John Hart Ely as a Constitutional Theorist

On Introducing Ely to Japan

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I. INTRODUCTION

Professor John Hart Ely is kind of a legend in the constitutional law scholarship in the United States during the 1980s. His landmark book, entitled *Democracy and Distrust: A Theory of Judicial Review*,[1] was published in 1980. It was a culmination of his previous works during the 1970s on the theory of judicial review. This book caused huge controversies among constitutional law academics and had a lasting impact on the direction of the academic discourse in constitutional law, not only in the United States but also in other countries.

1 J. H. ELY, Democracy and Distrust: A Theory of Judicial Review (1980).

As one of his graduate students who had studied theory of judicial review in Stanford under his supervision,[2] and as an academic who introduced his theory to Japan and endorsed it, it is my great privilege to participate in this conference and comment on Ely's theory. I would like to explain the background of his theory (part II), its outline (part III), its response from academics (part IV), reasons why I decided to introduce his theory to Japan and endorsed it (part V), and the lasting importance of Ely's theory (part VI).

II. Background for Ely's Theory

1. Path to Roe v. Wade

The power of judicial review, first exercised by the Supreme Court of the United States (SCOTUS) in *Marbury v. Madison*,[3] totally changed the discourse of constitutional law in the United States. Although it was a very controversial decision and the arguments for the power of judicial review were not perfectly satisfactory for all, it came to be widely accepted. As a result, the Constitution became a judicial norm to be enforced by the judiciary against the political branches. It was only a particular exercise of the power of judicial review in each specific case that could be subjected to debate but not the legitimacy of the power of judicial review itself.

The power of judicial review had not received such serious attention in the US in the 19th century because the SCOTUS had not used this power often to strike down legislation passed by Congress.[4] After all, Congress had not enacted many statutes affecting the general public at that time. It was only the later 19th century and early 20th century that brought a huge number of state statutes regulating the economy and social conditions aimed at protecting workers. Frustrated by these moves, corporations came to rely on the Due Process Clause of the Fourteenth Amendment to chal-

2 I was a JSD student from 1983 to 1986 at Stanford Law School under his supervision and obtained a JSD in 1986, submitting a thesis entitled Judicial Review v. Democracy: An Inquiry into the Nature and Limits of Legitimate Constitutional Interpretation by the Judiciary.

3 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

4 It was *Dred Scott v. Sandford*, 60 (19 How.) U.S. 393 (1857) that allowed the SCOTUS to exercise the power of judicial review for the first time since Marbury. It held that black slaves were not the United States citizens, denying their right to file a lawsuit in courts, and struck down the Missouri Compromise which banned slavery in the north, triggering the huge public anger and ultimately leading to the Civil War. However, the Dred Scott was reversed after the end of Civil War by the Fourteenth Amendment and the power of judicial review survived the most heated criticisms.

lenge these economic regulations and social legislations.[5] In response, the SCOTUS came to gradually interfere with the economic regulations and social legislations to see whether contested restrictions of the "liberty of contract", nowhere specifically provided in the Constitution but was found to fall within the "liberty" protected by the Due Process Clause of the Fourteenth Amendment, were reasonable. The SCOTUS subjected them to close scrutiny and struck them down when the Court found them unreasonable. This economic Substantive Due Process doctrine, typically shown in *Lochner v. New York*,[6] which struck down the maximum-working-hour legislation for bakery workers, raised very significant questions about the legitimacy of the power of judicial review.

In the old days, constitutional interpretation and adjudication was believed to be a value-neutral ascertainment of the right answer hidden in the provisions of the Constitution. Judges were merely discovering the answer from the Constitution already made by its framers and applied it to the case at hand. They were not creating law. Yet these decisions cast serious doubt on the appropriateness of this picture. The realists came to criticize this approach as mechanical jurisprudence and myth. Instead, they advocated for focusing on the reality; judges were creating law and constitutional interpretation and adjudication is filled with value judgments. This new understanding could totally destroy faith in the traditional justification for judicial review. If judges are creating answers with their own value judgments, why on earth could the judiciary assert superiority over the elected legislature and claim legitimacy?

Indeed, the SCOTUS faced significant backlash from both the political branches and the public. Especially when the SCOTUS struck down various New Deal statutes aimed at overcoming the Great Depression, strongly supported by the government and by the public, the SCOTUS was subjected to utterly aggressive attacks. President Roosevelt even proposed the idea of packing the SCOTUS to change the course of its decisions. Although this proposal was not accepted by many, the fear of political retaliation must have been felt by the Justices. As a result, the SCOTUS retreated from its active vindication of the liberty of contract. It simply came to defer to the judgments of the political process on matters of economic and social issues in the late 1930s.[7] This experience left the people the important lesson that the judiciary could block the majority will of the people and left the serious question of whether the power of judicial review could have any chance of survival.

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5 The Constitution of the United States, 14th amendment, clause 1.

6 *Lochner v. New York*, 198 U.S. 45 (1905).

7 *U.S. v. Carolene Products Co.*, 304 U.S. 144 (1938).

Nevertheless, during 1950s and 1960s, the SCOTUS led by Chief Justice Earl Warren, generally known as the Warren Court, came to closely scrutinize and strike down various restrictions on individual rights, especially freedom of expression, religious freedom, equality rights, and rights of suspects and defendants.[8] These decisions triggered heated debates about the proper role of the judiciary. Two opposing views were generally contrasted: theory of judicial restraint and theory of judicial activism. Theory of judicial restraint called for a much restrained judiciary, limiting its active exercise of power only when the legislation is evidently unreasonable. Mostly they called for reliance on "neutral principles" and criticized the decisions of the Warren Court as too unprincipled or result-oriented. On the other hand, the theory of judicial activism allowed for a much activist judiciary, justifying its active intervention when civil rights and civil liberties are concerned. Many of them believed that the Constitution is not a fixed document and embodies substantive values to be realized. They also believed that it needed to be updated and realized by the SCOTUS according to the changing society. The idea of a "living Constitution" was a very popular idea among them. But it must be noted that even the advocates for judicial activism generally did not endorse revitalization of *Lochner*. In that sense, advocates for judicial activism only partially embraced judicial activism for so-called civil rights and civil liberties but not economic liberties.

All these academics in a sense were attempting to solve the "countermajoritarian difficulty of judicial review" defined by Alexander Bickel.[9] American society is strongly committed to majority rule under a democracy. It is the people who elect their representative and choose the President, and the government is run based on majority rule in Congress. However, the SCOTUS Justices are not elected and do not face reelection, although they need to be nominated by the President and confirmed by the Senate, one branch of the Congress. When the SCOTUS strikes down legislation passed by Congress, it is in one sense throwing away the choice made by the people through the majority. In short, they were thus debating how the exercise of judicial review by the unelected SCOTUS could be justified in a majoritarian democratic society under the Constitution. This debate was mostly focused on cases where the SCOTUS went beyond the Constitution's text and history: cases where the SCOTUS could not find sufficient

8 *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); *Gideon v. Wainwright* 372 U.S. 335 (1963). Indeed, during his law school years in Yale, Ely joined the teams of Abe Fortas, which contributed to the landmark decision in Gideon and Fortas later became an Associate Justice of the SCOTUS. Ely himself later served Chief Justice Earl Warren as a law clerk.

9 A. BICKEL, The Least Dangerous Branch (1962) 16.

textual sources or historical evidence on the original intent of the framers. The Warren Court in the 1950s and 1960s looked like it was acting without principle and without such sufficient textual or historical support when it struck down many statutes enacted by the legislatures elected by the people. These decisions looked too result-oriented.

2. Roe v. Wade

When Chief Justice Warren was replaced by the conservative Chief Justice Warren Burger in 1969, many anticipated a retreat from judicial activism. Yet, in 1973, in a landmark decision in *Roe v. Wade*,[10] the SCOTUS struck down a Texas anti-abortion statute which prohibited abortion except to save the life of a pregnant mother. In the United States, abortion was prohibited in almost all states before the 1970s except to save the life and health of pregnant mothers. Gradually, an increasing number of states started liberalizing abortion in early pregnancy but still the majority of states were reluctant to liberalize it. Texas was one of such reluctant states. The SCOTUS in this case found the woman's right to an abortion within the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. It then reviewed whether the restriction on abortion could be justified. The SCOTUS refused to hold the right to an abortion an unbridled absolute right. But the SCOTUS viewed it as a "fundamental right", triggering strict scrutiny on its restriction. The SCOTUS believed that abortion could be regulated after the first trimester for the protection of pregnant women and could be banned after the fetus became viable outside of the mother's womb for the protection of the potential life of the fetus. As a result, the SCOTUS struck down the Texas abortion law which practically prohibited abortion except to save the life of mothers as overbroad, thereby practically wiping out almost all abortion regulations that existed at that time in other states.

