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Citation: 56 N.Y.U. L. Rev. 1981

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Tue Mar 24 14:12:34 2009

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DEMOCRACY AND THE RIGHT TO BE DIFFERENT

JOHN HART ELY*

Professor Ely recognizes that although a theory based on Carolene Products premises provides a way to protect minorities from discriminatory treatment, it does not protect a general right not to conform. Nor can that right be protected under, for example, the tenth amendment by arguing that decisions with merely individual consequences should be made individually, for Professor Ely argues that the very fact of state intervention in a decision means that the decision affects someone other than the individual. An inability constitutionally to protect the right to be different may be frustrating, but ultimately is not troubling since it is a right that will generally be invoked by people who do not really need protection from the political process.

Most of what I have to say about “Constitutional Adjudication and Democratic Theory” I said in *Democracy and Distrust*.¹ Most of the criticisms that have appeared so far—at least those that address arguments I actually made—were anticipated in the book, and I won’t bore the reader by restating the debate from my perspective.

I do want to spend a moment, however, on one particular style of response because it has been so recurrent, appearing in the reactions of commentators as diverse as Robert Bork, Paul Brest, Archibald Cox, and Mark Tushnet. The general form of the response is this: “Ely’s theory is indeterminate to the point of virtual uselessness because *Carolene Products* premises could be used, in a way I am about to demonstrate, to generate conclusion X (which conclusion is either absurd or one that on other grounds we know or assume Ely would reject).”²

*Ralph S. Tyler, Jr., Professor of Constitutional Law, Harvard University. © 1981 by John Hart Ely.

¹ J. Ely, *Democracy and Distrust* (1980).

² See, e.g., Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 Wash. U.L.Q. 695, 700 (“Representation-reinforcement could take us back to *Lochner*”); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 Yale L.J. 1037, 1055 n.74 (1980) (same suggestion); Brest, *The Substance of Process*, 42 Ohio St. L.J. 130, 137-38 (1981) (laws prohibiting sodomy and marijuana use and prescribing school dress codes are indistinguishable in principle from suspect “we-they” classifications); Cox, Book Review, 94 Harv. L. Rev. 700, 710-11 (1981), sketches an “Ely-ish attack upon the Hyde Amendment.” (I’m not sure I get to choose, but I much prefer “Elysian.” See Leedes, Book Review, 59 N.C.L. Rev. 628 (1981).) Cox’s rendition seems somewhat beside the point, since I had in the book (and previously) excoriated *Harris v. McCrae*’s predecessor, *Maher v. Roe*. See J. Ely, supra note 1, at 162, 246 n.38, 248-49 n.53. He goes on to suggest, however, that *Carolene Products* premises might be used to defend even *Roe v. Wade*, of which, he correctly notes, I was quite critical. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973). For an alternative answer to Cox’s argument, see Lupu, Book Review, 15 Harv. C.R.-C.L.L. Rev. 779, 794 (1981).

In fact I was aware that the *Carolene Products* premises I defended in Chapter 4 could be elaborated in various ways: that's why I wrote Chapters 5 and 6. I was also aware that the general case the critics variously pose, the law that does not classify but nonetheless by prohibiting a defined act bears most harshly on a particular minority, is related in some ways to those covered by the theory I elaborated. However, for reasons indicated in the book, I was unable in the abstract to make constitutional sense of the notion that discrete and insular minorities deserve special protection and therefore was forced to restrict my theory (in the absence of unconstitutional motivation) to laws that classify, specifically those that do so on the basis of the self-aggrandizing, other-denigrating generalizations of politically dominant classes.³

It would certainly be fair to counter my argument by attempting to demonstrate that the three paragraphs of the *Carolene Products* footnote in fact do not exhaust the set of appropriate constitutional premises for our courts: indeed, the possibility of this sort of argument is the main subject of this paper. It would also be fair to criticize the particular ways in which I elaborated those premises in Chapters 5 and 6, if possible by suggesting an alternative elaboration that remains principled—by which I mean that it stops short of proving everything—but nonetheless generates results more to the critic's liking.⁴ What seem beside any point I made are demonstrations that the premises with which I began, *Carolene Products* premises, might be elaborated in unprincipled ways.

