

Boston University School of Law

Scholarly Commons at Boston University School of Law

Faculty Scholarship

5-1987

Substance, Process and Outcome in Constitutional Theory

David B. Lyons

Boston University School of Law

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship



Part of the [Law Commons](#), and the [Philosophy Commons](#)

Recommended Citation

David B. Lyons, *Substance, Process and Outcome in Constitutional Theory*, in 72 *Cornell Law Review* 745 (1987).

Available at: https://scholarship.law.bu.edu/faculty_scholarship/2802

This Article is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact lawlessa@bu.edu.





DATE DOWNLOADED: Tue Sep 13 20:04:56 2022

SOURCE: Content Downloaded from [HeinOnline](#)

Citations:

Bluebook 21st ed.

David Lyons, Substance Process and Outcome in Constitutional Theory , 72 CORNELL L. REV. 745 (1986-1987).

ALWD 7th ed.

David Lyons, Substance Process and Outcome in Constitutional Theory , 72 Cornell L. Rev. 745 (1986-1987).

APA 7th ed.

Lyons, D. (1986-1987). Substance Process and Outcome in Constitutional Theory Cornell Law Review, 72(4), 745-764.

Chicago 17th ed.

David Lyons, "Substance Process and Outcome in Constitutional Theory ," Cornell Law Review 72, no. 4 (1986-1987): 745-764

McGill Guide 9th ed.

David Lyons, "Substance Process and Outcome in Constitutional Theory " (1986-1987) 72:4 Cornell L Rev 745.

AGLC 4th ed.

David Lyons, 'Substance Process and Outcome in Constitutional Theory ' (1986-1987) 72 Cornell Law Review 745.

MLA 8th ed.

Lyons, David. "Substance Process and Outcome in Constitutional Theory ." Cornell Law Review, vol. 72, no. 4, 1986-1987, p. 745-764. HeinOnline.

OSCOLA 4th ed.

David Lyons, 'Substance Process and Outcome in Constitutional Theory ' (1986-1987) 72 Cornell L Rev 745

Provided by:

Fineman & Pappas Law Libraries

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

SUBSTANCE, PROCESS, AND OUTCOME IN CONSTITUTIONAL THEORY*

David Lyons†

Scholarship in philosophy proceeds at a slower pace than in the law. As Tom Lehrer, the poet laureate of a recent generation, might have said, the law biz travels on a faster track. Or so it seems to a philosopher who has recently been treading the tracks of constitutional lawyers.

And so it is with apprehension that I take as my text a book that was published as long ago as 1980. As the title of this lecture might suggest to someone with so long a memory, the book is John Hart Ely's *Democracy and Distrust*.¹ That work provoked an impressive secondary literature.² But as the pace of commentary has slowed con-

* The John Dewey Lecture in Jurisprudence, presented on October 14, 1986, at the New York University School of Law. I am grateful to the School of Law for its warm hospitality and to members of the NYU faculty for their comments, especially on the last part of the lecture. My further reflections on those issues will require systematic treatment on another occasion; the present text is substantially that of the lecture as presented, with citations and supplementary notes added.

† Professor of Philosophy and of Law, Cornell University. Research that was drawn upon for this lecture was supported in part by a Constitutional Fellowship from the National Endowment for the Humanities in 1984-85. I am grateful to Matthew Nothnagle for his recent research assistance, especially on the position of women in the "political market," which receives brief treatment in Section IV. The issues and materials that he uncovered cannot be done justice within the present limits of time and space.

¹ J. ELY, *DEMOCRACY AND DISTRUST* (1980).

² See, e.g., *Symposium: Judicial Review versus Democracy*, 42 OHIO ST. L.J. 3 (1981); Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Ball, *Don't Die Don Quixote: A Response and Alternative to Tushnet, Bobbitt, and the Revised Texas Version of Constitutional Law*, 59 TEX. L. REV. 787 (1981); Caine, *Judicial Review—Democracy Versus Constitutionality*, 56 TEMPLE L.Q. 297 (1983); Caplan, *The Paradoxes of Judicial Review in a Constitutional Democracy*, 30 BUFFALO L. REV. 451 (1981); Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207 (1984); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981); Estreicher, *Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture*, 56 N.Y.U. L. REV. 547 (1981); Gangi, *The Supreme Court: An Intentionalist's Critique Of Noninterpretive Review*, 28 CATH. LAW. 253 (1983); Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343 (1981); Levinson, *Judicial Review and the Problem of the Comprehensible Constitution*, 59 TEX. L. REV. 395 (1981); Michelman, *Process and Property in Constitutional Theory*, 30 CLEV. ST. L. REV. 577 (1982); Sager, *Rights Skepticism and Process-Based Responses*, 56 N.Y.U. L. REV. 417 (1981); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980); Lynch, Book Review, 80 COLUM. L. REV. 857 (1980); O'Fallon, Book Review, 68 CALIF. L. REV. 1070 (1980). Earlier articles also treated the subject. See, e.g., Bork, *The*

siderably, we who travel in the slower track have had an opportunity to catch up.

I choose Ely's book as my text because I appreciate its merits and regret that it did not rise more above the common run of contemporary constitutional theory. I believe, however, that reflecting on its limits can help us to sharpen our thinking about judicial review.