This decision was so controversial in the United States and triggered serious debates as to its appropriateness. Those who were in favor of women's abortion right welcomed it and started the Pro-Choice movement to vindicate the *Roe* holding and expand the abortion right. Those who were opposed to abortion were seriously upset and started the Pro-Life movement to call for the reversal of *Roe* and the introduction of various abortion restrictions to save the life of fetuses. This decision also caused heated controversies among constitutional academics as well. Ely, who was a political liberal, supported the outcome of the decision if he were a member of the legislature.[11] As a constitutional academic, however, he was not happy with the fact that it was

10 *Roe v. Wade*, 410 U.S. 113 (1973).

the[11] judiciary that brought about that change.[12] He feared that *Roe* may be Lochnerizing again. Basically, the SCOTUS once again found the unlisted right to an abortion in the Due Process Clause, found that right to be fundamental, triggering strict scrutiny, and struck down legislation still quite common in many states. *Roe* could be seen as the most typical decision that manifested the countermajoritarian difficulty of judicial review.[13]

III. Ely's Representation Reinforcing Theory of Judicial Review

In his book, he examined the two opposing views on constitutional interpretation: interpretivism and non-interpretivism. Interpretivism holds that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution," while noninterpretivism holds that "courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document."[14] He found interpretivism quite alluring but ultimately concluded that the standard form of it was impossible since there are some clauses such as the Ninth Amendment that are open-ended and called for much active enforcement.[15] Ely claims that the commentators thus started asking "Which values […] qualify as sufficiently important or fundamental or whathaveyou to be vindicated by the Court against other values affirmed by legislative acts? And how is the Court to evolve and apply them?"[16]

However, when he closely examined noninterpretivism, he also found it unsatisfactory. All the sources each advocate attempts to draw constitutional interpretation, such as natural law, neutral principles, reason, tradition, consensus, and the predicted values of the future, lack objective standards and end up allowing unelected judges to subjectively enforce their own value judgments against the society.[17] Ely concluded that

11 J. H. Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, Yale Law Journal 82 (1973) 920, 926.

12 Ely, *supra* note 1, 2–3, 248.

13 For the origin and history of academic obsession with the counter-majoritarian difficulty, see B. Friedman, The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy, New York University Law Review 73 (1998) 333; B. Friedman, The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five, Yale Law Journal 112 (2002) 153.

14 Ely, *supra* note 1, 1.

15 Ely, *supra* note 1, 14.

16 Ely, *supra* note 1, 43, quoting Bickel.

17 Ely, *supra* note 1, 44–72.

"now I can see how *someone who started with Bickel's premise*, that the proper role of the Court is the definition and imposition of values, might well after a lifetime of searching conclude that since nothing else works – since there isn't any impersonal value source out there waiting to be tapped – one might just as well 'do the right thing' by imposing one's own values. It's a conclusion of desperation, but in this case an inevitable desperation. No answer is what the wrong question begets."[18]

Then, he found an alternative theory in the judgments of the Warren Court. Although

"the commentators of the Warren era were talking about ways of discovering fundamental values, the Court itself was marching to a different drummer […]. These were certainly interventionist decisions, but the interventionist was fueled not by a desire on the part of the Court to vindicate particular substantive values it had determined were important or fundamental, but rather by a desire to ensure that the political process […] was open to those of all viewpoints on something approaching an equal basis."[19]

This is the theory of a "participation-oriented, representation-reinforcing approach to judicial review."[20] He turned his attention to footnote four of the *Carolene Products* decision.[21] The *Carolene Products* decision applied a strong presumption of constitutionality to economic regulation and upheld the constitutionality of a statue which prohibited filled milk despite serious doubt on its reasonableness. Yet, in footnote four, the SCOTUS suggested that such a presumption might not be applied in certain circumstances:

"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. […]

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 ex- acting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. […]

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, […] or national, […] or racial minorities […]: 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 searching judicial inquiry."[22]

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18 ELY, *supra* note 1, 72.

19 ELY, *supra* note 1, 73–74.

20 ELY, *supra* note 1, 87.

21 *U.S. v. Carolene Products Co., supra* note 7. For its historical background, see R. M. COVER, The Origins of Judicial Activism in the Protection of Minorities, Yale Law Journal 91 (1982) 1287.

22 *U.S. v. Carolene Products Co., supra* note 7, footnote 4.

The first paragraph allowed the SCOTUS to actively vindicate individual rights specifically enumerated in the Bill of Rights, pure interpretivism.[23] Ely noted that this first paragraph was added after the draft of the decision was circulated and somewhat different from second and third paragraphs. The second and third paragraphs were both "concerned with participation: they ask us to focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted."[24] The majoritarian theme of paragraph two and the egalitarian theme of paragraph three, despite their apparently inconsistent impulses, fit together in a coherent political theory of representative democracy – a republican theory of representation of the whole people, with actual representation of the majority and "virtual representation" of minorities.[25] Ely thus argued that contrary to the standard characterization of the Constitution as "an enduring but evolving statement of general values," in fact "the selection and accommodation of substantive values is left almost entirely to the political process and instead the document is overwhelmingly concerned, 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."[26] Adopting the *ejusdem generis* way of thinking, he thus allows the courts to enforce open-ended provisions in the Constitution to enhance representation and to enable excluded minorities to join in the process of participation.

Therefore, he argued:

> "In a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office. Malfunction occurs when the process is undeserving of trust, 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."[27]

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23 ELY, *supra* note 1, 76.

24 ELY, *supra* note 1, 77.

25 ELY, *supra* note 1, 77–88.

26 ELY, *supra* note 1, 87.

27 ELY, *supra* note 1, 103. He viewed his own theory "ultimate interpretivism." ELY, *supra* note 1, at 88.

In other words, the SCOTUS should in American representative democracy be "policing the process of representation" by "clearing the channels of political change" and "facilitating the representation of minorities."

Upon endorsing such middle ground, he chose to justify a limited judicial activism. Apparently, he could accept most of the decisions of the Warren Court because his theory could justify most of its decisions. On the other hand, he could not defend *Roe*. Evidently, *Roe* represented the attempt to enforce "fundamental values" beyond text and history, which could not be justified under his representation-reinforcing theory, and, just like *Lochner*, was an illegitimate exercise of the power of judicial review.

IV. Impacts of Ely's Theory

1. Reactions to Ely's Theory

His book triggered a huge number of book reviews. And his theory has been subjected to searching examinations by constitutional academics.

Surely, his theory, which later came to be known as a "political process theory," would be able to justify most of the Warren Court precedents and allows the public to participate in the political process with much ease.[28] He provided us perhaps the most powerful defense of the power of judicial review when various blocks are hindering the public from participating in the political process and when the majority are shielding off public scrutiny and criticism, undermining the process of political change. His theory also would be able to justify the Warren Court's vindication of racial minorities which have been excluded by prejudice. In this sense, Ely was the most successful (belated) defender of the Warren Court decisions.

Nevertheless, overall voices in the United States are critical. Surely, there are a small number of conservative academics who were not convinced by his theory of going beyond the text and history of the Constitu-

28 D. A. Strauss, Modernization and Representation Reinforcement: An Essay in Memory of John Hart Ely, Stanford Law Review 57 (2004) 761; W. N. Eskridge Jr., Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics, Yale Law Journal 114 (2005) 1279. But see D. R. Ortiz, Pursuing a Perfect Politics: The Allure and Failure of Process Theory, Virginia Law Review 77 (1991) 721, 722 (Ely fails in his descriptive project); M. V. Tushnet, Foreword, Virginia Law Review 77 (1991) 631, 634 (difficulty of understanding some decisions, such as Griswold, as representation-reinforcing way). If Ely wanted to defend these decisions, maybe Ely's understanding of democracy is quite broad and may raise the possibility that his theory is motivated by his right-based metatheory, superior to other rights, and might face the same destination as all theories he criticizes. Ibid., at 635–636. See also R. A. Posner, Democracy and Distrust Revisited, Virginia Law Review 77 (1991) 641.

tion.[29] They believed that Ely went too far to allow judicial activism beyond text and history. Most of the constitutional academics in the United States were critical against his theory, however, believing that his dichotomy between interpretivism and noninterpretivism is flawed,[30] arguing instead that all are trying to interpret the Constitution, and concluded that his theory is too narrow and will not justify much activist exercise of judicial review in the post-Warren Court era, such as *Roe*.[31]

2. Some Representative Criticisms of the Academics

Professor Laurence H. Tribe[32] criticized Ely, for instance, since

> "the constitutional theme of perfecting the processes of governmental decision is radically indeterminate and fundamentally incomplete. The process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values – the very sort of theory the process-perfecters are at such pains to avoid."[33]

He wondered why Ely and other process theorists "continue to put forth process-perfecting theories as though such theories could banish divisive controversies over substantive values from the realm of constitutional discourse by relegating those controversies to the unruly world of power."[34] For Tribe, the Constitution embodies stubborn substantive commitments, and

> "the Constitution's most procedural prescriptions cannot be adequately understood, much less applied, in the absence of a developed theory of fundamental rights that are secured to persons against the state – a theory whose derivation demands precisely the kinds of controversial substantive choices that the process proponents are so anxious to leave to the electorate and its representatives."[35]

Perhaps, therefore, Ely and process theorists might be viewing the process value as a core value to be realized by the judiciary,[36] since any identification of minorities to be protected or any identification of prejudice to eradi-

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29 R. BERGER, Ely's "Theory of Judicial Review", Ohio State Law Journal 42 (1981) 87.

