

January 1981

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Recommended Citation

Judith S. Koffler, *Constitutional Catarrh: Democracy and Distrust*, by John Hart Ely, 1 Pace L. Rev. 403 (1981)

DOI: <https://doi.org/10.58948/2331-3528.1692>

Available at: <https://digitalcommons.pace.edu/plr/vol1/iss2/10>

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Book Review

BOOK REVIEW: Constitutional Catarrh: *DEMOCRACY AND DISTRUST*, BY JOHN HART ELY

Judith S. Koffler*

Constitutional theory, some have concluded, is essentially incoherent.¹ Despite this pronouncement (or perhaps because of it), John Hart Ely of Harvard Law School has recently brought forth *Democracy and Distrust*.² This book proffers a theory of judicial review whose apparent coherence and surface appeal call for serious investigation. An historical parallel may afford some illumination.

According to Plato and Thucydides, two remarkable features accompanied the decline of Athenian democracy. One was the rise of moral relativism, expressed in the theories of certain Sophists, who reportedly held that there were no objective, enduring moral values and, consequently, that one person's morals were no better (and no worse) than the next person's.³

The second feature was the decay of political and moral language, which seems to have reflected a decay in political and moral thought. The decay of language can be seen with clarity in

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1. Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1061-62 (1980). Tushnet connects this incoherence with the incoherence of modern liberal theory as diagnosed in R. UNGER, *KNOWLEDGE AND POLITICS* (1975).

2. J. ELY, *DEMOCRACY AND DISTRUST* (1980).

3. Plato explores the position of the Sophists in several dialogues, most notably in the *Gorgias*, the *Republic*, Book I, and the *Sophist*. PLATO: *THE COLLECTED DIALOGUES* 229, 575, 957 (E. Hamilton and H. Cairns, eds. 1961). See A. KOYRÉ, *DISCOVERING PLATO* (Colum. Paperback ed. 1960) and 3 W. GUTHRIE, *A HISTORY OF GREEK PHILOSOPHY* (1971) for a fuller treatment. The characters in Thucydides' historical account of the civil wars concretize the Sophistic position. See, e.g., THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* 212-23, 241-45, 400-08 (Penguin ed. R. Warner trans. 1972).

Thucydides' description of how, during the Peloponnesian War, the meanings of words were changed to camouflage political motives or to cover up the horrors of war, to turn prudence into cowardice and reckless indifference into courage.⁴ The decay of political thought found expression among the rhetoricians and the Sophists, those popular educators of the powerful and the parvenus.⁵ They embraced a view of reality as an elusive flux, a Heraclitean⁶ stream in which all things were in a state of perpetual change. This view reinforced their doctrine of the relativity of values and legitimated their almost Nietzschean contempt for traditional morality. Indeed, some Sophists asserted, conventional morality was a shackle to be cast off.⁷

The rise of moral relativism may indeed be connected with the decay of language: one has but to read the Melian dialogue

4. In Jowett's clearer translation:

The meaning of words had no longer the same relation to things, but was changed by them as they thought proper. Reckless daring was held to be loyal courage; prudent delay was the excuse of a coward; moderation was the disguise of unmanly weakness; to know everything was to do nothing.

THUCYDIDES, *THE PELOPONNESIAN WAR* 199 (Bantam Books ed. B. Jowett trans. 1960). See also F. CORNFORD, *THUCYDIDES MYTHISTORICUS* 183-85 (1965).

5. See 3 W. GUTHRIE, *supra* note 3, 211-19; 5 W. GUTHRIE, *A HISTORY OF GREEK PHILOSOPHY* 211-19 (1978); A. KOYRÉ, *supra* note 3, 60-61, 84-204.

6. One of Heraclitus' most famous fragments ("everything flows") was interpreted to mean that there was no fixed reality, and that all things were in motion. The Sophists in Socrates' time had apparently taken Heraclitus' paradoxical maxim and turned it into a literal negation of objective reality and of values. PLATO'S *THEORY OF KNOWLEDGE* 95, 99 (F. Cornford trans. 1957). See also P. WHEELWRIGHT, *HERACLITUS* 53-54 (1959).