³ See, e.g., passage quoted in note 5 *infra*. The temptation to apply my approach to laws that do not classify but rather, say, simply prohibit a defined act, seems related to another confusion, that I think the world is divided into "we"s and "they"s, from which metaphysical view I suppose it might follow—but see J. Ely, *supra* note 1, at 152-53—that courts should specially scrutinize any law of any shape that bears harshly on (a high percentage of?) "they"s. See Tushnet, *supra* note 2, at 1053 n.69; Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *Yale L.J.* 1063, 1074 (1980). In fact I confess utter inability to tell a "we" from a "they" outside the context of a particular classification: the abstract question "Which am I?" would strike me as utterly baffling no matter who asked it. See generally J. Ely, *supra* note 1, ch. 6; see also Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 *U. Chi. L. Rev.* 723, 733 n.44 (1974):

By speaking in we-they terms, I am not suggesting the existence of permanent "have" and "have not" classes with respect to legislative power. The majority with respect to a given issue comprises an amalgam of various interest groups, which may array themselves quite differently on other issues. . . . My suggestion is rather that there will be occasions on which a majority of the decision making body belongs to the class that is comparatively advantaged (or, as in the *DeFunis* situation, disadvantaged) by the distinction it has drawn. It makes no sense in terms of the analysis here proposed to talk of "we"s and "they"s without reference to the classification in issue.

⁴ My criticism of Herbert Wechsler (or, more accurately, of a view often attributed to him) was not that the search for "neutral principles" is misguided—my book obviously constitutes

I share a certain frustration with the book, however, one I suspect may be fueling much of the criticism. A *Carolene Products* approach is well designed to protect minorities from discriminatory treatment, but it makes no move whatever in the direction of protecting—except to the extent specific provisions of the Constitution (and therefore paragraph one of the *Carolene Products* footnote) protect various aspects of it—the right not to conform, that is, the right to be different.⁵

such a search—but rather that the “neutral principles” formula does not provide the premises from which any such search must begin. See J. Ely, *supra* note 1, at 54-55.

Neither was I so benighted as to suppose that specific elaborations of my *Carolene Products* premises would somehow flow from “the true meaning of democracy.” (I think there is an important connection between democracy and utilitarianism, but at least at present cannot see how recognizing that connection helps significantly to specify the former concept. See Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 *Ind. L.J.* 399, 407-08 (1978).) Throughout my discussion there obviously recurs the assumption that participation is not to be restricted without what the Court is prepared to agree is a very good reason for doing so. That presumption certainly tracks the development of our constitutional document over the two centuries since it was originally adopted, but just as certainly the answer to what should in a given context count as a very good reason is not something that will flow from a simple recognition that this is a democracy.

I certainly made the argument that proceeding from *Carolene Products* premises rather than others would significantly minimize the “countermajoritarian difficulty.” Once it is established that a court is properly seized of an issue, however, the book is quite clear that the sort of exercise Wechsler has in mind will be necessary before anything like “reflective equilibrium” can possibly be reached. See, e.g., J. Ely, *supra* note 1, at 120-25.

⁵ For a separate reason—and, frankly, to me this is much more frustrating—the poor will not be significantly helped by the approach developed in my book. The claims of poor people to certain minimum benefits do not involve the subject of this paper, the right to act in some nonconforming way, but rather the claims of a minority to more nearly equal status with the rest of us. They therefore raise problems within the compass of *Carolene Products*, albeit problems I was not able to work out in any principled way because of the lack of a governmental classification to which to pitch the analysis:

Laws that actually classify on the basis of wealth, drawing on some comparative generalization about the relative characteristics of the poor on the one hand and those who more nearly resemble the legislators on the other, are extremely rare. (Actually, there was such a case of *de jure* discrimination within recent memory, and the Court upheld the legislation!) What typically disadvantage the poor are various failures on the part of the government (or anybody else) to alleviate their poverty by providing one or another good or service. Now it is true that in order to merit suspicion a law need not necessarily discriminate explicitly against a disfavored group: that was the point of the earlier discussion of motivation. However, failures to provide the poor with one or another good or service, insensitive as they may often seem to some of us, do not generally result from a sadistic desire to keep the miserable in their state of misery, or a stereotypical generalization about their characteristics, but rather from a reluctance to raise the taxes needed to support such expenditures—and at all events they will be susceptible to immediate translation into such constitutionally innocent terms. A theory of suspicious classification will thus be of only occasional assistance to the poor, since their problems are not often problems of classification to begin with.