30 L.A. ALEXANDER, Modern Equal Protection Theories: A Metatheoretical: Taxonomy and Critique, Ohio State Law Journal 42 (1981) 3.

31 Probably, the only substantive rights which would not receive any constitutional protection will be the right to privacy and the personal autonomy right. T. GERETY, Doing without Privacy, Ohio State Law Journal 42 (1981) 143.

32 L. H. TRIBE, The Puzzling Persistence of Process-Based Constitutional Theories, Yale Law Journal 89 (1980) 1063.

33 TRIBE, *supra* note 32, 1064.

34 TRIBE, *supra* note 32.

35 TRIBE, *supra* note 32, 1066–1067.

36 TRIBE, *supra* note 32, 1072.

cate could not be accomplished without looking "beyond process to identify and proclaim fundamental substantive rights."[37] Then, Ely's whole theory stumbles.

Professor Chemerinsky[38] also criticized that the very "inquiry into the legitimacy of judicial review is futile and dangerous. The inquiry is futile because, if democracy is defined to require that all value choices be made by electorally accountable officials, then noninterpretive judicial review by definition is not acceptable in a democracy. The inquiry is dangerous because it accepts the conservative critics' definition of democracy and thereby legitimizes their premise that judicial review is unjustified unless it is made consistent with majority rule. The inevitable failure to reconcile noninterpretive court review with this definition of democracy undermines the legitimacy of countless Supreme Court decisions".[39] He also commented that the contention that judicial review is undemocratic is "disingenuous at best",[40] since any judicial invalidation of legislation passed by the majority is undemocratic, even based on interpretivist grounds. He rather argued that it is essential to

> "recognize that a purely procedural definition of American democracy as majority rule is grossly incorrect. A correct definition of American democracy must add to majority rule the protection of substantive values from tyranny by social majorities – an addition with crucial implications for the debate over the legitimacy of judicial review."[41]

His position is that the ultimate question should be how much discretion the Court should have in interpreting the Constitution and that "the choice must be based upon substantive values, upon a political theory that examines how our government should be structured and identifies which values are so important that they must be shielded from majority rule."[42]

On the other hand, Mark Tushnet[43] argued that Ely's attempt to satisfy three pillars of modern constitutionalism will be destined to be failure. Three pillars he referred to are the justification principle, which attempts to justify judicial intervention, the constraint principle, what dictates the judi-

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37 TRIBE, *supra* note 32, 1077. He later came to claim that it is futile to search for legitimacy. L.H. TRIBE, Constitutional Choices (1985) 3. See also L. H. TRIBE/ M. C. DORF, On Reading the Constitution (1993).

38 E. CHEMERINSKY, The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review, Texas Law Review 62 (1984) 1207.

39 CHEMERINSKY, *supra* note 38, 1209.

40 CHEMERINSKY, *supra* note 38, 1209.

41 CHEMERINSKY, *supra* note 38, 1210.

42 CHEMERINSKY, *supra* note 38, 1210.

43 M. TUSHNET, Darkness on the Edge of Town: The Contributions of John Hart ELY to Constitutional Theory, Yale Law Journal 89 (1980) 1037.

ciary to constrain in the name of democracy, and the principle of value-free adjudication.[44] While Ely's theory could justify the last two principles, Tushnet argued that it would not support the first principle and "the incompatibility of the three principles reflects the incoherence of modern liberal theory."[45] In particular, he argued that, although Ely succeeded in destroying his rival theories, Ely's criticisms against them ended up destroying his theory as well:

> "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."[46]

Yet, the fundamental difficulty with Ely's theory is that "its basic premise, that obstacles to political participation should be removed, is hardly value-free."[47] He was thus suggesting that any attempt to find a constitutional theory of judicial review that justifies judicial review while at the same time placing limits on it is doomed to failure in a liberal democracy.

3. The Impossibility of Avoiding Value Judgments and the Primacy of Substantive Values

Many other liberal constitutional academics similarly criticized Ely's theory as having failed.

Firstly, they claim that Ely's theory failed because it is impossible to avoid substantive value judgements.[48] Value judgments on substantive values is unavoidable. Moreover, they argue that the constitution is overwhelmingly a declaration of substantive values and Ely is wrong to argue

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44 TUSHNET, *supra* note 43, 1037–1038.

45 TUSHNET, *supra* note 43, 1038.

46 TUSHNET, *supra* note 43, 1038.

47 TUSHNET, *supra* note 43, 1045. See also M. TUSHNET, The Dilemmas of Liberal Constitutionalism, Ohio State Law Journal 42 (1981) 411; P. BREST, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, Yale Law Journal 90 (1981) 1063 (controversy over the legitimacy of judicial review in a democratic polity – the historic obsession of normative constitutional law scholarship' – is essentially incoherent and unresolvable).

48 J.E. FLEMING, A Critique of John Hart Ely's Quest for the Ultimate Constitutional Interpretivism of Representative Democracy, Michigan Law Review 80 (1982) 634; ORTIZ, *supra* note 28, 722 (Ely's theory succumbs to the same difficulties he so ably identifies in other theories and his arguments cannot wipe out the reliance on substantive commitments). See also R. D. PARKER, The Past of Constitutional Theory – And Its Future, Ohio State Law Journal 42 (1981) 223.

that the Constitution is mostly a procedural document.[49] Even if most of the constitutional provisions are concerned with procedures, as Ely claimed, that may not mean that all open-ended provisions need to be viewed as protecting procedural rather than substantive values.[50] Furthermore, as Tribe argued, the procedural provision of the Constitution may not be properly understood without referring to the substantive values they serve.[51] Thus, they claim that Ely's theory is doing the same thing as a noninterpretivist Court, enforcing one "ideal conception of the requirements of 'true democracy'" as a particular value to be enforced.[52] And he failed to prove that his "participational values" are more important or fundamental than the other substantive values.[53]

Ely's reliance upon footnote four of *Carolene Products* to support limited judicial activism also attracted criticism for being too narrow. His reading of footnote four especially focused on the second and third paragraphs but pretty much ignored the first paragraph. His reading may be criticized as too narrow for neglecting the first paragraph, which could explain why certain values are fundamental in the constitution, and thus could justify the active exercise of judicial review to vindicate unnamed fundamental values in the name of the constitution.[54] It is also claimed that it is not "discrete

49 M.C. DORF, The Coherentism of Democracy and Distrust, Yale Law Journal 114 (2005) 1237, 1239.

50 FLEMING, *supra* note 48, 638.

51 Probably, it would be better to contrast process with outcome. D. LYONS, Substance, Process, and Outcome in Constitutional Theory, Cornell Law Review 72 (1987) 745.

52 S. ESTREICHER, Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture, New York University Law Review 56 (1981) 547, 551. See also M. L. BENEDICT, To Secure These Rights: Rights, Democracy, and Judicial Review in the Anglo-American Constitutional Heritage, Ohio State Law Journal 42 (1981) 69, 73; D. J. RICHARDS, Moral Philosophy and the Search for Fundamental Values in Constitutional Law, Ohio State Law Journal 42 (1981) 319.

53 ESTREICHER, *supra* note 52, 551–552; M. J. PERRY, Interpretivism, Freedom of Expression, and Equal Protection, Ohio State Law Journal 42 (1981) 261. See also BENEDICT, *supra* note 52, 78–85 (historically, both representative democracy and judicial review developed as means to secure a greater end – protection of rights and there is no historical basis for the worry that judicial protection of rights somehow violates a deeper commitment to democracy).

54 F. GILMAN, The Famous Footnote Four: A History of the Carolene Products Footnote, South Texas Law Review 46 (2004) 163, 172 (claiming that Ely's centering of Carolene Products "create[d] the modern view of footnote four"); P. LINZER, The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone, Constitutional Commentary 12 (1995) 277 (arguing that Ely's interpretation of footnote four is unduly narrow); J. M. BALKIN, The Footnote, Northwestern University Law Review 83 (1989) 275,

and insular minorities" that need special protection because such groups could be highly organized to exercise political power. It is rather anonymous and diffuse powerless groups that need much active judicial protection.[55] In short, his reading of footnote four is too narrow in focusing only on "discrete and insular minorities" and its exclusive reliance upon it to justify judicial review is misguided to deny more active judicial review in other contexts.[56]

4. Questioning the Majoritarian Difficulty and Commitment to Democracy

Secondly, some went on to question whether there is a countermajoritarian difficulty in the first place. Ely simply assumed that the Constitution mandates "representative democracy" and attempted to justify judicial review against this democracy on the assumption that the political process is majoritarian.[57] However, one can question whether the structure of the government established by the Constitution is actually consistent with majoritarian democracy. Congress, the national legislature, is supposed to be representative of the majority will of the voters. However, Congress consists of two houses and one of the houses is the Senate, which is a representative of each state. As a result, each state has two Senators regardless of its population. There is a significant imbalance among states as to the impact of one vote. Moreover, the Senate has the same power as the House of Representatives in passing law. It is impossible to pass a statute without the support of the Senate. This makes the Congress seriously less majoritarian than it could appear. Furthermore, the President has a power of veto. The President needs to be elected by the indirect election of the people, but the number of electors is decided by the number of House of Representative members plus two Senators. Thus, smaller states have some advantage over more populous states. Moreover, since most of the states adopt the winner-takes-all approach to selection of electors, there could be a discrepancy between the

316–317 (advocating for a deconstructivist approach to defining "discrete and insular" minorities); COVER, *supra* note 21 (contending that a generalized approach cannot adequately grapple with inherently "contingent instances of prejudice").