7. See PLATO, *GORGAS* (W. Helmholtz trans. 1952) at 50-51. See also PLATO, *Cratylus* in 6 PLATO (Loeb Classical Library ed. H. Fowler trans. 1926) in which the Sophistical world view of the relativity of things is expressed in the form of an empirical Heraclitean flux. *Id.* at 15, 67-69, 189-91. The *Cratylus*, ostensibly about the relation of language to thought, explores at one level the connection between current sophistic theories of reality and theories about language. 3 W. GUTHRIE, *supra* note 3, at 206-09. The investigation about language, however, develops at a deeper political level into an exposé of the tyranny of words as instruments of domination of the mind. The dialogue has been interpreted as an attack on those Sophists who would degrade philosophy by turning the search for truth into a trivial investigation of words and their meanings. R. DEMOS, *THE PHILOSOPHY OF PLATO* 263 (1966). The point to be made is that Plato's criticism of the Sophists, his *bête noire*, as some have said, underlies most of the dialogues, for it was the Sophists who, denying the traditional notions of objective truth and righteousness, and asserting an ethic of power, success and selfishness, helped prepare the state for tyranny. As one scholar has observed, when traditional values have disintegrated and ethical norms are perceived as arbitrary fetters of the natural self, the society is ripe for tyrants. A. KOYRÉ, *supra* note 3, at 60-70.

of Thucydides to see the Athenians appealing to an early and crude social Darwinism as "justice" to justify atrocities practiced on weaker cities.⁸ A clearer connection appears in the historical figure of Cratylus, a neo-Heraclitean for whom Plato names one of his dialogues. Cratylus was so convinced of the subjectivity of knowledge and the truth of his view that all things were in a state of perpetual flux that he believed that one could not step even once into the same stream. In fact, rather than speak about things, he preferred to point his finger and hiss. For Cratylus, a quintessential Sophist, neither values nor language had any firm anchor to reality.⁹ But Cratylus, like all featherless bipeds, was a political being and his views on values and language may, as Plato suggests, have had much to do with political quietism and its active partner, tyranny.¹⁰

Accompanying this movement, Plato reminds us, was the growing intolerance and hysteria of a war-torn Athenian state which burned books and executed Socrates, the wisest and surely among the gentlest of its citizens, while violent and vicious demagogues came to power.¹¹

Two remarkable features of Ely's book invite comparison. One is Ely's conviction that all fundamental constitutional values are relative and subjective, and hence that they are beyond the competence of the Court to articulate and to define. From this premise, Ely reasons that the only proper role of the Court

8. THUCYDIDES, *supra* note 4, at 341-47. In this dialogue, the Athenians, urging the defenseless island of Melos to yield, explicitly abandon appeals to morality and justice. They urge the island to recognize the only persuasive "justice" in the world, the power of the strong over the weak. E. Dodds suggests that the rationalist-utilitarian war mentally revealed here "did not enable men to behave like beasts — men have always been able to do that. But it enabled them to justify their brutality to themselves. . . ." E. DODDS, *THE GREEKS AND THE IRRATIONAL* 191 (1973). Whether Heraclitus' theory of the world influenced the Sophists or not, we have Plato's word for the view that conceptions of the physical universe underlie their conception of human life. It is a materialistic view of the world, as without God or reason, which produces the theory that "might is right." E. BARKER, *THE POLITICAL THOUGHT OF PLATO AND ARISTOTLE* 35 (Dover ed. 1959).

9. PLATO'S THEORY OF KNOWLEDGE 95, 99 (F. Conford trans. 1947).

10. See note 7 *supra*. See also 2 G. GROTE, *PLATO* 545-48 (1875); 3 W. GUTHRIE, *supra* note 3, at 204-09, 223-24.

11. Among the demagogues was Cleon, "the most violent of the citizens," memorable for his praise of dullness of mind among the citizens and infamous for his *Realpolitik* and support for war atrocities against Athens' helpless enemies. F. CONFORD, *supra* note 4, at 110-28.

is to promote the political process, the political flux in which values find their true element. A second feature is the unusual quality of his discourse, written in a style that is frequently glib and sometimes pretentious, tending to catch-phrase and slang. Ely's language, ostensibly calculated to avoid the arid academic style of other writers, may have some deeper connection to his view on the relativity of values.

I. A Revival of Heraclitean Sophistry

When may the Supreme Court legitimately — that is, constitutionally — act to defeat the legislative will? The answer to this elementary query, which has perplexed generations of constitutional law students, depends, of course, upon one's interpretation of the Constitution, which in turn may depend upon one's unarticulated prejudices and passions. Ely's answer, which forms the thesis of the work, is easily summarized. He purports, first of all, to demolish as utterly subjective the *fundamental rights* foundation upon which the Supreme Court has constructed its laborious edifice of individual rights. Ely concludes that the incoherence and contradictions in such judicial rationales as "decency and fairness" or "tradition" or "moral consensus" or "natural law" lead us inexorably to look elsewhere than to an unaccountable elite of nine men for a source of these political values.¹² The author next advances the argument that the proper role of judicial review is most definitely not the articulating, discovering and protecting of objective rights, for these are apparently not discoverable. Rather, the Court's constitutional office is that of Heraclitean helpmate: to serve the "process" or promote the flux of democratic lawmaking.

