Global Constitutionalism (2024), 1–31
doi:10.1017/S2045381724000182

CAMBRIDGE UNIVERSITY PRESS

SPECIAL ISSUE ARTICLE

John Hart Ely would disown Comparative Political Process Theory, *Dobbs*, and most his other intellectual heirs (or maybe not)

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> He seemed to enjoy portraying himself as mostly without allies – a principled contrarian. This was central to his self-consciousness. And John was very conscious of himself.[1]

Introduction

John Hart Ely must get a lot of exercise these days, turning in his grave. No doubt *Dobbs v. Jackson Women's Health Organization*[2] – which, in finding no right to abortion in the U.S. Constitution, had overturned *Roe v. Wade*[3] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[4] – gave him another nasty lurch. The trendiness of Comparative Political Process Theory (CPPT) among us scholars must also jolt him about.[5] The U.S. Supreme Court in *Dobbs* both quotes Ely[6] and adopts his constitutional philosophy[7] and methodology,[8] but reaches a result he had considered 'a terrible mistake'.[9] CPPT, conversely, espouses public policies Ely preferred, but, professedly in his name, calls on judges to promote these

[1]RD Parker, 'In Memoriam: John Hart Ely – John, Fred, and Ginger' (2004) 117 *Harvard Law Review* 1751, 1752.

[2]*Dobbs v Jackson Women's Health Organization* (2022) Supreme Court of the United States 19-1392, 597 US (slip opinion).

[3]410 U.S. 113 (1973) (hereinafter '*Roe*')

[4]505 U.S. 833 (1992) (hereinafter '*Casey*')

[5]See, e.g., the works listed in M Hailbronner, 'Political Process Review: Beyond Distrust' (2020) 18 *International Journal of Constitutional Law* 1458, 1459–1460; R Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, Oxford, 2023) 2.

[6]*Dobbs* (n 2) 2 & 54.

[7]Compare ibid 14, 44–49, 67; with J Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge, MA, 1980) ch 3; JH Ely, 'The Wages of Crying Wolf: A Comment on Roe v. Wade' (1973) 82 *Yale Law Journal* 920.

[8]Compare *Dobbs* (n 2) 36; with Ely, *Democracy and Distrust* (n 7) 169.

[9]JH Ely, *On Constitutional Ground* (Princeton University Press, Princeton, NJ, 1996) 305.

preferences with an approach to judicial review he had called 'frightening'[10] and '*not* constitutional law' at all.[11]

Ely's signature work, *Democracy and Distrust*[12] (*D&D*), is in many jurists' pantheon of books on constitutional theory.[13] For them no other work has better eased the tension between judicial review and democratic principle.[14] *D&D* espoused what Ely called a 'participation-oriented, representation-reinforcing approach to judicial review'[15] (sometimes abbreviated to 'representation-reinforcing theory of judicial review'),[16] or, more simply, a 'process-oriented system of review'.[17] Its main prescription is that of *U.S. v. Carolene Products*'[18] famous footnote four: courts should strictly scrutinize a statute only when it (1) infringes a right that the written constitution either explicitly or was originally intended to guarantee; (2) closes off channels of political change to outsiders (e.g., by denying them a voice or the vote), or (3) is the product of such severe hostility or prejudice against some outsiders – viz. discrete and insular minorities – that insiders refuse to deal with them no matter what (e.g., racial segregation in schools). Save for these three exceptions (and an escape hatch I discuss in part IX) courts should give elected lawmakers a large leeway in deciding all public issues.[19]

The CPPT school takes *D&D*'s main premise – that courts must sometimes step in to prevent or fix systemic malfunctions in the political process – and runs with it.[20] As such CPPT brands itself as a 'neo-Elyian',[21] or simply 'Elyean',[22] approach to judicial review. In Part II I cast Ely as a principled contrarian who would balk at such brandings unless he agreed with them. At first blush he would not. As I discuss in Part III, leading variants of CPPT are what Ely considered noninterpretivist: they urge courts to enforce values they consider fundamental even though these are neither specified in the text nor inferable from the history or structure of the written constitution.[23] We may call this first-order noninterpretivism, to distinguish it from second-order noninterpretivism, viz., the judicial enforcement of a model of democracy derived from extraconstitutional sources,

[10]Ely, 'The Wages of Crying Wolf' (n 7) 935.

[11]ibid 947.

[12]Ely, *Democracy and Distrust* (n 7).

[13]Parker (n 1) 1752 (D&D is 'one of less than a handful of "great" books about American constitutional law in the twentieth century'); FR Shapiro, 'The Most-Cited Legal Books Published Since 1978' (2000) 29 *Journal of Legal Studies* 397, 401 (D&D was the most cited legal book [other than treatises and texts] published since 1978); R Doerfler and S Moyn, 'The Ghost of John Hart Ely' (2022) 75 *Vanderbilt Law Review* 769, 770; J Greene, 'The Anticanon' (2011) 125 *Harvard Law Review* 379, 394, 421.

[14]See WN Eskridge, 'Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics' (2005) 114 *Yale Law Journal* 1279, 1281.

[15]Ely, *Democracy and Distrust* (n 7) 87; John Hart Ely, 'Toward a Representation-Reinforcing Mode of Judicial Review' (1978) 37 *Maryland Law Review* 451, 469–470.

[16]Ely, *Democracy and Distrust* (n 7) 181; See also ibid 88, 101–102; Ely, 'Toward a Representation-Reinforcing Mode of Judicial Review' (n 15).

[17]Ely, *Democracy and Distrust* (n 7) 136.

[18]*United States v Carolene Products Co* (1938) 304 US 144 (US Supreme Court); Ely, *Democracy and Distrust* (n 7) 75–77.

[19]Ely, *Democracy and Distrust* (n 7) 102–103.

[20]S Gardbaum, 'Comparative Political Process Theory' (2020) 18 *International Journal of Constitutional Law* 1429, 1430; Dixon (n 5) 1–2.

[21]Dixon (n 5) 2.

[22]R Gargarella, 'From "Democracy and Distrust" to a Contextually Situated Dialogic Theory' (2020) 18 *International Journal of Constitutional Law* 1466.

[23]Ely, *Democracy and Distrust* (n 7) 2.

which Ely also rejected but did not discuss. In Part IV I show that Ely, on the contrary, espoused interpretivism – an approach limiting the scope of judicial review to norms clearly stated or implied in the written constitution – and rejected both first- and second-order noninterpretivism.[24] Thus in Parts V and VI I argue that, despite their aim 'to do justice to the intellectual inheritance Ely has given us',[25] leading variants of CPPT are also profoundly *anti*-Elyian in their embrace of noninterpretivism. As Ely might quip, 'noninterpretivist neo-Elyian' is a contradiction in terms – sort of like 'green pastel redness.'[26] Confronting this oxymoron is crucial. First, as I discuss in Part V, the natural tendency of noninterpretivism irreconcilably conflicts with the aim of Ely's interpretivism: noninterpretivism, including noninterpretivist CPPT, naturally increases the occasions for judicially invalidating a statute; Ely, in contrast, aimed to decrease such occasions. This difference can affect how enthusiastically a given judiciary would not only exercise judicial review but also receive either Ely's or CPPT's model (as the abortive introduction of *D&D* to Japan suggests). Second, as I show in Part VI, Ely presents a panorama of powerful challenges from democratic theory that any noninterpretivist theory of judicial review must meet, and which it seems none thus far has.

In Part VII I add that noninterpretivism also faces a hermeneutic problem that can muddle our view of certain constitutions. The preeminent philosopher of hermeneutics, Hans-Georg Gadamer, advises that, as we read a constitutional or other text, we must continually revise the preconceived mental models (e.g., of democracy) we project onto it if we wish to properly interpret (and not reinvent) that text.[27] Or, as Ronald Dworkin puts it, our interpretations must 'fit' the text.[28] This interpretive principle goes against our field's unexamined practice of placing constitutions of different countries under the blinding glare of a Schumpeterian model of elite, electoral democracy – a practice that can blinker out from comparative view several clauses in certain constitutions that do not fit the model. Worse: in insisting on certain models and values (largely developed from wealthy Western liberal democracies) as essential to constitutional democracy, it suppresses or overcrowds other models and values that have been democratically adopted or are otherwise important elsewhere, for example, in certain Southeast Asian countries such as the Philippines and Malaysia where widescale participation in public policymaking (outside of periodic elections) is deemed a defining trait of democracy. This can lead noninterpretivist CPPT scholars to endorse judicial underenforcement of these countries' core democratic principles. To address this danger I suggest, in Part VIII, that comparative constitutional theories should embrace a popular quality-control method in cross-cultural research, i.e., backtranslation, and hence support efforts of country specialists and local legal practitioners to recast the academese of comparative constitutional law theories into the judicially comprehensible legalese of their respective jurisdictions. A scholar's considerations relating to political parties, civil society groups, or rights, for example, might be translated into operable tests involving the doctrines of political question, standing, or ripeness.

[24]ibid 1; Cf. Ely, 'Toward a Representation-Reinforcing Mode of Judicial Review' (n 15) 451 ('An 'interpretivist' approach…proves on analysis incapable of keeping faith with the document's promise'); note that in this earlier work Ely had yet to distinguish clause-bound interpretivism from his own broader variant of interpretivism.

[25]Dixon (n 5) 15.

[26]Ely, *Democracy and Distrust* (n 7) 18.

[27]HG Gadamer, *Truth and Method* (2nd rev. edn, Crossroad 1989) 267.

[28]R Dworkin, *Law's Empire* (Belknap Press 1986) 230.

In Part VIII also I argue against Stephen Gardbaum's assertion that 'given its comparative nature, CPPT is not, and cannot be, simply an interpretive theory (as with domestic counterparts)'.[29] Comparative constitutional law theories can be interpretivist, and because of this *D&D* may be considered a classic of comparative constitutional law theory despite its focus on a single jurisdiction. This is possible because single-jurisdiction works like *D&D* can share with comparative constitutional law scholarship a particular idiom of inquiry (viz., a conceptual system for redescribing a practice in terms that are different from how it is usually understood), and this idiom can be placed within a wider, transnational tradition of liberal democratic constitutionalism. *D&D*, for instance, explores a central question for any liberal constitutional democracy: 'How can judicial review be reconciled with democratic rule?' Its concern is different from that of judges and other legal practitioners: it is to investigate the conditions, tensions, character, etc. of constitutional arrangements, not to engage in the practice of constitutional law. As such the conceptual toolbox it uses can be used to redescribe various constitutional systems, and as such allows us to place different constitutional arrangements side by side so that they may each illuminate the others. To illustrate I shall use a constitutional system that rejects Schumpeterian democracy, that of my home country the Philippines, to develop an interpretivist (or at least second-order interpretivist) neo-Elyian approach to judicial review. This case study would be an exercise in backtranslation, and hence would illustrate its usefulness.

Part IX, the Conclusion, suggests that for all his doggedness Ely was in the end a faint-hearted interpretivist, or even a reluctant noninterpretivist. Here I discuss an interpretivist escape hatch Ely introduces which opens the way for noninterpretivist CPPT to rightfully claim his mantle, though through a decades-spanning process of accretion of supportive caselaw and legislation. The escape hatch, however, applies only to first- (not second-) order noninterpretivisms. Regarding these I suspect that if Ely only knew what we now know about global constitutionalism then he might not disown many of us after all.

The principled contrarian

Ely had clerked for U.S. Supreme Court Chief Justice Earl Warren,[30] one of his few 'heroes',[31] and *D&D* is essentially a defense of the Warren Court's progressive precedents widening access to the political process and its payoffs against its successor the Burger Court's decisions narrowing it.[32] The latter court's conservative bent had convinced Ely that limiting the occasions for judicial review to the three exceptions of *Carolene Products*' Footnote Four would better secure civil liberties than letting Justices enforce whatsoever values they deem fundamental.[33] This was but a natural conclusion for Ely, who belonged to a generation brought up in the shadow of *Lochner*,[34] when progressive legislatures were

[29]Gardbaum, 'Comparative Political Process Theory' (n 20) 1453.

[30]JH Ely, 'The Chief' (1974) 88 *Harvard Law Review* 11.