55 B. ACKERMAN, Beyond Carolene Products, Harvard Law Review 98 (1985) 713, 745.

56 But see D. T. COENEN, The Future of Footnote Four, Georgia Law Review 41 (2007) 797 (the necessity of protecting discrete and insulated minorities leads to unempoweredness principle to justify protection of those unempowered); D. A. STRAUSS, Is Carolene Products Obsolete, University of Illinois Law Review 2010 (2010) 1251 (still showing the viable future).

57 ELY, *supra* note 1, 6–7.

number of electors a candidate obtains and the popular vote. Indeed, during past Presidential elections, some winning candidates obtained less popular votes than the losing candidates. The election of the President is hardly majoritarian. Besides, the actual operation of the Congress is far from the majoritarian.[58] There are countless examples where Congress failed to act in accordance with the majority will.

Moreover, one can also question whether judicial review is totally countermajoritarian. For instance, the Justices of the SCOTUS are nominated by the elected President and need to be confirmed by the Senate.[59] Unelected Justices might be mindful of the public opinion when they make a decision. Indeed, in some cases, unelected judges might be much in better position to enforce majoritarian control over a political process that is impeding majoritarian control.[60]

Furthermore, although the countermajoritarian difficulty argument holds that judicial review of laws enacted by legislatures is problematic because it subverts the will of electoral majorities, this assumption may not be appropriate. David Strauss argues thus that judicial review could "identify areas where the laws on the books no longer reflect popular opinion" and "invalidate statutes in the expectation that they are in fact carrying out the will of the people."[61] The SCOTUS might be viewed as reinforcing representation in these cases, therefore not necessarily acting against the majority will. Ilya Somin[62] claims, on the other hand, that the countermajoritarian theory rests on the assumption that a majority of voters have at least a basic level of political knowledge, but that several decades of political science research has found that the political knowledge levels of the American electorate are uniformly low. As a result, it is claimed that average levels of voter knowledge are so low that they fall well below the thresholds re-

58 C. B. LAIN, Upside-Down Judicial Review, Georgetown Law Journal 101 (2012) 113, pointing out huge structural impediments, functional impediments and political impediments for public participation to allow majoritarian control.

59 But see J.P. ZOFFER/D.S. GREWAL, The Counter-Majoritarian Difficulty of a Minoritarian Judiciary, California Law Review Online 11 (2022) 437 (casting doubt on the degree of control over the Justices through appointment and confirmation process by the people).

60 LAIN, *supra* note 58 (the judiciary might be filling the gap left behind by the political process that is impeding the majoritarian control).

61 STRAUSS, *supra* note 28, 762. See also F. SCHAUER, The Calculus of Distrust, Virginia Law Review 77 (1991) 653 (although Ely's theory is premised upon the distrust on the judiciary, this distrust may be merely speculative).

62 I. SOMIN, Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the 'Central Obsession' of Constitutional Theory, Iowa Law Review 89 (2004) 1287.

quired by even the least demanding theories of democratic representation. For this reason, judicial review has far less countermajoritarian effect, in most cases, than is usually supposed. Moreover, to the extent that judicial review limits the scope of government power, it may actually strengthen majoritarian democracy by reducing the knowledge burden on voters.

5. Questioning the Finality of the Constitutional Judgment of the SCOTUS

Thirdly, some went even further and argued that we don't have to worry much about the countermajoritarian difficulty of judicial review since the judiciary could never be able to block the majority of the people from accomplishing what they want forever. When the SCOTUS renders an unpopular decision, the decision often triggers negative responses and doubt as to the legitimacy of power of judicial review. But what would happen thereafter? For a time, "the Court can disregard such criticism, but if public opinion does not eventually come in line with the judicial view, constitutional amendment, changes in judicial personnel, and/or changes in judicial doctrine will typically bring judicial understandings closer to public opinion. Consequently, American courts have not, over the long run, acted as strongly counter-majoritarian bodies."[63] If this is indeed the case, the countermajoritarian difficulty may be nothing to worry about.[64]

Some even invoked the possibility of dialogue as a justification for much activist judicial review.[65] If the invalidation of legislation by the SCOTUS is the first step for such a dialogue, the ensuing public reactions and legislative responses are surely the second step. Then, the SCOTUS may have to reconsider, back down, or even overturn their decisions. Others argue that historically the so-called countermajoritarian difficulty came to attract so much attention because the Court's decisions are regarded as binding – not only upon the parties to the case at bar, but upon future litigants and the

63 M. C. DORF, The Majoritarian Difficulty and Theories of Constitutional Decision Making, Journal of Constitutional Law 13:2 (2010) 283, 283-84.

64 B. FRIEDMAN, The will of the People: How Public Opinion has Influenced the Supreme Court and Shaped the Meaning of the Constitution (2009) (arguing that the SCOTUS often follows public opinion). He argues that the chief function of judicial review in the modern era is "to serve as a catalyst, to force public debate, and ultimately to ratify the American people's considered views about the meaning of the Constitution." Ibid., 16.

65 B. FRIEDMAN, Dialogue and Judicial Review, Michigan Law Review 91 (1993) 577 (the process of constitutional interpretation that actually occurs does not set electorally accountable (and thus legitimate) government against unaccountable (and thus illegitimate) courts. Rather, the everyday process of constitutional interpretation integrates all three branches of government: executive, legislative, and judicial).

other branches of the state and national government as well. But this assumption may be wrong.[66] Then, the countermajoritarian difficulty of judicial review may not be worrisome.

6. Questioning the Majoritarianism

Fourthly, one can question whether majoritarianism itself deserves to be enhanced. Ely simply took it granted that the US Constitution is a "representative democracy."[67] He did not attempt to justify why majoritarianism is a basic requirement for democracy but apparently assumed that enhancing the majoritarian principle is appropriate.

However, his implied acceptance of majoritarianism as a mandate of democracy and endorsement of majoritarian control is subject to criticisms from liberal critics.[68] They generally argued that the American government is a "constitutional democracy" and not a majoritarian democracy and the protection of fundamental values is integral to constitutional democracy, thus casting doubt on Ely's premise of necessity to justify judicial review in light of majoritarian democracy.[69] These liberal critics thus argue that the vindication and realization of underlying substantive values is more important than procedural issues, including representative democracy.[70] To the extent judicial review will vindicate and promote these substantive values,

66 FRIEDMAN, *supra* note 65.

67 ELY, *supra* note 1, 88.

68 J. S. SCHACTER, Ely and the Idea of Democracy, Stanford Law Review 57 (2004) 737, 738. The most influential political science scholar Robert Dahl, for example, defined "democracy" as "the freedom of self-determination in making collective and binding decisions: the self-determination of citizens entitled to participate as political equals in making the laws and rules under which they will live together as citizens." R. DAHL, Democracy and Its Critics (1989) 326. See also R. A. DAHL, On Democracy (2000); R. A. DAHL, How Democratic Is the American Constitution? (2001). Of course, his definition does not provide much for constitutional theorists.

69 FLEMING, *supra* note 48, 643; M. J. PERRY, The Legitimacy of Particular Conceptions of Constitutional Interpretation, Virginia Law Review 77 (1991) 669. Indeed, Ely realized that democracy was not equal to allowing the majority to decide whatever they like. His equal protection prong of political process theory thus precludes an attempt to exclude certain minorities due to prejudices. Yet, these liberal critics generally argue that Ely failed to understand the full implications of accepting the possibility of social exclusion and inequality as distorting the process Ely attempted to endorse. See, e.g., SCHACTER, *supra* note 68, 753 (insufficient examination on various hurdles for holding the representatives accountable to the people).