Fifteen years ago Judge (then Professor) Bork wrote, "A persistently disturbing aspect of constitutional law is its lack of theory"³ I have a slightly different concern, namely, the impaired development of the theory as it currently exists. I hope it is not ungenerous to mention that I include Bork's own ventures into constitutional theory within the compass of my concern.⁴

I shall first recount Ely's principal ideas and relate them to the theoretical framework into which they were introduced. I shall then suggest some theoretical issues that Ely's ideas raise. I do not offer conclusions but items to be placed upon the agenda of constitutional theory. It may seem as if the literature has already answered some of the questions I shall discuss. My point is that answers are not enough; we suffer from a shortage of well-developed reasons to believe them.

I

CONTEMPORARY CONSTITUTIONAL THEORY

Ely's premise is that the U.S. Constitution prescribes a system of "representative democracy."⁵ In the context of American constitutional theory, this premise is, at best, conventional wisdom. That Ely tries to advance beyond banalities is one virtue of his work.

The next step in his argument has proved more controversial. He maintains that the Constitution is overwhelmingly concerned with the political "processes" of representative democracy, rather than with "substantive" values.⁶ The problem for judicial review is to understand the nature of those processes and the limits that the Constitution places upon them. Ely's approach is to interpret unclear aspects of the Constitution by reference to a theory about the overall character of the processes that the Constitution prescribes.

Impossibility of Finding Welfare Rights in the Constitution, 1979 WASH. U.L.Q. 695; Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659.

³ Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1 (1971).

⁴ I discuss Bork's general theory in Lyons, *Constitutional Interpretation and Original Meaning*, 4 Soc. PHIL. & POL'Y 75 (1986), and his application of the general theory to free speech at *infra* note 29.

⁵ J. ELY, *supra* note 1, at 88.

⁶ *Id.* at 73-104. *But see infra* section III.

Against the background of recent rhetoric in constitutional theory, such an approach might appear more novel than it really is. Constitutional theory has suffered from an ill-conceived opposition between the platitude that courts should decide constitutional cases solely by "interpretation" of the Constitution and the contention that courts may sometimes decide these cases on different grounds entirely. The so-called "interpretivists" profess fidelity to the "original" Constitution, while the so-called "noninterpretivists" worry about the lines of precedent that would be sacrificed if courts adopted such an approach.⁷

This opposition makes it appear as if one side neither has nor needs a theory of the Constitution, or even a theory about how to read it, while the other has a theory, but not one *of* the Constitution. Rather, the noninterpretivists seem to call on courts, at least occasionally, to bypass the Constitution entirely.

The conflict is ill-conceived on several grounds; the following points will serve our present purposes.⁸ The *apparent* contrast between interpretivism and noninterpretivism assumes agreement on what counts as interpretation of the Constitution as well as agreement on what emerges from the interpretative process. It assumes that genuine interpretation may not look beyond the "four corners" of the constitutional document and that the doctrinal products of the interpretative process are rather thin. None of these assumptions can be sustained.

When carefully qualified, for example, the two approaches quietly converge.⁹ Interpretivists and noninterpretivists usually qualify their definitions so that interpretation includes reference to such things as "structures and relationships"¹⁰ that are implicit in the institutions prescribed by the Constitution. Both sides usually agree, in effect, that interpretation can be based on principles that are nowhere specified in the document but only presupposed by constitutional prescriptions. Although the two camps disagree about constitutional doctrines and how to find them, their qualified views of constitutional interpretation share some common ground.

⁷ For the distinction between interpretivism and noninterpretivism, see Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975). For the parallel distinction between "originalism" and "nonoriginalism," see Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

⁸ For problems accruing to the distinction between interpretivism and noninterpretivism, see Dworkin, *supra* note 2, and Lyons, *supra* note 4.

⁹ On the interpretivist side, see, e.g., Bork, *supra* note 3, at 17; on the noninterpretivist side, see, e.g., Grey, *supra* note 7, at 706, n.9.

¹⁰ It has become a ritual to cite C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969), even though Black's strategy of interpretation is rarely used or discussed. An exception is found in Bork, *supra* note 3, at 17-35 (discussed at *infra* note 29).

Despite the disagreement and the uncertainty surrounding this area of convergence, the development should be welcome: it seems to express the realization that one can attribute doctrines to the Constitution not only because they leap off the document's surface but also because they derive from an understanding of the institutions it prescribes. In this respect, Ely's idea of working with a *theory* about the Constitution's overall character is not really novel at all.

Consider the following familiar example. Scholars routinely attribute to the Constitution a commitment to "majoritarianism" or "democracy." Some argue as a consequence that judicial review is a "deviant institution" in our system.¹¹ This clearly indicates a theory at work, for the so-called "counter-majoritarian difficulty"¹² assumes that majority rule (or something like it) is the overwhelming principle of the Constitution, even though the Constitution has never prescribed simple majoritarian democracy or even unrestricted representative government. Finding so strong a commitment to majoritarianism in the Constitution involves reading a good deal between (or beyond) the lines. It is to see the Constitution through the prism of a constitutional theory. To agonize then over the practice of judicial review is to take the theory¹³ very seriously.

II

SCRATCHING THE SURFACE OF "REPRESENTATIVE DEMOCRACY"

Ely deals with the opposing schools of thought about judicial review by accepting their self-caricatures. He disparages the crude interpretivist idea that the courts should read and apply the Constitution one piece at a time, as well as the crude noninterpretivist notion that courts should decide constitutional cases by applying values that have no grounding in the Constitution. He also finds it easy to escape between the horns of that artificial dilemma.¹⁴ He

¹¹ A. BICKEL, *THE LEAST DANGEROUS BRANCH* 18 (1962).

¹² *Id.* at 16.