Ely articulates two methods by which the Court is to fulfill its Heraclitean constitutional mission. First, the Court is to "unclog" the stream of political process whenever the insiders try to dam up the flow and prevent political change. This is called "clearing the channels of political change," and Ely devotes a chapter to it.¹³ An example of proper judicial activism in the service of the Heraclitean legislative flux is the line of reapportion-

12. J. ELY, *supra* note 2, at 73-75.

13. *Id.* at 105-34.

ment and voting rights cases for which the Warren court was both famous and defamed.¹⁴ Ely's thesis, written in defense of those decisions, is that in these instances the Court was fulfilling its proper constitutional duty of flux-monger: the "process" of democratic lawmaking had shown signs of systematic malfunction, and the Court rightfully came to the rescue.¹⁵

The second method, called "reinforcing representation," requires the court to act on behalf of oppressed minorities who are being systematically disadvantaged by the majority.¹⁶ By this method, the Court makes sure that the poor fish being cast upon the banks of the Heraclitean stream are thrown back into the flux, which must contend with them openly and fairly.

The judiciary is entitled and obligated to act by these two methods, if for no other reason than that the legislative process is "undeserving of trust."¹⁷ This happens, says Ely,

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.¹⁸

Ely's view of the Court's proper role rests upon a somewhat radical reinterpretation of the Constitution, according to which that enigmatic test is not a hieroglyph of enduring and evolving values for the Court to decipher and pronounce, but rather a pragmatic document calculated to promote, protect and preserve "process." The Constitution's concerns with guarantees of individual rights are explained away as either "process writ small," the process of fairness in the resolution of individual disputes, or "process writ large[,] . . . ensuring broad participation in the

14. *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

15. J. ELY, *supra* note 2, at 117-25.

16. *Id.* at 87, 135-79.

17. *Id.* at 103.

18. *Id.*

processes and distributions of government.”¹⁹ The document, according to Ely, leaves the selection and accommodation of fundamental values entirely to that Heraclitean stream, the political process. Indeed, Ely asserts, the Constitution is “overwhelmingly concerned” with process rather than with immutable rights.²⁰

Ely’s argument proceeds along the following lines: the Supreme Court has never issued a satisfactory and consistent theory of fundamental rights; indeed, its theories often show ignorance,²¹ class bias,²² a “smell of the lamp,”²³ or unmitigated bigotry,²⁴ as such memorable disgraces as *Bradwell v. Illinois*²⁵ remind us. Since neither judges nor philosophers can agree about fundamental rights, it must be because there are no such discoverable, objective and enduring values. Since there are no objective, discoverable values with which the Supreme Court can fill in the missing spaces in the Constitution, these values must be selected by some other body. The Constitution does not explicitly assign the selection and accommodation of substantive values to the Court. Moreover, the real thrust of the Constitution is the primacy of representative democracy. Therefore, the articulation, selection and accommodation of values must be left to the legislative “marketplace,” with the Court acting only as trust-buster.²⁶

Ely’s argument rings of a skepticism akin to that of both the late Athenian Sophists and the disaffected radical empiricists of our own century. One must question why Ely takes this stand. It is not immediately apparent why Ely’s conclusion that the Court *ought* to serve an active role in participatory democracy requires or is even advanced by the proposition that there are no objective, independently discoverable fundamental values. If Ely had

19. *Id.* at 87.

20. *Id.*

21. *Id.*

22. *Id.* at 59.

23. *Id.*

24. *Id.* at 51.

25. *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130 (1872).

26. J. ELY, *supra* note 2, at 102-03. Ely’s theory may arise from a noble, although half-hidden, goal: to acquit the Warren Court of alleged trespasses into the political thicket. He reminds us of an obvious truth which law students are often studiously trained to ignore — that the Court is in its vital nature a *political* organ.

taken this proposition seriously, we might have anticipated a critical treatment of the problems courts have faced in attempting to give principled meaning to the Due Process and Equal Protection Clauses of the Constitution. Instead, Ely guides us through a thirty-page whirlwind tour of the judicial rationales of natural law, neutral principles, reason, tradition, and moral consensus, as he points to the tattered ideology and rather familiar deficiencies many lay readers can easily identify, concluding:

All this seems to leave us in a quandary. . . . When we search for an external source of values with which to fill in the Constitution's open texture, however — one that will not simply end up constituting the Court a council of legislative revision — we search in vain.²⁷