J. Ely, *supra* note 1, at 162 (footnotes omitted). That, however, may just be a failure of analysis on my part: the premises from which I start are surely not wholly irrelevant. Cf. Michelman,

In fact, outside the areas of political and religious freedom, the various specific provisions of the Constitution evince little concern with this sort of interest. On the other hand, James Fleming is surely right in noting that the syntax of the privileges or immunities clause⁶ and the ninth amendment is most naturally that of substantive entitlement.⁷ In the end I don't think this observation fatal—it does no violence to these provisions to read them as I believe they ultimately must be read, as protecting rights of participation in the processes and outputs of representative government—but at least in combination with the libertarian instincts many of us share it makes the effort seem worth a try.

Of course every case involves a potential “liberty” claim, and thus some limiting strategy is needed, some way of telling which constitutionally unstated “liberties” are to receive constitutional protection and which are not. In his review of *Democracy and Distrust* James O'Fallon sketches the beginnings of a strategy that he correctly indicates was not among those criticized in the book, one that takes off from Ronald Dworkin's distinction between “‘personal preferences,’ regarding the assignment of goods or opportunities to oneself, and ‘external preferences,’ one's views as to how such advantages ought to be granted or denied to others.”⁸ Dworkin admits that this distinction will be of limited practical significance: “democracy cannot discriminate, within the overall preferences imperfectly revealed by voting, distinct personal and external components, so as to provide a method of enforcing the former while ignoring the latter.”⁹ This would not be true, however, of a case in which the regulation in question was necessarily instituted on the basis of wholly external preferences,¹⁰ that is, a case involving the regulation of what John Stuart Mill called self-regarding conduct.¹¹

Welfare Rights in a Constitutional Democracy, 1979 Wash. U.L.Q. 659. The subject of this paper, by contrast, is not even within the premises.

⁶ U.S. Const. amend. XIV, § 1.

⁷ Fleming, *A Critique of John Hart Ely's Quest for the Ultimate Constitutional Interpretivism of Representative Democracy* (Nov. 21, 1980) (paper delivered at Annual Meeting of Northeast Political Science Ass'n).

⁸ O'Fallon, *Book Review*, 68 Calif. L. Rev. 1070, 1089 (1980); see R. Dworkin, *Taking Rights Seriously* 234-36, 262, 275-76 (1977); cf. J. Mill, *On Liberty* 102 (C. Shields ed. 1956).

⁹ R. Dworkin, *supra* note 8, at 276. See also Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1213-14 (1970).

¹⁰ A regulation that necessarily was motivated entirely by personal preferences is something I have trouble even imagining.

¹¹ J. Mill, *supra* note 8, at 96; cf. O'Fallon, *supra* note 8, at 1091-92. I shall be arguing later that although such conduct is imaginable at least in theory, the notion of governmental intervention to prevent it is self-contradictory.

Mill defended his liberty principle—that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others”¹²—on the utilitarian ground that adoption of the principle would promote the general good.¹³ Even assuming that argument to be correct, however, it is one whose adoption as constitutional law *would* be susceptible to the criticisms of judicial imposition of “fundamental values” advanced in Chapter 3 of *Democracy and Distrust*¹⁴—every bit as susceptible as any other argument of a you-must-do-this-because-it’s-good form. Thus Paul Brest asks rhetorically, “If the Constitution does not enact Herbert Spencer’s *Social Statics*, does it enact John Stuart Mill’s *On Liberty*?”¹⁵

But although Mill may have defended it that way, his liberty principle does not seem to be simply another philosophical vision of what is good. It can also be defended—more convincingly in my opinion—in constitutive terms, in a way that plugs into the account of democracy as “applied utilitarianism.”¹⁶ If people are given votes in order to ensure that their interests will be counted in their community’s “greatest happiness” calculus, it would seem to follow rather directly that those whose happiness is not affected one way or the other by whether a given event takes place should not have a vote about whether it does.

There even are documentary pegs on which one could attempt to hang the conclusion that this theory is legitimately attributable to our Constitution. Perhaps the most obvious is the obligation of contracts clause,¹⁷ particularly if one concludes that the Court misread the original understanding when it held that clause to be strictly an antiretroactivity provision, applicable only to contracts in existence at the time the statute in issue was passed.¹⁸ For if the Framers did not mean that, and thus meant constitutionally to provide that decisions

¹² J. Mill, *supra* note 8, at 13; see also *id.* at 92, 114.