¹³ I use the label "theory" without meaning to disparage. Theories are my stock in trade, and I have no argument with theory-mongers. But the particular theory that I have just mentioned is usually framed in simple-minded terms. Ely's theorizing appears, by comparison, to be sharp and well-developed, which is one reason why it merits our attention.

¹⁴ This is possible because the alternatives that are surveyed and criticized by Ely in chapters 2 ("clause-bound interpretivism") and 3 (the appeal to "fundamental values") do not exhaust the possible approaches to judicial review. By contrast, his formulation of the distinction between interpretivism and noninterpretivism in chapter 1 might be understood to exhaust the possibilities:

Today we are likely to call the contending sides "interpretivism" and "noninterpretivism"—the former indicating that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution, the latter the con-

proposes to interpret the Constitution by developing a theory about what it overwhelmingly prescribes. This theory generates his solution to the problem of judicial review.

Ely believes that courts should respect the Constitution's emphasis on "process" instead of "substance." He intends, as he says, "to fill in the Constitution's open texture."¹⁵ He asserts that the Constitution—including those provisions that are often regarded as limits on majoritarianism—must be understood as dedicated to a system of representative democracy. When properly used, these provisions do not hinder, but help to make it work. He describes the result as "a participation-oriented, representation-reinforcing approach to judicial review."¹⁶

According to Ely, the Constitution prescribes *participation* in two ways. The basic political processes are supposed to be participatory,¹⁷ and access to those processes, at least to some significant degree, guaranteed. That is the principal point behind constitutional protections for, say, speech and voting: they "must . . . be protected, strenuously so, because they are critical to the functioning of an open and effective democratic process."¹⁸

The Constitution's emphasis on "process" instead of "substance" has a negative aspect too: it prescribes "legitimate processes, not legitimate outcomes."¹⁹ Ely says:

The constitutionality of most distributions . . . cannot be determined simply by looking to see who ended up with what, but rather can be approached intelligibly only by attending to the process that brought about the distribution in question—by what Robert Nozick has called a "historical" (as opposed to an "end-result") approach.²⁰

trary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document.

J. ELY, *supra* note 1, at 1. For norms that are *not* discoverable "within the four corners of the document," that is, which are *not* "stated or clearly implicit in the written Constitution," might still be *attributable* to the Constitution. To complicate matters, Ely's formulation of the distinction would classify the mode of judicial review that he recommends as *noninterpretivist*, but because he bases his theory on an interpretation of the Constitution as a whole, he suggests that it "represents the ultimate interpretivism." *Id.* at 87-88. Unfortunately, this careless use of theoretical categories seems characteristic of contemporary constitutional theory.

¹⁵ J. ELY, *supra* note 1, at 73.

¹⁶ *Id.* at 87.

¹⁷ Presumably these processes are law making and administration by elected officials, which would be "participatory" in an attenuated sense insofar as the system relies on representation rather than direct democracy.

¹⁸ J. ELY, *supra* note 1, at 105.

¹⁹ *Id.* at 101 (quoting Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 254 (1975)).

²⁰ *Id.* at 136.

But the Constitution is not entirely indifferent to the end-results of political processes. According to Ely, the Constitution calls for "participation" in the *benefits* that result from governmental functioning.²¹

Ely's claim sounds odd; it can seem downright silly. For "participation" in benefits amounts to something like "enjoyment," whereas participation in decisionmaking means playing a part in the processes. "Participation" in benefits therefore seems connected to "participation" in decisionmaking processes only by a philosophical pun.

But Ely does not mean this as a joke. He connects the two modes of participation under ideas about representation that he attributes to the constitutional system,²² which I think must be understood as follows. The first type of participation works primarily through the electoral process—one of the processes which must always remain accessible. This process selects representatives who are together charged with the task of setting governmental policies and who collectively lie under a duty of representation. Ely holds that government should treat those who are ruled with "equal concern and respect."²³ This means, according to Ely, that government must take fully into account everyone's interests. In this way, those who are ruled are assured an appropriate measure of participation in the benefits that emerge from the processes of representative democracy.²⁴

Ely believes that this theory accounts for ideas underlying the original Constitution, but especially for the amended Constitution as it has come down to us. He believes that majority rule was originally expected to insure that government would serve the interests of those governed. But this places too much faith in "pluralism." We have learned that those who wield majoritarian power can systematically neglect the interests of others.

We have learned, therefore, that formal access to the political process can be open, while genuine access to its "bounty"²⁵ is restricted. And so, for example, Ely concludes that, within the context of our system and its history, "equal protection" should be understood as insuring access to the products of the process. This puts

²¹ *Id.* at 87.

²² *See id.* at 77-88. Ely applies these ideas to the government as a whole rather than to individual representatives.

²³ *Id.* at 82 (quoting R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 180 (1977)).

²⁴ Ely claims to be following Dworkin here, but I think Dworkin would object that Ely's failure to discount "external" preferences violates the requirement that all be treated with equal concern and respect. *See* R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 234-39 (1977).

²⁵ J. ELY, *supra* note 1, at 74.

the general theory to work clarifying unclear aspects of the Constitution.

Ely accepts that "equal protection" does not confer on everyone rights to equal shares in the benefits of representative government. "Equal protection" means, rather, that we have rights to genuine representation of our interests in the government's deliberations. The political process may not neglect one's interests when distributing benefits.

III

SUBSTANCE, PROCESS, AND OUTCOME IN REPRESENTATIVE DEMOCRACY

I want now to comment on some aspects of Ely's theory. I intend to suggest how much more is required to develop a theory of the Constitution.

