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## Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory\*

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American constitutional theory has been marked by an ongoing effort to reconcile two fundamental propositions about constitutional law, legislation, and the judiciary in American society. The first proposition, which I will call the justification principle, asserts that there are occasions when judicial displacement of legislative decisions—judicial review—is justified. The second proposition is that judges cannot justifiably do whatever they want, but must respect some constraints on their behavior as judges; this I will refer to as the restraint principle. Constitutional theory attempts to specify the constraints that judges must respect by deriving them from the Constitution and the nature of democracy. It seeks to constrain judges both directly, by the moral force it exerts on their work, and indirectly, by providing an agreed-upon standard against which their work can be measured.

John Hart Ely, in his recent work *Democracy and Distrust*,<sup>1</sup> attempts to rework constitutional theory. In doing so, however, Ely suggests a conclusion that is obviously incompatible with his own position: an extension of Ely's reasoning leads to the proposition that constitutional theory is impossible; any theory that reconciles the justification prin-

\* Cf. B. SPRINGSTEEN, *DARKNESS ON THE EDGE OF TOWN* (Columbia Records, Inc. 1978).

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1. J. ELY, *DEMOCRACY AND DISTRUST* (1980) [hereinafter cited as ELY]. It is worth noting that, to quote Tom Lehrer, Professor Ely in part "made me what I am today," and that this Article, which may be seen as a critique of his work, also recognizes and respects his contributions.

ciple and the restraint principle violates a third, equally fundamental proposition. This third principle, the principle of value-free adjudication, states that in a pluralist society, objective values are not available as the basis for ordering social institutions.<sup>2</sup> Ely is correct in concluding that "one perfectly well *can* be a genuine political liberal and at the same time believe . . . that the Court should keep its hands off . . ."<sup>3</sup> Although that conclusion reconciles the restraint principle and the principle of value-free adjudication, it leaves the justification principle unsupported; and liberalism, taken in the broad sense, requires that the latter principle be defended. I will argue that the incompatibility of the three principles reflects the incoherence of modern liberal theory. The contradictions of liberalism, not any peculiarity about judicial review, lead to an impasse for constitutional theory.

The argument proceeds through an examination of *Democracy and Distrust*. The first section of this Article discusses the two prevailing schools of constitutional theory and Ely's criticisms of them. Ely argues that both Burkean and natural law theories are unacceptable, either (1) because they are purely formal and thus fail to satisfy the justification principle, or (2) because they are subject to an intolerable degree of judicial manipulation and so fail to satisfy the restraint principle, or (3) because they are based upon assertions about objective values and therefore violate the principle of value-free adjudication. The second section takes up Ely's proposed constitutional theory, which contends that judicial review is justified when it is "representation-reinforcing." I argue that the scope of Ely's theory necessarily must be comprehensive, despite Ely's attempt to delineate areas of constitutional law in which judges can be constrained by a value-free "interpretivism." I then argue that Ely's critique of the prevailing theories can be turned, point for point, against his own theory; in particular, representation-reinforcing review necessarily involves judicial displacement of citizens' choices between political and other kinds of activity, in the name of the objective value of political participation. The final section examines the consequences for constitutional scholarship of Ely's success in destroying other theories and his failure in constructing his own. After a brief look at two unsatisfactory responses within the framework of standard scholarship, I sketch a new approach to the field by drawing on Roberto Unger's analysis of liberal thought.

2. This principle states merely that there is no consensus on objective values that might provide such a basis, not that it is impossible to discover philosophically valid principles of justice.

3. Ely, *supra* note 1, at 72.

## Ely and Constitutional Theory

### I. The Critique of the Prevailing Theories

Professor Ely's catalogue of constitutional theories<sup>4</sup> includes some, such as the direct appeal to the judge's personal values, that clearly fail to satisfy the justification and restraint principles, and some, such as Alexander Bickel's theory that the Court should "predict" progress, that collapse into the others. For this analysis, I have classified mainstream constitutional theories into two schools, each with two subdivisions.

#### A. *Burkean Theories*

One type of theory can be called Burkean. The essential idea of Burkean theories is that, all things being equal, what has been done before ought to be done again. The theories follow from the concept of precedent and are therefore strongly linked to the concerns of judicial review.

Burkean theories can be subdivided into substantive and procedural types. Substantive Burkeanism contends that, in the absence of good reasons for innovation, departures from tradition are unjustified. As a theory of judicial review, substantive Burkeanism collapses into little more than pure formalism or ordinary political conservatism. As Ely notes, it is difficult to identify the relevant tradition against which we can measure legislation to determine its novelty. Substantive Burkeanism is therefore subject to considerable manipulation at the outset.<sup>5</sup> But even if a tradition could be singled out, the determination of which circumstances justify innovation is also subject to manipulation. Legislators, presumably closer to the problems of the day than judges, would seem best-suited to determine the need for innovation. Yet if legislators' desire for change is all that is necessary to overcome the presumption against change, substantive Burkeanism provides no basis for any judicial displacement of legislative choice and therefore contradicts the justification principle. The alternative course for substantive Burkeanism is to make the presumption against change stronger. That, however, would contradict the restraint principle, for judges would have no guidance as to what overcomes the strengthened presumption.<sup>6</sup>

4. *Id.* at 43-72.

5. *See id.* at 60-62.

6. Even as astute a theorist as Alexander Bickel, in struggling to a "Burkean ending," *id.* at 71, was able to provide only a vague description of the constraints on judges, resorting to evocative metaphor rather than precise statement. *See* A. BICKEL, *THE MORALITY OF CONSENT* 28-30 (1975).

It is not surprising, therefore, that substantive Burkeanism is readily transformed into an undifferentiated defense of the status quo.<sup>7</sup>

Procedural Burkeanism has traditionally been called "reasoned elaboration." Its central idea is that precedents and the traditional tools of legal analysis, such as inquiry into purpose and examination of text, impose relatively strong constraints on judicial behavior.<sup>8</sup> Ely argues that judges must somehow give content to the principles that they are supposed to apply neutrally; thus the "neutral principles" approach, a weak version of procedural Burkeanism, collapses into natural law theory.<sup>9</sup> But the procedural Burkean argument has stronger versions, which Ely addresses in his critique of "interpretivism."<sup>10</sup> Ely defines interpretivism as a theory of constitutional adjudication whereby "the work of the political branches is to be invalidated only in accord with an inference whose starting point . . . is fairly discoverable in the Constitution."<sup>11</sup> That starting point is "certain fundamental principles whose specific implications for each age must be determined in contemporary context."<sup>12</sup> Ely argues that whatever might be said about interpretivism as a constraint with respect to judicial interpretation of certain sections of the Constitution, there are provisions, such as the equal protection clause, that must be given content using norms beyond those "stated or clearly implicit in the written Constitution."<sup>13</sup> The procedural Burkean response to this criticism is obvious: no statute should be struck down on the ground that it conflicts with any clause not subject to interpretivism. Ely's reply is that, because the Constitution does not on its face provide for judicial review, the justification for judicial review of any kind, including that which procedural Burkeans would allow, must ultimately rely upon noninterpretivist arguments.<sup>14</sup> Ely's basic point seems to be that interpretivism would preclude the Court from doing certain things that everyone would agree the Court should do.

A deeper difficulty infects interpretivism. If all it requires is that

7. Compare Nagel, Book Review, 127 U. PA. L. REV. 1174 (1979) (reviewing L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978)) with A. BICKEL, *supra* note 6; see ELY, *supra* note 1, at 71-72 (providing different account of evolution of Bickel's political conservatism).

