the hope it raises of breaking through the longstanding stalemate of constitutional theory.

I also find myself fascinated by Ely's argument—against my better judgment. Each year I find myself returning to his proposal only to find that its promise remains unfulfilled. This paper represents in some ways another attempt to exorcise my hopes. I argue that Ely's descriptive project fails. His masterwork simply misdescribes what the Court does when it decides cases. Although the Court invokes process theory, it often does so dishonestly in order to legitimate a wholly substantive approach. Furthermore, Ely's theory succumbs to the same difficulties he so ably identifies in other theories. His elaborate psychological and sociological analyses obscure but do not obviate reliance on substantive commitments. Ultimately, I argue, no process theory can escape these difficulties. At some level in any constitutional theory, the substantive judgments Ely purports to eschew must enter into the analysis. I conclude by briefly speculating as to why, despite its defects, process theory still holds constitutional theory in its thrall.

Part I briefly describes Ely's theory and its background, particularly the impasse in constitutional theory to which it responds. By describing the state of the art at the time Ely wrote *Democracy and Distrust*, I hope to explain better both the book's attraction and its innovation. Building upon concerns the Court recognized as early as *McCulloch v. Maryland*,[5] Ely constructs a theory of judicial review that purports to bolster rather than undermine the majoritarian premises upon which our political system stands. His theory seeks to avoid the pitfalls of originalism and nonoriginalism, the two traditional theories of judicial review, neither of which makes sufficiently persuasive claims of democratic legitimacy.[6]

---

[4] See, e.g., Ackerman, Beyond *Carolene Products*, 98 Harv. L. Rev. 713, 716 n.6 (1985) ("Ely's work currently dominates the field . . . .").

[5] 17 U.S. (4 Wheat.) 316 (1819).

[6] Originalism, what Ely calls interpretivism, refers to interpretive methods like intentionalism and textualism, whereas nonoriginalism, what Ely calls noninterpretivism,

Part II evaluates Ely's descriptive claim. Although the Court sometimes claims that process theory justifies its results, the Court often fails to follow the course the theory dictates, particularly in the area of equal protection doctrine most central to Ely's analysis: the suspect classification strand. In the central inquiry of these cases, the Court mentions process theory but actually employs a thinly camouflaged version of process theory's opposite—substantive review.

Part III looks to Chapter 6 of *Democracy and Distrust*, the heart of Ely's work, to show how Ely himself falls prey to the difficulties he condemns in the traditional approaches to judicial review. Like every other constitutional theory, Ely's ultimately relies on substantive judgments, many of which are extremely controversial. This Part contributes to the literature of Ely-bashing not by pointing out that this occurs, for many other critics have done as much,[7] but by showing *how* it occurs and *where* Ely sneaks in the inevitable value judgments.

Process proponents could argue that nothing necessarily follows from Parts II and III. Despite the Court's failure to apply process theory and Ely's failure to develop it convincingly, one might still hope to develop a process theory that could succeed.[8] Part IV argues, however, that these failures are not accidental, for any type of process theory must fail, and fail in the same way that the Court's and Ely's versions do. In the end, to determine whether the political process has failed, a court must import a whole world of contestable judgments. The central objection is not that process theory inevitably smuggles in a few values in deciding any particular question, but that the central inquiry of process theory, whether the political decision-making process has functioned properly, is substantive through and through.

I. Ely's Project and His Theory

Democracy and Distrust excites so much interest because it claims to break through a longstanding impasse in constitutional theory. For several decades at least, constitutional theory has consisted

---

refers to interpretive methods like consulting tradition and social consensus or employing natural rights. J. Ely, supra note 1, at 1.

[7] See, e.g., R. Bork, supra note 2, at 194-99; Tribe, supra note 2.

[8] Michael Klarman, in fact, claims to do as much in his contribution to this symposium. Klarman, supra note 3.

largely of a single, unending, and inconclusive debate between what Ely calls interpretivism and noninterpretivism. Interpretivism, which others call originalism,[9] holds that judicial review can legitimately strike down only those governmental actions prohibited by the original intent of the framers or by the plain language of the constitutional text. It divides into two primary camps, intentionalism and textualism, which differ only in the relative priority they give intent and text. By contrast, noninterpretivism, which most others refer to as nonoriginalism, holds that judicial review can legitimately protect values found outside the original understanding, particularly those values defined by cultural consensus, tradition, or fundamental rights. Ely argues that both sides of the traditional debate fail because they both violate majoritarianism, the political principle upon which democracy rests.[10]

Originalism violates majoritarianism because it invalidates legislative outcomes that conflict with values that may not be our own. By appealing to the original understanding, originalism supplants contemporary majoritarianism with, at best, majoritarianism of the dead. The majority of some of our ancestors, not of ourselves, decides what our government can do.[11] Nonoriginalism violates majoritarianism differently. It replaces the outcome of a majoritarian legislative process with the values chosen by unelected judges.[12] Even when the judges try to choose values that are society's and not necessarily their own, they necessarily impose their own ideas of those values and thus cannot rightfully trump the results of the majoritarian process.

Ely tries to move beyond this great impasse in constitutional theory not by offering better arguments for one side or the other, but by proposing a new approach that neither side can fault. According to Ely,

---

[9] The issue of terminology is quite complex. Ely's terms misleadingly suggest that one approach interprets the Constitution whereas the other does not. In truth, all the approaches interpret the text although they do so differently. Grey, The Constitution as Scripture, 37 Stan. L. Rev. 1, 1 (1984). To avoid the implications of Ely's terms, I shall use the terms originalism and nonoriginalism as indicated in the text.

[10] J. Ely, supra note 1, at 11-72. Chapter 2, "The Impossibility of a Clause-Bound Interpretivism," attacks originalist methods, whereas Chapter 3, "Discovering Fundamental Values," attacks their opposites. Together these two chapters constitute the critical, in the sense of negative, section of Ely's argument. Chapters 5 and 6, "Clearing the Channels of Political Change" and "Facilitating the Representation of Minorities," constitute the constructive section.