At this moment of despair, Ely comes forward with his process-based theory of constitutional decisionmaking. There are no fundamental and enduring values that the Court can objectively determine, except for one: the Heraclitean value of process. The judiciary can appropriately concern itself "only with questions of participation, and not with the substantive merits of the political choice under attack."²⁸

Ely's theory about a process-based role for the Court has appeal. By concerning itself with questions of participation, Ely intends that the Court should assure all persons a right to participate in the political process in some meaningful way, unhampered by process-clogging concentrations of power. His perception of the Court's essential constitutional role as "policing the process of representation"²⁹ leads to the vision of a judiciary involved in dilating constricted channels which stop the flow,³⁰ and in keeping minorities within the political stream when oppressive factions try, in effect, to toss them out.³¹ The appeal of this theory, as Laurence Tribe has indicated,³² lies in its apparently pro-democratic aspect. The Court, not just greasing the

27. *Id.* at 73.

28. *Id.* at 181.

29. *Id.* at 73-104.

30. *Id.* at 105-34.

31. *Id.* at 135-79. This chapter builds on Ely's brilliant and cogent analysis in *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

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

wheels of a democratic machine,³³ as it were, but engaged in a democratic dynamic of constant political flux, is seen to act as constitutional cathartic, purifying the stream and dissolving tyranny and factions. It is a theory, in addition, that tends to avoid those perennial charges that the Court is acting as a super-legislature, since apologists for judicial intervention can respond that the Court is not imposing its own substantive values upon the political choices of the legislature. Indeed, they can proclaim that the Court is working *with* the legislative process, not *against* it.³⁴

Ely's theory has a slightly worn appearance, which he acknowledges. He traces his position to the celebrated *Carolene Products* footnote four,³⁵ in which Justice Stone articulated as a defensible ground for judicial intervention the protection of "discrete and insular minorities" from prejudice in the law-making process, in view of the fact that the political processes, ordinarily open to bring about repeal, were thereby choked off. What is different in Ely's treatment, we observe, is his insistence that the Court's *sole* constitutional concern is with minding the Heracleitian stream.³⁶

Ely's theory has been effectively criticized by writers who show how his reductionist theory of the Court's judicial role fails to account for such provisions as the Fourth Amendment's guarantees against unlawful searches and seizures, which plainly have little to do with assuring representative democracy,³⁷ the First Amendment's substantive commitments to religious liberty,³⁸ or the Thirteenth Amendment's guarantee against involuntary servitude.³⁹ Ely acknowledges these rights, but dismisses them as secondary to the constitutional preoccupation with representation.⁴⁰

33. J. ELY, *supra* note 2, at 76.

34. Tribe, *supra* note 31, at 1063 n. 2.

35. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938), discussed in J. ELY, *supra* note 2, at 75-77.

36. J. ELY, *supra* note 2, at 88. "This suggests . . . that preserving fundamental values is not an appropriate constitutional task." *Id.*

37. See, e.g., Tushnet, *supra* note 1.

38. Tribe, *supra* note 31, at 1065.

39. *Id.*

40. J. ELY, *supra* note 2, at 88-101. Ely describes them as "an odd assortment, the understandable products of particular historical circumstances — guns, religion, con-

Despite the failure of Ely's theory to account for the Constitution's explicit recognition that there is, for example, such a positive fundamental right as the "right . . . to be secure" in one's person and home,⁴¹ there would seem nevertheless to remain in Ely's book an important challenge to received judicial rationales underlying the Court's protection of constitutional values. But this challenge promises more than it fulfills. Instead of exposing the prejudices concealed by (and perhaps unveiling the cultural blindness of) such judicial concepts as Frankfurter's "notions of decency and fairness of the English-speaking people,"⁴² and rather than exploring the class-biased presumptions hidden by such grand phrases as "implicit in the concept of ordered liberty,"⁴³ Ely flings all theories of fundamental values into the constitutional dustbin on the ground that all are equally subjective. Since ideas of value seem to Ely to behave as irrationally as commodities in the market, they are consigned to that marketplace of values, the political bazaar.⁴⁴

tract, and so on — and in any event they are few and far between." *Id.* at 101.

41. U.S. CONST. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"

42. The phrase is memorialized in Justice Frankfurter's concurring opinion on *Adamson v. California*, 332 U.S. 46 (1947). Agreeing that the prosecutor's comment on the failure of an accused to testify did not violate due process, Frankfurter asserted that the relevant inquiry in such cases was whether the proceedings offended "those canons of decency and fairness and which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." *Id.* at 67-68.