[31]Ely, *Democracy and Distrust* (n 7).

[32]JH Ely, 'The Supreme Court, 1977 Term – Foreword: On Discovering Fundamental Values' (1978) 92 *Harvard Law Review* 1, 8–10.

[33]Ely, *Democracy and Distrust* (n 7) 3 & 102 n.*; JH Ely, 'Constitutional Interpretivism: Its Allure and Impossibility' (1978) 53 *Indiana Law Journal* 399, 401.

[34]*Lochner vs. New York*, 198 U.S. 45 (1905).

lionized and judicial supremacy stigmatized.[35] He therefore espoused interpretivism – an approach limiting the scope of judicial review to norms clearly stated or implied in the written constitution – and rejected its opposite, noninterpretivism.[36]

Ely's interpretivism left him stranded alone on an island. The ghost of Ely's former teacher and colleague, Alexander Bickel, looms over much of *D&D* – and self-consciously so.[37] Bickel had singled out what he termed 'the counter-majoritarian difficulty', the fact that unelected judges are thwarting the will of elected legislatures, as the central problem of judicial review.[38] Ely agreed;[39] most jurists of his generation did.[40] *Roe*, however, signaled a change in the mindset of the next generation, which came to reject the premise that judicial review must ultimately serve majority rule.[41] Ely himself had recognized that this new generation grew up not in the shadow of *Lochner* but of Indochina and Watergate, when discontent with the presidency and Congress was at 'an all-time high' in the United States.[42] By the time *D&D* was published, defending the constitutional protection of privacy – the noninterpretivist right *par excellence*, with the right to an abortion as its paradigm case – had already overtaken tackling the counter-majoritarian difficulty as the central problem of judicial review.[43] Perhaps this is why the whole first half of *D&D*, a sustained attack against noninterpretivism, 'often goes missing from scholarly memory.'[44] CPPT scholars are part of this forgetful crowd, and this is in large part why Ely would disown our claims to his intellectual inheritance.

Having picked interpretivism as his constitutional philosophy, Ely at first decided to doggedly follow it even when it strayed from his political or moral convictions[45]; 'if a theory is sound,' he wrote, 'we should live with the results.'[46] This doggedness led him to lambast *Roe*, the 1973 U.S. Supreme Court decision which struck down Texas's (and nearly every other American state's) criminal abortion statutes for infringing the Fourteenth Amendment's Due Process Clause.[47] *Roe* recognized a constitutional right of privacy comprising all personal rights deemed 'fundamental' or 'implicit in the concept of ordered

[35]JM Balkin and S Levinson, 'The Canons of Constitutional Law' (1998) 111 *Harvard Law Review* 963, 1008.

[36]Ely, *Democracy and Distrust* (n 7) 1; Cf. Ely, 'Toward a Representation-Reinforcing Mode of Judicial Review' (n 15) 451 ('An 'interpretivist' approach…proves on analysis incapable of keeping faith with the document's promise'); note that in this earlier work Ely had yet to distinguish clause-bound interpretivism from his own broader variant of interpretivism.

[37]Ely, *Democracy and Distrust* (n 7) 71.

[38]AM Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd edn, Yale University Press, CT, 1986) 16.

[39]Ely, *Democracy and Distrust* (n 7) 4–5; Ely, 'Constitutional Interpretivism: Its Allure and Impossibility' (n 33) 405.

[40]PW Kahn, *Legitimacy and History: Self-Government in American Constitutional Theory* (Yale University Press, CT, 1992) 167.

[41]Parker (n 1) 1752.

[42]JH Ely, 'Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures' (1991) 77 *Virginia Law Review* 833, 836.

[43]Kahn (n 40) 154–170; Balkin and Levinson (n 35) 997; J Rubenfeld, *Revolution by Judiciary: The Structure of American Constitutional Law* (Harvard University Press, MA, 2005) 188.

[44]Doerfler and Moyn (n 13) 3 n.7; see Henry Paul Monaghan, 'In Memoriam: John Hart Ely – John Ely: The Harvard Years' (2004) 117 *Harvard Law Review* 1748, 1750.

[45]A Soifer, 'In Memoriam: John Hart Ely – Ely the Transgressor' (2004) 117 *Harvard Law Review* 1753, 1756.

[46]Ely, *Democracy and Distrust* (n 7) 152.

[47]U.S. Const. Amend. XIV, §1.

liberty.'[48] The Court extracted this right from the constitutional guarantee that 'No state shall…deprive any person of life, liberty, or property, without due process of law', and adjudged it capacious enough to include a pregnant woman's right to an abortion.[49] For Ely this was 'the clearest example' of noninterpretivism: the view that courts should enforce values they consider fundamental even though these are neither specified in the text nor inferable from the history or structure of the written constitution.[50] It was *Roe*'s constitutional philosophy – a judicial approach he also derisively labeled 'value imposition'[51] – that he had called frightening and not constitutional law. So while Ely preferred the moral and political conclusion *Roe* had made,[52] he nonetheless called it 'a very bad decision.'[53]

Ely was well positioned and immensely qualified to be appointed Justice to the U.S. Supreme Court, but he knew his essay on *Roe* doomed this prospect by accomplishing the remarkable feat of alienating both feminists and pro-lifers, as well as Democrats and Republicans, in the same breath.[54] ('Good thing the job I've got'[55] – an 'unconscionably cushy'[56] one – 'is better',[57] he said.) 'It was typical Ely', wrote Alan Dershowitz, 'remaining true to his enduring principles was more important than any short-term political or career considerations.'[58] We can thus trust that he stood on constitutional ground when he did an about-face on *Roe*[59] (although he himself had some doubts[60]). Two days after the U.S. Supreme Court affirmed *Roe* in *Casey*, he wrote an approving letter to the pertinent Justices saying that – for reasons I explain in Part IX – ruling otherwise 'would have been a terrible mistake'.[61] It is ironic, then, that the *Dobbs* Court both quotes Ely and adopts his process-based approach to judicial review on its way to overruling *Roe* and *Casey*. Definitely he would disown *Dobbs* too.

Noninterpretivist comparative political process theories

Comparative political process theory

The CPPT school buys into Ely's thesis that the purpose of judicial review, as he puts it, is 'primarily to safeguard democracy, to make sure that political incumbents do not manipulate things so as to deny others an effective right to participate in either the democratic process or its outcomes.'[62] As such it shares both Ely's focus on systemic

[48] *Roe* at 152.
[49] U.S. Const. amend. XIV, §1.
[50] Ely, *Democracy and Distrust* (n 7) 2.
[51] Ely, 'Toward a Representation-Reinforcing Mode of Judicial Review' (n 15) 451; Ely, *Democracy and Distrust* (n 7) 73.
[52] Ely, 'The Wages of Crying Wolf' (n 7) 923, 926–927.
[53] ibid 947.
[54] Ely, *On Constitutional Ground* (n 9) 304–305; Alan M Dershowitz, 'In Memoriam: John Hart Ely' (2004) 117 *Harvard Law Review* 1743, 1744.
[55] Ely, *On Constitutional Ground* (n 9) 305.
[56] Ely, 'Another Such Victory' (n 42) 838.
[57] Ely, *On Constitutional Ground* (n 9) 305.
[58] Dershowitz (n 54) 1744–1745; Ely, *On Constitutional Ground* (n 9) 305 text accompanying fn.*.
[59] His turn was halting at first, depending solely on stare decisis: L Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (Knopf 1987) 126; cf. *On Constitutional Ground* (n 9) 300 fn.*.
[60] Ely, *On Constitutional Ground* (n 9) 305.
[61] ibid.
[62] ibid 8.

malfunctions in the workings of representative democracy and his premise that placing complete trust in politicians to fix them would be as foolish as letting foxes guard the henhouse.[63] This orientation allows CPPT to fit seemingly disparate judicial doctrines and decisions from different jurisdictions into a comparative framework of constitutional analysis and diagnosis.[64]

CPPT goes beyond Ely in several ways. First is its breadth: *D&D* theorizes judicial review in a single (though influential) jurisdiction, the United States. In contrast, CPPT theorizes an approach to judicial review that can throw comparative light on different jurisdictions.[65] Second is its worry: political crises across the globe are today threatening the very existence of liberal constitutional democracies, and CPPT joins the spate of recent scholarship diagnosing these crises and prescribing cures.[66] Ely was worried about political outsiders, CPPT's worry extends to the political system itself.[67] Thus Gardbaum, for instance, advises courts to scrutinize the failure of legislatures to hold executives accountable, the capture of independent institutions by the government, the capture of the political process by special interests, and even outright dysfunction of the political process.[68] A third way CPPT goes beyond Ely is in its scope: CPPT endorses judicial review of not only what a law says, but also how it was made. This includes the quality of deliberation involved in passing a statute.[69] Hence courts should engage in not only 'substantive review' (as Ely had proposed[70]) but also 'pure procedural review'[71] or 'semi-procedural review'.[72] Here CPPT tracks the increasing openness from 2010 onwards of courts in different continents to review legislative processes.[73] Fourth is the more variegated remedies CPPT proposes. Even in the 'second look' approach he broached, Ely still prescribed old-fashioned striking down of the offending statute.[74] In addition to this strong medicine, CPPT scholars also prescribe a suite of 'weak-form',[75] 'strong-weak', and 'weak-strong' remedies;[76] one example is what Rosalind Dixon terms 'engagement-style' remedies, which require government officials to first consult affected citizens before they are, say, evicted from their homes.[77] While CPPT scholars generally prefer such weaker remedies,[78] they also sometimes prescribe remedies much stronger than old-fashioned invalidation. One example is

[63]Gardbaum, 'Comparative Political Process Theory' (n 20) 1450, 1454–1455.

[64]ibid 1451.

[65]ibid 1430; Dixon (n 5) 2.

[66]See JW Müller, 'Democracy's Midlife Crisis' <https://www.thenation.com/article/archive/how-democracies-dies-how-democracy-ends-book-review/>; M Loughlin, 'The Contemporary Crisis of Constitutional Democracy†' (2019) 39 *Oxford Journal of Legal Studies* 435.

[67]Dixon (n 5) ch 3; Gardbaum, 'Comparative Political Process Theory' (n 20) 1452–1453; Gargarella (n 22) 1466.

[68]Gardbaum, 'Comparative Political Process Theory' (n 20) 1435–1446.

[69]ibid 1446–1447; Dixon (n 5) 6 & 140 Table 4.2; Gargarella (n 20) 1471–1472.

[70]Gardbaum, 'Comparative Political Process Theory' (n 20) 1449.

[71]ibid 1448.

[72]Dixon (n 5) 142.

[73]S Gardbaum, 'Due Process of Lawmaking Revisited' (2018) 21 University of *Pennsylvania Journal of Constitutional Law* 1, 28–29.

[74]Ely, *Democracy and Distrust* (n 7) 169.

[75]S Gardbaum, 'Comparative Political Process Theory: A Rejoinder' (2020) 18 *International Journal of Constitutional Law* 1503, 1506.

[76]Dixon (n 5) ch 7.

[77]ibid 212 and 230.

[78]Gardbaum, 'Comparative Political Process Theory' (n 75) 1510.

Roberto Gargarella's proposal that courts issue structural injunctions requiring legislators to open up their deliberations to the public.[79]

The crossroads where Ely and CPPT scholars diverge is in their differing notions of democratic malfunction.[80] For Ely there is malfunction when the political process invites distrust; this occurs when the ins are unfairly keeping the outs out either by denying them a voice or the vote or simply out of prejudice or hostility against them.[81] And he argued that fixing such malfunctions was the main aim of many of the Warren Court's renowned precedents: *Brandenburg v. Ohio*[82] (protecting inflammatory speech[83]), *Kramer v. Union Free School District No. 15*[84] (strict scrutiny of statutes on the right to vote[85]), *Reynolds v. Sims*[86] and *Baker v. Carr*[87] (one person, one vote[88]), *Gomillion v. Lightfoot*[89] (banning racially discriminatory redistricting measures[90]), and, of course, *Brown v. Board of Education* (banning racial segregation in public schools[91]). CPPT scholars believe that these are not the only ways that democracies can systemically malfunction.[92] At bottom this is a difference in their notion of what democracy at minimum requires (viz., the 'democratic minimum core'[93]), and how courts may appropriately arrive at that notion as a yardstick for contested laws. On this question of 'how' Ely was staunchly interpretivist, CPPT scholars largely noninterpretivist.