[11] See, e.g., id. at 11-41.

[12] See, e.g., id. at 43-72; R. Bork, supra note 2, at 251-61.

his approach is invincible because it is both originalist and nonoriginalist at the same time and because it is also strongly majoritarian. It is a theory for all people and for all time, and one that offers everything to everyone. Put simply, Ely attempts to align judicial review with democracy. He allows courts to strike down legislative actions but only when the legislature has acted undemocratically, not when the courts merely disagree with the legislative outcome. This approach seeks to identify and correct failures in the democratic process, rather than accomplish any particular substantive ends. Ely, for example, defends the reapportionment cases because they strengthen the democratic legitimacy upon which legislation rests.[13] Similarly, he defends cases striking down discrimination against blacks and certain other groups because these laws reflect prejudice, a phenomenon that, he believes, distorts the democratic process.[14]

Ely first protects himself from the right by claiming that his is an originalist approach to judicial review. He argues that nearly all of the original Constitution and the Bill of Rights, except for a few provisions like those governing slavery, leave

> the selection and accommodation of substantive values . . . almost entirely to the political process and instead [concern themselves], on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with what might capaciously be designated process writ large—with ensuring broad participation in the processes and distributions of government.[15]

In other words, the original understanding of the Constitution was all about process with either a small or capital "p." All those protections, like the first and fourth amendments', which we had always thought substantive, were actually processual. To Ely, this seems so clear that he claims his process theory represents "the ultimate interpretivism."[16]

Through the rest of the book Ely claims the complementary virtues of nonoriginalism for his approach. To him, process theory represents nonoriginalism not because it violates the original understand-

---

[13] See J. Ely, supra note 1, at 116-25.

[14] See id. at 153-70.

[15] Id. at 87 (footnote omitted).

[16] Id. at 88.

ing (for it does not) but rather because it coheres with our traditions, cultural consensus, and beliefs about fundamental rights, the three primary sources of value in nonoriginalist review. Furthermore, because he believes it serves majoritarianism, Ely's process theory is "entirely supportive of[ ] the American system of representative democracy."[17] In other words, since it bolsters democratic legitimacy, Ely's theory works to protect the foundations of our political traditions, one of the few areas in which we might claim that a rough cultural consensus exists.

In making these claims, Ely develops a theory the Supreme Court first laid out, even if not first applied, during the New Deal.[18] In footnote four of *United States v. Carolene Products Co.*,[19] the Supreme Court elaborates three different bases for legitimate judicial review.[20] In the first paragraph, the Court invokes originalism by saying that it

---

[17] Id. at 102.

[18] See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428, 431, 435 (1819), for a much earlier application of process theory.

[19] 304 U.S. 144 (1938).

[20] Id. at 152 n.4. After applying traditional rationality review to an economic and health regulation, the Court remarked that other types of laws might call for stricter analysis. The footnote in full reads as follows:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See *Stromberg v. California*, 283 U.S. 359, 369-70; *Lovell v. Griffin*, 303 U.S. 444, 452.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see *Nixon v. Herndon*, 273 U.S. 536; *Nixon v. Condon*, 286 U.S. 73; on restraints upon the dissemination of information, see *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-714, 718-720, 722; *Grosjean v. American Press Co.*, 297 U.S. 233; *Lovell v. Griffin*, *supra;* on interferences with political organizations, see *Stromberg v. California*, *supra,* 369; *Fiske v. Kansas*, 274 U.S. 380; *Whitney v. California*, 274 U.S. 357, 373-378; *Herndon v. Lowry*, 301 U.S. 242; and see Holmes, J., in *Gitlow v. New York*, 268 U.S. 652, 673; as to prohibition of peaceable assembly, see *De Jonge v. Oregon*, 299 U.S. 353, 365.
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, 268 U.S. 510, or national, *Meyer v. Nebraska*, 262 U.S. 390; *Bartels v. Iowa*, 262 U.S. 404; *Farrington v. Tokushige*, 273 U.S. [2]84, or racial minorities, *Nixon v. Herndon*, *supra; Nixon v. Condon*, *supra:* whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more

might legitimately strike down legislative actions that contravene a "specific prohibition of the Constitution."[21] In the second paragraph, the Court suggests that it could legitimately reach "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[22] As examples of such legislation it cites cases involving laws restricting the right to vote, laws restricting the dissemination of information, and laws interfering with political organization and with the right to assemble.[23] In the third paragraph, the most interesting of the three, the Court suggests it could act when laws burden particular religious, ethnic, or racial minorities or, more generally, when "prejudice against discrete and insular minorities . . . curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities."[24]

Although the first paragraph embodies a type of theory strikingly different from those embodied in the later two, the difference between the theories of the second and third paragraphs emerges as the most important to process theory. Each of these two paragraphs' theories represents a vastly different strand of process theory.

Under the second paragraph's theory, courts should remove those blockages in the democratic process that the legislature itself creates. Thus, when the legislature restricts political speech or the franchise, a court should remove the restriction in order to restore the political process to its proper functioning. When it restores the vote or frees political discussion, a court concededly strikes down legislative results, but only to vindicate fundamental democratic principles, the very principles, in fact, that legitimate legislative activity in the first place. This type of process theory directly removes those formal obstructions in the political process that the political process itself has created.

The court proposes a much more ambitious theory in the third paragraph. Unlike the prior theory, it aims not to correct a problem but rather to invalidate the problem's results. Whereas the prior theory

---

searching judicial inquiry. Compare *McCulloch v. Maryland*, 4 Wheat. 316, 428; *South Carolina v. Barnwell Bros.*, 303 U.S. 177, 184, n.2, and cases cited.

Id.

[21] Id. at 152 n.4.

[22] Id.

[23] Id.