43. This phrase found expression in *Palko v. Connecticut*, 302 U.S. 319 (1937), in which Justice Cardozo held that the Fifth Amendment's guarantee against double jeopardy did not apply to the states. Such a guarantee was distinguished from other, more fundamental rights, such as First Amendment freedoms and the right of an accused to counsel.

In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.

Id. at 324-25.

44. The marketplace metaphor, or rather the market mentality, as Karl Polanyi described it, pervades Ely's argument. For example, Ely himself views his theory of constitutional adjudication as having an "antitrust" orientation. J. ELY, *supra* note 2, at 102-03. The "political market," *id.* at 103, the "political marketplace," *id.* at 135, and the "pluralist's bazaar," *id.* at 152, are terms that surface with the sense that they are literal descriptions rather than metaphor. The same might be said of Ely's description of legislative products said to be the result of cost-benefit balance. *Id.* at 157. Urging in 1947 that civilization must find a new thought pattern, Polanyi pointed out how the market

Although Ely proffers this theory as an anti-elitist constitutional limit, he ends up exalting means over ends. The legislative process, theoretically the instrument by which society achieves its ends, becomes an end in itself. For, according to Ely, the constitutional limits on power, such as the Due Process Clause, have lost their moorings to the ends which have traditionally informed them. Being without objective validity, such ends as individual dignity, decency and fairness are not only purged of judicial class bias or idiosyncrasy; they are removed entirely from the judicial vocabulary. How the Court should go about deciding future cases involving due process and privacy in general, and how it should reach a sound accommodation in conflicts of specific rights, remain unsolved mysteries.

Many of the Court's constitutional decisions, it might be argued, are concrete controversies in which the larger question of ends and means must be resolved. "What are the ends for which representative democracy is instituted" no doubt underlies such controversies as *Skinner v. Oklahoma*,⁴⁵ in which the Court was called upon to limit legislative tinkering with the reproductive organs of convicts. The larger question hovers behind such controversies as *San Antonio School District v. Rodriguez*,⁴⁶ in which the Court was urged to strike down a state's scheme under which the measure of public aid to education depended upon district wealth. Underlying that controversy was the question, what are the material preconditions to effective participation in the democratic process? And how shall the Court address controversies that raise the issue of the state's duty to tolerate harmless but unorthodox modes of living or self-expression, as with consensual adult homosexuality?

These vague constitutional puzzles, which Ely sees as the proper practical province of the legislature and as *terra incognita* forbidden to judges, surface in the cases in ways that Ely's representation-reinforcing and channel-clearing Heracliteanism can not resolve satisfactorily. What constitutional "representation-reinforcing" value is at stake in the sterilization of con-

mentality tended to stultify our vision of the human world and its purposes. Polanyi, *Our Obsolete Market Mentality*, 3 COMMENTARY 109 (1947).

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

46. 411 U.S. 1 (1973).

victed criminals?⁴⁷ What "channel-clearing" judicial function enables the Court to determine whether or not a state's scheme of financing public education results in unacceptably diluted power for the poorly educated?⁴⁸ What limits to legislatively imposed morality arise from the process-based theory of judicial review?⁴⁹ Perhaps Ely might respond to these problems by suggesting that sufficiently powerless groups are prime candidates for special judicial protection.⁵⁰ Insofar as legislative majorities tyrannize homosexuals or emasculate convicts guilty of only certain crimes, or passively prescribe education for the rich and minimal literacy for the poor, his process-based theory may imply that the Constitution requires judicial activism in the name of protecting these powerless minorities. Then again, his theory may imply nothing of the sort, since we are not clearly informed as to what criteria govern the question whether an identifiable group is sufficiently blocked in its efforts at democratic participation to warrant judicial activism. Participation presumably means something, but precisely what it means when society's elected representatives stigmatize homosexuals indiscriminately with criminals cannot be answered if, following Ely's invitation, the Court treats all questions of moral values as if they were candidates campaigning for office.

Rejection of Ely's assertion about the subjectivity of values need not plunge one hopelessly into elitist or purely arbitrary and subjective moral theory. Such a rejection may simply recognize that questions of value require, instead of immediate answers, a relentless, rigorous and critical dialectic. No less a philosopher than Socrates might have laughed heartily at Ely's philosophical predicament, even as he might have noted his agreement that no mortal can have the last word on fundamental values or ultimate truths. By Socrates' method (itself essen-

47. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

48. *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

49. J. Ely, *supra* note 2, at 163 & 255 n. 92.

50. Ely's final chapter, "Facilitating the Representation of Minorities," is a laudable attempt to justify the doctrine of suspect classification. Judicial suspicion of unconstitutional legislative motivation seems warranted at least in cases where the disfavored group has been excluded from participation in the political process and in cases where the disadvantaged group has been the object of widespread vilification. J. Ely, *supra* note 2, at 153.