Ely's use of the distinction between "process" and "substance" has attracted much criticism.²⁶ Laurence Tribe argues, for example, that "much of our constitutional history" turns on "substantive" concerns about religious freedom, slavery, and private property.²⁷ In other words, Ely exaggerates how much the Constitution emphasizes "process."

This is an important point. Ely's approach assumes that unclear aspects of the Constitution may be interpreted by making them serve the constitutionally prescribed processes. But, insofar as the Constitution is committed to "substantive" (that is, *nonprocess*) values, these values might equally provide a basis for its interpretation.

It would certainly seem to make a difference whether or not one adopts Ely's approach to constitutional interpretation. Take, for example, the first amendment's statement that "Congress shall make no law . . . abridging the freedom of speech."²⁸ Arguably, the words "the freedom of speech" refer to a limited class of speech that is immune to congressional interference. Ely's approach would support this line of reasoning, and it might lead us to a very narrow conception of constitutionally protected speech.²⁹ It would limit

²⁶ Some of this reflects a failure to read Ely carefully. See *id.* at 75 (terminological note).

²⁷ Tribe, *supra* note 2, at 1067.

²⁸ U.S. CONST. amend. I.

²⁹ Bork construes the constitutional protections for speech by interpreting the first amendment in terms of what speech would be required to make the system of "Madisonian democracy" work (which he claims would be strictly "political" speech that advocates nothing unlawful). Bork, *supra* note 3, at 17-35. Bork's argument appears, in effect, to apply Black's strategy for deriving unspecified rights from an understanding of the institutions that the Constitution prescribes. See generally C. BLACK, *supra* note 10. By ignoring the difference that having a first amendment makes, and restricting the scope

speech to just that needed to make the political processes work properly, and no more.

It is unclear just how much speech this would include. Perhaps the institutions of representative democracy will not function as they should unless protections for speech are very broad and strong.³⁰ In any case, if we believed that the Constitution is dedicated to the service of some "substantive" values, we could not assume that the Constitution *limits* protections for speech to what the political processes need to work.

Some critics argue, then, that Ely exaggerates the Constitution's emphasis on "process." I mention this point in order to distinguish it from a different objection, which might be put as follows: In order to interpret the Constitution, including the parts that emphasize "process," one must inevitably have recourse to "substantive" values.³¹ This argument is independent of the claim that the Constitution emphasizes some "substantive" values. Tribe's point here is that courts seeking to clarify what *processes* the Constitution prescribes will need guidance from the "substantive" values that those processes are supposed to serve.³²

This point needs explanation and defense. Tribe seems simply to assume that the processes prescribed by the Constitution have no value of their own and must instead serve some independent, "substantive" values.³³

Our understanding of the issue is hindered by Ely's choice of terms. His distinction between "process" and "substance" is ill-conceived: "process" should be contrasted, not with "substance," but with *outcome*. There is considerable evidence that this is, in fact, what Ely has in mind. The following passage is worth repeating:

The constitutionality of most distributions . . . cannot be determined simply by looking to see who ended up with what, but rather can be approached intelligibly only by attending to the process that brought about the distribution in question—by what Robert Nozick has called a "historical" (as opposed to an "end-result") approach.³⁴

of a specified right to that of a derived right, instead of adding the latter to the former, Bork's interpretation of the first amendment turns Black's suggestion on its head.

³⁰ Bork does not even consider this possibility. See Bork, *supra* note 3.

³¹ See Tribe, *supra* note 2, at 1069-72.

³² *Id.*

³³ When making this point during the lecture I suggested in passing that the same applies to Dworkin, but in reviewing the materials while preparing these notes I have discovered that I was mistaken. Dworkin argues that a conception of democracy that is capable of serving the needs of constitutional adjudication requires an "outcome," non-process-based, defense. Dworkin, *supra* note 2, at 500-16.

³⁴ J. ELY, *supra* note 1, at 136; see R. NOZICK, ANARCHY, STATE, AND UTOPIA 150-82 (1974).

The Constitution prescribes a certain kind of process, but it does not prescribe how to distribute the products of the process. Ely's point is that the Constitution emphasizes "process" as opposed to outcome. So it might seem that he could meet the second objection simply by refining his terminology.

But the basic issue is not terminological. The question is whether to understand representative democracy on the model of Nozick's "historical" conception of justice. Following Nozick, Ely characterizes the political processes of representative democracy that are prescribed by the Constitution as "legitimate."³⁵ He appears to mean, as he occasionally says, that the processes are supposed to be fair, and that *the fairness of those processes makes the outcomes fair or legitimate too*—not the other way around.³⁶

Is that correct? What in the overall design of a representative political system produces fairness? Is fairness process-based, or outcome-based, or some combination of the two?

Let me clarify the alternatives. One might suppose (at least as a first approximation) that a criminal procedure is fair *because* it reliably distinguishes the guilty from the innocent and identifies them correctly. If so, then a process can be fair because it tends to produce a valued outcome that one can, in principle, identify independent of the process.

By contrast, a lottery's fairness is not a function of its outcome, except in a negative way: in order to reach an impartial result it must *not* be rigged. We cannot judge the fairness of a lottery's outcome independently of the lottery itself. A fair lottery, then, exemplifies what John Rawls labels "pure procedural justice."³⁷

The question that we face—a familiar question within political theory—is whether representative government is desirable because of its tendency to produce valued results (such as service of the interests of all those who are governed, which might conceivably be done in some other way), or rather because of the values that inhere in or that are served directly by the basic processes of representative democracy (values that we might not be able to serve in any other way). A satisfactory answer might, of course, involve some combination of the two possibilities.