[24] Id. at 153 n.4.

removes imperfections in the process, this type of theory strikes down laws that an imperfect process generates. In a sense, it cures symptoms while the other cures disease. Its aim, however, is more ambitious than the second paragraph's because, practically speaking, it plays a much larger role in judicial review and because the second paragraph's theory cannot reach the most corrosive of all process imperfections: prejudice. Though the second paragraph seeks to cure formal and structural process imperfections that the legislature itself creates, the third paragraph seeks to cure the effects of informal and pervasive attitudinal structures that go well beyond politics.[25] Since a court cannot directly reach private prejudice in the same way it can reach a ban on political speech, it must strike down its results. As the Court noted in a related context: "The Constitution cannot control . . . prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[26]

Both strands of process theory ultimately contravene their own premises, however, by smuggling in substantive value judgments. Ely, for example, justifies the Court's reapportionment cases with paragraph two arguments.[27] He attacks malapportionment for denying many individuals equal influence in the political process without compelling reason.[28] The proper degree of influence to give an individual or a group relative to others, however, does not fall from the heavens. It varies according to how one thinks society should be organized, whether citizens do or should fall into classes, and whether communities of various sorts deserve a particular status.[29] All of these questions are substantive through and through. Questions of who may

---

[25] This is not to deny that politics plays a major role in forming people's attitudes. It does, as laws stigmatizing or prohibiting certain social behaviors, like gay sex or women serving in combat positions in the armed forces, can attest. In some cases, the Court does regulate what values a law can reinforce, see Craig v. Boren, 429 U.S. 190 (1976), but it usually does so on the ground that the law reflects unwarranted prejudice, not that the law seeks to create it.

Paragraph two's and paragraph three's theories do overlap to some extent. Laws disenfranchising blacks, for example, both impose a formal blockage and reflect prejudice. Most laws the two paragraphs cover, however, like laws malapportioning a legislature or laws denying blacks economic opportunities, fit only one theory, not both.

[26] Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

[27] J. Ely, supra note 1, at 116-25.

[28] Id. at 120.

[29] Cf. Tribe, supra note 2, at 1071-72 (substantive questions implicated in deciding who votes and how voting power is to be allocated).

vote and in what kind of electoral system they may do so may appear merely procedural only because we view the underlying substantive judgments as uncontroversial. But they are uncontroversial not because they are "objective," "neutral," or devoid of substantive content, but because they reflect deeply and widely shared values. Only the extent of our agreement with them makes them appear unproblematic.

I will not criticize paragraph two theories, including Ely's, in greater detail because they do not cover much ground. Even if they had no difficulties, they could justify only a small part of the area of judicial review that process theory traditionally defends. While they could justify political speech cases and ones involving other political participation rights—exactly the types of cases mentioned and cited in the second paragraph of footnote four—they could not justify much else, particularly cases like *Brown v. Board of Education*[30] and *Loving v. Virginia*,[31] which typify the larger and more significant part of equal protection review. To get anywhere interesting, process theory must invoke paragraph three, and Ely's version emerges as no exception.[32] Ely spends by far the largest chapter of his book, Chapter 6,

---

[30] 347 U.S. 483 (1954).

[31] 388 U.S. 1 (1967).

[32] In his contribution to this symposium, Michael Klarman offers a new defense of process theory. Klarman, supra note 3. Agreeing with Ely's critics that Ely's own paragraph three theory fails, Klarman develops a new hybrid theory. Id. at 783-89. He argues—against Ely himself—that the Court can identify all those laws springing from a flawed political process through uncontroversial analysis of the formal blockages to political participation. Id. at 788-89. His approach has paragraph three's scope but with paragraph two's less controversial rationale. He would seek the scope of paragraph three without paying its costs.

I have several doubts about this approach in addition to my general ones about paragraph two theories. First, although Klarman's approach recognizes the impossibility of employing a nonsubstantive conception of prejudice, his own approach relies on an equally illusive concept: a nonsubstantive theory of appropriate political empowerment. See id. at 788-89. We simply cannot tell whether a group possesses sufficient power in a political system without making controversial substantive judgments focusing on how much political power the group *should* have. Whether an at-large voting scheme unfairly submerges the strength of minority groups depends, for example, on how much the minority group's interests and voting patterns diverge from the majority's, how responsive the majority-controlled political process has been to the minority's needs, and a host of other substantive concerns. See, e.g., Rogers v. Lodge, 458 U.S. 613, 623-27 (1982). If Klarman's inquiry does rest on such judgments, he has succeeded only in displacing Ely's problem, not in overcoming it.

Second, insofar as Klarman's approach identifies only appropriate occasions for judicial review, but not appropriate results for when those occasions arise, it solves a very small part of the difficulty. See Klarman, supra note 3, at 783-84. Although the judge may know when to

entitled "Facilitating the Representation of Minorities," developing his paragraph three analysis; in fact, he begins the chapter by charging those who believe in the sufficiency of paragraph two with political naivety.[33] To his mind, paragraph two cannot even justify the proper treatment of race, the paradigm class of equal protection.[34] Since Ely's paragraph three strand of process theory performs the bulk of the work, I shall devote the rest of my analysis to it.

II. Process Theory in the Courts

Ely's work mixes together positive and normative theory. At many times Ely purports to explain why the Supreme Court reached the result it did; at others he implicitly criticizes the Court for reaching wrong results, as in the sex discrimination cases.[35] I will first evaluate Ely's descriptive claim that the Supreme Court has actually followed process theory. I will avoid the usual temptation in evaluating a descriptive claim to canvass cases and tally the number that can or cannot be interpreted to support it. Such a task, I fear, would quickly exhaust the patience and interest of my readers. Instead, I will look at equal protection, the area where Ely believes the Court has most faithfully applied process theory, and will examine the key stage of its doctrinal analysis: determining whether a particular group deserves special judicial solicitude. This provides an interesting test of Ely's claim not only because this determination is central to the whole equal protection inquiry, but also because in making this determination, the Court actually claims to employ a process rationale.