tially a lesson in humility), truth emerges only by *negation* — that is, in the process of discovering errors and of recognizing self-deception. And what could be less subjective than error or self-deception? These are surely two demonstrable accoutrements that abound in our intellectual universe.⁵¹

I introduced this review with an observation about the decline of the Athenian democracy into an authoritarian state, an event that was accompanied by the Sophistic movement's rejection of moral values as purely relative. The connection between this allusion and Ely's argument will be addressed after an examination of the second feature of his book which commands our attention, its language.

II. An Impoverished Discourse

Others have pointed out the impoverishment and sterility of such theories as those Ely defends.⁵² Related to this sterility — or perhaps caused by it — is the impoverishment of the language in which Ely conducts his discourse. To those familiar with George Orwell's *Politics and the English Language*,⁵³ Ely's book offers fertile material for illustration of the more serious instances of those features of political language that Orwell deplored in his time. Pretentious diction, a frequently patronizing and too familiar tone, meaningless words and phrases, trivializing jokes, and glib pandering to the reader's prejudices mar

51. Socrates may well agree with Felix Cohen's observation:

Legal philosophy is not a bad play in which each actor clears the stage by killing off his predecessors. Rather is legal philosophy, like philosophy generally, a great cooperative exploration of possible perspectives . . . through which life's many-faceted problems can be viewed.

Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 268 (1950). Legal philosophers familiar with Plato's dialogue *Theaetetus*, which contains the memorable contrast between the lawyer and the philosopher, will recall that at the end of that dialogue, Socrates and his interlocutors confess that they have no final answer to the question, "What is knowledge?" Nevertheless, the exercise in dialectic was not an empty one:

Then supposing you should ever henceforth try to conceive afresh, *Theaetetus*, if you succeed, your embryo thought will be the better as a consequence of to-day's scrutiny; and if you remain barren, you will be gentler and more agreeable to your companions, having the good sense not to fancy you know what you do not know.

PLATO, *Theaetetus* in PLATO'S THEORY OF KNOWLEDGE 163 (F. Cornford trans. 1957).

52. See, e.g., Tribe, *supra* note 31, at 1064; Tushnet, *supra* note 1, at 1058.

53. G. ORWELL, *Politics and the English Language*, in THE ORWELL READER 355-66 (1956).

Ely's treatment. One finds such trite expressions as "cheap shot,"⁵⁴ "hoist by its own petard,"⁵⁵ "a sure-fire way to get a laugh" (of the Ninth Amendment),⁵⁶ and "doesn't mean we're home free,"⁵⁷ in the course of just a few pages. One questions why Ely has adopted this folksy, familiar tone. Surely constitutional theory ought to be made democratically accessible, even if it is impossible to make it altogether coherent. But is Ely's audience to be addressed through verbal narcotics and familiar catch phrases? The effect is to make the reader feel at home — or at least the reader who is accustomed to turning off his or her mind and to being put into a semi-somnolent condition by the latest situation comedy on television.

Some aspects of Ely's discourse are serious. The book begins by introducing two new "isms" into constitutional law, an offense serious enough in itself, but nevertheless pardonable in one who undertakes to justify and explain his tactics.⁵⁸ Ely does not do so, at least not satisfactorily. "Interpretivism" means little more than the view Justice Black took on the Due Process Clause;⁵⁹ "noninterpretivism" means the opposite.⁶⁰ Missing is an account of interpretation and an elaboration of a theory behind it. Instead, Ely tells us in his second chapter, "The Impossibility of a Clause-Bound Interpretivism,"⁶¹ not once but twice how things "get pretty scary"⁶² when such wide open provisions as the Due Process Clause and the Ninth Amendment are interpreted. This chapter lacks clarity and precision of thought. Instead, we meet the sort of carelessness of language which Orwell suggested leads us away from the path of critical thinking.⁶³ For example, in the course of rehashing a familiar debate over the interpretation of the Due Process Clause, Ely commits such verbal atrocities as the following:

54. J. ELY, *supra* note 2, at 40.

55. *Id.* at 43.

56. *Id.* at 34.

57. *Id.* at 36.

58. *Id.* at 1-3.

59. *Id.* at 2.

60. *Id.* at 1-2.

61. *Id.* at 11-41.

62. *Id.* at 20, 34.