First-order noninterpretivism

Ely recognized that the U.S. Constitution (like most written constitutions) contains open-ended terms protecting unenumerated rights whose content 'was meant to be worked out over time.'[94] The task he took on in *D&D*, he says, is

> the location of a source of values with which to give content to such open-ended provisions…whose clear implication seems to be that the class of protected rights is *not* exhausted by those which are explicitly set down in the document.[95]

The location cannot be in 'an external source' he concludes.[96] At least not for courts exercising judicial review because they should anchor their reasoning on the written

[79]Gargarella (n 22) 1470–1472.
[80]Hailbronner (n 5) 1459–1460.
[81]Ely, *Democracy and Distrust* (n 7) 103.
[82]395 U.S. 444 (1969).
[83]Ely, *Democracy and Distrust* (n 7) 114–115.
[84]395 U.S. 621 (1969).
[85]Ely, *Democracy and Distrust* (n 7) 116–120.
[86]377 U.S. 533 (1964).
[87]369 U.S. 186 (1962).
[88]Ely, *Democracy and Distrust* (n 7) 120–124.
[89]364 U.S. 339 (1960).
[90]Ely, *Democracy and Distrust* (n 7) 139–140.
[91]ibid 150–153.
[92]Gardbaum, 'Comparative Political Process Theory' (n 20) 1434 & 1448.
[93]Dixon (n 5) 61.
[94]Ely, *On Constitutional Ground* (n 9) 297.
[95]Ely, *Democracy and Distrust* (n 7) 209 n.35.
[96]ibid 73.

constitution.[97] With this conclusion he allied himself with interpretivism, which he defined as the view that 'judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution,' and opposed noninterpretivism, which he defined as 'the contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document.'[98]

Ely used a pejorative to refer to noninterpretivism: 'value imposition', which he defined as 'the designation of certain goods (rights or whatever) as so important that they must be insulated from whatever inhibition the political process might impose'.[99] In *D&D* he lists and repudiates judicial resort to the following extraconstitutional norms as inconsistent with representative democracy: the judge's own values, natural law, neutral principles, reason, tradition, consensus, and predicting progress.[100] In doing so he repudiated the noninterpretivist postulate that it is appropriate to draw on one or more such external sources to give content to a written constitution's open-ended provisions.

A good example of noninterpretivism is the theory of judicial review in Dixon's recent book *Responsive Judicial Review* (*RJR*), perhaps the most elaborated CPPT variant to date.[101] *RJR* espouses a noninterpretivist constitutional philosophy: it advises courts to enforce norms that are neither written down in a constitution nor plausibly inferable from its history or structure. It argues that courts should promote the responsiveness of democratic processes to both minority constitutional rights and majority constitutional understandings. To do so courts must purposely use judicial review to correct three forms of democratic dysfunction: 1) anti-democratic monopoly power, 2) democratic burdens of inertia, and 3) democratic blind spots.

The first form is at the heart of the theory, which preaches strong judicial protection of what Dixon considers democracy's 'minimum core', comprising free and fair regular elections, democratic rights such as free speech, and institutional safeguards such as the separation of powers.[102] For her this minimum core is the 'key yardstick' for courts in detecting dysfunction in their home democracy.[103] *RJR* focuses on judicial review of legislation. Hence the second form of dysfunction, democratic burdens of inertia, refer mainly to when a legislature ignores majority constitutional understandings of a right or a claim. Similarly, democratic blind spots (the third form) refer mainly to when legislators fail to either adequately take these constitutional norms into account or think up comparable measures that could better accommodate them.[104]

One of *RJR*'s main theses is that when conventional types of constitutional argument (including reference to a constitution's text, history, or structure[105]) fail to guide, courts must interpret open-ended provisions according to 'majority constitutional understandings – or

[97]Ely, 'The Wages of Crying Wolf' (n 7) 949.

[98]Ely, *Democracy and Distrust* (n 7) 1.

[99]ibid 75 fn*; Ely, 'Toward a Representation-Reinforcing Mode of Judicial Review' (n 15) 454 fn 13.

[100]Ely, *Democracy and Distrust* (n 7) 44–70; see also Ely, 'The Supreme Court, 1977 Term – Foreword: On Discovering Fundamental Values' (n 31).

[101]Dixon (n 5); cf. Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, Cambridge, 2015).

[102]Dixon (n 5) 61.

[103]ibid 146.

[104]ibid 82–87.

[105]See P Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford University Press, Oxford, 1982) 3–119.

constitutional understandings or values that command the widest, or clearest majority or plurality, support in the broader "constitutional culture"'.[106] Thus, even without strong support in law, a court ought to strike down a statute in the name of majoritarian understandings if doing so would, say, prevent an irreparable injury to human dignity.[107]

RJR also offers a stronger proposal: courts should 'attempt to identify an emerging if still nascent democratic majority position', and in doing so evaluate 'the most normatively desirable direction of constitutional change and the likely evolution of democratic opinion.'[108] Here she follows Bickel's proposal that courts should specially protect values that they think 'will – in time, but in a rather foreseeable future – gain general assent.'[109] This strategy might sometimes meet popular opposition and nonenforcement at the outset, says Dixon. But over time it may win over majority constitutional understandings. To quote again from Bickel: the judiciary must be 'a leader of opinion, not a mere register of it'.[110]

RJR's methodology of 'developing 'generic' constitutional principles or guidance for courts worldwide' from comparative constitutional practices is also noninterpretivist at heart.[111] More generally, *RJR* is noninterpretivist because it prescribes courts to enforce norms with little support in the pertinent constitution's text, history, or structure if that is necessary to safeguard democracy's minimum core or to correct democratic malfunctions which either are systemic or could seriously and irreparably endanger human dignity.[112]

Second-order noninterpretivism

The previous subsection shows the ways *RJR* endorses what we may call *first-order noninterpretivism*, the type of noninterpretivism Ely repeatedly railed against. Here I shall show that CPPT in general, including *RJR*, also endorses another sort of noninterpretivism which *D&D* implicitly rejects. We may call it *second-order noninterpretivism*: a constitutional philosophy that considers it appropriate to draw on external sources to identify the types of democratic malfunction courts should address. This gets to the heart of Laurence Tribe's famous critique of political process theories: beneath any process theory is a substantive theory, and this mires down interpretivists in the same external sources of values noninterpretivists draw upon.[113]

Second-order noninterpretivism is clearest in *RJR*'s concept of the democratic minimum core, which is derived not from any written constitution but from 'an overlapping

[106]Dixon (n 5) 186 (italics removed).
[107]ibid 100.
[108]ibid 151 (italics removed).
[109]Bickel (n 38) 239; excerpted in Dixon (n 5) 151.
[110]Bickel (n 38) 239.
[111]Dixon (n 5) 17.
[112]In fact, it views some 'attempts to increase the *legal* legitimacy' of a judicial review decision as counterproductive, 'especially if they come at the expense of a focus on the risk of electoral or institutional monopoly, or increase the risk of reverse democratic inertia.' To illustrate she says that the Supreme Court of India's attempt in *Golak Nath v. State of Punjab*, (1967) 2 SCR 762, to give the unconstitutional constitutional amendment doctrine a 'quite strong textual basis' resulted in a doctrine that was 'much broader than a doctrine focused on protecting the "basic structure" or "democratic minimum core" of the Indian Constitution', so that it greatly risked reverse burdens of inertia: ibid 124.
[113]LH Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89 *Yale Law Journal* 1063, 1064, 1068–1070, 1076–1078.

consensus among democratic theorists about what democracy requires'[114] as well as 'extant practices among democratic systems.'[115] *RJR* thus advises courts to enforce 'a range of institutions that can be identified as common to well-functioning constitutional democracies worldwide', presuming that 'those institutions common to all (or at least the vast majority of) constitutional democracies worldwide are more or less necessary to the maintenance of the democratic minimum core.'[116] She calls this method 'transnational constitutional anchoring.'[117] It requires 'attention to comparative constitutional practices' and advises courts to intensely scrutinize a proposed legal change to the minimum core if it has no analog in other constitutional democracies.[118]

Gardbaum's CPPT is also self-consciously noninterpretivist in this way.[119] His aim is to provide guidance to courts in not one or a few, but 'in all democracies'.[120] This leads him to embrace a broadly applicable normative theory of judicial review that is free from the narrow confines of a single constitutional system, one which justifies judicial intervention to correct political malfunctions and shows when and how courts should go about doing this.[121] The gist of his theory is that a free and fair political process is the foundation of all democratic constitutions so that maintaining it is an essential task of any democracy.[122]

Ely was a first- and second-order interpretivist

I disagree with Dixon's claim that 'Ely was skeptical of "interpretivism"',[123] more so with Gardbaum's stronger one that 'Ely rejected interpretivism as fatally undermined by the existence of…open-ended constitutional provisions'[124] so that he set up his process-oriented approach as a 'rival approach' to interpretivism.[125]

It is true that in a footnote to a 1978 essay Ely hinted that his theory was 'a principled form of noninterpretivism', meaning 'one that does not rely on the judge's assessment of society's fundamental values'.[126] At that time he concluded that 'you cannot be an interpretivist' because all sorts of interpretivism were impossible.[127] But though he copied and pasted sizable chunks of this essay into the first two chapters of *D&D*, he redacted both this conclusion – which he had thought was '[t]he point'[128] of the essay – and the

[114]Dixon (n 5) 62 (italics removed). Roni Mann perceptively describes this consensus as a 'thin layer' focused on process and unconcerned with political morality: author's notes of Roni Mann's comments (given through Zoom) for Panel 4 of 'Symposium: The New Comparative Political Process Theory', The University of Tokyo, Law Faculty Bldg. 3, 8th Floor Meeting Room, 24 April 2023.

[115]ibid (italics removed).

[116]ibid (italics removed).

[117]ibid.

[118]ibid 146.

[119]Gardbaum, 'Comparative Political Process Theory' (n 20) 1433 fn. 24; TG Daly, 'Post-Juristocracy, Democratic Decay, and the Limits of Gardbaum's Valuable Theory' (2020) 18 *International Journal of Constitutional Law* 1474, 1478.

[120]Gardbaum, 'Comparative Political Process Theory' (n 75) 1506.

[121]Gardbaum, 'Comparative Political Process Theory' (n 20) 1431.

[122]ibid 1453.

[123]Dixon (n 6) 51.

[124]Gardbaum, 'Comparative Political Process Theory' (n 21) 1432.

[125]ibid 1448.

[126]Ely, 'Constitutional Interpretivism: Its Allure and Impossibility' (n 34) 402, fn. 12.

[127]ibid 445.

[128]ibid.

discussion accompanying the abovementioned footnote. Ely was silent about these redactions despite taking care to explain why he also redacted another argument in the essay.[129] The clue to his change of mind is a tweak in titles: the 1978 essay was titled 'Constitutional Interpretivism: Its Allure And Impossibility'; but though the title of *D&D*'s chapter 1 is 'The Allure of Interpretivism', that of chapter 2 is 'The Impossibility of a *Clause-Bound* Interpretivism' (italics mine).