70 DORF, *supra* note 49, 1239; L. G. SAGER, Rights Skepticism and Process-based Responses, New York University Law Review 56 (1981) 417. See also M.J. PERRY, The Legitimacy of Particular Conceptions of Constitutional Interpretation, Virginia Law Review 77 (1991) 669; ACKERMAN, *supra* note 55, 746.

then, they would argue, judicial review would be justified. There is no need to worry about the countermajoritarian difficulty of judicial review.[71]

7. Could the Judiciary Act as a Guardian of Minorities?

The doubt on the ability of the SCOTUS to block attempts of the majority to restrict public participation and to exclude certain minorities from the political process forever raises, on the other hand, the opposite question. Despite the "almost-obsessive focus on the supposed counter-majoritarian difficulty" of judicial review, the people might not realize the "real, and exactly opposite danger – that the Supreme Court is insufficiently counter-majoritarian to protect minority rights when they are really threatened."[72]

Indeed, one can question whether Ely successfully defended the role of the judiciary as a guardian of the political process by removing blockages to political participation by minorities.[73] It may be also doubtful surely why the

71 E. CHEMERINSKY, In Defense of Judicial Supremacy, William & Mary Law Review 58 (2017) 1459 (arguing that, "in deciding who should be the authoritative interpreter of the Constitution, the answer is the branch of government that can best enforce the Constitution's limits against the desires of political majorities" and it should be judiciary); M. J. PERRY, Noninterpretive Review in Human Rights Cases: A Functional Justification, New York University Law Review 56 (1981) 278; R. DWORKIN, The Forum of Principle, New York University Law Review 56 (1981) 469. These critics generally don't find any value on relying upon public participation to vindicate the rights of the people. J.H. WILKINSON III, Cosmic Constitutional Theory: Why Americans are Losing Their Inalienable Right to Self-Governance (2012) 60. Such an over-emphasis on rights and freedoms of individual citizen may run the risk of depriving the sense of governing together. See R. H. PILDES, Romanticizing Democracy, Political Fragmentation, and the Decline of American Government, Yale Law Journal 124 (2014) 804, 815 (noting the decline of the American government and arguing for an institutional and organizational approach to democracy instead of rights-oriented approach). In one sense, these critics assume that the Constitution is embodying the mandate to achieve justice or mandates the government, including the judiciary, to pursue the moral ideal or aspiration. See also H. P. MONAGHAN, Our Perfect Constitution, New York University Law Review 56 (1981) 353 (the constitution may not be perfect); J. H. ELY, Democracy and the Right to be Different, New York University Law Review 56 (1981) 397 (the Constitution does not guarantee the right to be different); T. SANDALOW, The Distrust of Politics, New York University Law Review 56 (1981) 446 (distrust of politics, with to remove certain issues out of politics, of the liberals rises mostly from the disagreement with substantive results).

72 R. D. DOERFLER / S. MOYN, The Ghost of John Hart Ely, Vanderbilt Law Review 75 (2022) 769.

73 P. BREST, Substance of Process, Ohio State Law Journal 42 (1981) 131.

judiciary is better at protecting excluded minorities in light of its history of long-standing failure to protect so many vulnerable minorities in the past.[74]

8. The Importance of Ely's Theory Despite all These Criticisms

An overwhelming number of liberal constitutional academics thus denies any necessity to limit judicial activism to representation-enhancing and facilitating participation in the US, thus defending the much active role for the SCOTUS to support *Roe* and the active vindication of an unwritten right to an abortion.[75]

However, despite all criticisms against Ely's theory, these critics still fail to show what are the most important substantive values to be vindicated and realized and why these substantive values are more important than others. Many liberal critics probably seems to assume that the values vindicated by liberal scholars, such as John Rawls and Ronald Dworkin, are the most important values to be realized by the US Constitution.[76] But we are not offered any persuasive explanation why the US Constitution could be viewed as embodying the theories of Rawls or Dworkin or why their theories are right or the best ones to vindicate.[77] Even if they were the right one or the best one, we are not sure why it should be the unelected judiciary that is supposed to accomplish these theories instead of the political process, i.e., ultimately we the people themselves.[78]

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74 DOERFLER/MOYN, *supra* note 72. These authors thus argued that the "ghost" of Ely thus needs to be buried to raise any hope that the judiciary could be trusted against legislative and majoritarian attacks on minorities.

75 L. H. TRIBE, Abortion: The Crash of Absolutes (1990); R. B. SAPHIRE, The Search for Legitimacy in Constitutional Theory: What Price Purity?, Ohio State Law Journal 42 (1981) 335; E. CHEMERINSKY, In Defense of Roe and Professor Tribe, Tulsa Law Review 42 (2013) 833; T. GERETY, Doing without Privacy, Ohio State Law Journal 42 (1981) 143.

76 J. RAWLS, A Theory of Justice (1971); R. DWORKIN, Taking Rights Seriously (1977).

77 Initially, their theories looked like just moral theories and, as a result, many questioned why their moral theories are the correct or best one to vindicate. Later Rawls came to defend his theory as "political liberalism" based on overlapping consensus. J. RAWLS, Political Liberalism (1993). One can then question whether there is indeed an overlapping consensus to support his theory of justice.

78 But see F. I. MICHELMAN, The Not So Puzzling Persistence of the Futile Search: Tribe on Proceduralism in Constitutional Theory, Tulsa Law Review 42 (2007) 891 (distinguishing democratic process-based constitutional theories like Ely and liberal proceduralist constitutional theory such as Rawls). Most liberal academics believe that Lochner was wrong. But rarely do we encounter the argument why Roe was appropriate but Lochner was wrong. But see D. NEJAIME/R. B. SIEGEL, Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a De-

Moreover, despite such overwhelming criticisms against Ely, his theory left a tremendous impact on American constitutional law.[79] There is no wonder why Ely' book was ranked as the most cited scholarly work between 1978 to 2000.[80]

Indeed, there are a number of academics who are deeply influenced by Ely's theory.[81] There are also a number of scholarly works in specific related fields of constitutional law receiving strong influence from his theory.[82] In this sense, his theory has had a huge impact on constitutional law academics in the United States. Furthermore, his theory could still provide the strongest endorsement for judicial intervention in order to clear the political process and to abolish the exclusion of discrete and insular minorities from political participation.[83]

On top of these, over the years, we came to see the rise of republican constitutionalism against liberal constitutionalism. Republican constitution-

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mocracy, New York University Law Review 96 (2021) 1902 (reconsideration of Lochner may be appropriate).

79 NEJAIME/SIEGEL, *supra* note 78, 1907. It is true that there are not much judicial decisions explicitly citing his theory. S. ISSACHAROFF, The Elusive Search for Constitutional Integrity: A Memorial for John Hart Ely, Stanford Law Review 57 (2004) 727, 734–735. However, the theory's impact should not be evaluated only by the number of decisions where it was cited, although recent SCOTUS's emphasis on federalism and separation of powers cases may be seen as an endorsement of this concern on structure of the government. S. G. CALABRESI, Textualism and the Countermajoritarian Difficulty, George Washington University Law Review 66 (1998) 1373. Although Ely cast doubt on Roe, he could have supported *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down a sodomy ban only on homosexual couple, on equal protection ground. K. M. SULLIVAN/P. S. KARLAN, The Elysian Fields of the Law, Stanford Law Review 57 (2004) 695, 703–713. Similarly, probably he could strike down the exclusion of same-sex marriage on equal protection ground as well. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

80 F. R. SHAPIRO, The Most-Cited Legal Scholars, Journal of Legal Studies, 29 (2000) 409.

81 M. J. KLARMAN, The Puzzling Resistance to Political Process Theory, Vanderbilt Law Review 77 (1991) 747.

82 C. MORSE, A Political Process Theory of Judicial Review under the Religion Clauses, Southern California Law Review 80 (2007) 793.

83 J. D. GRANO, Ely's Theory of Judicial Review: Preserving the Significance of the Political Process, Ohio State Law Journal 42 (1981) 167. See also M. J. KLARMAN, The Supreme Court, 2019 Term – Foreword: The Degradation of American Democracy – and the Court, Harvard Law Review 134 (2020) 1, 178–187; J. WEINSTEIN, Participatory Democracy as the Central Value of American Fee Speech Doctrine, Virginia Law Review 97 (2011) 3 (although not relying upon Ely); E. B. SMITH, Representation Reinforcement Revisited: Citizens United and Political Process Theory, Vermont Law Review 38 (2013) 445.

alism emphasizes the republican thoughts underlying the United States Constitution and attempts to revitalize these thoughts in the theory of judicial review. Cass Sunstein[84] and Bruce Ackerman[85] are among them.[86] Republicanism aims to accomplish the public good instead of individual personal fulfillment and they generally emphasize the importance of public participation in politics as citizens and the significance of "public virtue." The primary purpose of society and the government is the achievement of public good, and not the protection of a personal private sphere for individuals to enjoy freedom.

Furthermore, we came to see the rise of populist constitutional theory in the United States, viewing the Bill of Rights as a safeguard of popular majority rule against the usurpation of power by a minority of elites. This trend now includes constitutional scholars such as Mark Tushnet,[87] Larry Kramer,[88] and Richard Parker.[89] Although their views are quite different, they are united in attacking liberal jurisprudence in favor of a more active people's participation for the vindication of individual rights.[90] They don't view the individual rights protected by the Constitution as a protection of private spheres where the government is excluded and strongly oppose the liberal view.

Ely's theory might be viewed as a precursor to this new emphasis on public participation and the public role of citizens in vindicating individual rights.[91]

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84 C. R. SUNSTEIN, Beyond the Republican Revival, Yale Law Journal 97 (1988) 1539.

85 B. ACKERMAN, We the People I: Foundations (1993).

86 M. SELLERS, Republicanism, Liberalism, and the Law, Kentucky Law Journal 86 (1997–98) 1 (properly understood, republicanism and liberalism do not conflict).

87 M. V. TUSHNET, Taking the Constitution Away from the Courts (2000). M. TUSHNET, Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty, Michigan Law Review 94 (1995) 245.

88 L. D. KRAMER, The Supreme Court, 2000 Term – Foreword: We the Court, Harvard Law Review 115 (2001) 4.

89 R. D. PARKER, Here the People Rule: A Constitutional Populist Manifesto (1998). See also A. AMAR/A. HIRSCH, For the People (1999); A. AMAR, The Bill of Rights: Creation and Reconstruction (1998); A. AMAR, America's Constitution: A Biography (2006); A. R. AMAR, The Consent of the Governed: Constitutional Amendment Outside Article V, Columbia Law Review 94 (1994) 457, 495-96.