To determine the suspectness of a class, the Court employs criteria that, although varying somewhat from case to case, are best outlined

---

distrust the political process, if she cannot fashion a nonsubstantively based liability rule to guide her once she gets there, the majority can rightly raise the countermajoritarian difficulty.

[33] J. Ely, supra note 1, at 135.

[34] Ely states that the pluralist model of politics upon which paragraph two theories rest does not work sufficiently well to protect minorities, "as the single example of how our society has treated its black minority (even after that minority had gained every official attribute of access to the process) is more than sufficient to prove." Id.

[35] See id. at 164-70. After much discussion in which he rejects false consciousness as a process concern, Ely arrives at a truly innovative proposal: the courts should remand to the legislature for reconsideration laws which it now strikes down for unconstitutionally burdening women. Id. at 169. At this point Ely clearly criticizes, not describes, what the Court has done.

in *Frontiero v. Richardson*.[36] Justice William Brennan's plurality opinion in that case discusses four factors that indicate whether a particular group deserves heightened scrutiny. They are (1) discrimination; (2) stereotyping; (3) immutability of the group characteristic; and (4) political powerlessness.[37]

Surprisingly, perhaps, the first two factors turn out to be the same. Although "discrimination" carries an overwhelmingly negative connotation in our political culture, discrimination by itself does not warrant granting special solicitude to a particular group. After all, every statute classifies and thus discriminates against some people in favor of others. The question must be whether the difference in treatment is justified. We do not, for example, allow blind people to drive trucks. The law prohibits the blind from doing what the sighted may, but few would argue that it therefore discriminates in a constitutionally significant way. As this example suggests, discrimination does not bother us when it accurately reflects a group's real capabilities.

Our laws similarly discriminate against convicted felons.[38] We often disenfranchise them[39] and sometimes impose other civic disabilities, like bars to certain elective offices, upon them. Few would argue, however, that convicted felons are less capable of voting than the rest of us. No one has put forward a convincing reason explaining why they cannot make political decisions just as well or as badly as the rest of us can.[40] Rather, we disenfranchise felons because we believe that we should cast out from the center of the political community those who violate the community's deepest norms. They may remain citizens but only second-class ones. We believe we should treat felons differently, not because they are capable of less but simply because of what they have done. As this second example suggests, discrimination does not bother us when it reflects proper or, more accurately speaking, socially privileged normative judgments about how an individual should be treated— regardless of that person's real capabilities. Together the examples of the blind and of felons indicate that discrim-

---

[36] 411 U.S. 677 (1973).

[37] See id. at 684-88.

[38] For a general discussion of why we disenfranchise felons, see Note, The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box," 102 Harv. L. Rev. 1300 (1989).

[39] See id. at 1300 n.1 (listing some states' provisions).

[40] See id. at 1301-09 (discussing problems with preferred justifications).

ination by itself poses little concern. It only raises concern when it embodies an inaccurate descriptive stereotype or an invidious normative one. The Court's first two factors are thus identical.

The third factor, immutability, also collapses into stereotyping, as the example of the blind drivers again shows. The immutability of most blindness does not make us suspicious about denying driver's licenses to blind people. Immutability, thus, may heighten concern, but standing alone cannot create it. As the example suggests, the original concern must stem from inaccurate or invidious stereotyping, the belief that members of a group are unable to do or should not be able to do something that they actually can or should be allowed to do.

The Court's emphasis on stereotyping in the first three factors seriously undermines any claim that it pursues process theory. Stereotype-analysis, at least when performed with candor, is inherently substantive. Stereotypes come in two varieties, neither of which we can do without. Descriptive stereotypes generalize about people's actual behavior and capabilities. In short, this type of stereotype aims to describe how the world *actually is*, and, like any generalization, it usually distorts to some degree. Prescriptive stereotypes, on the other hand, define how people should behave and what social roles they should assume. They aim to prescribe how the world *should be*. The statement "women live longer than men," for example, has much descriptive but little prescriptive force. It represents an accurate descriptive stereotype. On the other hand, the statement "a woman's place is in the home" is primarily prescriptive and has descriptive force only insofar as women follow its prescription. When a court strikes down a law because of the stereotypes it embodies, it disagrees with the legislature either about what the world actually looks like or what it should look like. In either case, the court violates process theory, for it displaces the legislature's vision of reality or of normatively proper behavior with its own. The court could hardly engage in a more substantive mission.

That leaves the final factor: political powerlessness, the quintessential process theory concern. On the surface, then, the Court's overall approach to identifying suspect and quasi-suspect classifications appears highly schizophrenic. The Court applies both process review and its naughty opposite, substantive review, at the same time. And, unhappily for a process theorist, at this point the score stands at one

to three. Closer inspection, however, of how the Court applies the political powerlessness criterion luckily reveals an underlying consistency among the four factors, but a consistency that will prove disappointing to the process theorist.

The case of *City of Cleburne v. Cleburne Living Center*[41] best illustrates the Court's application of the political powerlessness criterion. In this case, the Cleburne Living Center wanted to establish a group home for the mentally retarded. It applied to the City of Cleburne for the permit necessary to use a property for this purpose, but the city denied the application. The Cleburne Living Center then challenged the city's denial on several grounds, including equal protection. In particular, it claimed that the mentally retarded constituted a quasi-suspect class and that the city's decision failed to pass intermediate scrutiny.

The Supreme Court refused to grant the mentally retarded the quasi-suspect class status they sought for several reasons, one of which rested on the Court's belief that they were not politically powerless.[42] In one sense, this was an astounding conclusion since most political jurisdictions do not allow the mentally retarded to vote.[43] To the Court, however, mere disenfranchisement did not deprive the group of power in the political process. Rather,

> the [federal and state] legislative response [to the needs of this group], which could hardly have occurred and survived without public support, negates any claim that the mentally retarded are politically powerless *in the sense that they have no ability to attract the attention of the lawmakers*. Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect.[44]

In other words, the Court decides whether a group has political power not by whether it can "assert direct control over the legisla-

---

[41] 473 U.S. 432 (1985).