Ely's first-order interpretivism

Ely considered it 'the defining characteristic of an interpretivist approach' that it counsels courts to 'not intervene without a warrant in the Constitution.'[130] This warrant is broader than a constitution's plain text. Interpretivism, as Thomas Grey (from whom Ely borrowed the term[131]) explains, considers it appropriate to draw '[n]ormative inferences…from silences and omissions, from structures and relationships, as well as from explicit commands' of the written constitution.[132] *D&D*'s whole premise is that the text, history, and structure of the U.S. Constitution throw sufficient light on its open-ended terms.[133]

What Ely rejected was not interpretivism but the then usual form of it which he termed clause-bound interpretivism.[134] In the 1978 essay rejecting all sorts of interpretivism, he said that the Eight, Ninth, and Fourteenth Amendments contain clauses that are 'open and across-the-board invitations to import into the constitutional decision process *considerations that will not be found* in the amendment[s] nor even, at least not in any obvious sense, elsewhere *in the Constitution.*'[135] He kept the first part of the quote in *D&D*, but changed the end to '…considerations that will not be found in the language of the amendment or the debates that led up to it.'[136] Similarly, while in 1978 he said that 'the content of the equal protection clause…plainly will not be found anywhere in the document or the recorded remarks of its writers',[137] in *D&D* he changes tune: 'the content of the Equal Protection Clause…will not be found anywhere in its [i.e., the clause's] terms or in the ruminations of its writers.'[138] These suggest that in the two years between both works he had found 'considerations…in the Constitution' that make interpretivism possible.[139]

Ely acknowledged that he was 'importantly influenced'[140] by Charles Black Jr.'s seminal book *Structure and Relationship in Constitutional Law*, which had introduced

[129]Ely, *Democracy and Distrust* (n 7) 187, fn. 14.
[130]ibid 186 n.10.
[131]ibid 185 n.1.
[132]Thomas C Grey, 'Do We Have an Unwritten Constitution?' (1975) 27 *Stanford Law Review* 703, 706 n.9.
[133]Ely, *Democracy and Distrust* (n 7) 101.
[134]ibid 11–41.
[135]Ely, 'Constitutional Interpretivism: Its Allure and Impossibility' (n 33) 415 (italics mine).
[136]Ely, *Democracy and Distrust* (n 7) 14.
[137]Ely, 'Constitutional Interpretivism: Its Allure and Impossibility' (n 33) 438.
[138]Ely, *Democracy and Distrust* (n 7) 32.
[139]To give another example, compare Ely, 'Constitutional Interpretivism: Its Allure and Impossibility' (n 33) 438 (the Equal Protection Clause 'must be given content but cannot derive it from anything within the four corners of the document or the known intent of the framers.'); & Ely, *Democracy and Distrust* (n 7) 31 (The Equal Protection Clause is 'a provision whose general concern – equality – is clear enough but whose content beyond that cannot be derived from anything within its four corners or the known intentions of its framers.').
[140]Ely, *Democracy and Distrust* (n 7) 225 fn. 48.

structural argument, viz., 'the method of inference from the structures and relationships created by the constitution', to Ely's generation.[141] Ely pincites the pages where Black emphasizes that structural arguments must be 'controlled by the text'.[142] Because his process-oriented approach is so controlled, he considers it a 'version[] of interpretivism' distinguishable from the clause-bound one he criticized.[143] Hence in *D&D* Ely already considered his approach 'neither "interpretivist" *in the usual sense* (of treating constitutional clauses as self-contained units) nor "noninterpretivist" *in the usual sense* (of seeking the principal stuff of constitutional judgment in one's rendition of society's fundamental values rather than in the document's broader themes).'[144] He suggested his approach is either 'a form of interpretivism' or 'sitting somewhere between an interpretivist and a non-interpretivist approach' – but not an entirely noninterpretivist one.[145] In fact he says that on his 'more expansive days' he regarded his theory of judicial review as 'the ultimate interpretivism.'[146]

Ely's second-order interpretivism

As to Tribe's critique that there must be a substantive theory of democracy underlying Ely's process theory which would have to be derived from some external source of values, Ely replied that '[m]ost of the criticisms that have appeared so far – at least those that address arguments I actually made – were anticipated in the book'.[147] Arguably this was because Ely had always been concerned with 'the underlying democratic theory of *our* government.'[148] By this I take him to mean that he was also a second-order interpretivist: his underlying theory of democracy was derived not from an external source but from his reading of the text, history, and structure of the U.S. Constitution which, he claims, had been 'understood from the beginning' in just that way.[149] In fact two of his three main lines of argument pursue this second-order interpretivism.[150] He spends almost a whole chapter, including a subsection on 'The Nature of the United States Constitution', on them.[151]

Ely's defense of the one person, one vote standard illustrates his second-order interpretivism. *Reynolds v. Sims* and the rest of the Warren Court's voting cases, he said,

> took care of a problem the legislatures had refused to do anything about…[and] they involve rights (1) that are essential to the democratic process and (2) whose dimensions cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo.[152]

[141]Charles Lund Black, *Structure and Relationship in Constitutional Law* (Ox Bow Pr 1986) 7; see Bobbitt (n 105) 76–77.
[142]Black (n 141) 31; see Ely, *Democracy and Distrust* (n 7) 102 n.*.
[143]Ely, *Democracy and Distrust* (n 7) 12.
[144]ibid ibid 88 n.* (emphases supplied).
[145]ibid 12–13.
[146]ibid 87–88.
[147]Ely, *On Constitutional Ground* (n 9) 306.
[148]Ely, *Democracy and Distrust* (n 7) 4 (emphasis supplied).
[149]ibid 7.
[150]ibid 75 n.*.
[151]ibid 73–104.
[152]ibid 117.

What rights are essential to the democratic process (or, to borrow *RJR*'s jargon, what is the minimum core of democracy)? Ely begins answering this by noting that different understandings of democracy, including by many among the U.S. Constitution's framers, often place 'political equality, or the principle that everyone's vote is to count for the same' at their core.[153] But this seeming consensus cannot be judicially mandated unless it can be anchored on the U.S. Constitution, he says. This Ely does by tracing the Constitution's 'line of growth of development' over the centuries and finding in the several amendments to it (especially in the Fourteenth) 'a strengthening constitutional commitment to the proposition that all qualified citizens are to play a role in the making of public decisions.'[154] For courts seeking to enforce this commitment, says Ely, the most judicially administrable standard is one person, one vote.[155]

The contrary aims of Ely and noninterpretivist CPPT

Interpretivism does not prevent judicial decisions from being controversial.[156] In fact a main objection to structural argument, of which *D&D* is an exemplar, is that it is indeterminate.[157] What interpretivism does is limit the occasions for strict judicial scrutiny.[158] This might seem strange to some, considering that Ely's ideal court, the Warren Court, was famously revolutionary: it ended racial segregation, was the first to invoke the First Amendment to strike down a federal statute, pioneered the application of nearly the entire Bill of Rights to states, constitutionalized a sweeping 'right to vote', and mandated that congressional and state legislative districts be reapportioned to meet an exacting 'one-person, one-vote' standard.[159] But despite Earl Warren's renown as 'the most liberal chief justice in the annals of the [U.S. Supreme] Court',[160] numbers-wise the Warren Court invalidated acts of Congress at about the same rate as its predecessors and at a somewhat lower one than its successors.[161]

An interpretivist court will find it appropriate to strictly scrutinize a statute only when a norm 'fairly discoverable in the Constitution' is at stake.[162] Fairly discoverable means that the norm flows from an approach that is defensible in the same way Ely argued the Warren Court's approach was: 'in terms of inferences from values the Constitution marks as special.'[163] Thus the 'starting point' or 'underlying premise' of the inference must be found inside the Constitution (i.e., its text or structure) and not some outside source such as natural law, neutral principles, reason, or tradition.[164] Ely believed that the resulting constraint in scope would lead to better judicial enforcement of essential constitutional

[153]ibid 122.
[154]ibid 123.
[155]ibid 124.
[156]ibid 186 n.10.
[157]Bobbitt (n 106) 84, 231.
[158]Ely, *Democracy and Distrust* (n 7) 186 n.10.
[159]AR Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (Basic Books, 2012) 141–196.
[160]N Feldman, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices* (Grand Central Publishing, Twelve, 2010) 398.
[161]Amar, *America's Unwritten Constitution* (n 159) 197–198.
[162]Ely, *Democracy and Distrust* (n 7) 2.
[163]Ely, 'The Wages of Crying Wolf' (n 7) 943 (emphasis removed).
[164]Ely, *Democracy and Distrust* (n 7) 2.

values, a belief that American constitutional history plausibly bears out.[165] He argued from judicial psychology, positing that 'the force of one's principles often varies inversely with their range.'[166] Thus he thought that judges will wield the sword of judicial review timidly if its blade is too wide or too long but boldly if it is short and sharp as a dagger.[167] As an example he pointed to Justice Hugo Black, who for some was the Warren Court's intellectual leader:[168] 'he felt he had been given a limited number of jobs to do and he made sure he did them.'[169]

Ely thought that noninterpretivist judges, in contrast, were relatively unconstrained.[170] The different strands of noninterpretivist CPPT corroborate this. Most of them construe constitutional rights and hence the scope of judicial review more broadly than Ely did.[171] For example, Ely would disapprove of *RJR*'s list of principles that judiciaries assaying statutes should take into account as it includes such constitutionally external sources as 'broader rights to dignity, equality, and freedom for all individuals' as well as 'commitments to the rule of law, ethnic and religious pluralism, or constitutional stability or unity'.[172] Ely rejected this broad-ranging approach because he thought noninterpretivist judges will think their roving commissions undemocratic and so tread timidly, rushing in only at times out of political or moral disgust.[173] He blamed this mindset for the weakening of procedural due process, which he thought was partly because of the return of substantive due process.[174]

This, jargon aside, is the main fault line of aim between Ely and noninterpretivist strands of CPPT. Ely sought to limit the occasions for strict judicial scrutiny; noninterpretivist CPPTs tend to multiply them. Recognizing that Ely aimed to limit the scope of judicial review might help us gauge whether a country's judiciary would be receptive to his theory. For example, *D&D* was translated to Japanese as early as 1990 and its approach vigorously discussed by Japanese jurists since then.[175] It has not caught on with the Japanese Supreme Court, however, and one possible reason for this is that 'the Japanese Supreme Court has been a model of judicial restraint; there is no need for further restraint.'[176] If this is true, then in certain countries CPPT's characteristic *anti*-Elyian embrace of noninterpretivism, alongside a number

[165]R McCloskey and S Levinson, *The American Supreme Court* (4th edn, University of Chicago Press, IL, 2005) 250.

[166]Ely, 'Constitutional Interpretivism: Its Allure and Impossibility' (n 33) 403.

[167]ibid 402 & 420.

[168]Akhil Reed Amar, *The Law of the Land: A Grand Tour of Our Constitutional Republic* (Basic Books, 2015) 49–53.

[169]Ely, 'Constitutional Interpretivism: Its Allure and Impossibility' (n 33) 402.

[170]ibid.

[171]Dixon (n 5) 57.

[172]ibid 101.

[173]Ely, 'Constitutional Interpretivism: Its Allure and Impossibility' (n 33) 403.

[174]Ely, *Democracy and Distrust* (n 7) 19–20.

[175]S Matsui, 'John Hart Ely as a Constitutional Theorist: On Introducing Ely to Japan' *Journal of Japanese Law* (forthcoming).

[176]K Obayashi, 'Political Process Theory Is Not a Utility Knife: Comparative Political Process Theory and Judicial Review in Japan' *Journal of Japanese Law* (forthcoming). *See also* M Okochi, 'A Constitutional Analysis of Same-Sex Marriage Cases: Litigation for Social Change in Japan' *Journal of Japanese Law* (forthcoming) Part I.2.

of other reasons, might make it a more attractive model of judicial review than Ely's original model.[177]

Ely's critiques of noninterpretivism

Ely's critique of first-order noninterpretivism

Judicially enforcing rights a constitution specifically protects poses no democratic problem for Ely. The limits on majority rule they impose, he says, 'ultimately come from the people' (assuming that the constitution had been popularly ratified).[178] Not so for noninterpretivism. Invariably a noninterpretivist judge would end up using 'his or her *own values* to measure the judgment of the political branches'.[179] This for Ely goes against democratic principles. Worse: if followed widely noninterpretivism would produce 'a systemic bias in judicial choice of fundamental values, unsurprisingly in favor of the values of the upper-middle, professional class from which most lawyers and judges…are drawn'; it is therefore 'flagrantly elitist and undemocratic'.[180]

This brings us to *RJR*'s prescription that courts should enforce majority constitutional understandings. Ely had rejected the stronger prescription that judges read a consensus on 'conventional morality' or the 'true moral principles of the people' into open-ended provisions, arguing that these are either undiscoverable or more reliably reflected by legislatures than courts.[181] He observed that this prescription motivated most justifications for noninterpretivism.[182] It is undemocratic despite its populist pretensions, he argued, considering evidence that discovering consensus is a fool's errand, especially for courts; judges can often delude themselves that a somehow discoverable popular consensus, when properly refined, would back their own moral disapproval of a statute.[183]

As to *RJR*'s weaker prescription, how could courts plausibly brandish majority constitutional understandings against a popularly elected legislature whose decisional principle is majority rule? If the intent is 'to protect the rights of the majority by ensuring that legislation truly reflect popular values', said Ely, 'the legislative process would plainly be better suited to it than the judicial.'[184] And if the intent is 'to protect the rights of individuals and minority groups against the actions of the majority,' then it 'makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority.'[185] He therefore thought it

[177]See R Dixon, 'Comparative Representation-Reinforcement in Japan' *Journal of Japanese Law* (forthcoming).