63. G. ORWELL, *supra* note 53, at 355.

One might assume that this [discussion] doesn't matter, that it is revisionism for the sheer hell of it. . . . The question is a fair one, but it turns out it may matter, because of the negative feedback effect the notion of substantive due process seems to be having on the proper function of the Due Process Clause.⁶⁴

The reader stops in her tracks: what *can* this writer be saying? The colloquialisms, presumably used to lighten the reader's burden, tend rather to confuse. Sometimes, as in the example just quoted, they are agglutinated into a mass of jargon and circumlocution ("gobbledygook"). In another passage, Ely writes of a debate between Madison and Jefferson on the Bill of Rights:

[T]he possibility that unenumerated rights will be disparaged is seemingly made to do service as an intermediate premise in an argument that unenumerated powers will be implied (though at the very end of the first sentence it seems to flip again and the possibility that unenumerated powers will be inferred now seems threatening because of what that would mean to unenumerated rights).⁶⁵

If the reader has not become impatient by this time with the tediously familiar arguments, Ely's gelatinous prose and folksy tone combine into a redoubtable literary irritant.

There may be more serious implications. A reader may justly wonder, first, whether there is indeed anything beyond the surface of familiar debates over constitutional interpretation, and, if so, whether the legal academy is competent to penetrate beyond its own received categories. Further, in view of the apparent muddle in which Ely expresses his ideas, one may be led to question the importance of the ideas both to the writer and to the reader.⁶⁶

Some readers will recoil at the trivializing phrases with which Ely labels the opposition. For example, the realists, and implicitly the entire tradition of those materialist critics and historians, are passed off jocularly as "spoil-sports."⁶⁷ This may

64. J. ELY, *supra* note 2, at 18-19.

65. *Id.* at 36.

66. Orwell reminds us of the politically infectious consequences that bad habits of language can work both on the speaker and on the audience. G. ORWELL, *supra* note 50, at 362-63.

67. J. ELY, *supra* note 2, at 5.

provide a laugh at the establishment, and it seems not unhealthy. But Ely's disposal of so much serious criticism in the past tends to nourish shallow thinking. We are patronizingly and paradoxically cautioned, when Ely quotes the *Federalist Papers* as authority, "and remember, *The Federalist* was propaganda."⁶⁸ In the course of a discussion of natural law, Ely can not restrain himself from capitalizing on the mass-media mentality he hopes to find in his audience: "It's not nice to fool Mother Nature."⁶⁹ His language, ostensibly designed to add color to an otherwise dull argument, rather points out the superficiality of the analysis.⁷⁰

More serious indications of the sophistical and anti-intellectual character of Ely's language emerge in his treatment of the writings of contemporary moral philosophers. Ely disposes of the importance of such writers as Rawls and Dworkin with jocular brevity and untoward dispatch.⁷¹ For example, commenting on Dworkin's suggestion that constitutional lawyers would do well to read Rawls's *A Theory of Justice*,⁷² Ely writes:

The invitation to judges seems clear: seek constitutional values in — that is, overrule political officials on the basis of — the writings of good contemporary moral philosophers, in particular the writings of Rawls. . . . But how are judges to react to Dworkin's invitation when almost all the commentators on Rawls's work have expressed reservations about his conclusions? The Constitution may follow the flag, but is it really supposed to keep up with the *New York Review of Books*?⁷³

Indeed, the specious humor leads to an hypothesis about the result of judicial consideration of legal philosophers: "We like Rawls, you like Nozick. We win, 6-3. Statute invalidated."⁷⁴ Thus, even while feebly attempting to satirize the intellectual establishment, Ely seems to demonstrate contempt for those

68. *Id.*

69. *Id.* at 50.

70. Ely, who is fond of maxims, might well have heeded one he cites, "familiarity breeds inattention." *Id.* at 18. The overly familiar quality of his prose tends to breed inattentiveness in the reader.

71. *Id.* at 58.

72. J. RAWLS, *A THEORY OF JUSTICE* (1971).

73. J. ELY, *supra* note 2, at 58.

74. *Id.*

who speak in the idiom of a moral vocabulary.