[42] In reasoning towards the result, the Court found important the mentally retarded's "reduced ability to cope with and function in the everyday world," their immutable variety, the lawmakers' "addressing their difficulties in a manner that belies a continuing antipathy or prejudice," the mentally retarded's access to political power, and the slippery slope. Id. at 442-43, 445-46.

[43] Note, Mental Disability and the Right to Vote, 88 Yale L.J. 1644, 1645-47 (1979).

[44] *Cleburne*, 473 U.S. at 445 (emphasis added).

ture" or even vote, but by whether it has the "ability to attract the attention of the lawmakers."

Justice Thurgood Marshall, although he believed that the mentally retarded should receive quasi-suspect class status, agreed with the way the Court applied the political powerlessness criterion. He wrote:

> The political powerlessness of a group . . . [is] relevant insofar as [it] point[s] to a social and cultural isolation that gives the majority little reason to respect or be concerned with that group's interests and needs. Statutes discriminating against the young have not been common nor need be feared because those who do vote and legislate were once themselves young, typically have children of their own, and certainly interact regularly with minors. Their social integration means that minors, unlike discrete and insular minorities, tend to be treated in legislative arenas *with full concern and respect, despite their formal and complete exclusion from the electoral process.*[45]

In Justice Marshall's view, political powerlessness has little necessarily to do with one's ability to participate in the political process. Rather, it turns on the legislature's care for a group and concern for its needs. This resembles quite closely the Court's inquiry into whether a group can "attract the attention of the lawmakers." Since Justice Marshall's opinion, moreover, was the only opinion in the case not formally concurring in the Court's overall reasoning, the Court was unanimous in this approach.

Legislative care, however, stands as a poor proxy for political power in the sense process theory demands. In fact, inquiring into legislative care undercuts process theory. To determine whether the legislature cares, a court cannot just ask whether the legislature has addressed a particular group's concerns, for the legislature could have addressed those problems inappropriately. A law commanding sterilization of the mentally retarded, for example, might indicate legislative interest in their condition, but it would demonstrate more fear and hostility than care. To show care, the legislature must address a group's concerns appropriately. In other words, it must treat members of the group according to their actual capabilities or according to the prevailing normative consensus as to how they should be treated. But if this is true, political powerlessness represents just a different dimension of stereotyping. Both ask whether a law imposing disabili-

---

[45] Id. at 472 n.24 (Marshall, J., concurring in part and dissenting in part) (emphasis added).

ties on some people accurately reflects the way things are or helps enforce the way things should be. In either case, the court engages in old-fashioned substantive review.

In the name of process theory, then, the Court actually performs a substantive inquiry. Contrary to the initial diagnosis, the Court's approach does not suffer from schizophrenia—employing process analysis and its opposite at the same time—but represents a well-integrated attack on process theory's basic assumptions. All four of the criteria rest on analysis of the substance of legislative and social stereotypes. The suspect classification criteria invoke process only to reject it, and they claim a kind of methodological legitimacy they actually lack. In the Court's hands, the central process inquiry, political powerlessness, becomes its opposite.

III. Ely's Slide Into Substance

To a committed process theorist like Ely, the Court's comic inversion of the process inquiry might prove the judiciary's incompetence more than any fundamental flaw with the theory. It would not be, after all, the first time the Supreme Court has failed to understand what it was doing. As if responding to the Court's displacement of process with substance, its conversion of the political powerlessness inquiry into one of stereotyping, Ely boldly centers his discussion of the suspect classification criteria on stereotyping itself. In a sense, Ely attempts to rescue process theory by reversing the direction of the Court's argument in *City of Cleburne v. Cleburne Living Center*. He argues that stereotyping, the quintessential substantive concern, actually reflects a concern with process. He agrees with the Court that stereotyping and political powerlessness are ultimately the same but argues that bad stereotyping represents an imperfection in process, not the reverse.

Realizing that a sufficiently robust process theory must focus on informal and extrastructural process imperfections,[46] Ely "[s]witch[es] the principal perspective . . . [of process theory] from the purely political to one that focuses more on the psychology of decision."[47] In particular, he focuses on the corrosive effects of prejudice on democracy. He writes:

---

[46] J. Ely, supra note 1, at 135.

[47] Id. at 153.

> [P]rejudice is a lens that distorts reality. We are a nation of minorities and our system thus depends on the ability and willingness of various groups to apprehend those overlapping interests that can bind them into a majority on a given issue; prejudice blinds us to overlapping interests that in fact exist. [As one commentator] put it . . . : 'Race prejudice divides groups that have much in common (blacks and poor whites) and unites groups (white, rich and poor) that have little else in common than their antagonism for the racial minority.'[48]

Ely here uses stereotyping in both its prescriptive and descriptive senses.[49] When he speaks of prejudice as a lens which distorts reality, he focuses primarily on descriptive stereotypes. Prejudice—our biases, our assumptions about other people—prevents us from seeing what other people really are, how they actually behave, and what the world is really like. When, on the other hand, Ely mentions how prejudice blinds us to overlapping interests, he speaks more about prescriptive stereotypes. Prejudice in this sense—hatred of others, feelings of social superiority, and assignment of people to particular social roles—prevents people from uniting even though they share aims and interests. Relying on either type of prejudice would appear to pose a problem to Ely because both involve substantive judgments—either about how the world actually is or how it should be.

Sensitive to these concerns, of course, Ely attempts to propose a way of separating good from bad stereotypes without simply judging them according to their descriptive accuracy or normative appeal. As he says in focusing primarily on descriptive stereotypes, "[a] mode of review geared to whether the incidence of counterexample [to the stereotype] is 'too high' is . . . indistinguishable from the unacceptable theory that courts should intervene in the name of the Constitution whenever they disagree with the cost-benefit balance the legislature has struck."[50] Instead, he proposes to scrutinize "those [stereotypes] involving a generalization whose incidence of counterexample is significantly higher than the legislative authority appears to have

---

[48] Id. (quoting Goodman, De Facto School Segregation: A Constitutional and Empirical Analysis, 60 Calif. L. Rev. 275, 315 (1972)).