[178]Ely, *Democracy and Distrust* (n 7) 8.

[179]ibid 44.

[180]ibid 59.

[181]Ely, *On Constitutional Ground* (n 9) 297.

[182]Ely, *Democracy and Distrust* (n 7) 63.

[183]ibid 63–67; As Exhibit-A he offered the separate concurring opinions in *Furman v. Georgia*, 408 U.S. 238 (1972) of Justices Brennan and Marshall, arguing that 'the death penalty was unconstitutional because it was out of accord with contemporary values', which swiftly spurred 'a virtual stampede of state reenactments of the death penalty', ibid 65.

[184]Ely, *Democracy and Distrust* (n 7) 68–69.

[185]ibid 69.

> entirely incompatible with democracy for courts to define their mission as one of correcting elected officials who have strayed too far…from what they claim they know (and the legislators do not) that "the people" really think is right.[186]

Ely also questioned the reliability of a main source of evidence *RJR* suggests courts can use to discover majority constitutional understandings: public opinion polls.[187] Ely rejected the use of poll results in constitutional reasoning. He said 'that is not the way we make law in a representative democracy.'[188] The best gauge of majority opinion on the many conflicting issues of the day is the ballot box.[189] It is a better barometer of majority opinion than polls because elections register a crucial variable which pollsters have trouble measuring: 'the intensities of preference' of voters.[190] Polls rarely register these intensities because pollsters seldom force individuals to either sacrifice time, money, effort, or other resources for a preference, or to decide the relative priority of their preferences. Voters, on the other hand, must choose not only 'among several candidates who *all* hold some positions with which we disagree: we have to buy a bundle, and we are bound not to like *some* of the ingredients', but also if they should 'bother trying to persuade others how to vote or even for that matter to vote themselves'.[191] Ely also observed that 'there is nothing unusual…with an intense minority's compromising on issues about which it feels less strongly in order to garner support on those it cares most about.'[192] Knowing this, 'our various representatives obviously allocate their persuasive energies (and barter their votes) in accord with the intensity with which they (and their estimate of the intensity with which we) care about various issues.'[193]

Another problem with public opinion polls is that they register only soft stances. As Bruce Ackerman explains with respect to elections, ballots reflect only half-baked decisions about poorly understood issues, decisions which would likely change if voters spent more time considering their votes.[194] The same observation applies *a fortiori* to opinion polls. 'Given the "softness" of normal public opinion, it is simply impossible to say how the people of today would decide an issue if they mobilized their political energies' to engage in democratic wheeling and dealing, where an interest in legalizing abortion may be sacrificed for, say, a tax break or a subsidy.[195] *D&D* captures this point in a quote by Louis Jaffe: 'There may be a profound ambiguity in the public conscience; it

[186]Ely, *On Constitutional Ground* (n 9) 8–9.

[187]Dixon (n 5) 149; She acknowledges that polls 'are not sources judges are accustomed to assessing or engaging with, and are indications of opinion that are disconnected from thicker democratic commitments to rights and deliberation', ibid; and that 'predicting the outcome of democratic elections is notoriously difficult even for political professionals with access to a wide range of public and private polls, and this is not something that judges are either well-trained or resourced to do', ibid 227; As she notes, Justice Blackmun, while drafting his opinion in Roe, consulted Gallup opinion polls showing broad public support for legalizing abortion, ibid 188; This did not save the decision from sparking Roe rage, Robert Post and Reva Siegel, 'Roe Rage: Democratic Constitutionalism and Backlash' (2007) 42 Harvard Civil Rights-Civil Liberties Law Review 373, 406–423.

[188]Ely, *Democracy and Distrust* (n 7) 218–219 n.112.

[189]Ely, 'Constitutional Interpretivism: Its Allure and Impossibility' (n 33) 407.

[190]ibid 408.

[191]ibid 407.

[192]Ely, 'The Wages of Crying Wolf' (n 7) 935, fn.89.

[193]Ely, 'Constitutional Interpretivism: Its Allure and Impossibility' (n 33) 408.

[194]Bruce Ackerman, *We the People* (Belknap Press of Harvard University Press 1991) ch 9.

[195]ibid 263.

may profess to entertain a traditional ideal but be reluctant to act upon it.'[196] Recent experiences have led pollsters to rediscover this insight.[197]

Finally, as to the Bickelian strategy of predicting the progress of popular opinion, Ely thought that judges are likely no better at crystal-ball gazing than lawmakers. Or at least they are not so much better at it that they could strike down statutes based on their predictions. Even assuming this, he wrote in *D&D* that such a strategy is 'antidemocratic on its face':

> today's judicial decision…will inevitably have an important influence on the values of tomorrow's majority. The "prophecies" of people in power have an inevitably self-fulfilling character, even when what is being "prophesied" is popular opinion…Thus by predicting the future the justices will unavoidably help shape it, and by shaping the future they will unavoidably…shape the present. Assuming it works, that amounts to the imposition of the justices' own values.[198]

Bickel had admitted as much, acknowledging that in successfully predicting progress a court would be 'at once shaper and prophet of the opinion that will prevail and endure.'[199] In Part IX I show how Ely later endorsed this prospect with respect to judicial prophecies like *Roe* that track the constitutional trendline. This endorsement was the lever that opened for Ely an interpretivist escape hatch which, I argue, can partly reconcile his views with *RJR*'s first-order noninterpretivism.

Extrapolating Ely's critique of second-order noninterpretivism

Ely dedicated his *Harvard Law Review* Foreword[200] and one of *D&D*'s six substantive chapters to attacking first-order noninterpretivism as inconsistent with representative democracy.[201] He never cared to attack second-order noninterpretivism, however. At least not directly. He believed he had already 'demonstrated that *no* plausible account of democracy supports a stronger theory of judicial review' than the one he had.[202] What his direct critique would have been we can only extrapolate.

A good place to start is his essay lambasting *Roe*. He agreed with the Court that a woman's right to an abortion is part of the liberty protected by the Due Process Clause. This clause, however, only guarantees that state restrictions on liberty (as well as life or property) are procedurally fair and, at most, reasonably related to a permissible governmental goal. And 'ordinarily the Court claims no mandate to second-guess legislative

[196]Ely, *Democracy and Distrust* (n 7) 64.

[197]M Savage, 'Why Did the Election Polls Overstate Labour's Lead?' *The Observer* (13 July 2024) <https://www.theguardian.com/politics/article/2024/jul/13/why-did-the-election-polls-overstate-labours-lead>; SKKN Hatley, A Lau and Courtney, 'What 2020's Election Poll Errors Tell Us About the Accuracy of Issue Polling' (Pew Research Center, 2 March 2021) <https://www.pewresearch.org/methods/2021/03/02/what-2020s-election-poll-errors-tell-us-about-the-accuracy-of-issue-polling/>.

[198]Ely, *Democracy and Distrust* (n 7) 70.

[199]Bickel (n 38) 239.

[200]For Ely authoring a Harvard Foreword marks one as that year's 'hottest constitutional theorist': Ely, 'Another Such Victory' (n 42) 842 n.18.

[201]Ely, *Democracy and Distrust* (n 7) 43–72; Ely, 'The Supreme Court, 1977 Term – Foreword: On Discovering Fundamental Values' (n 32).

[202]Ely, *On Constitutional Ground* (n 9) 16.

balances' of clashing interests (here the pregnant woman's liberty interest versus the state's interests in maternal health and potential life) unless the Constitution designates one or the other as specially protected.[203] *Roe* is 'frightening', said Ely, because it judicially accords special protection to a right (of privacy) neither explicitly mentioned in the Constitution nor plausibly inferable from its history or structure.[204] As such it is '*not* constitutional law and gives almost no sense of an obligation to try to be',[205] violating as it does the Supreme Court's 'obligation to trace its premises to the charter from which it derives its authority.'[206]

In another essay Ely also dismissed interpretations of the U.S. Constitution premised on a thoroughly republican (as opposed to pluralist) model of democracy as 'unwarranted as a matter of constitutional interpretation, as no coherent account of the document supports it' and as the classical republican tradition 'is conventionally identified with the antifederalists, whose attempt to defeat ratification failed.'[207] In *D&D* Ely also points out that 'at the core of [the U.S.] Constitution from the beginning' is a concept of representation (dramatically embodied in the Fourteenth Amendment) which rejects 'the republican tenet that the people and their interests were essentially homogenous'.[208] As with structural arguments, therefore, Ely thought that any model of democracy used to interpret a written constitution must be controlled by its text because courts are duty-bound to trace their premises to it.

Second-order noninterpretivism's hermeneutic problem[209]

Second order noninterpretivism also suffers from a hermeneutic problem. Legal comparatists start understanding any new constitution in the same way we begin understanding anything: through a progression of mental models. We first understand something as an instance of something (a book) and move on to interpreting it as kind of that something (a novel), then as a category of that kind (a historical novel), and so on.[210] We see a document beginning with 'We, the sovereign Filipino people…' and instantly recognize it as a constitution. Reading on we see articles on citizenship and universal suffrage and these prompt us to interpret it as a democratic constitution. Also finding in it a Bill of Rights and articles on the legislative, executive, and judicial departments, we refine our understanding of it as a liberal democratic constitution.[211]

A mental model is at the back of our mind whenever we approach a text. We presume the text fits the model, and this presumption guides our reading of the first passages of it we encounter. Without some such guide we would be looking blankly at phrase after

[203]Ely, 'The Wages of Crying Wolf' (n 7) 923.
[204]ibid 935.
[205]ibid 947.
[206]ibid 949.
[207]Ely, 'Another Such Victory' (n 42) 840 n.15.
[208]Ely, *Democracy and Distrust* (n 7) 82.
[209]See BD Tiojanco, 'How to Misread a Constitution' (*International Journal of Constitutional Law Blog*, 1 July 2022) <http://www.iconnectblog.com/how-to-misread-a-constitution/>.
[210]M Heidegger, *Being and Time: A Translation of Sein Und Zeit* (Joan Stambaugh tr, State University of New York Press, 1996) 139–140.
[211]See T Ginsburg and A Huq, *How to Save a Constitutional Democracy* (Oxford University Press, Oxford, 2019) 10.

phrase until we form a mental model of what these phrases amount to. As Gadamer explains:

> A person who is trying to understand a text is always projecting. He projects a meaning for the text as a whole as soon as some initial meaning emerges in the text. Again, the initial meaning emerges only because he is reading the text with particular expectations in regard to a certain meaning.[212]

The presumed mental model is thus our way into the text.[213] But since the mental model we project onto a text is presumed, it must also be provisional. Again, Gadamer (who refers to mental models as 'fore-projections' or 'fore-conceptions'):

> every revision of the fore-projection is capable of projecting before itself a new projection of meaning; rival projects can emerge side by side until it becomes clearer what the unity of meaning is; interpretation begins with fore-conceptions that are replaced by more suitable ones.[214]

The 'first, constant, and last task' of interpretation – says Martin Heidegger – is to keep refining the model we are projecting onto the text in terms of the text itself.[215] The test of a mental model is the text: does it fit? Do the various passages of the text confirm the mental model we are projecting onto it? We constantly need to countercheck the validity of our worked out mental models with the text itself.[216] We must resist the urge to draw propositions about the text from our provisional mental models.[217] Instead we must be open to 'the experience of being pulled up short by the text', i.e., the experience of it frustrating our expectations.[218] We must read a constitution in its entirety and not cherry-pick clauses which confirm our presumed, projected mental model; we do this 'so that the text can present itself in all its otherness and thus assert its own truth against one's own foremeanings.'[219] This is in line with a basic hermeneutic principle of textual interpretation: we must understand a text in its own terms.[220] It is what Ronald Dworkin calls the "dimension of fit", which he considers the first test of any interpretation: it does not require interpretations to "fit every bit of the text", only that they "flow throughout the text" and "have general explanatory power" such that they do not "leave[] unexplained some major structural aspect of the text".[221] A theory must fit the text, says Dworkin, "to count as an interpretation of it rather than the invention of something new."[222]

Second-order noninterpretivism violates this basic hermeneutic principle. It does so because it uses its mental model of democracy not as a model *of* this or that liberal democratic constitution but as a model *for* all liberal democratic constitutions.[223]

[212]Gadamer (n 27) 267.
[213]Heidegger (n 210) 141.
[214]Gadamer (n 27) 267.
[215]Heidegger (n 210) 143.
[216]Gadamer (n 27) 267–269.
[217]Heidegger (n 210) 6.
[218]Gadamer (n 27) 268.
[219]ibid 269.
[220]ibid 291.
[221]Dworkin (n 28) 230.
[222]ibid 67.
[223]See C Geertz, *The Interpretation of Cultures* (Basic Books 1973) 93–94.