One is left with the sense that Ely's laudable anti-elitism, which informs his Heraclitean theory, has developed, despite Ely's best intentions, into an assault on language and critical thought. One does not genuinely democratize discourse about serious human affairs by translating the deadened academic prose of legal commentators into the stultifying prose of the mass media. Both are congenial to the authoritarian state. An inaccessible language alienates the populace from knowledge of the forces that control it; but the familiar, thoughtless phrases that fill the public mind help no less to prepare it for orthodoxy and political acquiescence.⁷⁵

III. A Heraclitean Disease

It is perhaps not accidental that Ely half concedes early in the book that he may, by some standards, be considered a demagogue.⁷⁶ Equally significant is Ely's conclusion, in which he admits that his audience might assail his process-based theory along the following lines: "You wouldn't let courts second-guess the substantive merits [of legislation]? Why, that means you'd have to uphold the constitutionality of the Holocaust!"⁷⁷ But Ely's reply to this criticism is to insist that his constitutional theory provides safeguards against the worst of all possible worlds: "A regime this horrible is imaginable in a democracy only because it so quintessentially involved the victimization of a discrete and insular minority."⁷⁸ And that is, quite literally, the end of the matter for Ely. In effect, we are told that even though the judiciary is to shut down its moral and critical faculties, its heart and mind, as long as it throws the masses of oppressed minorities back into the political stream the flux is safe from atrocities. One has only to read the majority opinions in *Korematsu v. United States*⁷⁹ or *Dred Scott*⁸⁰ to feel uneasy at

75. In Orwell's words, "This invasion of one's mind by ready-made phrases . . . can only be prevented if one is constantly on guard against them, and every such phrase anaesthetizes a portion of one's brain." G. ORWELL, *supra* note 50, at 364.

76. J. ELY, *supra* note 2, at 63.

77. *Id.* at 181.

78. *Id.* at 182.

79. 323 U.S. 214 (1944).

80. 60 U.S. (19 How.) 393 (1857). Ely's disposal of the *Dred Scott* decision as an

Ely's display of confidence. In the former, the Court *did* perceive the presence of a discrete, insular minority; it was a minority which, according to the military, threatened sabotage and espionage. In the latter decision, Dred Scott and his kind were perceived as a distinct, indeed *sui generis* species of chattels that walked. How will Ely's stream flush away these impurities — "aberrations" — in our constitutional jurisprudence? Questions of justice and, simultaneously, questions of the corruption of the language of the law hold fast the mind with an intensity that will not dissolve in the Heraclitean flux. Indeed, it is the very language of those decisions that makes the blood run cold.⁸¹

Having begun with the Greeks, it may be fitting to conclude with a passage from Thucydides' Melian dialogue. We meet here in concrete human actions those two features, moral subjectivity and corruption of language, which may connect Ely's theory with the wider significance of human history. The Melian dialogue takes place between Athenian ambassadors and their fellow Greeks on the small island of Melos, which the Athenians tried to force against its will into the war. The Athenians openly abandon appeals to morality, for, they maintain, all know that justice among mortals depends on equality of power. In practical affairs, "justice" consists in the strong exacting what they can and the weak conceding what they must:

"aberration" is astonishing. J. ELY, *supra* note 2, at 16. It suggests too clearly the blindness of the legal scholars to history. Worse, it makes the voice of Professor Derek Bell, Ely's former colleague, one that appears to cry in an academic wilderness. See D. BELL, *RACE, RACISM AND AMERICAN LAW* 15-20 (2d ed., 1980).

81. Socrates in the dialogue *Cratylus* suggests that the Heraclitean view of moral and empirical reality may in fact be a symptom indicating a disease of the mind:

But if there is always that which knows and that which is known — if the beautiful, the good, and all the other verities exist — I do not see how there is any likeness between these conditions of which I am now speaking and flux or motion. Now whether this is the nature of things, or the doctrine of Heracleitus and many others is true, is another question; but surely no man of sense can put himself and his soul under the control of names . . . nor will he condemn himself and all things and say that there is no health in them, but that all things are flowing like leaky pots, or believe that all things are just like people afflicted with catarrh, flowing and running all the time. Perhaps, *Cratylus*, this theory is true, but perhaps it is not. Therefore you must consider courageously and thoroughly and not accept anything carelessly — for you are still young and in your prime; then, if after investigation you find the truth, impart it to me.

PLATO, *Cratylus*, *supra* note 7, at 191.

Of divinity we believe and of humanity we know that everywhere, under constraint of nature, it rules whatever it can hold the mastery. We did not make this law, nor are we the first to observe it. It existed already when we inherited it; we shall bequeath it to exist forever.⁸²

There may be few constitutional guarantees against another Holocaust, despite Ely's hopes. Blindness and hardness of heart are qualities the judiciary shares with the rest of humanity. But a knowledge of human history and deep concern with the problems of moral philosophy might make a contemplative judiciary, if not thoroughly just, at least a little more humble and more gentle. Ely's Heraclitean theory, however, would justify a wanton judicial ignorance.

82. F. CORNFORD, *supra* note 4, at 179 (quoting THUCYDIDES, *THE PELOPONNESIAN WAR*, BOOK V, ch. 104).