¹³ See *id.* at 14, 77. At one point Mill appears to have come close to making the constitutive argument, but on analysis the argument is utilitarian: it ran that people would be inexpert at estimating the happiness of others and thus if they were permitted to do so (as they necessarily must be in the case of controlling self-regarding conduct) the utilitarian calculus would be inaccurate. *Id.* at 102.

¹⁴ J. Ely, *supra* note 1, at 43-72 (references to judges’ personal values, natural law, reason, tradition, consensus, and predicting progress criticized).

¹⁵ P. Brest, *Processes of Constitutional Decisionmaking* 798 (1975).

¹⁶ See Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 *Ind. L.J.* 399, 407-08 (1975), and sources cited; O’Fallon, *supra* note 8, at 1059.

¹⁷ U.S. Const. art. I, § 10.

¹⁸ See J. Ely, *supra* note 1, at 91-92 and sources cited.

affecting only the contracting parties were their business alone and not that of the government, it seems likely they would also have wanted an individual's wholly self-regarding act to be immune to state regulation.¹⁹

A less obvious reference, admittedly, would be the tenth amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People." In isolation the last four words say nothing we wouldn't know from the ninth amendment and the privileges or immunities clause, that people retain some unenumerated immunities to government regulation, and in that sense they simply restate the problem. By their placement they may suggest a little more, however. It is familiar history that the tenth amendment is a reminder, in particular a reminder that just as decisions with national consequences are to be made by the national government, decisions whose consequences are more local are to be made by more local governments. What may not be so familiar is that the amendment adverts to a tripartite division of decision "power"—national, local, *and individual*. And although that in turn by no means compels the conclusion that decisions with merely individual consequences are to be made individually, that conclusion certainly fits.

The position does seem to entail conclusions many would find troubling. Presumably it would invalidate, and indeed Mill used examples along these lines,²⁰ laws prohibiting the distribution (with adequate notices, of course) of impure foods and quack medical remedies and those setting minimum standards for housing and the safety of workplaces. And ironically—though it was obvious from my allusion to a "nonretroactive" contracts clause—it would legitimate the case which after *Plessy v. Ferguson*²¹ it is most imperative for liberals to distinguish, *Lochner v. New York*.²² That case and its progeny obviously can be rationalized, and some of them were, on the libertarian ground that what two or more adults contract to do with or to another is nobody's business but their own, and it is certainly not the government's.²³ *Lochner* too can be found in Mill if one troubles to

¹⁹ Of course there are conflicting currents—such as the late-eighteenth century "Commonwealth's" perceived responsibility for the spiritual life of its citizens—but there surely is no need to get mired in a debate over either the original understanding or its relevance if, as I shall argue, the idea is not one that can be made to pan out in theory.

²⁰ J. Mill, *supra* note 8, at 116-18.

²¹ 163 U.S. 537 (1896).

²² 198 U.S. 539 (1905).

²³ See *Coppage v. Kansas*, 236 U.S. 1, 18-19 (1915); *Adair v. United States*, 208 U.S. 161, 174-75 (1908).

read him:²⁴ many of his examples involved contract,²⁵ and he understood that once one starts regulating the agreements of adults either to keep them "conscionable" or on the theory that bargaining power is unequal, there will soon be nothing left of his theory.²⁶

Well, what does that prove? Only that if everyone sat down and reread *On Liberty*, some of those now disposed to constitutionalize it might decide not to, and some of those instinctively opposed might become enthusiasts. Interesting perhaps, but it hardly cuts one way or the other on the legitimacy of the constitutive argument sketched above. Redemption of the devious "seem" in the sentence leading off the preceding paragraph will generate a more telling objection, however. It is in fact the rarest of regulations that will not on analysis be understood as furthering the interests of persons beyond the actor or cooperating actors. Rescue parties may have to risk their lives searching for some not-so-rugged individualist; clean-up crews may have to collect what is left of another. And beyond that, times have changed since Mill wrote: today any person's death or illness diminishes us all, because we are involved in insurance and taxes.²⁷

Well, what does *that* prove? Only that the constitutionalization of *On Liberty* would on full analysis turn out to be trivial in its practical consequences. Interesting perhaps, if only because it shows that constitutionalizing Mill's theory is not likely to satisfy many people's craving for liberty, but it certainly isn't a reason *not* to constitutionalize it. The point goes further, though: if it truly were the case that the conduct in question was not affecting the happiness of someone other than the actor(s), the government wouldn't be intervening to prevent it. If no one else cared, there wouldn't be a law against it, and if there were a law, it would not be enforced. And if that is so this entire discussion has been about a set of cases that is not simply trivial but empty, the set of cases in which the law is invoked to control activity that concerns no one but the actor(s).