Many comparative constitutional law scholars today are guilty of this. We use our mental models of democracy, constitutionalism, free speech, etc. less as grids for comprehending actual constitutions and more as guides for 'correcting' them. This procrustean propensity becomes problematic when a mental model worked out from various constitutions blinds us to clauses in another constitution that do not fit it.[224]

What makes second-order noninterpretivism worse is that democracy is an essentially contested concept: in theory what democracy means and entails will always be in dispute.[225] If in practice the concept of democracy has not been disputed of late, it is because its contestability was a casualty of the Cold War, which 'elevated democracy as the defining characteristic of Western Europe, while also restricting its exercise to those who were willing to subscribe to a particular definition of its values.'[226] This particular definition was in turn a product of the horrors of fascism, which 'could not really exist before the citizenry had become involved in politics.'[227] Preventing a return to the overheated mobilized politics which enabled fascism was a main aim of postwar politicians, philosophers, and jurists alike, so that stability became the watchword of constitutional design.[228] This led liberal constitutional theory to adopt an elitist model of democracy which limited democratic participation to the ballot.[229]

The post-fascist, post-Cold-War context is absent in places like Southeast Asia, some countries of which consider widescale participation in public policymaking (outside of periodic elections) as a defining trait of democracy.[230] This conception of democracy differs from the standard liberal conception of it. Formal nonelectoral channels for widescale participation in public policymaking are seldom considered part of democracy's minimum core by comparative constitutional law scholars, who generally subscribe to the Schumpeterian model of elite, electoral democracy.[231] Of the variants of CPPT I have come across, only Gargarella's 'dialogic or deliberative approach'[232] identifies the noninvolvement of the public in policymaking deliberations as a democratic malfunction which justifies activist judicial intervention.[233] This can lead noninterpretivist CPPT scholars to

[224]See, e.g., my critique of Surabhi Chopra, 'The Constitution of the Philippines and Transformative Constitutionalism' (2021) 10 Global Constitutionalism 307; in Tiojanco, 'How to Misread a Constitution' (n 209).

[225]WB Gallie, 'Essentially Contested Concepts' 56 Proceedings of the Aristotelian Society, New Series 167, 183–187 (1955–1956)

[226]M Conway, *Western Europe's Democratic Age, 1945-1968* (Princeton University Press, NJ, 2020) 92.

[227]RO Paxton, *The Anatomy of Fascism* (Reprint edition, Vintage, NY, 2005) 42.

[228]JW Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (Yale University Press, CT, 2011) 128; Conway (n 226) 34, 64, 102, 111.

[229]Müller (n 228) 5.

[230]In other places such as Kenya as well, see Gautam Bhatia's essay in this special issue, 'The Hydra and the Sword: Constitutional Amendments, Political Process, and the BBI Case in Kenya'; and Joshua Malidzo Nyawa, 'Kenyans as "Adult Citizens": Kenya's Landmark SHIF and Finance Act Decisions on Public Participation [Guest Post]' (*Constitutional Law and Philosophy*, 1 August 2024) <https://indconlawphil.wordpress.com/2024/08/01/kenyans-as-adult-citizens-kenyas-landmark-shif-and-finance-act-decisions-on-public-participation-guest-post/>.

[231]Y Hasebe, 'The New Comparative Political Process Theory: Its Legitimacy and Applicability in Japan', *Journal of Japanese Law* (forthcoming); e.g. Gardbaum, 'Comparative Political Process Theory' (n 20) 1450–1451; Dixon (n 5) 61; Ginsburg and Huq (n 211) 10; see J Schumpeter, *Capitalism, Socialism and Democracy* (Routledge, UK, 2003).

[232]Gargarella (n 22) 1468.

[233]ibid 1469.

endorse judicial underenforcement of core democratic principles in some Southeast Asian countries. In Malaysia, for example, despite local government elections having been suspended since 1965, the Federal Court recently ruled that public participation in important local government matters such as land planning is considered 'an integral part of the democratic process'.[234] Similarly in Thailand the Chiang Mai Metropolitan Administration Bill of 2013, supported by civil society actors who were 'convinced that in elections votes are simply bought', offered a model of local democracy that encourages citizen participation through mechanisms of public consultation, committee membership, referenda, etc.[235] While this Bill ultimately proved abortive, as of this writing the Move Forward Party in Thailand is striving to revive this decentralization campaign.[236]

The procrustean propensity is even more problematic when the alternative model of democracy was overwhelmingly ratified in a nationwide constitutional plebiscite following a hotly contested campaign.[237] In the Philippines, for example, formal channels for widescale participation in public policymaking are a crucial component of the participatory model of democracy the 1987 Constitution enshrines.[238] This is clear from the 1986 Philippine Constitutional Commission's Records:

OPLE: …The Committee added the word "democratic" to "republican,"…The constitutional framers of the 1935 and 1973 Constitutions were content with "republican."…

NOLLEDO: … being the proponent of this amendment, I would like the Commissioner to know that "democratic" was added because of the need to emphasize people's power and the many provisions in the Constitution that we have approved related to recall, people's organizations, initiative and the like, which recognize the participation of the people in policy-making in certain circumstances….

OPLE: …In the old days, it was taken for granted that democracy stood for liberal democracy. I think democracy has since expanded in its scope…

NOLLEDO: … "democracy" here is understood as participatory democracy…

OPLE: Yes, of course, we can agree most wholeheartedly on that construction of the word.[239]

[234]*Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors and Other Appeals*, [2023] 5 CLJ 167, 194; Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* 150–155 (2nd edn, Hart Publishing, Oxford, 2022). See also *Perbadanan Pengurusan Sunrise Garden Kondominium v. Sunway City (Penang)* SDN BHD & Ors and Another Appeal [2023] 2 CLJ 333. I thank Andrew Harding for bringing these two cases to my attention.

[235]A Harding and R Leelapatana, 'Possibilities for Decentralisation in Thailand: A View from Chiang Mai' 1 *Thai Legal Studies* 76, 91 & 94(2021).

[236]พริษฐ์ วัชรสินธุ, 'ก้าวไกลเชียงใหม่' เคาะจังหวะกระจายอำนาจ ปลดล็อกข้อจำกัด กำหนดอนาคตท้องถิ่น [Parit Wacharasindhu, 'Move Forward Chiang Mai: local future'] (Lanner, Chiang Mai, December 21, 2023) <https://www.lannernews.com/21122566-01/>. I thank Rawin Leelapatana both for this citation (whose title and gist he kindly translated for me) and for updating me about the status of this bill.

[237]BD Tiojanco, 'The Making of the 1987 Philippine Constitution' in NS Bui and M Malagodi (eds), *Asian Comparative Constitutional Law: Constitution-making* (Hart 2023) 235–237.

[238]ibid 237–239; BD Tiojanco, 'The Philippine People Power Constitution: Social Cohesion through Integrated Diversity' in J Neo and BN Son (eds), *Pluralist Constitutions in Southeast Asia* (Hart 2019).

[239]IV Records of the Constitutional Commission 86. 18 Sep. 1986.

As a prominent 1986 Constitutional Commissioner fairly recently explained, this model of democracy envisions that 'consultations with the people's organizations and civil society is part of due process in the pursuit of social justice.'[240] Unfortunately, the predominance of Schumpeterian democracy as the framework for interpreting the 1987 Constitution[241] has misled the Philippine Supreme Court into interpreting its several clauses mandating the establishment of these channels as merely directory.[242] Insofar as the Schumpeterian democratic minimum cores posited by leading CPPT scholars encourage such misinterpretations, they contribute to less democratic readings of a written constitution than what an interpretivist judge would arrive at. In these situations a noninterpretivist CPPT would prove more anti- than neo-Elyian.

The possibility of an interpretivist CPPT

Interpretive comparative constitutional studies[243]

I also disagree with Gardbaum that 'given its comparative nature, CPPT is not, and cannot be, simply an interpretive theory (as with domestic counterparts)'.[244] Comparative constitutional law theories can be (first- and second-order) interpretivist and so *D&D* can be considered a classic of comparative constitutional law theory despite its focus on a single jurisdiction.

A classic, says Gadamer (mentioning Plato, Aristotle, Leibniz, Kant, and Hegel), is a timeless work.[245] It is a classic because discriminating readers across generations have time and again recognized its value. What makes it valuable is the horizon we acquire through it, enabling us 'to look beyond what is close at hand – not in order to look away from it but to see it better, within a larger whole and in truer proportion.'[246] The horizon, in short, improves our understanding of a subject. We acquire this horizon because the classic work wends its way through an inquiry or story with surprising questions, frames, themes, arguments, and answers which challenge and perhaps change our own premises and opinions. While we may not fully agree with a classic, we take it seriously because its exalted place in our tradition recommends its reasoning or narrative as possibly better informed and considered than ours.

D&D can be a classic for the Philippines – whose written constitution is different though derived from the U.S. Constitution, and where American case law is at best only persuasive authority[247] – and for comparative constitutional law theory – where the

[240]Christian Monsod (The Relevance of the 1986 People Power Revolution Today, School of Economics Auditorium, University of the Philippines Diliman, Quezon City, Philippines, 24 February 2017) <https://www.rappler.com/nation/162426-relevance-edsa-people-power-today>.

[241]NG Quimpo, *Contested Democracy and the Left in the Philippines after Marcos* (Ateneo de Manila University Press) 6.

[242]See, e.g., *Anak Mindanao Party-List Group v Executive Secretary*, G.R. No. 166052, 558 Phil. 338, 29 August 2007.

[243]See Tiojanco, 'Can There Be Classics of Comparative Constitutional Law Theory?' (n 47); BD Tiojanco, 'Comparative Constitutional Law Theory Today Depends Upon Back-Translators' (29 April 2022) <http://www.iconnectblog.com/comparative-constitutional-law-theory-today-depends-upon-back-translators/>.

[244]Gardbaum, 'Comparative Political Process Theory' (n 20) 1453.

[245]HG Gadamer, *Truth and Method* (2nd rev. edn, Bloomsbury Academic, 2004) xxi & 290.

[246]ibid 304.

[247]BDG Tiojanco and RRKS Juan, 'Importing Proportionality through Legislation: A Philippine Experiment' in Po Jen Yap (ed), *Proportionality in Asia* (Cambridge University Press, Cambridge, 2020) 252–254.

U.S. is but a single though influential jurisdiction of inquiry – because it can be placed within a wider, transnational tradition of liberal democratic constitutionalism.[248] *D&D* explores a central question for any liberal constitutional democracy: 'How can judicial review be reconciled with democratic rule?' As the trendiness of CPPT shows, constitutional law scholars have recognized the immense value of engaging with it since its publication four decades ago in 1980. So while *D&D* was initially what Kim Scheppele calls a 'nationalist' theory of judicial review because Ely had assumed 'a common national "we" in the audience' for it,[249] its worldwide reception has transformed it into a classic of comparative constitutional law scholarship.