90 P. BLOKKER, Populism as a Constitutional Project, International Journal of Constitutional Law 17:2 (2019) 536 (discussing on the rise of populism in Europe and, while accepting populism as an alternative candidate as a constitutional theory, ultimately concluding that it failed up to its premises). For a liberal countercriticism against populist theories, see E. CHEMERINSKY, In Defense of Judicial Review: The Perils of Popular Constitutionalism, University of Illinois Law Review 2004, 673.

91 Although Ely himself was not explicit, his theory surely sounds like leaning toward republicanism. See *infra* note 111–113.

V. Introducing Ely's Theory to Japan

1. Why I Believed that Ely's Theory is Vital to Japan

When his landmark book was published, I was struck by his effort to ground the theory of judicial review on the democratic ideal of the US constitution. I translated his book into Japanese together with my mentor, Professor Koji Sato, of Kyoto University[92] and wrote several law review articles and several books on the theory of judicial review.[93] I strongly believed that his understanding could be applied to the Constitution of Japan and endorsed his theory as a powerful and most persuasive theory.

As many of you know, the idea of constitutionalism came to Japan during the Meiji period and the Meiji government established the Meiji Constitution, in 1889, following the steps of Prussia's Constitution. Although it was called the constitution, it was totally undemocratic, and it did not deserve to be called a constitution. It was enacted by the sovereign power of the Emperor and the Emperor had all the government powers under the constitution. He merely declared to abide by it by his own voluntary decision. The people were treated as subjects of the Emperor. Although certain rights were admitted in the constitution, they were granted by the benevolent grace of the sovereign Emperor, and they were only protected within the confines of law. Furthermore, there was no provision of judicial review, and the courts were precluded from reviewing the constitutionality of legislation.

The Constitution of Japan, promulgated in 1946, right after the devastating loss caused by the Pacific War, was totally different. It was enacted based on the draft crafted in the General Headquarters of the Allied Powers (GHQ), which was at that time occupying Japan, under the leadership of General Douglas MacArthur. The GHQ believed since the start of its occupation that the radical reform of the Meiji Constitution was necessary. As a result, it urged the Japanese Government to start the reconsideration of the Constitution. However, the Japanese government was reluctant, and even after it was practically forced to reconsider the Meiji Constitution, the revisions they endorsed were so minor. The GHQ feared that the Japanese plan might lead to serious backlash against the GHQ for its non-intervention. Therefore, the GHQ decided to draw the draft and hand it over to Japan for consideration. A committee was created inside the GHQ, including several American attorneys, to create the draft and the final draft was handed over to Japan when their representatives came to the GHQ anticipating its opin-

92 J. H. Ely, *Minshushugi to Shihoushinsa* [Judicial Review and Democracy] (Sato/Matsui trans., 1990).

93 S. Matsui, *Shihonshinsa to Minshushugi* [Judicial Review and Democracy] (1991); S. Matsui, *Niju no kijunron* [Constitutional Double Standards] (1994).

ion on the draft they had submitted earlier. It was a total shock to the Japanese side especially since it was totally different from the Meiji Constitution. However, their effort to revive their original draft didn't work out and the Japanese government ultimately decided to accept the draft handed over by the GHQ and start the official revision process. After four months of review and examinations, the Constitution of Japan was finally adopted and promulgated. It was a radically different constitution, based on the popular sovereignty principle: it was the people of Japan who enacted the Constitution.[94] Moreover, it established representative democracy, establishing the national legislature, the Diet, and created the central executive body, the Cabinet, from the Diet. It adopted the Westminster system of parliamentary democracy. It also constitutionally declared "fundamental human rights" as inherent and enduring constitutional rights of the people.[95] Furthermore, it specifically granted the power of judicial review to the judiciary.[96] The Constitution of Japan is now binding upon all branches of the government, and it became a judicial norm to be enforced by the judiciary against the political branches.

Faced with the enactment of this new constitution, the constitutional academics in Japan came to endorse the liberal understanding of the constitution and the protection of individual rights.[97] The predominant aim of the constitution, they claim, is the protection of individual freedoms and liberties. The structure of the government is and should be designed to serve this predominant aim. The fundamental human rights declared by the constitution are natural rights of all individuals as human beings and they deserved to be protected even before the enactment of the Constitution. The power of judicial review, granted by the constitution to the judiciary, also needs to serve this aim. In other words, they expect the judiciary to play an active role in vindicating the fundamental human rights protected by the Constitution. This was the predominant constitutional liberalism in Japanese style.

I share the commitment to individualism and liberalism of this predominant academic view. Unlike conservative academics who still believed that the Constitution of Japan was not legitimately enacted and that the Meiji Constitution was the only legitimate constitution in Japan or who believed that the Emperor should be granted the status of sovereign and Japan should be a monarch, I strongly believe that the Constitution of Japan created a totally new Constitution, based on the popular sovereignty principle.

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94 *Nihonkoku kenpo* [Constitution of Japan], promulgated in 1946, preamble.

95 Constitution of Japan, ch. 3.

96 Constitution of Japan, Art. 81.

97 S. MATSUI, Constitution Americanized?: Constitutional Liberalism, the Japanese Style (forthcoming).

However, despite the strong endorsement of the constitutional liberalism of the predominant academics, I was a kind skeptical of the over-emphasis on the protection of freedom and liberty and the unbridled support for judicial activism. If all that matters is the protection of individual freedom and liberty, then it would be immaterial whether the government decision-making process is a democratic one. All that matters may be to find just one very brilliant wise leader, a philosopher king, who can protect individual freedom and liberty as much as he or she can. Then, why do we need a democracy and grant the right to vote to everyone?

I also came to have a serious concern with the unlimited endorsement of the power of the judiciary to vindicate these freedoms and liberties. In a democratic society, the people are represented by the representatives they chose, and it is these representatives who decide government affairs by majority vote. When the representatives make bad choices or errors, the people can correct them in the next election. Then, it is the people that is vindicating the constitution and individual rights. However, when judges declare the choice of the representatives as unconstitutional and strike it down, they basically deny the people the right to decide through their representatives on government affairs by majoritarian vote. I came to question on what basis could judges be allowed to do this. It looks like a legitimate question for me since judges are not elected and will not be subject to election. They are trained in law, and they are appointed ultimately by the Cabinet (although there is room for public review of the appointment of the Supreme Court Justices, it is totally ineffective and almost meaningless). How can we expect them to stand against the government and to vindicate individual rights when the government believes the restriction and deprivation justified. Moreover, there is a risk that the unelected judges might err in constitutional judgment and thwart the democratic decision-making process and become a "government by the judiciary." What is the appropriate role for the judiciary to play in a democracy?

Ely's theory of judicial review provided me with a very powerful alternative to the predominant constitutional liberalism. Instead of placing the protection of individual freedom and liberty at the forefront, it could provide us a theory of why we need to establish a democratic government, granting the right to vote to every citizen and guaranteeing freedom of expression and other freedoms to participate in government decision-making. At the same time, it could provide us with much persuasive explanation of how the judiciary, an unelected and politically irresponsible branch of the government, can play an appropriate role in a democracy. Sure, it would place limits on what we can expect from the judiciary: we cannot and should not expect the judiciary to play ultimate guardian of all individual freedom and liberty and safeguard the people from all errors and

mistakes the government would make. It is only when the government tries to thwart the participation of the people and exclude certain minorities from coalitions that the judiciary is most aptly to play the role of guardian.

I was especially attracted by the fact that Ely's theory can be viewed as an elaboration of James Madison's original design of the United States Constitution. Madison, well known as the father of the United States Constitution, introduced a plan for the constitution in order to build much stronger Nation. In designing the new federal government, he was particularly concerned with the vices of "factions."[98] He viewed the people not as isolated and autonomous individuals. He rather viewed the people as belonging to various groups and associations. But he wanted to avoid the pitfall of allowing the people to advance their private interests by ignoring the public good. His vision of a "large republic" was a clue to solve this vice: by envisioning such a large republic, it is unlikely that any particular group or organization can dominate the whole government and the people would be able to choose better candidates for leaders. His vision was a republic where the public can participate in politics with so many differences in cooperation with others.[99]

The United States Constitution was an embodiment of his vision. Although the Constitution was filled with compromises, its basic tenet was clear from the beginning. Ely's theory of judicial review could be seen as an attempt to expand and elaborate the proper role for the judiciary in this overall constitutional design. If that was the founding vision of the United States Constitution, then the Constitution of Japan, definitely a follower of these modern attempts to declare a constitution, especially receiving strong influence from the United States Constitution throughout its drafting process, would have much in common with his vision. Therefore, I believed that Ely's theory would fit the Constitution of Japan more comfortably than the predominant liberal theory.