8. H. WECHSLER, *Toward Neutral Principles of Constitutional Law*, in *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 9-10, 21-24, 27 (1961).

9. ELY, *supra* note 1, at 54-60. Natural law approaches assume that there are enduring moral truths that can be discovered through the exercise of human faculties.

10. *Id.* at 11-41.

11. *Id.* at 2.

12. *Id.* at 1.

13. *Id.*

14. *Id.* at 40. Although an interpretivist might deny the propriety of judicial review, such a denial would obviously contradict the justification principle.

the Court allude to "certain fundamental principles," interpretivism fails as a constraint. If, as Ely claims, interpretivism is so expansive as to accommodate *Griswold v. Connecticut*<sup>15</sup> and the abortion decisions,<sup>16</sup> it can hardly be said to restrict judicial discretion. The procedural Burkean may respond by claiming that decisions, to be justified, must be tied more closely to the textual "starting point" than is *Griswold*.

Consider, for example, *Brooks v. Tennessee*,<sup>17</sup> in which the Court held unconstitutional a state law that required a defendant who wishes to testify on his own behalf to be the first witness for the defense.<sup>18</sup> The Court touched base with specific constitutional provisions far more adequately than in *Griswold*, by arguing that the law impermissibly interfered with the Fifth Amendment right against self-incrimination and the Sixth Amendment right to counsel. These interpretivist arguments, however, cannot justify the decision; the Court's reliance upon these specific provisions is inconsistent with what it has said about them in other contexts.<sup>19</sup> The procedural Burkean could argue that the manipulation of precedent in *Brooks* is not within the scope of acceptable judicial behavior. But this argument is harder to make in the case of *Brooks* than *Griswold*, for the manipulation of precedent in *Brooks* seems indistinguishable from what courts do all the time.

Procedural Burkeanism thus requires an extraordinarily strong concept of the constraining force of text and precedent. Of course, the procedural Burkean can retreat further by arguing that most constitutional provisions are not subject to an interpretivist approach and, hence, should not come into play in judicial review. Some provisions clearly do allow such an approach, such as the provision that the President "have attained to the Age of thirty-five Years."<sup>20</sup> In the event

15. 381 U.S. 479 (1965); see ELY, *supra* note 1, at 221 n.4 (*Griswold* has "strong interpretivist urges").

16. See Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (criticizing decisions) [hereinafter cited as *Wages*]. Ely fails to recognize that Justice Douglas's brilliant and generally neglected concurring opinion in *Doe v. Bolton*, 410 U.S. 179, 209-21 (1973), is no less interpretivist than *Griswold*. See *Wages, supra*, at 932 n.82 (using citation signal "*but cf.*" to compare Douglas's opinion with Court's general failure to use "principle of privacy" as source of protection).

17. 406 U.S. 605 (1972).

18. It is worth noting that the distinction between "the stuff taught in criminal procedure courses" and "the stuff taught in constitutional law courses" parallels the distinction between the "mundane" and "majestic" provisions of the constitution, and the distinction between interpretivism and noninterpretivism.

19. See Westen, *Order of Proof: An Accused's Right to Control the Timing and Sequence of Evidence in His Defense*, 66 CALIF. L. REV. 935 (1978).

20. U.S. CONST. art. II, § 1, cl. 5. Although the provision is subject to some dispute as to whether the candidate must be 35 at the time of his election, or only by the date of inauguration, even a vigorous anti-interpretivist would have to concede its narrowness.

that this provision became subject to dispute, the procedural Burkean would allow the Court to interpret; the provision itself provides rather close bounds on what the Court can do. Because procedural Burkeanism preserves at least a limited role for judicial review, it is not inconsistent with the weakest version of the justification principle.<sup>21</sup> It is difficult, however, to think of an instance in which a legislature enacted a statute that violated one of the specific constitutional provisions for which procedural Burkeanism permits judicial review. The reason is obvious: legislators accept some, though perhaps minimal, responsibility for fidelity to the Constitution. To the degree that a constitutional command is clear, a majority of legislators is probably unwilling to contravene it. Procedural Burkeanism, therefore, does not deal with the real world of judicial review and is, in that sense, inconsistent with the justification principle.

Thus both forms of Burkeanism fail by adopting one of two extreme positions; either they impose purely formal restrictions on legislation that cannot, in the real world of politics, ever be violated, or they do not overcome the problems occasioned by judges' ability to manipulate text and precedent to whatever ends they choose.

### B. *Natural Law Theories*

One version of natural law theory asserts that judges should enforce common morality.<sup>22</sup> This approach is implausible on its face; one would expect legislators to be at least as well-attuned to common morality as are judges, and thus there would be no justification for judicial review. Perhaps courts might intervene where a flood of changing consensus has failed to reach the backwaters of society. In *Moore v. City of East Cleveland*,<sup>23</sup> for example, the Court invalidated a city ordinance that, in effect, made it a crime for a grandmother to live with her grandchildren.<sup>24</sup> There is an odd conservatism about this,

21. It is inconsistent with the stronger version of the justification principle, which requires that there be a nontrivial number of instances in which review is justified, because procedural Burkeanism itself is defensible only with respect to a small number of relatively specific constitutional provisions. See ELY, *supra* note 1, at 13.

22. *Id.* at 63-69. David A. J. Richards presents a version of this approach that he calls "methodological natural law." See D. RICHARDS, *THE MORAL CRITICISM OF LAW* (1977). His approach provides a basis for my categorization, despite Professor Ely's concern about the misleading connotations of the label "natural law." ELY, *supra* note 1, at 1 n.\*.

23. 431 U.S. 494 (1977).

24. The facts of *Moore* do not represent an attempt by the judiciary to impose a changing consensus on anachronistic behavior; rather, the Court invoked existing consensus to condemn the city's innovative departure from it. Nevertheless, the case serves as an example of an isolated ordinance plainly inconsistent with the strongly held views of many people.

though. Even in the unlikely event that the East Cleveland ordinance heralded an emerging consciousness that regards social claims to order and quiet as more important than individual claims to personal relationships, the Court is bound by the *present* consensus.<sup>25</sup>

Once again, this theory can be criticized for its manipulability. Ely argues that elements of common morality can be identified only at such a level of abstraction that they are of no use in restraining judges in adjudication. Moreover, if there is dispute about the elements, it is impossible to identify a "common" morality.<sup>26</sup> The common morality theory relies upon an empirical claim about the existence of shared values; that empirical claim is, so far as we can tell, simply false. On its face, it contradicts the principle of value-free adjudication.

The other version of natural law theory asserts that judges are constrained by principles of justice. Ely criticizes such theories for their manipulability, on the ground that they have "been summoned in support of all manner of causes in this country . . . and often on both sides of the same issue."<sup>27</sup> This confuses two ways in which constitutional theory can constrain judges. One way, to which Ely's criticism is properly directed, relies upon the social-psychological assumption that, all things equal, people will act in accordance with their moral beliefs. If judges regard natural law as the ultimate authority for their decisions, they must determine what it requires. Because there is disagreement about that, judges will necessarily take sides on contentious issues and may well take the side that supports their personal preferences. Natural law theories are therefore unlikely to prevent judges from writing their preferences into law.