That may seem like a play on the word "concerns." For another's act may "concern" you by affecting your tangible interests, or it may "concern" you simply because you think it's wrong for the actor to be doing what he's doing. That brings us back to Dworkin's distinction, of course, but *that* is a distinction one cannot draw, pace O'Fallon,

²⁴ J. Mill, *supra* note 8, at 107.

²⁵ "[T]he liberty of the individual, in things wherein the individual is alone concerned, implies a corresponding liberty in any number of individuals to regulate by mutual agreement such things as regard them jointly, and regard no persons but themselves." *Id.* at 124; see also *id.* at 16.

²⁶ *Id.* at 112; cf. *id.* at 100, 107; *Coppage v. Kansas*, 236 U.S. 1, 17 (1915).

²⁷ See also L. Tribe, *American Constitutional Law* 889-90 (1978).

without running smack into the rebuttal arguments of Chapter 3. Even granting *arguendo* that a truly self-regarding act should be immune to regulation, the moment the law intervenes we know the act in question wasn't that. And as for sorting among the reasons persons other than the actor are moved to intervene, in particular distinguishing between "tangible" injury and moral distress as bases for intervention, a couple of points should be made. Revulsion in the absence of tangible harm to oneself is by no means inevitably the reaction of an intermeddling Comstockian. Even ignoring all the tangible costs a suicide inflicts on a community, news of a suicide—it is simply impossible not to evoke John Donne in this context—diminishes us all.²⁸ I agree that such reactions of moral "diminution" should not often become the occasion for state regulation, but that is a debatable and (more importantly for present purposes) nonconstitutive choice of one vision of the way members of a community should interact over another. The moment the actor's behavior adversely affects others—no matter what it is about the receptor that occasions his upset—the two are interacting and become (at least as concerns that act) part of the same community, and the constitutive argument from democracy as utilitarianism becomes inapplicable.

There are therefore no acts that affect only the actor—at least none against which state officials will be tempted to intervene—only some that do so less than others. The recurrent problem of regulation is when the effects become great (and "legitimate") enough to justify government response: unless there is unusual reason to distrust our elected representatives on a certain such issue, there can be no justification in our system for taking it away from them. That attempt having failed, it seems to me there is no principle for deciding which varieties of nonpolitical and nonreligious liberty to protect constitutionally that is not on the one hand so fatuously vague as to be useless or on the other easy prey for the sorts of arguments advanced in Chapter 3 of *Democracy and Distrust*.

How much ought that to upset us? I indicated that I too find it frustrating, but I'm not sure a much stronger reaction is in order. The range of political thought and behavior has historically been quite narrow in the United States, and that narrowness has all too often been reinforced by law. And needless to say our treatment of minorities has oftentimes been scandalous. The right not to conform in fashions other than political, however, does not seem to have been a

²⁸ Cf. J. Mill, *supra* note 8, at 97 ("No person is an entirely isolated being . . ."). Or am I hearing bells that aren't tolling?

particular problem in this country, at least not in the sense that conformity outside the political arena has habitually been compelled by law.

I hope you will have noted that although it is true that the theory advanced in my book provides no constitutional remedy for this last problem, which I am suggesting has not in fact been much of a problem historically, it is centrally directed to the first two problems—affording minorities protection from discriminatory treatment and protecting rights of political expression—and if taken seriously would go a long way toward correcting them. Is that because I set out to write a book designed to correct those evils I had identified as most egregious? Anyone who has read it will recognize that that was hardly the methodology. But at the same time it is no coincidence that it works out that way. The “right to be different” is fundamentally, though obviously not inevitably, an upper middle class right: it is, if you will, the right of my son to wear his hair as long as he pleases. Our nation’s underclass—the poor, the black, the Hispanic—by and large could not care less about the “right” to wear tattered clothes and let their grooming go: with the help of the law we’ve kept them in a state of difference so long they’d like at least the option of becoming, in some important respects, more the *same*. That aspiration is one that will continue to need protecting, but for reasons elaborated at length in the book the aspirations of “people like us” do not need particular protection from the political process.