This transformation was possible because *D&D* shares with comparative constitutional law scholarship a particular idiom of inquiry, viz., a conceptual system for redescribing a practice in terms that are different from how it is usually understood.[250] The concern of its theory of judicial review is different from that of judges and other legal practitioners. It is to investigate the conditions, tensions, character, etc. of constitutional arrangements, not to engage in the practice of constitutional law.[251] As such the concepts it both borrows (e.g., democracy, political process, open-ended constitutional clauses, noninterpretivism) and fashions (e.g., clause-bound interpretivism, process-oriented system of review) can be used to redescribe constitutional systems other than that of the United States. The understanding that single-jurisdiction works like *D&D* enables for comparative constitutional studies is analogous to anthropological understanding: it offers a conceptual toolbox which allows us to place different constitutional arrangements side by side so that they may each illuminate the others.[252]

The same can be said for CPPT in general. Comparative constitutional law scholarship redescribes local legal practices in terms that are different from what practitioners would routinely use to describe them. We may call these re-descriptive terms *experience-distant concepts*, as opposed to the *experience-near concepts* which form part of every legal practitioner's professional vocabulary.[253] A judge of the South African Constitutional Court, for example, might agree with *D&D* and CPPT that systemic democratic malfunction is a proper occasion for judicial intervention, but she would likely phrase her intervention in terms of sections 59(1)(a) and 72(1)(a) of the South African Constitution.[254] Experience-distant concepts like democratic malfunction, minimum core, procedural review, etc. allow CPPT scholars to place different judicial practices side by side so that they may each illuminate the others. Dixon, for example, might classify the South African judge's intervention above as an engagement-style form of weak-strong remedy that can be usefully compared with the monitoring form of it used in India and Colombia.[255] Indeed, as Gardbaum recognizes, this is one main attraction of CPPT: its Elyian orientation allows it to place seemingly disparate judicial doctrines and

[248]Ginsburg and Huq (n 211) 6–19.

[249]KL Scheppele, 'Constitutional Ethnography: An Introduction' (2004) 38 *Law & Society Review* 389, 392.

[250]M Oakeshott, *On Human Conduct* (Oxford University Press, Oxford, 1991) 15–19.

[251]ibid 26; M Loughlin, 'Constitutional Theory: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 183, 186.

[252]See C Geertz, *Local Knowledge: Further Essays In Interpretive Anthropology* (Reprint edn, Basic Books, 2000) xi, 55–70.

[253]ibid 57–58.

[254]See, e.g., *Doctors for Life International v Speaker of the National Assembly* 2006 ZACC 11.

[255]See Dixon (n 5) 232.

decisions from different jurisdictions within a comparative framework of constitutional analysis and diagnosis.[256]

Local experts from these different jurisdictions need to back-translate the academese of CPPT scholars into various local legalese. A scholar's considerations relating to political parties, civil society groups, or rights, for example, might be translated into operable tests involving the doctrines of political question, standing, ripeness, or, in the Philippines, transcendental importance.[257] This process of backtranslation, viz., the retranslation of a translated text back into its original language, is the most popular quality control method in cross-cultural research (anthropology, psychology, marketing, etc.).[258] It is mainly used to check the quality of translated research materials such as tests and questionnaires. More important for comparative constitutional law studies, however, is its use in what cross-cultural researchers call decentering; this is a process where both the original and the translated texts are considered equally important in the writing of the final version of the test, questionnaire, etc. to be translated for conducting research.[259] Analogously, decentering in comparative constitutional law theory would be a process where experience-near-concept translations of experience-distant-concepts are used to refine a theory so that it could better accomplish its aim, which in this case is to guide judges and Justices attempting to safeguard an embattled constitutional democracy. As Aileen Kavanagh vividly puts it, a noninterpretivist variant of CPPT

> gives us a bird's eye view across varied terrain. But eventually we need to come back down to earth and get our hands dirty in the details, attentive to variation in soil composition and climate. Most likely, the locals who have been working that soil for generations will have something relevant and useful to say to the global comparative scholar.[260]

This dialogue between a second-order noninterpretivist's 'typological' approach and the 'contextual' one of a single-jurisdiction work can produce an interpretive variant of CPPT.[261] Since an interpretive theory is tethered to the text of a written constitution, it would characteristically be a single-jurisdiction study. On this point an interpretive CPPT comes close to Scheppele's vision of constitutional ethnography, which is 'an attempt, both literally and conceptually to translate concepts across sites, times, and research questions.'[262] Constitutional ethnographic theories, aiming at 'thematization', provide 'a set of repertoires that can be found in real cases and that provide insight into how constitutional regimes operate' so as to enable scholars to 'see more deeply into particular cases.'[263] Such theories therefore take 'a basically comparative view.'[264]

[256]Gardbaum, 'Comparative Political Process Theory' (n 20) 1451.

[257]See BD Tiojanco, 'Stilted Standards of Standing, The Transcendental Importance Doctrine, and the Non-Preclusion Policy They Prop' (2012) 86 *Philippine Law Journal* 606.

[258]S Tyupa, 'A Theoretical Framework for Back-Translation as a Quality Assessment Tool', (2011) 7 *New Voices in Translation Studies* 35, 35–36.

[259]R Brislin, 'Back-Translation for Cross-Cultural Research' (1970) 1 *Journal of Cross-Cultural Psychology* 185, 186.

[260]A Kavanagh, 'Comparative Political Process Theory' (2020) 18 *International Journal of Constitutional Law* 1483, 1488–1489.

[261]Gardbaum, 'Comparative Political Process Theory' (n 75) 1513.

[262]Scheppele (n 249) 392.

[263]ibid 391.

[264]ibid (emphases removed).

Ely also aimed at thematization. The problem with Burger Court decisions, said Ely, was that they 'lack a theme.'[265] He was convinced that thematic judicial decisions better secured freedoms than disparate ones.[266] The theme he proposed, of course, is the one CPPT has adopted: judicial intervention to safeguard the democratic process. Compared to a work of constitutional ethnography, however, an interpretive CPPT will be focused more sharply on constitutional interpretation. Constitutional ethnographies aim to capture 'the lived detail' of a particular constitutional system.[267] As such it looks not only at a written constitution's text, history, and structure, but also at 'complex interrelationships among political, legal, historical, social, economic, and cultural elements.'[268] In contrast, an interpretive CPPT account of a single jurisdiction will examine if a judicial theme of safeguarding democracy is defensible 'in terms of inferences from values the Constitution marks as special.'[269] As Kentaro Matsubara explains in another context, such an account will be 'inherently comparative' because it 'necessarily involves an implied comparison' with judicial review in the United States and other jurisdictions from which other CPPT variants draw upon.[270]

An interpretivist CPPT approach to the Philippine constitution

I mentioned earlier (at the end of Part VII) that the 1987 Philippine Constitution envisions widescale participation in public policymaking as 'part of due process in the pursuit of social justice.'[271] In an often-overlooked section, the Constitution guarantees that

> The right of the people and their organizations to effective and reasonable participation at all levels of social, political, and economic decision-making shall not be abridged. The State shall, by law, facilitate the establishment of adequate consultation mechanisms.[272]

The Philippine Supreme Court has stressed the by-law clause at the end of this section.[273] Thus the prevailing doctrine is that with respect to this right 'the role of the State would be mere facilitation, not necessarily the creation of these consultation mechanisms,' and that the 'Penalty for failure on the part of the government to consult could only be reflected in the ballot box and would not nullify government action.'[274]

[265]Ely, 'The Supreme Court, 1977 Term – Foreword: On Discovering Fundamental Values' (n 32) 10.

[266]Ely, *Democracy and Distrust* (n 7) 102 n.*.

[267]Scheppele (n 249) 395.

[268]ibid 390.

[269]Ely, 'The Wages of Crying Wolf' (n 7) 943 (emphasis removed).

[270]K Matsubara, 'East, East, and West: Comparative Law and the Historical Processes of Legal Interaction in China and Japan' (2018) 66 *American Journal of Comparative Law* 769, 772.

[271]Christian Monsod (n 240).

[272]Phil. Const. art. XIII, sec. 16.

[273]By law clauses are found in many constitutions. See R Dixon and T Ginsburg, 'Deciding Not to Decide: Deferral in Constitutional Design' (2011) 9 *International Journal of Constitutional Law* 636.

[274]*Anak Mindanao Party-List Group v Executive Secretary*, G.R. No. 166052, 558 PHIL. 338, 29 August 2007.

The 1987 Constitution's underlying model of democracy envisions a mobilized and organized citizenry as the motor of its social justice goals.[275] As one constitutional commissioner explained during the 1986 Constitutional Commission's plenary debates, people's organizations are 'the enabling vehicle through which justice can be attained through some kind of involvement and participation in decision-making.'[276] The emphasis, therefore, should not be on the by-law clause, but on the clause before it: 'The right of the people and their organizations to effective and reasonable participation at all levels of social, political, and economic decision-making shall not be abridged.' If they cannot meaningfully exercise this right, then government must – indeed, the Constitution explicitly states 'shall' – establish adequate consultation mechanisms. Otherwise a crucial component of Philippine democracy's minimum core would be undermined, and the judiciary may intervene to fix this democratic malfunction.

The Supreme Court strongly enforces democratic processes, notably elections.[277] Its robust exercise of its novel constitutional power to 'Promulgate rules concerning the protection and enforcement of constitutional rights' is also already established.[278] With this expanded rulemaking power the Court has issued writs of continuing mandamus, which direct government agencies or officials to continually work towards the fulfillment of an action or series of actions ordered by the court.[279] A CPPT approach will counsel the Court to extend the scope of continuing mandamus to the enforcement of the people's right to participate in decision-making through adequate consultation mechanisms and monitor bureaucratic compliance with this constitutional requirement. It can cite as support the Administrative Code of 1987, which requires notice and hearing for agency rulemaking.[280] Up to 2003 the Philippine Supreme Court had enforced this notice-and-hearing requirement by requiring administrative agencies to hold a hearing before adopting a legislative rule, i.e., an administrative issuance that implements a statute by providing its details.[281] Since then, however, the Court has required notice and hearing only for agency decisionmaking, but not for agency rulemaking.[282] It has thus restored the doctrine under the 1917 Revised Administrative Code[283] that in general '[p]revious notice and hearing…is not essential to the validity of [administrative] rules or regulations' because 'where the function of the administrative body is legislative, notice or hearing is not required by due process of law.'[284] Presently, therefore, there is no general requirement for

[275]Tiojanco, 'The Making of the 1987 Philippine Constitution' (n 237); Tiojanco, 'The Philippine People Power Constitution: Social Cohesion through Integrated Diversity' (n 238).

[276]II R.C.C. 46, 2 August 1986.

[277]See, e.g., *Macalintal v. Commission on Elections*, G.R. No. 263590, June 27, 2023.

[278]Phil. Const., Art. VIII, sec. 5(5) (1987).

[279]BD Tiojanco, 'Integrated Diversity: A Pluralist Argument for the Philippine Writ of Continuing Mandamus' in PJ Yap (ed), *Constitutional Remedies in Asia* (Routledge, UK, 2019).

[280]Executive Order No. 292, s. 1987, Book VII, ch.2, sec. 9 (25 July 1987).

[281]As opposed to a mere interpretative rule (i.e., an issuance which gives guidelines to a statute that the agency enforces), where a hearing is not required before its adoption: *Misamis Oriental Association of Coco Traders v Finance Secretary*, G.R. No. 108524, 10 November 1994; *Commission of Internal Revenue v Michel J. Lhuillier Pawnshop, Inc.*, G.R. No. 150947, 453 Phil. 1043, 15 July 2003.

[282]*Abella Jr. v Civil Service Commission*, G.R. No. 152574, 485 Phil. 182, 17 November 2004; *Dagan v Phi. Racing Commission*, G.R. No. 175220, 598 PHIL. 406, 12 February 2009; *Quezon City PTCA Federation v Department of Education*, G.R. No. 188720, 781 Phil. 399, 23 February 2016.

[283]Which required only publication and the department head's approval for administrative rulemaking: ACT No. 2711, Book II, Title VI, ch.25, art.1, sec. 551 (1917).