By following Nozick, Ely suggests that one will find the virtues

³⁵ J. ELY, *supra* note 1, at 101.

³⁶ *Id.* at 102-03.

³⁷ J. RAWLS, *A THEORY OF JUSTICE* 86 (1971). Procedures that presuppose independent criteria of justice for evaluating outcomes might exemplify either "perfect procedural justice" (when they are guaranteed to achieve results that are independently valued) or "imperfect procedural justice" (when they are reliable means to results that are independently valued, but cannot guarantee such results).

of representative democracy in its processes themselves. Nozick holds that the justice of distributions depends entirely on the "legitimacy" of "transactions."³⁸ He means that the outcome's justice depends entirely on the character of the process. In drawing the analogy with Nozick's "historical" conception of justice, therefore, Ely suggests that representative democracy is valuable, not because of its tendency to promote independent values, but simply because of its inherent fairness. Thus, Ely appears to reject any instrumental valuation of representative democracy, but he provides no reason for his rejection.

A more general problem remains. Most constitutional scholars seem to believe, in effect, that a theory concerning the character of constitutional institutions must guide an interpretation of the Constitution itself. But these scholars usually limit their general theories to simple talk about "democracy" or "majoritarianism." They fail to explain what that means, in part because they do not address the question of what values a constitutional system like ours should serve.

Ely's analysis of the idea that the Constitution stands for representative democracy is, by comparison, complex, but he stops the analysis prematurely. He says, in effect, that we must understand the Constitution in terms of the political principles that its institutional prescriptions presuppose. My present point is that the principles of representative democracy themselves require clarification, and that the results will affect the way we understand unclear aspects of the Constitution.

Ely's strategy for interpreting the Constitution is to be guided by the political principles for which it stands—the principles of representative democracy. This suggests a general approach to interpretation, that is, one that refers to more fundamental values. This general approach implies that we should interpret the principles of representative democracy, in turn, by reference to the more basic values that they serve.

This would hold even if representative democracy were understood as an instance of pure procedural justice. The point is that the reasons for regarding representative democracy as a good thing are neither obvious nor uncontroversial. It is unclear whether the processes of representative democracy are supposed to be inherently fair, so that whatever comes out of them is morally acceptable, or whether they are useful means to some independent ends. We need to understand what values representative democracy serves

³⁸ R. NOZICK, *supra* note 34, at 150-82.

and how its processes serve them.³⁹ Only then can we interpret unclear aspects of the Constitution so that those values will be served. And only then can we determine the relation between judicial review and the principles of representative democracy.

Let me reinforce the suggestion that there is need for further inquiry. Supposing that representative government, as such, is inherently fair and justifiable on the basis of its intrinsic merits is implausible for two reasons. First, as a species of democracy, representative democracy seems but a "second-best," compromise arrangement—more feasible than, but in principle inferior to, direct, participatory democracy. Second, one might limit simple majoritarian democracy in order to protect or serve independent values that simple majoritarianism threatens. It is often observed, for example, that the Constitution appears to provide special protections for private property. To suppose that such provisions might be justified is not to assume that they serve the values that underlie representative democracy.

The system that we have inherited is neither unrestricted representative government nor simple democracy with restrictions. It is a restricted form of representative government. To complicate matters, the Constitution has been amended in ways that appear to intensify its commitment to democracy. If we wish to interpret the unclear aspects of the Constitution by reference to the theory of government that underlies it, then we will have to figure out how best to understand that theory. I have suggested that we understand the theory by reference to the values that such a form of government serves.

This will appear obvious to some and subversive to others. But if it is legitimate to understand the Constitution by reference to principles that are not specified by it—a proposition with which everyone seems to agree, including the so-called "interpretivists"⁴⁰—then it is arbitrary and self-defeating to stop the inquiry at the first level of analysis, as Ely and others do.

I can suggest one reason why the analysis stops. Along with many other legal scholars, Ely is uncomfortable with the idea that constitutional interpretation might depend upon judgments about *value*. It is conventional wisdom that the Constitution stands for something like "representative democracy." This idea is so uncontroversial, however, that it may not seem like interpretation at all and, given the prevailing attitudes among legal theorists towards "value judgments," the point is so conventionally acceptable that it

³⁹ For some suggestions on the values of representative democracy, see J. PENNOCK, *DEMOCRATIC POLITICAL THEORY* 3-15 (1979), and Dworkin, *supra* note 2.

⁴⁰ See Lyons, *supra* note 4, at 89.

may not seem to involve any kind of "value judgment." Furthermore, most of those who engage in constitutional theory do not question the moral legitimacy of either representative democracy or the American constitutional system. Thus, even normative constitutional theory develops without seeming to need any normative premises. Furthermore, the legacy of moral skepticism within American jurisprudence discourages one from venturing further—from inquiring into the values that underlie representative democracy. The theoretical inquiry is thus inhibited. The result is an abortive exercise in constitutional theory.

IV

FAIRNESS IN THE "POLITICAL MARKET"

I have just commented on the question whether one should value representative democracy for itself or for its instrumental use. I will now consider the problem of what properties the political processes of representative democracy must have in order to be fair.