[49] The distinction is perhaps a crude one and misleading insofar as it suggests a clean-cut between the two categories. As in the case of race, for example, descriptive stereotypes can be used to bolster prescriptive ones. Still, distinguishing between the two kinds of stereotyping helps the analysis because it better focuses the different concerns we have with each type.

[50] J. Ely, supra note 1, at 156.

thought it was."[51] In this way he believes he can avoid the charge of simply supplanting legislative stereotypes with judicial ones.

At this point Ely makes the first of two critical moves in this section of the book. As he has warned us, he jumps from the political to the psychological and attempts to employ social science to identify those legislative stereotypes most likely to distort reality. In other words, he would have us believe that something like hard scientific fact, rather than a mushy and contestable world view, separates acceptable from unacceptable stereotypes in his system.

Social psychology provides Ely with a seemingly tight typology of legislative stereotypes. Since we tend to flatter ourselves and denigrate others, we should expect that we would overestimate the capabilities and goodness of those like ourselves and underestimate these qualities in others.[52] Ely describes the phenomenon as follows:

> [T]here are psychic rewards in self-flattering generalizations. For years social psychologists have understood—and it would be pretty obvious even if they hadn't pointed it out—that "[t]he easiest idea to sell anyone is that he is better than someone else," and it's a rare person who isn't delighted to hear and prone to accept comparative characterizations of ethnic or other groups that suggest the relative superiority of those groups to which he belongs. The phenomenon is one that is observable among children, and it persists into adulthood, largely, it seems, as a means of ego preservation. "Ever since Aristotle divided the human race into natural masters and natural slaves, dominant classes have fed their self-esteem by claiming they were on top and others on the bottom because such was the natural or God-given order of things."[53]

In other words, legislators will systematically apply flattering stereotypes to those like themselves and negative stereotypes to others. This is, Ely believes, a simple fact of human nature that unavoidably distorts the political process, for even when legislatures are proceeding in all good faith, they cannot escape this psychological bias. This observation, Ely says, should make us suspicious of any legislative classifi-

---

[51] Id. at 157.

[52] Id. at 158.

[53] Id. at 158-59 (footnotes omitted) (quoting G. Allport, The Nature of Prejudice 372 (1954) and Fredrickson, The Legacy of Malthus, N.Y. Times Book Rev., Mar. 13, 1977, at 7, respectively).

cation which benefits people like those in the legislature, mostly white men, while burdening others.

To Ely, groups fall naturally into "we"s, those like the majority, and "they"s, those who are not. Blacks, for example, comprise the prototypical "they" group, while white men are definite "we"s. Thus, courts should look quite hard at laws burdening blacks relative to whites.[54] Laws burdening whites relative to blacks, on the other hand, should largely escape scrutiny because predominantly white legislatures can be counted on not to apply negative stereotypes of whites without some thought.[55] If legislators burden whites, as in affirmative action programs, they must be guided by a good reason.

Legislative classification can also benefit and burden groups both of whom are different from or similar to members of the legislature. In *Williamson v. Lee Optical*,[56] for example, the state allowed optometrists and opthamologists, but not opticians, to duplicate lenses without a prescription. According to Ely, the Court rightly refused to intervene because from the perspective of the legislature both the advantaged and burdened groups were "they"s.[57] Members of the legislature would feel no more affinity to one than to the other. Laws burdening the young or old, on the other hand, deserve no special scrutiny for a very different reason. Even if members of the legislature are middle-aged, they were once young and can expect—or at least hope—to become old, and thus are apt to identify in some way with members of both groups.[58] Presumably groups the majority has migrated from or can expect to migrate to are "we"s.

To categorize other groups such as aliens, women, the poor, gays, and lesbians, Ely relies on a notion even more controversial than migration: social empathy. As he says, "[o]ne can empathize without having been there,"[59] meaning that we should consider as "we"s not only those groups we have, do, or will belong to, but also those with whom we feel "in touch." This marks the second critical move in this section of Ely's work and the one that smuggles in a world of substantive values.

---

[54] See id. at 159.
[55] Id. at 170.
[56] 348 U.S. 483 (1955).
[57] J. Ely, supra note 1, at 159-60.
[58] Id. at 160.
[59] Id.

Ely invokes the language of paragraph three of footnote four of *United States v. Carolene Products Co.* to determine whether social empathy exists. He writes:

> One can empathize without having been there . . . and at this point a reference to discreteness and insularity reasserts its relevance. . . . [They] have a social component . . . and it is that component that seems more relevant [than the political component] to the amelioration of cooperation-blocking prejudice. Increased social intercourse is likely not only to diminish the hostility that often accompanies unfamiliarity, but also to rein somewhat our tendency to stereotype in ways that exaggerate the superiority of those groups to which we belong. The more we get to know people who are different in some ways, the more we will begin to appreciate the ways in which they are not, which is the beginning of political cooperation.[60]

Discreteness and insularity thus help focus the "promising approach to the question of suspiciousness—one geared to the existence of official or unofficial blocks on the opportunities of those the law disadvantages to counter by argument or example the overdrawn stereotypes we might, from the demography of the decision-making body, otherwise suspect were operative."[61] To Ely, paragraph three provides a way of exposing informal but pervasive blockages to process.

As Ely's emphasis on the curative effects of social intercourse suggests, his psychological typology of stereotyping rests at bottom upon sociological analysis. Whether we see others as "we"s or "they"s depends ultimately upon how and how much we socially interact with them. Ely believes, moreover, that he can gauge social intercourse purely quantitatively. Thus, he sorts groups into "we"s and "they"s according to how often members of the majority realize they are coming into contact with others and how extensive those contacts are. If two groups mix often and openly, they will challenge the opinions each holds about the other and force each other to revise and improve the kinds of stereotypes the other applies.[62]

---

[60] Id. at 160-61 (footnotes omitted).