[284]*Central Bank of the Philippines v Cloribel*, G.R. No. L-26971, 11 April 1972.

administrative rulemaking in the Philippines to implement the people's right to participate in decision-making through adequate consultation mechanisms.[285] A CPPT approach will counsel the Philippine Supreme Court to expand the writ of continuing mandamus to monitor bureaucratic compliance with the constitutional and statutory requirement of public participation in administrative rulemaking.[286]

Many other Philippine statutes similarly feature a public participation requirement – with some explicitly stating that it 'refers to the constitutionally mandated process whereby the public, on their own or through people's organizations, is provided an opportunity to be heard and to participate in the decision-making process on matters involving the protection and promotion of its legitimate collective interests, which shall include appropriate documentation and feedback mechanisms'.[287] The Local Government Code of 1991, to cite a celebrated example, *prima facie* requires prior and periodic consultations with different stakeholders before any national government project or program is implemented in a locality.[288] Unfortunately, violation of this public consultation requirement has been widespread from the outset.[289] The Philippine Supreme Court has abetted this trend by narrowly reading the scope of this requirement.[290] A CPPT approach will counsel the Court to instead expand the writ of continuing mandamus to monitor compliance with these statutory public participation requirements.

Despite this political process orientation, Ely might frown upon my CPPT reading of the Philippine Constitution for reasons of institutional competence, which is one of his three main lines of argument in *D&D*.[291] He argued that 'what procedures are needed fairly to make what decisions are the sorts of questions lawyers and judges are good at.'[292] And this fact favored his approach because it will 'assign to the courts a role lawyers are specially trained to fulfill, that of ensuring purity of process.'[293] Institutional competence for him includes 'considerations of administrability,' which takes into account the judiciary's institutional arrangements.[294] On this aspect the Philippine

[285]G Base, 'Notice-and-Comment Rulemaking in Comparative Perspective: Some Conceptual and Practical Implications' (2020) 15 *Asian Journal of Comparative Law* 95, 105.

[286]See I offer an extended defense of the Philippine Supreme Court's use of the writ of continuing mandamus in Tiojanco, 'Integrated Diversity: A Pluralist Argument for the Philippine Writ of Continuing Mandamus' (n 279).

[287]Urban Development and Housing Act of 1992, Republic Act No. 7279, sec. 3(d) (1992). See also the Comprehensive Agrarian Reform Law of 1998, Republic Act No. 6657, sec. 2 (1988) ('The State shall recognize the right of farmers, farmworkers and landowners, as well as cooperatives and other independent farmers' organizations, to participate in the planning, organization, and management of the program'); Magna Carta of Small Farmers, Republic Act No. 7607, sec. 2 (1992) ('the State shall recognize the right of small farmers and farmworkers, as well as cooperatives and independent farmers' organizations, to participate in the planning, organization, management and implementation of agricultural programs and projects').

[288]Rep. Act No. 7160, secs. 2(c), 26–27 (1991).

[289]Thus as early as 1993 President Fidel Ramos issued a memorandum circular calling attention to and enjoining strict compliance with it: Memorandum Circular No. 52, s. 1993.

[290]*Lina v Paño*, G.R. No. 129093, 416 Phil.438, 30 August 2001; *Bangus Fry Fisherfolk Diwata Magbuhos v Lanzanas*, G.R. No. 131442, 453 Phil. 479, 10 Jul. 2003

[291]Ely, *Democracy and Distrust* (n 7) 75 n.* & 88; contra Kavanagh (n 260) 1485 ('Ely was remarkably reticent about capacity considerations when it came to developing his own theory.').

[292]Ely, *Democracy and Distrust* (n 7) 21.

[293]Ely, *On Constitutional Ground* (n 9) 297–298.

[294]Ely, *Democracy and Distrust* (n 7) 124 (italics removed).

Supreme Court's recent record has been poor. Regulatory compliance with its continuing mandamus order to clean up Manila Bay has been slow, with the Court struggling to find sufficient manpower to adequately monitor the agencies concerned in this single instance. Hence considerations of the administrability of the continuing mandamus might have caused the Court to refuse to issue this writ in subsequent decisions.[295] Fortunately, the variegated remedies the CPPT school proposes is in fact its proponents' most talked about, and perhaps most promising contribution.[296] An interpretive CPPT approach will thus address the administrability critique by back-translating to Philippine legalese the various types of remedies CPPT scholars have curated from around the world.

Conclusion: Ely's interpretivist escape hatch

The U.S. Supreme Court in *Casey* reaffirmed the special protection *Roe* accorded a pregnant woman's right to an abortion, holding that a state may not ban abortions either before viability or afterwards if continued pregnancy would threaten maternal health. Ely eventually came to praise *Roe* because it had 'contributed greatly to the more general move toward equality for women,' which he thought was 'in line with the central themes of our Constitution'; he thought that *Casey* was correct in upholding it because not doing so 'would wreak havoc on that constitutionally legitimate movement.'[297] This was Ely's interpretivist escape hatch, which, following Akhil Amar, we may call 'the argument from constitutional trendline.'[298] *Dobbs* finds no right to abortion in the U.S. Constitution, meaning that state legislatures can prohibit abortions at any point of a pregnancy.[299] It could therefore, professedly in Ely's name, disrupt the constitutional trendline toward gender equality which he celebrated.

'I approve of it politically if not constitutionally', he said of *Roe*, it had 'contributed greatly to the more general move toward equality for women, which seems to me not only good but also in line with the central themes of our Constitution.'[300]

Had his constitutional philosophy given way to these moral and political preferences?

'My fear', he confessed, is that 'there may indeed be something there' in that thought.[301]

But Ely can also rely on his constitutional philosophy. He acknowledged that the three occasions of constitutional intervention which *Carolene Products* had sketched 'in fact do not exhaust the set of appropriate constitutional premises for our courts'.[302] Constitutional trendline was for him another appropriate premise. In *D&D* this trendline tracked the arc of formal amendments to the U.S. Constitution and hence was

[295]Tiojanco, 'Integrated Diversity: A Pluralist Argument for the Philippine Writ of Continuing Mandamus' (n 279) 173–174.

[296]See, e.g., two of the other essays in this special issue: R Dixon and PJ Yap, 'Responsive Judicial Remedies'; S Gardbaum, 'Comparative Political Process Theory 2: Semi-substantive Judicial Review'.

[297]Ely, *On Constitutional Ground* (n 9) 305.

[298]Akhil Reed Amar, '"America's Constitution" and the Yale School of Constitutional Interpretation' (2006) 115 *Yale Law Journal* 1997, 2010.

[299]*Dobbs* (n 2) 69.

[300]Ely, *On Constitutional Ground* (n 9) 305.

[301]ibid.

[302]ibid 307.

characteristically interpretivist.[303] An argument from it could have been smoothly made for *Casey* if the Equal Rights Amendment had been ratified, and Ely knew it.[304] But the ERA had fallen three states short for ratification. Consequently to support *Casey* he went for a cloudy concoction of arguments from both trendline and stare decisis. He remained Delphic about how to trace trendline outside of amendments and admitted not having 'a well-developed theory of stare decisis'[305] while refusing to 'yield[] an inch on [his] criticism of *Roe* (which isn't…necessarily to say that the case should now be overruled).'[306]

But Ely also said he had 'no quarrel' with the power of courts to strike down a statute where there is an infringement of a right that is either explicitly or originally intended to be guaranteed by the written constitution. This power, he said, has been 'entirely settled by history'.[307] With *Roe* he said that courts should 'feel bound to uphold the decision' because '[t]he Justices have built a number of decisions on it, and the holding is now part of an elaborate system of legal doctrine. It's part of the law.'[308] Despite *Dobbs*, *Roe* arguably remains firmly part of American constitutional law's 'academic theory canon'[309]; both the progressive left and liberal center in the academe seem to still generally assume that any theory of American judicial review 'must explain and justify *Roe*'.[310] As *RJR* surveys, this stance is in line with the jurisprudence of many constitutional democracies on most continents.[311]

The John Hart Ely who would disown all of us never faced this development. He also confessed having a 'clouded crystal ball' when it comes to how his views on 'Constitutional Adjudication and Democratic Theory' would evolve.[312] *Roe* for him was like the unadorned minor ninth, which he said 'still strikes my ear, as I believe it does most people's, as uncivilized.'[313] But that was more than three decades ago, and even at that time he had supposed that 'this too will pass', considering that 'every time there develops what appears to be a consensus among musicians (and their listeners), to the effect that a certain interval is unacceptable noise, someone who can't be dismissed on any principled basis as "not a real musician" starts using it, and often others follow.'[314] The argument from constitutional trendline and stare decisis allows Ely to follow this development in the United States. His reluctance to quarrel with constitutional questions entirely settled by history could also allow him to follow it abroad.

Does Ely's about-face on *Roe* look like a validation of *RJR*'s Bickelian prescription that courts predict the progress of popular constitutional understandings? If it is true, as some

[303]Ely, *Democracy and Distrust* (n 7) 6–7, 98–99, 123; summarized in Amar, '"America's Constitution" and the Yale School of Constitutional Interpretation' (n 298) 2009–2010.

[304]Ely, *Democracy and Distrust* (n 7) 164 n.*.

[305]Ely, *On Constitutional Ground* (n 9) 305.

[306]ibid 363.

[307]*Ibid.*

[308]quoted in Caplan (n 59) 126.

[309]Balkin and Levinson (n 35) 1016.

[310]ibid 997; e.g., Rubenfeld (n 43) 188 (saying that if his constitutional theory is 'to have power', it 'ought both to capture Roe v. Wade and to draw its principles' from its methodology).

[311]Cf. *Imbong v Ochoa, Jr.*, G.R. No. 204819, 8 April 2014 (Phils.) (holding that the 1987 Philippine Constitution enshrines the 'principle of no abortion').

[312]Ely, *On Constitutional Ground* (n 9) 306 n.*.

[313]Ely, 'Another Such Victory' (n 42) 837 n.10.

[314]ibid.

scholars argue, that the U.S. Supreme Court seldom strays too far from public opinion,[315] then can't the 'elaborate system of legal doctrine' built out from *Roe* be considered a register of such understandings? Seen this way, Ely's escape hatch could in time open the floodgates for noninterpretivist decisions that stand the test of time. And it would support *RJR*'s advice to courts to nudge their countries towards 'the most normatively desirable direction of constitutional change and the likely evolution of democratic opinion' that over time may win over majority constitutional understandings.[316] Though Ely would likely oppose second-order noninterpretivism for its cavalier disregard of higher law-making and the hermeneutic dimension of fit, I think he would accept first-order noninterpretivisms like *Roe* that follow constitutional trendline and which can garner judicial or statutory support. In this CPPT would benefit from the work of backtranslation and should endorse and support such efforts.

Perhaps Ely would not disown many of us after all.

Acknowledgements. I thank Rosalind Dixon for getting me started on this essay. I also thank the University of Tokyo Transnational Law Center, the National University of Singapore Centre for Asian Legal Studies, Singapore Management University's Center for Commercial Law in Asia, and Uppsala University for holding seminars where I presented earlier drafts of this work. Special thanks to my co-panelists, commentators, and discussants in these seminars: Gautam Bhatia, Ana Robalinho, Jaclyn Neo, Tom Ginsburg, Damian Chalmers, Michaela Hailbronner, Hajime Yamamoto, Kriszta Kovács, Dan Puchniak, Maartje de Visser, Andrew Harding, Rawin Leelapatana, Patrik Bremdal, Anna Jonsson Cornell, Iain Cameron, and Caroline Taube. This essay draws on my class notes from the Reading the Constitution course Professor Akhil Reed Amar taught at Yale Law School during the Fall 2013 semester, particularly its 10th session, held on 9 October 2013. I thank the three anonymous peer reviewers for their helpful suggestions, which have improved this essay in substance and structure, from title to final paragraph.

[315]McCloskey and Levinson (n 165) 246–247; B Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (1st edn, Farrar, Straus and Giroux, NY, 2010).

[316]Dixon (n 5) 151 (italics removed).

Cite this article: Tiojanco BDG. 2024. John Hart Ely would disown Comparative Political Process Theory, *Dobbs*, and most his other intellectual heirs (or maybe not). *Global Constitutionalism* 1–31, doi:10.1017/S2045381724000182