2. Major Obstacles

It is true that the Constitution of Japan has more overtones of natural rights theory and much substantive value orientation. The use of the term "fundamental human rights" to refer to individual rights of the citizens rather than "civil rights or liberties" is a good illustration of the natural rights overtone. Also, a similar kind of commitment to natural law theory can be found in the body of the Constitution.[100]

98 A. HAMILTON/J. MADISON/J. JAY, The Federalist Papers, No. 10 (James Madison) (2016, originally published in 1878).

99 ELY, *supra* note 1, 80–81 (referring briefly to Madison).

100 Constitution of Japan, *supra* note 94, Art. 97.

Moreover, it has several clauses which look like they impose significant substantive restrictions on the democratic decision-making process. For instance, the pacifism clause of article 9, by renouncing the power of war and prohibiting the maintenance of armed forces, looks like it imposes a substantive restraint on the democratic decision-making process.[101] Moreover, the right to welfare in article 25, added to the Constitution during the legislative examination process, looks like it mandates the adoption of a welfare state and provides for a substantive restraint on the democratic decision-making process.[102] Therefore, it is utterly understandable that an overwhelming number of constitutional academics believe that the constitution embodies the substantive goals to be achieved and that these substantive restraints work to restrain the democratic decision-making process.

They thus criticized my view for its misunderstanding of the nature of the constitution: it is impossible to wipe out substantive values from constitutional adjudication. And for them, the constitution is rather substantive rather than procedural. They also adopted the same kind of criticisms we saw in the United States against Ely's theory also against my view. They questioned whether the political process is in reality majoritarian and the judiciary needs to overcome some counter-majoritarian difficulty. They had a deep distrust of the political process and rather had a deep devotion to the unelected judges. The predominant aim of the constitution is to protect freedoms and liberties of the people and not to adopt democratic government. Constitutionalism trumps, they claim, democracy. Or true democracy needs to embrace the predominant protection of freedoms and liberties, and so long as this goal is achieved, democracy is secured.

Despite these criticisms, I am still convinced that Ely's theory will best explain the need for the constitution and lay out the proper role of the unelected judiciary to play in the democratic structure of the government. The Constitution of Japan is evidently based on the popular sovereignty principle, and it is "we the Japanese people" who established the Constitution and provided for the government structure. It is an attempt to establish a more stable and orderly government. Moreover, chapter 3 in listing the individual rights, stipulated that they are rights of the "people" and not all individuals or all persons. It implies that the Constitution meant to protect them as rights of "citizens". I doubt the deep distrust on political participation and the power of the people and naïve trust and reliance upon the unelected judiciary by the liberal academics are hardly justifiable. Unlike the US Constitution, the Constitution of Japan explicitly grants the power of judicial review to the judiciary. The legitimacy of the power of judicial review

101 Constitution of Japan, Art. 9.
102 Constitution of Japan, Art. 25.

cannot be doubted. But in light of the overwhelming purpose of the project to establish representative democracy in Japan, we need to find a proper role for the judiciary. The judiciary cannot be authorized to rule as it believes or interpret the Constitution as they see fit according to their own personal views.[103]

It is undeniable that the Supreme Court of Japan (SCOJ) has been very passive and the SCOJ may be said to be the most conservative Court in the world.[104] During more than 70 years of its history, it has only been 13 times that the SCOJ declared a statute passed by the Diet, the national legislature, as unconstitutional, and two of them refused to strike down the legislation.[105] It has twice struck down economic legislation[106] but never ever reviewed the constitutionality of a statute restricting the freedom of expression closely let alone to strike it down. With respect to election speech, there are so many tight regulations on election speech, including the very tight and short election campaigning period, the total ban on door-to-door canvassing, and an almost total ban on the distribution of election documents. However, the SCOJ sustained all these regulations because of its belief in the necessity of securing the fairness of elections.[107]

The strong urge to vitalize the SCOJ among liberal academics is, therefore, utterly understandable. However, they don't really understand the risks and the importance that it is ultimately the people themselves who need to stand up and correct wrong decisions and mistakes of their representatives. Moreover, liberal academics are expecting too much from the judiciary, more than can be expected or could be justified. A blanket endorsement of judicial activism by liberal academics in Japan is highly unrealistic and illusionary.[108] I did not want to help create a myth that, if the

103 If the liberal critics are right, it is natural to expect that the candidate who shared substantive value judgement with the government will likely be appointed and that the judgment of the Supreme Court will become a numbers game: which camp outnumbers the rival camp. J. H. ELY, Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures, Virginia Law Review 77 (1991) 833.

104 S. MATSUI, Why is the Japanese Supreme Court so Conservative?, Washington University Law Review 88 (2011) 1375.

105 See S. MATSUI, Constitution of Japan: A Contextual Analysis 145 (2011).

106 MATSUI, *supra* note 105.

107 MATSUI, *supra* note 105. See S. MATSUI, Election Campaign Regulation and the Supreme Court of Japan, in: Po Jen Yap ed., Judicial Review of Elections in Asia (2016).

108 Most Japanese constitutional academics want the judiciary to actively vindicate the pacifism principle of Art. 9 as a constitutional vindication of the right to live in peace, review the reasonableness of all economic regulations or restriction on economic freedoms, actively protect the welfare right, and review all legislation to see

political process does not provide help, judges could be counted on to vindicate citizens' claims. Such a myth would deprive the most important lesson in a democracy: it is the people themselves who need to stand up and correct any unwise or mistaken errors of the representatives and there is no one else to count on.

A fierce critic of my view accuses Ely and my view as idolizing the pluralist political process that does not deserve to be honored since the pluralist political process merely honors the bargaining judgment made by the majority of the society.[109] Surely, I believe that the political process needs to be understood as a pluralist process. Yet, although Ely referred to "pluralist,"[110] Ely was explicitly referring to the "republican ideal" that representatives would govern in the interest of the whole people."[111] He also invoked the concept of "virtual representation," to tie the fate of the governed with the fate of those possessing political power.[112] He thus argued that two ideals, i.e., the protection of popular government on the one hand, and the protection of equal concern and respect of minorities on the other, can be understood as arising from the common duty of representation.[113] Apparently, we are not supposing the representatives are free to pursue private interest and the political process is merely a bargaining process of all self-interested participants.

Similarly, these critics assume that any exercise of government power needs to conform to the public welfare. In other words, all government action needs to be reasonable. But there is no constitutional mandate for the legislature to be reasonable or to conform to public welfare. Even if there is, this does not mean that all exercise of government powers needs to be subjected to judicial review. There has to be a unique role for the judiciary to play and the judiciary is not an ultimate guardian against all governmental mistake and errors.

VI. Lasting Importance of Ely's Theory

Forty years have passed since Ely published his landmark book, and we came to see a growing number of changes.

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whether they are reasonable and strike it down if it was found to be unreasonable regardless of whether the legislation infringes on constitutional rights. To me, this is asking unelected judges too much.

109 Y. Hasebe, *Seiji torihiki no bazaar to shihousinsa* [Bazaar of Political Bargaining and Judicial Review], Horitsu jiho 67:4 (1995) 62.

110 Ely, *supra* note 1, 80.

111 Ely, *supra* note 1, 79.

112 Ely, *supra* note 1, 82–86.

113 Ely, *supra* note 1, 86–87.

Now, Pamela Karlan argues, for example, that there are significant changes in demography "becoming more racially and ethnically diverse, more geographically concentrated and homogeneous, and more divided, not only in its partisan affiliations, but in its values and its prospects for the future", but some fundamental, hard-wired features of our Constitution, especially the Senate and the Electoral College, are "assisting a shrinking white, conservative, exurban numerical minority to exert substantial control over the national government and its policies." She views that

> "the current Supreme Court is countermajoritarian in a way that enables this entrenchment. Far from engaging in representation-reinforcing judicial review, the Court's decisions contribute to 'the ins […] choking off the channels of political change to ensure that they will stay in and the outs will stay out' regardless of what the people would choose."[114]

Her criticism is that SCOTUS is not failing to enhance participation but rather actively hindering the increased participation.[115] This argument shows that there is more to be done to promote public participation.

Scott E. Lemieux and David J. Watkins[116] still believe, however, that judicial review could contribute to democracy. Virtually all sophisticated approaches to democratic theory do not simply equate democracy with majoritarianism, although this is often forgotten when discussing judicial review. Using the "democracy-against-domination" approach, they assess the democratic status of judicial review, and conclude that judicial review has the potential to make a modest and contingent positive contribution to democracy. Such contribution may be especially important in the modern world, where the people's views are highly fragmented and highly split. The US may be now totally divided and judicial review might be needed to overcome such division. Their argument is one response to the highly fragmented and highly divisive contemporary society. This argument might show that judicial review can do more than just facilitate public participation and can contribute to the integration of divided society.

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114 P. S. KARLAN, The New Countermajoritarian Difficulty, California Law Review 109 (2020) 2323, 2325.

115 See also F. TOLSON, Democratizing the Supreme Court, California Law Review 109 (2021) 2381 (our political institutions, politics, and the U.S. Constitution have a number of countermajoritarian elements that make it impossible to frame the difficulty as a problem specific to judicial review in any principled way). However, the Constitution may be flawed and hard to amend, and the Supreme Court may not be able to fix it, but it may not be the Supreme Court's job to fix the Constitution: it may be ours. W. BAUDE, The Real Enemies of Democracy, California Law Review 109 (2021) 2407.

116 S. E. LEMIEUX/D. J. WATKINS, Beyond the "Countermajoritarian Difficulty": Lessons from Contemporary Democratic Theory, Polity 41 (2009) 30.