Ely appears to embrace two different models. I have mentioned his suggestion that the government has a duty of representation which requires that it keep access open to the benefits produced by the political processes, as well as to the processes themselves. The former condition appears satisfied, on Ely's view, so long as the government takes each person's interests fully into account. The following passage suggests his other model:

The approach to constitutional adjudication recommended here is akin to what might be called an "antitrust" as opposed to a "regulatory" orientation to economic affairs—rather than dictate substantive results it intervenes only when the "market," in our case the political market, is systemically malfunctioning.⁴¹

He continues, "A referee analogy is also not far off: the referee is to intervene only when one team is gaining *unfair advantage*, not because the 'wrong' team has scored."⁴² This model reflects more than the first the idea that representative democracy comprises certain processes. It also follows more closely Nozick's use of the market analogy in developing his "historical" conception of justice. But this model generates important, difficult questions: for example, what constitutes a systemic malfunction of the political "market"? When do participants in the political "market" enjoy unfair advantage or suffer unfair disadvantage? Ely does not explicitly address such questions.

Although Ely employs the market analogy, he does not pursue

⁴¹ J. ELY, *supra* note 1, at 102-03 (footnote omitted).

⁴² *Id.* at 103 (emphasis added).

it far. Here, too, he follows Nozick's unfortunate example. Nozick's theory of justice underestimates the difficulty of describing the essential features of a process whose outcomes are morally acceptable, regardless of how benefits and burdens are distributed as a consequence. Nozick suggests, for example, that an economic transaction is "legitimate" so long as the parties to it are not subject to force or fraud.⁴³

That seems inadequate for at least two reasons. It ignores the problem of "externalities"—the fact that private agreements can have effects upon third parties that *impermissibly* violate their rights. Furthermore, it adopts an overly simple conception of market fairness. Nozick's formula ignores, for instance, the relative positions of the participants; economic exchanges cannot be considered fair—so that all their results are morally acceptable—when one of the parties controls the market and can dictate terms with impunity.⁴⁴

This last illustration suggests that the theory of representative democracy should be concerned with the effects of power centers on the fairness of the political process. Concentrations of political, as well as economic, power tend to limit the fairness of the respective "markets." Our British friends from "Beyond the Fringe" made a relevant point when they compared political parties on the two sides of the Atlantic: they observed that whereas our Republican Party corresponds to their Conservative Party, our Democratic Party corresponds to their Conservative Party.⁴⁵

Does our two-party system limit options in a way that undermines the fairness of the political "market"? If constitutional theory is to use the market metaphor, it must recognize the need to answer such a question.

One possible defense of a two-party system is worth mentioning now. One might argue that participants have plenty of choices, at several levels, and that the electorate is not limited to choosing between Tweedledum and Tweedledee:

After all (we might be told), we are free to work for a wider and more agreeable range of options—by forming new coalitions, for example. If the two-party system is stable, that is because so many are content with the range and quality of choices that it offers. And if people do not take advantage of the political opportunities, it is not because they are unable to do so. Rather, it is because—

⁴³ R. Nozick, *supra* note 34, at 150-82.

⁴⁴ Such a market would not be competitive, but prohibiting force and fraud in transactions does not guarantee competitiveness. In any case, a competitive and fair market is difficult to define. In addition, the interaction between fairness and competitiveness is unclear and determining what differences in resources or other conditions create unfairness in a market is difficult.

⁴⁵ *Beyond the Fringe* (Capital Records, Inc. 1962).

for one reason or another (such as the assignment of a low priority to the issue)—they simply choose not to.

I shall not now pursue this particular question further. Instead I will take up a parallel problem with which Ely deals—the question of whether sex discrimination should be considered an equal protection issue.

In Ely's terms, the question is whether women's access is blocked to the political processes or to the politically generated benefits. His answer is no. Although "access was blocked in the past," he says, it "can't responsibly be said to be so any longer."⁴⁶ He sums up the point as follows:

[I]f women don't protect themselves from sex discrimination in the future, it won't be because they can't. It will rather be because for one reason or another—substantive disagreement or more likely the assignment of a low priority to the issue—they don't choose to. Many of us may condemn such a choice as benighted on the merits, but that is not a constitutional argument.⁴⁷

Ely's treatment of this issue merits close scrutiny for a variety of reasons. I will focus, however, only on ways in which the problem reflects the need for further development of the theory of representative democracy.

A momentary return to the economic model may be helpful. Our understanding and appraisal of "free" markets appear to assume that participants have appropriate attitudes. They seem to assume, for example, a willingness, perhaps an inclination, to compete. Without such dispositions, those who must rely on markets to secure their shares of basic goods will do comparatively badly.

It would be a mistake, I think, to claim that noncompetitive individuals use the market to pursue their interests just like everyone else because one of the interests they serve is an aversion to competition. The problem is that, within a market context, competitive attitudes are not simply interests equal to others, but are keys to the benefits that one can obtain from the process.

Suppose, now, that some who must rely upon an economic market for their needs have been subjected, against their wills, to psychological conditioning which insures that they have an aversion to competition, a lack of confidence in their abilities to compete, or simply a tendency to defer to the perceived needs of others. Imagine, in other words, that some have been forced to become losers in a competitive context. Such conditioning would block their access

⁴⁶ J. ELY, *supra* note 1, at 169.

⁴⁷ *Id.* at 169-70.

to the benefits of the process. Does that violate the requirements of a fair market? I am inclined to think that it does.