[61] Id. at 167-68.

[62] The openness of the interaction is important to Ely because otherwise members of one group will not know that they are interacting with members of a different one. See id. at 162-64. People who hide their membership in a group, like gays who pass as straight, never challenge the majority's assumptions about that group's behavior.

Ely's project requires that he be able to judge social interaction, and hence social empathy, purely quantitatively. If he cannot, if he must make qualitative judgments, his project fails, for judging the quality of social intercourse would require him to apply a notion of how people should treat others.[63] Can Ely rightly claim that the mere mixing of people will cure prejudice? I think not. To the extent laws stem from inaccurate descriptive stereotyping, Ely's claim has some force. If the majority has made no normative judgment as to another group's social role or status, members of the majority will revise their ideas of the others' capabilities the more they see of them and the more the others challenge their attitudes. As the case of women shows, however, laws based on prescriptive stereotyping work differently.

No other two groups interact as extensively and intimately as do men and women. Indeed, it would be hard to imagine any two groups with greater formal social intercourse. Yet despite millennia of the most extensive interaction possible, prescriptive gender stereotypes have long resisted serious revision. As much feminist theory and many traditional Supreme Court opinions attest, we still prescribe different social roles to the sexes in a way that often demeans women.[64] Over the last twenty-five years, of course, some gender stereotypes have fallen and others have come under pressure, but hardly because of new and different formal social interactions. If we recently have begun to revise our ideas of gender, it is because we have started looking closely at the social roles our view of gender enforces and these roles' normative implications. Formal social interaction by itself failed to transform us because we are all creatures of our history and of our culture, and we largely define identity through the roles in which we are raised. We can revise these roles and rewrite our own scripts, but when the roles and scripts tell us how we should behave rather than what capabilities we possess, formal social interaction alone will not spark change. In fact, by itself the pervasive mixing of groups, like men and women, can reinforce prescriptive stereotypes by

---

[63] Indeed, even a purely quantitative analysis of social interaction encounters a difficulty of this kind. Quantitative analysis of the type Ely attempts requires a notion of how much people should interact or at least of how much social interaction is required in order for people to revise their assumptions about others. These notions are both arguably substantive. I focus on qualitative analysis in the text only because it clearly relies on substantive concerns.

[64] See, e.g., C. MacKinnon, Toward a Feminist Theory of the State 90-91, 93-94 (1989); Williams, Deconstructing Gender, 87 Mich. L. Rev. 797, 806-13 (1989); Craig v. Boren, 429 U.S. 190 (1976).

making it harder for some group members to dissent.[65] Ely's sociological analysis, then, must have a qualitative component. We cannot reduce social empathy to simple demographics.

But then how does one tell whether social empathy exists? If, to twist Ely a bit, one can fail to empathize while being there, what indicates empathy? The only other course available is the sort of qualitative analysis Ely necessarily avoids. To judge empathy, we must ask whether members of one social group treat others the way they *should*. But, as Ely himself realizes, this constitutes a substantive evaluation of the prescriptive and descriptive stereotypes of the groups.[66] In other words, Ely's two major analytical moves—from political to psychological and then to sociological analysis—only displace the point at which substantive values flood in. Moving from a straightforwardly substantive conception of prejudice to a conception based on social empathy obscures but does not obviate Ely's reliance on contestable and often controversial value judgments. Although he develops it somewhat differently, in the end Ely's inquiry looks much like the Court's inquiry in *Cleburne*, which he would presumably discredit. Whereas the Court asks whether the legislature is treating people the way it should, Ely asks whether the members of the majority group are treating members of other groups the way they should. Legislative care and social empathy differ only in the group whose attitudes they analyze: the legislature's or the electorate's. Both inquiries are equally substantive.

---

[65] Many feminists, for example, note how exclusively female communities enable women to escape the restrictive roles men impose on them. See, e.g., Clark, The Beguines: A Medieval Women's Community, Quest: A Feminist Q., Spring 1975, at 72, 73-80; Mernissi, Women, Saints, and Sanctuaries, *in* The *Signs* Reader: Women, Gender & Scholarship 57 (E. Abel & E.K. Abel eds. 1983) [hereinafter The *Signs* Reader]. Adrienne Rich argues more provocatively that compulsory heterosexuality's denial of "woman-identification" and of women's community has led to "an incalculable loss to the power of all women *to change the social relations of the sexes, to liberate ourselves and each other.*" Rich, Compulsory Heterosexuality and Lesbian Existence, *in* The *Signs* Reader, supra, at 139, 165. Similarly, some proponents of consciousness-raising, one important methodology of feminist thought, argue that it can only occur in groups that exclude men. C. MacKinnon, supra note 64, at 86-87.

[66] Ely's discussion of false consciousness reveals exactly this type of concern. J. Ely, supra note 1, at 165-67.

IV. The Futility of Any Process Theory

Can we identify process failures in a value-neutral way or are all attempts doomed from the start? The Court's and Ely's failures to develop a true process theory raise the suspicion that any attempt to do so must fail. To my mind, their failures are no accident. Any attempt to identify process imperfections ultimately must employ substantive judgments. The only question is how.

As previously discussed, any identification of formal, structural blockages in the democratic process, like disenfranchisement and vote dilution, ultimately relies upon a theory of different groups' and individuals' civic status and how political power ought to be distributed.[67] Although principles like one-person, one-vote may strike us as natural now, they did not always do so. Their naturalness, moreover, stems not from their objectivity or neutrality, but from the depth and breadth of the cultural consensus that supports them. They are substantive through and through.