Such theories could, however, constrain judges indirectly if they provided an objective measuring rod for assessing judges' behavior. In order to serve as such a measuring rod, a theory would have to be sufficiently developed to indicate a clear result in most cases. The constraint here is a theoretical one; there is no guarantee that judges will always, or even often, hit upon what natural law requires or that judges will acknowledge the errors of their ways when the theorists disclose them. Provided that the prevailing theory has the necessary specificity, though, it will not be subject to manipulation. Thus it can, contrary to Ely's assertion, serve as a constraint.

Moreover, natural law theories are not empty, as Ely claims. Ely argues that whenever someone wants to establish that there are eternal

25. See ELY, *supra* note 1, at 62-63.

26. *Id.* at 63-64. Such disputes exist across the entire range of issues. See *id.* at 63-65.

27. *Id.* at 50.

standards of Truth and Beauty, he points to "uselessly vague" propositions.<sup>28</sup> Here Ely confuses existence with completeness. The natural law theorist points to vague propositions only to show that there are objective values, not to enumerate them.<sup>29</sup>

The question for constitutional theory, therefore, pertains to comparative institutional competencies. While it is true that we probably would not identify Justices of the Supreme Court as premier moral philosophers,<sup>30</sup> neither would we so identify legislators. On the whole, and somewhat tentatively in light of the Court's record, I suggest that there may be a slight advantage to the courts on the comparative issue.<sup>31</sup> Thus, if natural law theories are unacceptable, it is because "our society does not . . . accept the notion of a discoverable and objectively valid set of moral principles."<sup>32</sup> If the principle of value-free adjudication is to be retained, the natural law approach to constitutional theory must be rejected.

The question remains whether society *should* accept the notion of objectively valid moral principles. Neither our purposes nor those of Professor Ely require that this issue be resolved. The focus of constitutional theory is defining and justifying a role for the Supreme Court in society as we find it, not in an Ideal Society. It is enough, then, to establish the empirical claim that we do not believe that there are objective values.

Thus, in criticizing both the Burkean and the natural law variants of constitutional theory, Ely stresses their incompatibility with the following principles: (a) there is a nontrivial role for judicial review in our constitutional system; (b) the restraints on judicial review must not be subject to manipulation by judges; and (c) there is no mutually agreed-upon set of objective moral values to guide adjudication. The incompatibility arises because the prevailing theories are either purely

28. *Id.* at 51.

29. One could have a natural law theory of sufficient specificity to explain why nonunanimous jury verdicts are permissible unless the jury size is six, *see* *Burch v. Louisiana*, 441 U.S. 130 (1979); perhaps some Albert Einstein of the moral universe will someday discover (not develop) that theory. Ely notes that even the religious "are unlikely to hold that the Almighty speaks with a sufficiently unambiguous ethical voice to help with today's difficult issues of public policy." ELY, *supra* note 1, at 52. The example of the Mormon Church's stance on the Equal Rights Amendment shows, however, that he has identified only a contingent fact about some religious beliefs, not a defining characteristic of either religion or the Almighty.

30. *See* ELY, *supra* note 1, at 56.

31. Ely effectively demolishes the argument that courts should be preferred when moral disputes can be reduced to factual ones, *id.* at 53, but he argues that many of the most interesting moral disputes cannot be so reduced.

32. *Id.* at 54.



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formal, or subject to substantial manipulation, or inconsistent with political reality. Ely's own theory, however, is also inconsistent with these principles, for the same reasons, as I will demonstrate in the following section.

### II. A Critique of Ely's Theory

Professor Ely offers a theory derived from footnote four of *Carolene Products*.<sup>33</sup> According to Ely, the footnote, despite "its notoriety and influence . . . has not been adequately elaborated."<sup>34</sup> Unfortunately, he contributes little that is new; he does, however, summarize the theory underlying the decision in a way that makes at least some of its implications apparent. Judicial review is justified, on this theory,

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.<sup>35</sup>

In brief, Ely claims that review is justified whenever there are formal or functional obstacles to the assertion of political power. The difficulty with this theory, as will be explained below, is that the theory is consistent with the justification principle only if it applies solely to functional obstacles; and yet identifying functional obstacles both permits manipulation, which violates the restraint principle, and requires the use of objective values, which violates the principle of value-free adjudication.

#### A. *The Basis of the Theory*

The fundamental difficulty with Ely's theory is that its basic premise, that obstacles to political participation should be removed, is hardly value-free. As he acknowledges, "[p]articipation itself can obviously be regarded as a value."<sup>36</sup> Ely defends his theory at this point with three assertions: first, that participation is what the Constitution is, in fact,

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

34. ELY, *supra* note 1, at 76.

35. *Id.* at 103.

36. *Id.* at 75 n.\*.

about; second, that participation is part of the American system of representative democracy; and third, that courts have a comparative advantage in enforcing that value.<sup>37</sup>

The untenability of Ely's claim that participation is the basic value embodied in the Constitution becomes clear in applying his theory to the Bill of Rights. The effort to view the Bill of Rights solely as representation-reinforcing does not succeed, except in the important case of the First Amendment. The theory is manifestly inapt for the criminal justice provisions, yet Ely is forced by his critique of interpretivism to try to bring those provisions within the scope of the theory. The theory is applicable to those provisions only if one can identify some obstacles in the political process to the assertion of the interests they protect. Ely fails to identify any such obstacles.<sup>38</sup>

The failure of Ely's theory can best be illustrated by using an example. In *Delaware v. Prouse*,<sup>39</sup> the Court held it unconstitutional for police to stop motorists, without warrants, for random license and registration checks. Because Ely regards the Fourth Amendment "as [a] harbinger of the Equal Protection Clause,"<sup>40</sup> we can apply his equal protection analysis to the problem. In Ely's view, the equal protection clause is directed at discrimination by the legislature on behalf of some people ("us") against others ("them").<sup>41</sup> Consider a statute adopted by the Delaware legislature explicitly authorizing random stops. From a post-enforcement perspective, of course, the case seems to present a clear "us—the law-abiding citizenry"/"them—the crooks" dichotomy; but from the legislator's perspective, the case is a paradigmatic "us-us" situation, because of the randomness of the authorized stops. This holds for all legislative authorizations of warrantless searches, so long as lawmakers recognize that probable cause for a search may exist even in the case of innocent persons. Ely's only defense would seem to be that legislatures do not in fact authorize warrantless searches. As a constitutional matter, however, this distinction is not intuitively persuasive.<sup>42</sup> Far more work has to be done before the Fourth Amendment can be incorporated into Ely's theory.

37. *Id.*

38. Although Ely tries to identify such obstacles in the context of the Fourth Amendment, arguing that low-visibility police discretion and status differential between the police and the citizenry necessitate judicial interposition through the warrant process, *id.* at 96-97, his attempt does not succeed.

39. 440 U.S. 648 (1979).

40. ELY, *supra* note 1, at 97.

41. *Id.* at 159-60.

42. The distinction rests on the notion that the processes of legislation and adjudication are different enough to justify a different constitutional status for identical substantive rules if they are promulgated by different bodies. *See* pp. 1058-60 *infra*.

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The failure of the theory is even more apparent with respect to the other criminal justice amendments. Only the most cynical would deny that statutes regulating criminal procedure address “we-they” situations; legislators do not generally think of themselves or their constituents as potential defendants. Ely might try to defend judicial displacement of legislative choice in this area on the grounds of the political impotence of the pro-defendant lobby. But the experience of the Senate Judiciary Committee with respect to the revision of the federal criminal code provides evidence that there is an independent civil liberties lobby that supports policies in which its members have no direct material interest.<sup>43</sup> The phenomenon of moral entrepreneurialism, which this illustrates, substantially weakens the “we-they” analysis here, where it may be most plausible.<sup>44</sup> Thus, it is far from established that participation is the preeminent constitutional value, and Ely’s first defense of his theory’s incorporation of that value fails.