We can apply this analysis to Ely's discussion of women. His point is that if women do not protect themselves from sex discrimination, their inaction simply reflects the women's choice. It will not reflect a fault in the political market. As with conditioned losers in the *economic* market, however, one may argue that the fairness of the *political* market presupposes that participants have comparable competitive dispositions. Although the analogy is not perfect,⁴⁸ it does suggest that Ely's argument is unsound.

We have insufficient knowledge of the psychological and social mechanisms to allow unqualified judgments here, but I suspect that there are grounds for thinking that the socialization of women typically results in a competitive disadvantage in the political as well as the economic market. If so, then the presuppositions of a fair political market are apparently unsatisfied.

I have just scratched the surface of this issue. But my point is that one cannot appreciate the need for further inquiry unless one addresses the question: What makes a political process fair?

V

THEORIES OF THE CONSTITUTION

I will conclude with some comments on a question that is at once one of the more general, more difficult, and most neglected in this area. It may be formulated as follows: What relation must a theory have *to* the Constitution if it is to be a theory *of* the Constitution?

As more than one type of theory is possible, I should try to clarify this question by referring to the function of such a theory.⁴⁹ I have in mind a theory that is meant to guide interpretation of the Constitution and, consequently, the disposition of constitutional cases.

It is tempting to begin by distinguishing between theories that attempt to explain and those that seek to justify. The problem with such an approach, however, is that some of the same factors are likely to play a role in both types of theory. For example, any plausi-

⁴⁸ I imagined in the original example that some persons were subjected against their wills to conditioning of the sort that, in real life, women may typically be subjected to from infancy. We would not perhaps think of infants and small children as being subjected to conditioning "against their wills" when such attitudes and dispositions are inculcated, but the parallels appear morally relevant.

⁴⁹ One question I do not consider is what "the Constitution" encompasses, that is, whether it includes authoritative and standard judicial interpretations of the Constitution, regardless of their soundness.

ble explanation of how the Constitution evolved will very likely refer to the influence of certain political convictions, and theories that provide plausible justifications for the adoption or maintenance of the same Constitution will likely assume the soundness of these convictions.

Consider, for example, the principle that legislators and administrators should be "accountable" to a broad, popular electorate. One may plausibly suppose that part of the explanation for having a Constitution seemingly committed to that principle is the conviction of those who helped shape the Constitution that the entrenchment of such a principle is necessary if the Constitution is to be justifiable. Thus, the principle is likely to play a role in theories that explain how we came to have this Constitution. Similarly, insofar as the relevant convictions are sound, the principle of electoral accountability of officials will help to justify a Constitution that respects it. I suspect that this overlap of explanatory and normative theories encourages the tendency to consider "original intent" when theorizing about the Constitution and to assume that such factors have a proper place in normative theories of judicial review.⁵⁰ In any case, any theory meant to guide interpretation of the Constitution seems to seek justifiable decisions.

One approach to theorizing about the Constitution begins platonically by asserting that the Constitution must be taken as a "given,"⁵¹ but goes on to assume that interpretation must be purely historical and linguistic and, most importantly, purely value-free. One might typically defend this approach in part as follows:

When judges are called upon to interpret the Constitution, their job is to figure out what, in fact, it means. They must consider the actual text, the original intentions that informed that text, and subsequent history. The task of interpretation is often formidable, but the difficulties do not license judges to undertake a different inquiry entirely—to base interpretations on a different constitution, one that they would prefer us to have. Their job is to apply that Constitution which, for better or worse, we actually do have.

This argument assumes, of course, that constitutional interpretation can be purely linguistic and historical, purely value-free.

Conversely, some contend that value-free interpretation is impossible. One commonplace but irrelevant argument to this effect is the claim that we cannot avoid being influenced by our values when we make difficult judgments that have politically significant consequences, as often happens in constitutional interpretation. That is a

⁵⁰ For a criticism of this assumption, see Lyons, *supra* note 4, at 75-82.

⁵¹ See, e.g., Bork, *supra* note 3, at 3.

psychological claim. It does not show that value-laden interpretation is preferable, and it ignores the corrective mechanisms within a social process like constitutional interpretation.

A different argument contends that supposedly value-free linguistic and historical methods of interpretation unavoidably generate alternative interpretations, and that only an appeal to political principles will provide a justified choice between these competing interpretations.

Ronald Dworkin has persuasively argued, for example, that reference to "original intent" is inherently ambiguous,⁵² and that only an appeal to principles of political morality can eliminate such ambiguity.⁵³ But the second point needs to be shown; the former point does not entail the latter. It is plausible to suppose that political principles have an essential role to play in this context, but I have seen no argument establishing that political principles alone can provide a rational basis for selecting between alternative interpretations of a constitutional document.

Paul Brest once suggested a reason for having recourse to political principles: he suggested that an overriding mission of constitutional theory is to establish the "authority" of the Constitution.⁵⁴ But he did not explain what kind of authority he had in mind, or why constitutional theory should try to secure it. And he seems, paradoxically, to have invoked the need to establish the authority of the Constitution as a reason, not for interpreting the Constitution, but for invoking values that he thought could *not* be attributed to the Constitution. Brest's suggestion goes off course.

But we can, I think, reconstruct what Brest and others might have had in mind. The following may simply express what is often assumed. I have yet to see the argument developed, though it is obviously needed.

Constitutional adjudication regulates activities within our political system. Like legal decisions generally, constitutional decisions require justification, and, insofar as constitutional interpretation makes a difference to decisions, it requires justification too.