Aaron Tang also found in the SCOTUS's tendency to ignore whether the parties are powerless minorities or not and afford special protection when the case involves fundamental values problematic: a theory he calls "Reverse Political Process Theory."[117] He criticizes this ignorance and argues that "political process theory ought to retain force as a negative command. That is to say, even if one believes judges cannot avoid substantive value judgments when deciding which groups are so powerless as to warrant extraordinary protection from the democratic bazaar, attention to the political process should still require judges to stay their hand before granting special constitutional treatment to entities that are powerful enough to look out for themselves."[118] This argument suggests that there is a need for more fine-grained tests for determining which powerless groups require stronger judicial support.

Ben Kabe emphasizes the difference between Ely and Justice Brandeis, who,

> "like Ely, thinks that judicial nondeference is appropriate only if the legislature is impairing the democratic process. But while Ely primarily addresses the process of democracy, Brandeis is preoccupied with the precursors to democracy. Speech is a necessary input to a functional democratic process because it creates a citizenry capable of truly participating in that process."[119]

He finds blind spots for both of them:

> "Ely largely ignores or takes for granted that people with access to the democratic process will be capable of participating vigorously and intelligently. Brandeis does not appear to notice that some groups, most obviously African-Americans, may be discriminated against and prevented from participating in the democratic process altogether."[120]

He argues for the integration of both into "a more complete democracy-based justification for and theory of judicial review than either can offer alone," which he calls a "democratic republican" form of judicial review.[121] This argument suggests that there is further need to pay more attention to the ability and capacity of people to participate, and not only to the process of participation.

Surely, Ely's theory needs to be re-evaluated and re-formulated in light of these changing circumstances. However, Ely's theory could still remain the centerpiece of theory of judicial review to provide an impetus to facili-

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117 A. TANG, Reverse Political Process theory, Vanderbilt Law Review 70 (2019) 1427.
118 TANG, *supra* note 117, 1428.
119 B. KABE, Democracy and Civic Duty: A Brandeisian Theory of Judicial Review, Dartmouth Law Journal 19 (2021) 51, 52.
120 KABE, *supra* note 119, 52.
121 KABE, *supra* note 119, 52.

tate the judiciary to vindicate the political process and public participation. This should not be forgotten.

Moreover, such impetus could be equally or more important in other countries, such as Canada[122] as well as Germany[123] and others.[124] Even in the U.K. where there is no judicial review of the constitutionality of statutes enacted by the Parliament, still some sorts of judicial review might be vindicated in light of his political process theory.[125] Indeed, the research into comparative political process around the world can provide much useful insight into the proper role for the courts. Especially, his theory could provide valuable lessons to the world, in countries where the people are struggling to build democracy in their own countries.[126]

122 P. J. MONAHAN, Judicial Review and Democracy: A Theory of Judicial Review, U.B.C. Law Review 21:1 (1987) 87; G. T. SIGALET, Dialogue and Distrust: John Hart Ely and the Canadian Charter, International Journal of Constitutional Law 19:2 (2021) 569.

123 M. HAILBRONNER, Combatting Malfunction or Optimizing Democracy? Lessons from Germany for a Comparative Political Process Theory, International Journal of Constitutional Law 19:2 (2021) 495.

124 R. DIXON/M. HAILBRONNER, Ely in the World: The Global Legacy of Democracy and Distrust Forty Years on, International Journal of Constitutional Law 19:2 (2021) 427. See also A. LOUGHLAND, Taking Process-Based Theory Seriously: Could 'Discrete and Insular Minorities' Be Protected Under the Australian Constitution?, Federal Law Review 48:3 (2020) 324; C. GEIRINGER, When Constitutional Theories Migrate: A Case Study, American Journal of Comparative Law 67 (2019) 281; R. DIXON/A. LOUGHLAND, Comparative Constitutional Adaptation: Democracy and Distrust in the High Court of Australia, International Journal of Constitutional Law 19 (2021) 455. Even in EU countries, it looks like there is a huge interest in the political process theory Ely has developed. See A. WOODHOUSE, Process Review as Panacea: A Critique of Process Review Advocacy in the European Union, European Law Journal 45 (2020) 373. See generally R. DIXON, Responsive Judicial Review: Democracy and Dysfunction in the Modern Age (2023).

125 Compare J. WALDRON, The Core of the Case Against Judicial Review, Yale Law Journal 115 (2006) 1346, with R. DIXON, The Core Case for Weak-Form Judicial Review, Cardozo Law Review 38 (2017) 2193. See also D. LANDAU/R. DIXON, Abusive Judicial Review: Courts against Democracy, UC Davis Law Review 53 (2020) 1313.

126 R. DIXON, A New Comparative Political Process Theory?, International Journal of Constitutional Law 18 (2020) 1490; S. GARDBAUM, Comparative Political Process Theory, International Journal of Constitutional Law 18 (2020) 1429. See also M. J. CEPEDA ESPINOSA/D. LANDAU, A Broad Read of Ely: Political Process Theory for Fragile Democracies, International Journal of Constitutional Law 19 (2021) 548.

VII. CONCLUSION

Professor Ortiz once remarked:

"Few, if any, books have had the impact on constitutional theory of 'John Hart Ely's Democracy and Distrust'. […] In some ways, Democracy and Distrust has proven the most influential as well. Although Ely has persuaded few theorists and gained few adherents, he did change the territory and define the arguments to which most constitutional theorists now feel obliged to respond. 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."[127]

Skeptics doubt whether any constitutional theory may not matter a lot any more since it is hard to believe that any of them could have any material impact on constitutional adjudication by the judiciary.[128] However, for constitutional academics, it does matter a lot since it would potentially constrict the activities of the courts.[129]

In overruling *Roe* after almost a half century later in *Dobbs v. Jackson Women's Health Organization*,[130] in 2022, the SCOTUS specifically referred to Ely as one of the critics of *Roe*[131] and concludud:

"We therefore hold that the Constitution does not confer a right to abortion. Roe […] must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives."[132]

Many liberal critics were outraged and strongly argued for the constitutional enshrinement of right to an abortion. It is true that sex, sexuality, and sexual autonomy, including abortion, require the special constitutional protection since they are essential for liberal democracy to survive.[133] To

127 ORTIZ, *supra* note 28, 721–722.

128 L. A. GRAGLIA, "Constitutional Theory": The Attempted Justification for the Supreme Court's Liberal Political Program, Texas Law Review 65 (1987) 789; M. V. TUSHNET, Does Constitutional Theory Matter?: A Comment, Texas Law Review 65 (1987) 777.

129 D. LAYCOCK, Constitutional Theory Matters, Texas Law Review 65 (1987) 767; J. GREEN, How Constitutional Theory Matters, Ohio State Law Journal 72 (2011) 1183.

130 *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

131 "One prominent constitutional scholar wrote that he "would vote for a statute very much like the one the Court end[ed] up drafting" if he were "a legislator," but his assessment of Roe was memorable and brutal: Roe was "not constitutional law" at all and gave "almost no sense of an obligation to try to be." *Dobbs*, 597 U.S. 215 (2022), *supra* note 130, at 228 (referring to Ely). See also ibid., at 278.

132 *Dobbs*, 597 U.S. 215 (2022), *supra* note 130, at 292.

133 The Constitution of Japan has a provision which mandates the respect for individual dignity and equality when it comes to sex and family affairs. Constitution of Japan,

that extent, these critics are right. However, with respect to other privacy rights, they are simply too much overreacted. After all, in almost all countries in the world, many of the privacy issues are handled as one of legislative choice and the people came to demand much freedom with respect to them. There is of course nothing to prevent the people from changing the law if they want to.

Once Judge Learned Hand remarked:

> "For myself it would be most irksome to be ruled by Platonic Guardians. even if I know how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything: but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture."[134]

It is not only a small satisfaction that participation in political decision-making can bring to us. Participation in political decision-making is vital in a democracy. And it should be the most important means to secure that the government will not try to silence us or to exclude us and to secure our precious freedoms and liberties. Ely's theory keeps reminding us the importance of this teaching.

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supra note 94, Art. 24. I believed that this provision gives constitutional protection to sexual autonomy. Initially I didn't believe this right was essential for political process and did not deserve strong protection from the courts just like Ely did. However, now I came to realize that sex, sexuality and sexual autonomy is vital for democracy to survive and sustain the civil society and maintain the liberal democracy and they deserve strong judicial protection just as other political process rights such as freedom of expression. S. MATSUI, *Nihonkoku kenpo* [Japanese Constitutional Law] (4th ed., 2022); S. MATSUI, Sex, Sexuality and the Constitution (2023). See also NEJAIME/SIEGEL, *supra* note 78, at 1946, 1959 (unlike Lochner, the modern substantive due process cases do not involve "ordinary commercial transactions," and that the claimants in the cases faced "conditions of stigma, denigration, and inequality that impeded their democratic participation. They faced "prejudice [… that] tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities" such that the turn to courts can be justified within the Carolene Products framework. From this stand-point, the substantive due process cases can be understood as exercises of democracy-promoting review").

134 L. HAND, The Bill of Rights (1958) 73–74.