The second defense is that participation supports “the American system of representative democracy.”<sup>45</sup> That assertion may mean either of two things. First, it might be taken to argue that participation is a value that Americans collectively embrace. The very fact, however, that a significant body of constitutional scholarship values substantive goals above participation—the fact that natural law theories are widely voiced<sup>46</sup>—suggests the falsity of Ely’s empirical claim. No more do we believe in Democracy than we do in Justice. All this may reduce to a dispute on the facts. Ely thinks that the society agrees that participation is the primary value; he criticizes natural law on the basis that society does not agree about anything to a degree substantial enough to enable one to rely upon social agreement as the basis for a theory. The empirical claim implicit in Ely’s critique contradicts the one implicit in his theory, and the first empirical claim is more plausible.

In asserting that participation supports democracy, Ely may be suggesting instead that, regardless of whether participation is a widely shared value, it is a necessary condition for the functioning of a democracy. This is analogous to the argument that Meiklejohn makes in defining the contours of the First Amendment. In Meiklejohn’s view, certain “core speech” should be protected because its protection

43. See, e.g., *Reform of the Federal Criminal Laws: Hearings on S. 1437 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 9058-91 (statement of ACLU representatives).

44. Cf. p. 1055 & note 77 *infra* (public choice theory fails to take account of moral entrepreneurs).

45. ELY, *supra* note 1, at 75 n.\*.

46. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* iii-iv, 52, 572-75 (1978).

is essential to the functioning of the political process.<sup>47</sup> There are two difficulties with any such argument for enshrining participation in a constitutional theory. First, as a practical matter, democracies continue to function despite very low rates of participation.<sup>48</sup> Second, and more important, this approach assumes that maintaining a certain *form* of government rather than, say, preserving individual liberty, is the fundamental value embodied in the Constitution. Just as Ely failed to show that participation is what the Constitution is about, he does not establish that representative democracy is what it is about. He solves the conceptual difficulties of constitutional theory only by ignoring the central issue—how to determine whether a guiding principle exists, and if so, what it is.

Even if one assumes, with Ely, that supporting democracy is the fundamental constitutional value, it is not clear that his theory conforms to the assumption. In the next section I will argue that if representative democracy is a system of citizen sovereignty based upon a market model, as Ely believes,<sup>49</sup> his own theory does not support that system.

### B. *The Problem of Jurisdiction*

The American legal system contains a hierarchy of legislative authority, in which decisions of superior legislatures take precedence over the decisions of inferior ones. So long as those disadvantaged by such decisions have unimpeded access to the superior legislature, judicial review is not representation-reinforcing. The problem of jurisdiction—the allocation of authority in legislative hierarchy—raises serious questions about Ely's theory. To preserve the justification principle, Ely must take into account practical political considerations. These, however, leave his theory open to manipulation and so violate the principle of restraint.

Consider, for example, *Kramer v. Union Free School District No. 15*.<sup>50</sup> Kramer, a thirty-year-old stockbroker, lived with his parents in Atlantic Beach, New York. State law provided that voting in school district elections would be restricted in certain districts (including Atlantic Beach) to parents of school-age children, taxpayers, and renters. The Supreme Court, in an opinion by Chief Justice Warren,

47. A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 22-27 (1948).

48. See K. PHILLIPS & P. BLACKMAN, *ELECTORAL REFORM AND VOTER PARTICIPATION* 1-9, 23-34 (1975) (chronicling decline in American voter participation and contrasting it with high turnout in other Western democracies).

49. ELY, *supra* note 1, at 102-03.

50. 395 U.S. 621 (1969).

held that this statute was unconstitutional because it disenfranchised many people who had an interest in school district elections but allowed others to vote who had “at best, a remote and indirect interest in school affairs.”<sup>51</sup> This decision appears to fit Ely’s theory perfectly: the Court removed an obstacle to participation in the political process because that obstacle was not precisely tailored to state purposes unrelated to participation.

There is, however, an insurmountable problem. Justice Stewart in dissent quite properly pointed out that, though Kramer could not vote in school district elections, he could vote for state legislators who support the repeal of the statute. So long as a voter can vote in elections for the state legislature, and it is within the legislature’s authority to repeal voter disqualification rules that it or subordinate legislatures have imposed, judicial review is not justified on Ely’s view. Thus, Kramer’s proper recourse under a representation-reinforcing theory was to Congress or the state legislature, not to the courts.<sup>52</sup>

In addition, it is significant that the statute that Kramer challenged was not of statewide uniformity. According to the market theory of local government, which Ely accepts, each local government provides a distinctive bundle of services;<sup>53</sup> individuals “vote with their feet,” by moving to the locality that gives them their preferred combination of services at a cost that they are willing to pay. From this perspective, New York offered Kramer a choice: live with your parents and have no vote in school district elections, or live in Manhattan and have a vote. Because Kramer decided that he preferred to live with his parents despite the disenfranchisement, why should the Court refuse to hold him to that choice, or prevent the legislature from offering him that choice? More directly, why should the Court override the preferences of those who chose to live in Atlantic Beach precisely because of its mix of services and disenfranchisements?<sup>54</sup> Although Ely’s theory purports not to impose values on anyone, it systematically overrides decisions by some individuals to preclude their participation in poli-

51. *Id.* at 632.

52. It is worth noting that the most significant expansion in eligibility to vote in state elections occurred through the Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 to 1973p (1976). The force of the example is qualified by the fact that the Warren Court’s earlier interventions provided some of the political force behind enactment of the statute.

53. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POLITICAL ECON. 416 (1956).

54. Professor Ely’s concluding paragraph discusses “the right to personal mobility”; it does not, however, induce him to reflect on his general theory. He says that the right “fits quite snugly into” his theory because “a dissenting member for whom the ‘voice’ option seems unavailing should have the option of exiting . . .” ELY, *supra* note 1, at 179. But, the “voice” option is unavailing only if there are formal barriers to influencing legislative decision.

tics; it is therefore inconsistent with the principle of value-free adjudication.<sup>55</sup>

The argument as to superior and inferior legislatures is narrower. We can assume that the market theory of local government does not apply at the national level; "Why don't you go to Russia?" is not an acceptable answer to requests for judicial intervention. Thus, even though interstate travel is constitutionally guaranteed<sup>56</sup> and citizens can resettle, Ely's theory would suggest that review of federal statutes but not of state laws is justified.<sup>57</sup> Moreover, an extension of this line of reasoning would limit the Court to review of congressional statutes restricting suffrage. To that extent, the theory is inconsistent with the strong version of the justification principle, which requires that there be a nontrivial role for judicial review.<sup>58</sup>

Although the formal obstacles to participation support a limited role for judicial review, there are functional obstacles as well. In the real world, the assumptions that Kramer can either move to another area or lobby effectively at the superior legislature are both doubtful. Moving to a locality in which he could vote may be beyond Kramer's means.

55. Although certain groups that are subjected to discrimination may be socialized into passivity, *id.* at 165-70; *see* p. 1056 *infra*, this argument has little application in the context of *Kramer*. If judges can override citizens' decisions to avoid politics on the ground that they have been socialized to prefer filial devotion and avarice to political action, there is no possibility of satisfying the principle of restraint.