The more interesting case, and the one that does most of the work in any process theory, lies in identifying informal, attitudinal blocks to process, what Ely and footnote four refer to as "prejudice." The question is whether any helpful nonsubstantive conception of prejudice exists. Because any process theory that judges the results of or inputs to government decisionmaking invariably makes substantive judgments, the only hopeful approach lies in something like Bruce Ackerman's suggestion of testing for openmindedness in the decisionmaker.[68] Under this approach, a government decisionmaking body must treat all arguments that come before it with equal respect. It cannot reflexively reject or accept a proposal but must analyze it thoroughly. But can we employ this notion of openmindedness without consulting values?

What would this sort of openmindedness look like? If she were to be untainted by substance, the decisionmaker would have to work up the values for every decision from scratch. The decisionmaker could not rely on any judgments formed outside the decisionmaking process itself, for that would smuggle in and privilege certain values. Such a decisionmaker, however, would never be able to make a decision. For to make a decision, she would be forced eventually to judge argu-

---

[67] See supra text accompanying notes 27-29.

[68] See Ackerman, supra note 4, at 737-40.

ments, data, and proposals against a background of what she believes the world really is like or what it should be like. Neither type of background view, however, particularly the normative one, is uncontroversial. People will always disagree over these kinds of issues, and many, moreover, will believe that there is simply no absolute right. To the extent we ourselves construct our world, as the tide of postmodernism claims, decisionmaking has no foundations to rest upon that are not socially contingent.[69] In this sense, true openmindedness makes decisionmaking impossible. It demands not a fair mind, but a vacuous one that cannot reach any conclusion. Although such a mind could entertain all arguments, it could settle none. This type of openmindedness would be a self-defeating aim for a decisionmaker.

More promisingly, openmindedness could refer to an ability to evaluate arguments and data "fairly." But this sense of openmindedness is quite complicated. Since a mind that entertained ideas like genocide would be considered by most to be not open but wild, openmindedness can put certain arguments out of bounds, while permitting a varying range of opinion over others. As the example of genocide demonstrates, openmindedness signifies less a lack of commitment to specific values than it does a commitment to consider any argument within particular bounds that vary with the question. When there is no social consensus on an issue, openmindedness demands that all arguments be considered. When, on the other hand, social consensus is narrow and complete, as it is, I hope, on genocide, openmindedness permits but a single answer. Openmindedness in a decisionmaker thus depends upon the degree to which the decisionmaker's community believes an argument can be questioned. An open mind reflects the strength and settledness of every social value. It entertains argument over particular issues exactly to the extent to which and in the ways in which the community finds these issues contestable. One can be openminded, in other words, only relative to a particular community.

To determine the openmindedness of a decisionmaker, then, one must discover whether she treats arguments as contestable in the same way and to the same degree as her society does. But this task resembles the Court's inquiry in *City of Cleburne v. Cleburne Living Center* and Ely's inquiry in *Democracy and Distrust*. Whereas the

[69] See R. Rorty, Contingency, irony, and solidarity 3-69 (1989).

Court in *Cleburne* asks whether the legislature cares, that is, whether its enactments treat people in different groups properly, and Ely ultimately asks whether people in one group socially empathize with people in another group, that is, whether individuals treat other individuals properly, openmindedness asks whether the decisionmaker holds every fact and value settled in the same way and to the same degree that society does. Such an inquiry is purely substantive and makes any hope of an openminded but value-free decisionmaker nonsensical. This type of openminded decisionmaker, moreover, could not, by definition, resolve any of the contested issues that rend society. She could only reproduce them. To solve them would require a choice among values over which the society permits debate, and that would be less than openminded.

CONCLUSION

Despite its failure to describe how the Court actually reaches its decisions and its failure to deliver on its own promises for judicial review, *Democracy and Distrust* is justly celebrated. Its project may be futile, but its continuing allure tells us much about ourselves. We still hope against experience to find a way to reconcile two political institutions, simple majoritarianism and expansive judicial review, which are plainly irreconcilable. They conflict unavoidably because they spring from opposed sets of metapolitical commitments.

Simple majoritarianism coheres with popular liberal and subjectivist assumptions that hold that the individual is the source of most value. Since in this view there is no absolute yardstick of the good to adjudicate between peoples' values, everyone must respect whichever values a majority of individuals holds.[70] In this view, values have no intrinsic validity and receive privilege only because a majority of individuals agrees with them.

Expansive judicial review, on the other hand, coheres more with communitarian assumptions. In this view, legislatures cannot impose rules on us that conflict with deeply held social values.[71] Because the community constructs the individual, not the other way around,[72] the

---

[70] The boldest statement of this view in the legal literature is Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 10 (1971).

[71] E.g., A. Bickel, The Least Dangerous Branch (1962).

[72] To say that the community controls is not to say that political majorities should have their way. The community can decide—and ours arguably has—that the individual should be

community enjoys priority over the individual, and social values necessarily trump those that a majority of individuals holds.

Process theory seeks to cut through the opposition between these two metapolitical views by justifying communitarian results individualistically. It enforces community norms in the name of perfecting the process that aggregates individual preferences. If we could accept Ely's story, we could resolve one of the deepest and most troubling tensions in our political culture.[73] This, I believe, explains Ely's theory's attraction despite all its difficulties. Ely holds out to us an important, though impossible, hope—the hope that we can reconcile our most fundamental political values. And despite our knowledge that we cannot, we succumb to his temptation. So high runs our hope that it triumphs over judgment.

---

able to decide certain issues regardless of what the political majority wishes. Majoritarianism is not a form of communitarianism because a majority of individuals is not identical to the community. For an extended discussion of this point and the other arguments raised in the Conclusion, see Ortiz, The Price of Metaphysics: Deadlock in Constitutional Theory, *in* Pragmatism in Law and Society (M. Brint & W. Weaver eds. forthcoming 1991).

[73] Cf. Kennedy, The Structure of Blackstone's Commentaries, 28 Buffalo L. Rev. 209, 211-13 (1979) (conflict between individual and community is the fundamental contradiction of liberalism). But see Gabel & Kennedy, Roll Over Beethoven, 36 Stan. L. Rev. 1, 15 (1984) ("I renounce the fundamental contradiction.").