By "justification" I mean the following. Many of the normal, routine activities of law, as well as its enforcement mechanisms, involve practices that clearly require justification. People who act in the name of the law do things which would require justification if they were *not* done in the name of the law—they use coercion and force, they kill and maim, they deprive people of liberty and valued goods. The mere fact that something is done in the name of the law

⁵² See, e.g., Dworkin, *supra* note 2, at 471-500.

⁵³ *Id.*

⁵⁴ Brest, *supra* note 7, at 224-38.

does not automatically confer on that activity any measure of justification. The conclusion I draw is that judicial decisions, like other things, stand in need of full-fledged moral justification.⁵⁵

This suggests—although it does not yet entail—that interpretation of law generally, and of the Constitution in particular, should *not* be value-free, but should be conducted *so as to promote* the full-fledged moral justification of the decisions that turn upon such interpretations. This can be done if—and I suspect only if—one selects between competing interpretations so as to render the resulting decisions justifiable, as far as that is possible.

Such choices will be a complex matter, because acts done in the name of the law, like acts within complex institutions generally, can be justified in a variety of ways—on their own merits or on the merits of the law or of the system of law that requires them (or some combination thereof). So the interpretation of a specific decision presupposes a normative conception of the laws under which the decision is made.

If we call those conceptions “theories,” then we have at least the sketch (although as yet no more than a sketch) of an argument to the effect that a theory of the Constitution should be related to the Constitution in a certain way, that is, so as to render the Constitution justifiable.

I believe this idea accords with a good deal of the practice of legal and specifically constitutional interpretation. I also believe it is consistent with the idea that constitutional theory should regard the Constitution as a “given.” This approach assumes in part a stringent judicial obligation of fidelity to the law, and specifically to the Constitution. It also assumes, somewhat independently, the justifiability of the Constitution and the political system that grew up under it, all things considered.

It is important to emphasize that the assumption of justifiability is not trivial. For at least half of the life of the Constitution (perhaps much longer), there have been obvious grounds for skepticism about its justifiability, even though most of those engaged in its administration may have had no more doubts about it than their counterparts do now.⁵⁶

That leads me to express a qualm about the idea I have been

⁵⁵ See Lyons, *supra* note 4; Lyons, *Derivability, Defensibility, and the Justification of Judicial Decisions*, 68 *MONIST* 325 (1985). A similar point is suggested in R. DWORKIN, *LAW'S EMPIRE* 93-108 (1986), which I discuss in *Reconstructing Legal Theory*, forthcoming in *PHIL. & PUB. AFF.*

⁵⁶ Conventional wisdom only allows doubts about the justifiability of the Constitution in the past tense. This accompanies the complacent thinking that characterizes a system as “representative democracy” even though it disenfranchises the vast majority of adults.

suggesting, namely, that interpretational theories should construe the Constitution so that it is justifiable, if that is possible.

Interpretation of the law proceeds within a variety of contexts. Some interpretations are rendered by people who are empowered to provide authoritative readings and applications of the law. Thus far I have developed my argument with their activities in mind. But interpretations are rendered for other reasons too—the most important for present purposes being the appraisal of the law.

I see no reason, either in logic or experience, for someone who is critically evaluating the law to give it the benefit of the doubt. It is incumbent on the critic to judge the law for what it is. Failure to do so constitutes not merely an intellectual but also, I think, a moral fault. It is, for example, a failure to take the side of those who suffer injustice or at least to acknowledge the injustice, and experience indicates that such failures occur for reasons we do not like to admit.

This suggests that interpretations rendered by critics who are doing their jobs well may diverge from interpretations rendered by judges who are doing *their* jobs well. What I have said so far implies, I think, that judges who do their jobs well interpret the law so that it literally becomes better than it otherwise would be. But those judges may not dominate the system. If they do not, then the law may unfortunately evolve in the direction of unsound interpretations. So an honest critic could not always base an accurate picture of the law on the practice of its best interpreters, especially if she had sufficient reason to expect contrary interpretations to dominate adjudication.

Another problem is that this approach to legal and specifically constitutional interpretation is motivated by moral, not purely intellectual, considerations. I have not suggested that morality requires *mis*interpretation of the law. But neither do I believe it has been shown, or that we can assume, that the approach to interpretation I have advocated yields interpretations that are *truer* to the Constitution than the alternatives. The question remains open.⁵⁷

⁵⁷ These concluding reflections proved provocative, and they elicited some vigorous questions after the lecture—questions I cannot adequately answer here, if I can answer them at all. For now it may be helpful if I amplify the concluding point. Dworkin argues that sound legal interpretation, like interpretation in general, shows law in the best light possible. R. DWORKIN, *supra* note 55, at 45-68. I am unpersuaded. See Lyons, *Reconstructing Legal Theory*, *supra* note 55. In the lecture I suggested that we should welcome interpretations that put the law in a morally good light. Decisions based on such interpretations might be morally desirable, but it does not follow that such interpretations are legally sound, or sounder than possible alternatives. (It is worth emphasizing that the best theory of interpretation—whatever it may turn out to be—need not provide a determinate interpretation of the law in all cases, especially when there are good moral reasons for welcoming a particular interpretation. This is not invalidly to infer indeterminacy from unclarity, but only to recognize that certain kinds of indeterminacy are

possible.) One may object that I have not identified any plausible alternative to the theory of interpretation that would read the law in the best light possible. I concede the point, but suggest that inferring from that the soundness of Dworkin's approach to interpretation is premature. I am by no means skeptical about the possibility of there being a best (or soundest) theory of legal interpretation, but I am not persuaded that I have already seen that theory.