56. *See* *United States v. Guest*, 383 U.S. 745 (1966).

57. In light of the general understanding of the Constitution, such a suggestion seems strange. *Cf.* O. HOLMES, COLLECTED LEGAL PAPERS 295-96 (1920), *quoted in* ELY, *supra* note 1, at 33 ("the United States would [not] come to an end if we lost our power to declare an Act of Congress void . . . [but] the Union would be imperiled if we could not make that declaration as to the laws of the several States").

58. Under Ely's theory, national sedition laws, which prohibit speech aimed at changing the existing system of law, would be subject to review. Although Professor Robert Bork arrived at the same result more directly, *see* Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 26-31 (1971), Ely's theory suggests an alternative explanation for why such statutes are unconstitutional. Assume that there are undesirable laws on the books. Those who care can organize political efforts to repeal those laws. Even if there are prohibitions against activity aimed at repealing the laws, political organizations can aim first to repeal the laws prohibiting agitation about the substantive laws and next to repeal the substantive laws themselves. A national sedition law frustrates that option, assuming that its ban on dissent applies to proposals to repeal the sedition law itself, and is therefore unconstitutional.

There is a response to this argument for a ban on national sedition laws, which invokes the principle of restraint. Once a judge knows that judicial review is justified in certain cases, there is a risk that he will improperly invoke that theory in many other cases. National sedition laws come down the pike very rarely; courts generally seem to uphold them anyway. *See, e.g.,* *Dennis v. United States*, 341 U.S. 494 (1951) (sustaining prosecution of Communist Party leaders under Smith Act). One might argue, therefore, that the risks entailed by allowing judicial review of such laws, as well as laws pertaining to suffrage, outweigh the benefits. Given that sedition laws are exceedingly bad things, however, expansion of the scope of judicial review to include them seems, on balance, justified.

It is not clear, however, that the functional obstacle of poverty triggers judicial intervention under Ely's theory.<sup>59</sup> With regard to lobbying, the practical difficulty was well stated by Justice Jackson:

[T]hese restraints are individually too petty, too diversified, and too local to get the attention of a Congress hard pressed with more urgent matters . . . .

The sluggishness of government, the multitude of matters that clamor for attention, and the relative ease with which men are persuaded to postpone troublesome decisions, all make inertia one of the most decisive powers in determining the course of our affairs and frequently gives to the established order of things a longevity and vitality much beyond its merits.<sup>60</sup>

It is hard to imagine either the New York legislature or Congress getting exercised about the narrow exclusion in *Kramer*. In part, Kramer's likely failure in lobbying the state legislature is reflected in his choice to devote his energies to other activities. If Ely's theory is to provide judicial review with a significant role and thus satisfy the strong version of the justification principle, it must take practical politics into account.

As I will argue in the next section, the recognition of practical politics permits manipulation in the choice of assumptions about the legislative process. Ely fails to give persuasive reasons for accepting his assumptions and, thus, his theory has the same problems of empirical verification for which he criticized natural law approaches to constitutional law.

### C. *The Problem of Definition*

Professor Ely undertakes his equal protection analysis by arguing that the equal protection clause is, in essence, a prohibition of legislation passed for certain impermissible reasons.<sup>61</sup> Both because it is difficult to prove unconstitutional motives and because inferences as to motives, which are drawn from circumstantial evidence, are likely to be controversial, judicial scrutiny of legislative motives would produce results that conformed to neither the justification nor the restraint principles. Ely, therefore, suggests an analysis of what makes classifications "suspect," in order to assure that "the rights of minorities are . . . adequately

59. For Ely, the cases invoking poverty as a classification involve "failures . . . to alleviate . . . poverty" and "do not generally result from . . . a stereotypical generalization about . . . characteristics [of the poor]." ELY, *supra* note 1, at 162.

60. *Duckworth v. Arkansas*, 314 U.S. 390, 400 (1941) (Jackson, J., concurring).

61. ELY, *supra* note 1, at 136-45.

protected"<sup>62</sup> by means of judicial review, without leaving judges unrestrained.

Suspect classifications can be treated as surrogates for unconstitutional motives, Ely argues, because we can be reasonably sure that a statute passed for impermissible reasons will not satisfy the requirement that it serve a substantial and legitimate goal with the necessary fit between goal and classification.<sup>63</sup> The problem, then, is to determine when a classification is suspect. In enacting a statute, legislators weigh the burdens that the statute imposes on those within the adversely affected class against the benefits to everyone else. To Ely, what matters is the legislative assessment of the balance. In particular, judicial deference to legislative choice is inappropriate when legislators underestimate the burdens and overestimate the benefits in deciding to enact a statute.<sup>64</sup> But what leads to inaccurate legislative assessments? Here Ely turns to the differential treatment that the legislature often gives to "us"—those who are fully and directly represented in the legislature—and to "them"—those who are not. "We" (the legislators) are likely to overestimate the costs of equal treatment and are even more likely to assume that our presuppositions about the differences between "us" and "them" suffice to produce a good fit between the classifications and our legislative goals.<sup>65</sup> Ely's argument, however, finesses the problem of identifying who "we" and "they" are.

The problem of identification has two facets. First, in most situations, majorities are coalitions of minorities. Some of the "we" who prevail today will have to worry about securing the votes of some of today's "them" when new issues arise tomorrow. So long as coalitions shift as issues change, no one need fear that his interests will be unfairly disregarded; those interests may be overridden, but only in the way that any loser's interests are. Only if "we-they" distinctions cumulate across issues does Ely's argument work. Such distinctions do cumulate on the local level, when "they" are blacks or women, but that does not appear to be the case with national politics.<sup>66</sup>

Second, even when a single issue is considered, the definition of "we" and "they" is very likely to be arbitrary. This can be seen in

62. *Id.* at 145.

63. *Id.* at 145-46.

64. Equal protection analysis is, therefore, akin to the suspensive veto, *see* pp. 1058-60 *infra*, because, apart from prohibiting unconstitutional motivation, it does not prevent a responsible legislature from acting.

65. ELY, *supra* note 1, at 159.

66. For a discussion of the problem of groups' political power as it bears on the representational branch of Ely's theory, *see* p. 1051 *supra*.



terms of two illustrations. Consider first *Trimble v. Gordon*,<sup>67</sup> in which the Court held unconstitutional an Illinois statute that allowed legitimate children to inherit from both parents by intestate succession, but allowed illegitimate children to do so only from their mothers. The Court treated the case as one involving discrimination on the basis of illegitimacy, as it should have according to Ely's theory. After all, legislators are likely to be legitimate children and to have stereotyped views of illegitimate children and their parents; thus, the statute reflects a "we-they" dichotomy. But there is another, equally plausible perspective. The statute in *Trimble* distinguished between legitimate and illegitimate children only in the area of intestacy. Because the parents of most legislators will have written wills, the statutory classification is really "they-they"; the statute regulates two groups, neither of which the legislators belong to or directly represent.

A similar definitional trick can be used in the gender discrimination cases. In *Califano v. Westcott*,<sup>68</sup> for example, the Court invalidated a federal law that would aid families in which the father was the primary wage-earner and was unemployed, but not families in which the mother was the unemployed primary wage-earner. This can be characterized equally well as either a "we-they" gender line or as a "they-they" distinction between classes of potential recipients of public assistance.

These illustrations show that it is possible to define almost any illegitimacy and gender classification in "they-they" terms, thereby escaping strict scrutiny. Thus, Ely's equal protection theory is inconsistent with the restraint principle: the theory involves arbitrariness at the stage of definition.<sup>69</sup>

### D. *The Problem of Political Reality*

Ely argues that it is possible to avoid this arbitrariness by using a realistic analysis of politics. Such an examination, he contends, will

67. 430 U.S. 762 (1977).

68. 443 U.S. 76 (1979).

69. This difficulty is much like that of selecting the appropriate level of abstraction; Ely relies upon that difficulty in rejecting natural law theories. See ELY, *supra* note 1, at 51-52.

In his earlier writings, Ely attempted to solve the problem of arbitrariness by proposing that legislative purpose be defined in terms of the general type of statute involved; for example, exemptions to a traffic regulation must be analyzed in terms of safety, rather than as an implicit subsidy to exempted industries. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1225-26 (1970). Similarly, Ely sought to limit his theory "to the more obvious cases of we-they thinking." Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 734 n.45 (1974). The fundamental idea is apparently that there are natural classifications and artificial ones, just as there are natural purposes for traffic regulations and artificial ones. Any definition of a "natural classification" will, however, rely upon natural law theories and will therefore violate the principle of value-free adjudication.

clearly suggest the functional obstacles to participation and so will define the "we's" and "they's."<sup>70</sup> Ely characterizes his political analysis as a market theory. The difficulties with his argument can be illustrated by examining a more formal theory of that sort, the theory of public choice.

The theory of public choice treats voters as rational economic agents who calculate the profits expected from political activity.<sup>71</sup> Political activity is costly: voters must acquire information about the ability of competing candidates and parties to carry out the programs they propose and must organize to influence the development of those programs within parties and outside of them. When the benefits of a particular program will be widely diffused, it will rarely be rational for members of the group that would be benefited to invest in political activity; the expected return will probably be less than the cost of engaging in such activity. In addition, at least some of those in the benefited group will refrain from political activity because they expect that others will be active and so hope to secure the benefits without investing anything. Thus, it is almost certain that there will be less investment in political activity than the actual preferences of voters would generate in the absence of the free-rider problem. Diffuse groups are said to be, in a lovely phrase, suboptimally organized. In contrast, when legislation benefits smaller groups, members of those groups have incentives to achieve optimal organization. The free-rider problem disappears and each member's marginal contribution to success is significant.<sup>72</sup>

The most general application of public choice theory focuses upon attempts by interest groups to secure legislative regulation that benefits them—for example, by excluding competition through licensing. When interest groups seek regulation, they have a systematic advantage over the relatively unorganized consumer lobby.<sup>73</sup> This phenomenon can

70. ELY, *supra* note 1, at 151-52, 164-67. In this branch of his analysis, Ely assumes that there are no formal barriers to the participation of minorities in electoral politics. More important, he is so cautious in defining the scope of this argument that it is not clear to which minorities it applies. Ely seems to endorse its application to blacks, but rejects it as to women. Ely is also inconsistent. He states that "once we start to shift from a focus on whether something is blocking the opportunity to correct the stereotype . . . to one that attempts to explain why those who have that opportunity have chosen to pursue other goals instead, we begin to lose our way . . ." *Id.* at 165. In the "minorities" branch of this theory, however, Ely has been assuming that the channels of representation have been unblocked.

71. See M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976).

72. Olson argues that negotiation within the group and the prospect of continued interaction allow long-term deals to be struck as to members' position on every issue. See M. OLSON, *supra* note 71, at 60-62.

73. See *id.* at 63-65; Stigler, *A General Theory of Regulation*, 2 BELL J. ECON. & MANAGEMENT SCI. 3, 10-13 (1971).

easily be fit into Ely's theory; it identifies a practical obstacle to universal participation in the political process. Thus, on the basis of Ely's theory, one would argue that "producer protection" legislation ought to be closely scrutinized.<sup>74</sup>

The assumptions that allow the theory of public choice to yield interesting results are, however, reductionist in the extreme. Consider an example of Ely's. The Supreme Court has held that the commerce clause bars state legislation that discriminates against out-of-state producers,<sup>75</sup> "geographical outsiders [who are] . . . literally voteless."<sup>76</sup> But if we look at state legislatures, we find out-of-state interests well-represented. Moreover, the consumer interest may be suboptimally organized, but it can receive subsidies to support its lobbying in two ways. Out-of-state interests may bolster the consumer lobby and thus offset, in part, the effect of the free-rider problem. Ralph Nader and other consumer advocates, who receive nonmonetary returns on their political activity, strengthen it as well.<sup>77</sup> Once these factors are acknowledged, the clear results suggested by public choice theory evaporate; we are left with only indeterminacy, manipulability, and lack of constraint.<sup>78</sup>

The point can be made in terms of economic theory as well. Professor Richard Markovits has argued that economic analysis of a legal problem must take into account the theory of the "second best," which establishes the indeterminacy of the optimal solution when there are numerous deviations from the idealized assumptions of microeconomic theory.<sup>79</sup> These limitations also apply to the theory of public choice.<sup>80</sup>

74. The theory of public choice can be used to analyze the substantive due process cases. In *Lochner v. New York*, 198 U.S. 45 (1905), the legislature had adopted a law setting maximum hours for bakers. Under reasonable assumptions, the effect was to raise the price of bread. Because consumers, in effect, lost an unfair contest with bakery workers, according to Ely's theory, some judicial intervention was appropriate. The Court considered two kinds of market failure in *Lochner*. First, the Court dismissed the argument that the limitation of hours promoted health and safety. The Court also dismissed the suggestion that the law could be defended as a "labor law, pure and simple," *id.* at 57, because it did not see any imperfections in the labor market for bakers. Even if the Court was wrong, its analysis involved the kinds of "judgment calls" that Ely's theory permits. Thus the Court's result in *Lochner* is consistent with Ely's theory.

75. *See, e.g., Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827).

76. ELY, *supra* note 1, at 84.

77. Ely's discussion, *id.* at 83-85, does not consider this kind of "virtual representation" at the state level.

78. These defects are unavoidable unless an entirely formal version of Ely's theory is adopted; however, such a version has already been rejected, *see* p. 1050 note 58 *supra*.

79. Markovits, *A Basic Structure for Microeconomic Policy Analysis in Our Worse-Than-Second-Best World: A Proposal and Related Critique of the Chicago Approach to the Study of Law and Economics*, 1975 Wis. L. Rev. 950.

80. Like law-and-economics analysis, public choice theory has also been criticized on the grounds that it ignores substantive standards of justice. That criticism does not apply here because of the principle of value-free adjudication. *See* p. 1044 *supra*.

Thus, public choice theory does not enable us to identify functional obstacles and define "we's" and "they's" without arbitrariness. Because Ely's model of political activity is a less-formalized version of the theory of public choice, and therefore also subject to arbitrary results, it is inconsistent with the restraint principle.

This indeterminacy in Ely's theory can be seen in connection with one of his central concerns, the problem of intensity. Ely argues that minorities sometimes come to accept the majority's stereotypes and will therefore not care that the majority imposes burdens based on stereotypes.<sup>81</sup> As a result, they will not effectively use the available political process to reduce those burdens, and judicial intervention is warranted despite the absence of more traditional obstacles. As he says, "in some contexts," the idea has merit.<sup>82</sup> But those contexts would seem to be extremely rare.<sup>83</sup> The notion of socialization into passivity may itself reflect a stereotype. Moreover, the political power of activists within the minority group is augmented by that of moral entrepreneurs and other allies. Taking these facts into account, it is doubtful that any minority group is discriminated against today because of stereotypes rather than because of lack of political power.<sup>84</sup> Thus, it is un-

81. ELY, *supra* note 1, at 164-67.

82. *Id.* at 165.

83. In August 1865, a recently freed slave wrote his former master, who had requested the slave to return as an employee:

I have often felt uneasy about you. . . . Although you shot at me twice before I left you, I did not want to hear of your being hurt, and am glad you are still living. It would do me good to go back to the dear old home again . . .

. . . .

Mandy says she would be afraid to go back without some proof that you are sincerely disposed to treat us justly and kindly—and we have concluded to test your sincerity by asking you to send us our wages for the time we served you. This will make us forget and forgive old scores, and rely on your justice and friendship in the future. . . . We trust the good Maker has opened your eyes to the wrongs which you and your fathers have done to me and my fathers, in making us toil for you for generations without recompense. . . .

. . . .

P.S.—Say howdy to George Carter, and thank him for taking the pistol from you when you were shooting at me.

From your old servant,  
Jourdon Anderson

L. LITWACK, *BEEN IN THE STORM SO LONG* 333-35 (1979). Of course, we do not know how many people like Jourdon Anderson there are in any minority group.

84. Ely's discussion of the origins of discrimination against women has an additional defect. Although he concedes that today there are neither formal nor functional barriers to their participation in politics, ELY, *supra* note 1, at 164, 166-67, he argues that his analysis is helpful as to laws passed before 1920, when the Nineteenth Amendment was ratified, and before the time when the first serious controversy over female stereotypes arose. *Id.* at 167-68.

The response to this argument is obvious: if the laws are currently bothersome, there are no obstacles to their repeal. Ely notes that requiring recourse to repeal "would be

## Ely and Constitutional Theory

clear whether judicial displacement of legislative choices is justified in the absence of objective obstacles to minority participation. This indeterminacy violates the principle of restraint.

### III. The Future of Constitutional Theory

Although Ely's critique of prevailing theories of constitutional law rests upon three principles, neither the theories that he criticizes nor his own theory satisfies all three. This result suggests the conclusion that constitutional theory is impossible—that the three principles, taken together, rule out all constitutional theories. If constitutional theory is to survive, it would seem that one of these principles must be rejected. Though there are no obvious candidates, pressure may arise to reject the justification principle—with serious consequences for the protection of civil liberties.<sup>85</sup> I will argue that the three principles are bound up with what Roberto Unger calls the antinomies of liberal thought and that the incoherence of constitutional theorizing reflects internal tensions in liberalism.

#### A. *The Standard Version of Constitutional Theory*

The fact that no constitutional theory is ultimately coherent does not mean that academics will not continue to try to develop an acceptable theory. Indeed, the incoherence of constitutional theory has major quasi-economic advantages for legal scholars. We can be sure that the Supreme Court is not going to go out of business and will continue to hand down decisions for scholars to analyze. Every one of those decisions can be criticized; if the scholar dislikes the result, all he needs to do is to propose some theory that would generate the opposite result. Because the constitutional theories suggested thus far are incoherent, this is always possible.<sup>86</sup> The incoherence of constitutional theory may

to place in their path an additional hurdle that the rest of us do not have to contend with in order to protect ourselves. . . ." *Id.* at 169 n.\*. However, anyone who wants to alleviate a present condition by legislative action faces that hurdle. Ely's rebuttal thus rests on the implicit proposition that there is an asymmetry between enacting and repealing legislation. This is implausible, however, for if either enacting or repealing requires a supermajority, it seems likely that the other would as well.

85. Although Ely's fear that his theory "might mean less protection for civil liberties" ultimately gave way to his conviction "that just the opposite is true," *id.* at 102 n.\*, his initial misgivings were well-grounded. He might well have been thinking of the possibility that his theory would fall to the impossibility of reconciling the three principles; in that event, pressure to reject the justification principle could lead to an erosion of judicial intervention to protect civil liberties.

86. If, on the one hand, the Court refuses to invalidate a statute that the scholar dislikes, he can apply some natural law theory to show that if the Court's assumptions are

be economically rewarding, but it is intellectually sterile. Works such as Professor Bruce Ackerman's anthropology of constitutional reasoning<sup>87</sup> and Professor Joseph Vining's poetics of the law of standing<sup>88</sup> have begun to recognize this sterility, but even they succumb to the temptation to participate in constitutional theorizing.<sup>89</sup>

### B. *The Revised Standard Version of Constitutional Theory*

The revisionist approach to constitutional law argues that we should not be disturbed by judicial review because it does not matter very much. Legislation that is supported by a substantial majority will go into effect; the Court can only obstruct its implementation for a time. As Ely argues, however, the problems of constitutional theory do not disappear by treating judicial review as a veto that can be overridden.<sup>90</sup> First, there are no effective formal mechanisms for overriding a judicial veto;<sup>91</sup> we must rely upon such chance factors as deaths, retirements, and appointments to generate a change in the Court's philosophy. Thus, the judicial veto may have a much more long-lasting effect than the legal realists claim. Second, even assuming that the judicial veto can be overridden, the costs of thwarting the majority in the interim are great.

This second difficulty with the realist analysis also applies to an interesting recent development in constitutional theory, a development that, at first glance, might appear to offer a solution to the incoherence of current theories. That development is the increasing use of "suspensive" vetoes.<sup>92</sup> This new mode of judicial review results in decisions that specify only which body is authorized to make law. The best-established form of the suspensive veto is review of state legislation for inconsistency with the commerce clause: whenever the Court invali-

elaborated, the Court's theory is inconsistent with the justification principle. If, on the other hand, the Court invalidates a statute that the scholar likes, he can use Ely's theory or some version of Burkeanism to show that if the Court's assumptions are elaborated, the Court's theory is inconsistent with the restraint principle or the principle of value-free adjudication.

87. B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977).

88. J. VINING, *LEGAL IDENTITY: THE COMING OF AGE OF PUBLIC LAW* (1978).

89. See Epstein, Book Review, 30 *STAN. L. REV.* 635 (1978) (criticizing Ackerman for departing from traditional legal scholarship and erecting a grand framework for constitutional interpretation); Stewart, Book Review, 88 *YALE L.J.* 1559 (1979) (arguing that Vining has neglected institutional, prudential, and doctrinal considerations for his vision of a developing moral order).

90. ELY, *supra* note 1, at 45.

91. Ely properly dismisses the formal checks of control of jurisdiction or budget and constitutional amendment as ineffective. *Id.* at 46-47.

92. See *id.* at 125-34.

dates a state law on dormant commerce clause grounds, it is immediately open to Congress to reestablish the same rule.<sup>93</sup> The Court and the commentators have groped for additional applications of this approach. For instance, the judicially created requirement that the justification for distinctions drawn in a statute appear in the legislative record<sup>94</sup> does not preclude the use of those distinctions; instead, it ensures that the legislature, rather than the Attorney General, will make them.<sup>95</sup> Perhaps the clearest recent innovation in the use of suspensive vetoes occurred in *Hampton v. Mow Sun Wong*,<sup>96</sup> in which the Court held unconstitutional a regulation that barred aliens from the federal civil service. The Court acknowledged that such a bar might be justified as a means of providing American diplomats with leverage in bargaining with foreign nations, but held that the Civil Service Commission lacked the authority to create such a bar, though the President might have it. Another form of suspensive veto is the delegation doctrine, which, until recently, was discredited.<sup>97</sup> In general, the theory of suspensive vetoes remains undeveloped; the Court has not used it consistently on all the occasions when it might have.<sup>98</sup>

Though the theory might seem to offer a way out of the difficulties in which standard constitutional theory is bogged, in reality it does not. First, it is hard to find anything in the Constitution other than the guaranty clause<sup>99</sup> that prescribes state decisionmaking structures; this mode of judicial review is thus subject to manipulation. More important, suspensive vetoes are often a charade: in the gender discrimination cases, for example, there is no significant possibility that the statutes will be reenacted;<sup>100</sup> in response to *Hampton*,<sup>101</sup> the President took the Court's advice and repromulgated the employment bar in the

93. For a general discussion, see Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 Wis. L. Rev. 125.

94. See, e.g., *Califano v. Goldfarb*, 430 U.S. 199, 212-17 (1977) (statute invalidated because inquiry into legislative purpose reveals congressional reliance on archaic generalizations as to role of women); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648-53 (1975) (statute voided because statutory scheme and legislative history demonstrate that gender-based benefit rested on stereotype and was not intended to remedy discrimination).

95. See *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (requiring legislative articulation of remedial purpose to justify differing treatment).

96. 426 U.S. 88 (1976).

97. See Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROB. 46 (Summer 1976).

98. See p. 1046 & note 42 *supra*; Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373 (1978).

99. U.S. CONST. art. IV, § 4.

100. Even if women's political activists are at present unable to repeal the discriminatory legislation, they are now powerful enough to block its reenactment. See note 84 *supra* (no formal representational obstacles for women).

101. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

interest of foreign relations, thereby overriding the suspensive veto.<sup>102</sup> Finally, in situations in which the use of a suspensive veto would have force, principled analysis may not yield a clear result. It is not obvious, for example, why the voters of California should not be allowed to authorize the Regents of the University of California to decide that the University had discriminated against blacks in the past.<sup>103</sup> Suspensive vetoes are likely to become like ordinary judicial review; they will displace decisions made under a *given* procedure, with no realistic possibility that a revised process would yield the same decisions.

The fundamental difficulty with the revised version of constitutional theory, however, is its premise. Although that premise has rarely been articulated, the gender discrimination cases indicate that the point of the theory lies in the effort to make the lawmaking process more rational: the legislature ought to consider the reasons for its actions, and agencies without expertise ought not invoke reasons that implicate expertise. In essence, the aim is to make legislatures act more like courts.<sup>104</sup> Legislatures and courts are typically distinguished on the basis that legislatures are creatures of political will and courts are instruments of reason.<sup>105</sup> The revised version of constitutional theory attempts to subordinate will to reason; but liberalism makes that impossible.

### C. *The Contradictions of Constitutional Theory*

The final step in this argument explores why the three principles are fundamental. The first two principles are actually responses to what Roberto Unger has called the principle of arbitrary desire, a principle that he finds rooted in liberal psychology and politics.<sup>106</sup> Everyone,

102. Exec. Order No. 11,935, 41 Fed. Reg. 37,301 (1976).

103. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (Powell, J., announcing judgment of the Court). It has been suggested that the political constraints on faculties and Boards of Regents differ from the constraints on legislatures. See Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 695-96 (1975) (less need for faculties to obtain public consent). That is not the case at the University of Wisconsin, and one doubts that the Supreme Court is well-situated to make such determinations.

My previous attempt to work out the implications of the suspensive veto in the commerce clause context failed, not because the formulation was flawed, but because the outcome must be indeterminate. See Tushnet, *supra* note 93, at 150-54.

104. See Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

105. See ELY, *supra* note 1, at 56 (quoting Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 246-47 (1973) (policymaking institutions differ in function from deliberative bodies charged with discovering society's moral principles)).

106. R. UNGER, *KNOWLEDGE AND POLITICS* 42-46 (1975). The argument was foreshadowed by Professor Crawford MacPherson. See C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* (1962).



including legislators and judges, is motivated to satisfy desires for which no criteria of evaluation exist. Desire, moreover, is insatiable, because "we are striving beings who covet as long as we live."<sup>107</sup> Reason is the means, according to liberal psychology, whereby arbitrary desire can be controlled. The first two principles assert the need to avoid the tyranny that can result when someone motivated by arbitrary desire occupies a position of power. Judicial review is needed to avoid the tyranny of the majority, and constraints on judges are needed to avoid the tyranny of the judiciary. The difficulty is that liberalism provides no means of accomplishing that result. The obvious candidate is "the rule of law." As Professor Unger argues, however, that cannot be realized in liberal society, for it founders on the very arbitrariness of desire that makes it impossible "to prefer some ends to others."<sup>108</sup> Because the rule of law must be formally neutral, and therefore empty, it cannot provide the constraints on desire that the first two principles demand. Alternatively, if the rule of law were given substantive content, it would require that the will of some individual be subordinated to that of others, in contradiction of the principle that there are no criteria by which desires can be evaluated. This is just another formulation of the principle of value-free adjudication.<sup>109</sup>

The essential point is that constitutional theory must satisfy all three principles, and that, if Professor Unger's analysis of liberalism is correct, constitutional theory cannot do so. Liberal psychology and politics define desire in ways that make the principle of value-free adjudication a necessary part of constitutional theory; they define reason in ways that make the justification and restraint principles necessary parts as well; and yet no theory can accommodate all three. I have argued that constitutional theory is incoherent; if Professor Unger is right, that incoherence is no more than a specific instance of the theoretical problems of liberalism.

These arguments are both troubling and encouraging. They are troubling because they undermine what constitutional scholars have regarded as the aim of their work. Constitutional scholarship has been directed at developing "[1] a just and rational rule [2] that *generally* explains the Court's behavior in the past and, therefore, [3] has a *plausible* likelihood of being adopted as a rule of decision."<sup>110</sup> I have discussed elsewhere the peculiar assumptions that underlie the first

107. R. UNGER, *supra* note 106, at 53.

108. *Id.*

109. *See id.* at 76-81.

110. Westen, *Forfeiture by Guilty Plea—A Reply*, 76 MICH. L. REV. 1308, 1310 (1978).

two clauses.<sup>111</sup> The important issue here is the inability of constitutional theory to satisfy the third requirement. If constitutional theory is indeed incoherent, there is no logical reason why any particular theory is more likely to be adopted than any other.

One can, however, still attempt to understand why, in particular historical settings, specific constitutional doctrines are likely to be adopted. Sociological studies of the Supreme Court<sup>112</sup> that utilize vote-counting and factor analysis are of no help in this attempt. Instead, we must examine why internally contradictory institutions like judicial review are created, and how their contradictions emerge in legal doctrine and history. The answers are difficult to make out, and they will be hard to elaborate.<sup>113</sup> If Unger is right, the answers will be gleaned only if we understand the conflicts inherent in the premises of liberalism.

Professor Ely frames his critique of prevailing theories by quoting Alexander Bickel: "No answer is what the wrong question begets."<sup>114</sup> Unfortunately, no answer is also what the right question begets.

111. See Tushnet, Book Review, 78 MICH. L. REV. (1980) (forthcoming) (reviewing L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978)).

112. See, e.g., G. SCHUBERT, *THE JUDICIAL MIND* (1965).

113. For a first attempt, see Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979).

114. ELY, *supra* note 1, at 43.