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REPRESENTATIVE DEMOCRACY

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> Without the *Constitution* and the *Union*, we could not have attained the result; but even these, are not the primary cause of our great prosperity. There is something back of these, entwining itself more closely about the human heart. That something, is the principle of "Liberty to all"—the principle that clears the *path* for all—gives *hope* to all—and, by consequence, *enterprize*, and *industry* to all.
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> The *expression* of that principle, in our Declaration of Independence, was most happy, and fortunate . . . .
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> The assertion of that *principle*, at *that time*, was *the* word, "*fitly spoken*" which has proved an "apple of gold" to us. The *Union*, and the *Constitution*, are the *picture* of *silver*, subsequently framed around it. The picture was made, not to *conceal*, or *destroy* the apple; but to *adorn*, and *preserve* it. The *picture* was made *for* the apple—*not* the apple for the picture.[1]
>
> Abraham Lincoln

Several recent books have once again questioned the grounds upon which judges have the right to declare laws unconstitutional and the standards that should guide them in deciding constitutional issues.[2] The most noted of these has been John Hart Ely's *Democracy and Distrust*. Because this right of judicial review is not explicitly granted by the Constitution and because its exercise has often led the judicial branch into conflict with the legislative and executive branches, controversy has swirled about its use since the days of Jefferson and Marshall.[3] Even after the right became generally accepted, dispute continued over the way in which it

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1. IV THE COLLECTED WORKS OF ABRAHAM LINCOLN 168-69 (R. Basler ed. 1953).

2. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST (1980); T. HIGGINS, JUDICIAL REVIEW UNMASKED (1981); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982).

3. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803); XI THE WRITINGS OF THOMAS JEFFERSON 50-52 (A. Lipscomb ed. 1898).

should be exercised.

The contemporary variation of this long-standing issue arises out of the controversy surrounding the Supreme Court since the *Brown v. Board of Education*[4] decision of 1954. The Warren and early Burger Courts not only took an activist role in bringing about substantial and disputed changes in the constitutional standards ruling large areas of American life—race relations, criminal justice, family law, and others—but it seemed that the Court understood its role and the principles that should guide its judgment in a way that was hard to justify by traditional standards of constitutional interpretation.[5] This was perhaps nowhere more clear than in the abortion decision, *Roe v. Wade*,[6] in which the judges relied upon a right to privacy which they found broad enough to encompass abortions, but which they openly confessed they could not locate with any precision in the words of the Constitution.[7] Did the actions of the Court rest upon a new understanding of judicial review and, if so, was this understanding justified? Behind this question stands the perennial unease concerning the role of judicial review in a democracy. Are unelected judges justified in ordering such sweeping changes, perhaps against the wishes of the majority?

John Hart Ely's book is a revealing starting point for examining these questions because it tries to articulate and justify the implied answers to these questions which have dominated constitutional adjudication in the United States for the past thirty years. It seeks to give an answer which would justify most, if not all, of the decisions of the Warren Court and of the Burger Court to the extent it has followed in the footsteps of its predecessor. Indeed, Professor Ely acknowledges that his theory of judicial review is gleaned from the Warren Court and shows his appeciation by dedicating the book to Earl Warren.[8] Although the Warren Court did not actually justify its decisions in terms of Ely's theory, Ely believes that his theory is implied in the opinions of the Warren Court.[9]

Whatever the degree of fit between the unarticulated assumptions of the Warren Court and Professor Ely's theory, it is clear

4. 347 U.S. 483 (1955).
5. *See* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 45-100 (1970).
6. 410 U.S. 113 (1973).
7. *See id.* at 152.
8. *See* J. ELY, DEMOCRACY AND DISTRUST 73-75 (1980).
9. *See id.* at 221 n.4.

that he has expressed a view that elicits widespread sympathy. His work has received extravagant praise of the sort that calls to mind the reception given the work of John Rawls.[10] The parallel does not end with the acclaim. As *A Theory of Justice* stands in relation to the contemporary understanding of justice, so *Democracy and Distrust* stands in relation to the contemporary understanding of judicial review. Both have given intellectual respectability to widely held views by offering new theories of justice and its application. Rawls argues that justice is found in favoring the least advantaged members of society;[11] whereas, Ely argues that the special function of courts of justice is to protect the interests of what the Supreme Court has called "discrete and insular minorities."[12] In both, special solicitude for the interests of the disadvantaged is identified with justice or the duty of judges. The parallel reveals that Ely's work represents a strong intellectual current in contemporary society.

In presenting a new view of judicial review, Professor Ely rejects the traditional views of the proper standards judges should use in declaring laws unconstitutional. He identifies two kinds of traditional views which he calls, somewhat awkwardly, "clause-bound interpretivism" and "discovering fundamental values."[13] Neither of these views, he argues, is able to give un unequivocal reading of the Constitution. Even more importantly, neither is able to reconcile judicial review with democratic government. It is startling to realize that in presenting the traditional alternatives to his own view, Professor Ely scarcely refers to the classic defenses of judicial review to be found in *Marbury v. Madision,*[14] the *Federalist Papers,*[15] and other sources. The presumption seems to be that either the views ascribed to in Marshall or the *Federalist Papers* are identical to those of Justice Black, the chief representative of the "clause-bound interpretivist" school, or that they have been ade-

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

11. *See id.* at 75.

12. *See* J. ELY, DEMOCRACY AND DISTRUST 75-77 (1980). *See generally* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (political process is ordinarily relied upon to protect discrete and insular minorities).

13. J. ELY, DEMOCRACY AND DISTRUST 43 (1980).

14. 5 U.S. (1 Cranch) 137, 177-78 (1803).

15. *See* THE FEDERALIST Nos. 78 & 79 (A. Hamilton).

quately refuted by Alexander Bickel and others.[16]

It is equally striking that Professor Ely makes no reference to the greatest dispute in American history over the proper interpretation of the Constitution—that dispute involved in the Civil War and the crisis preceding it. Nor does he mention the opinions of the leading figure of that crisis and profound student of the Constitution, Abraham Lincoln. Lincoln's views, as I shall illustrate, are neither those of the "clause-bound interpretivism" nor of the "discovering fundamental values" schools. Furthermore, Lincoln is able to show us how judicial review is consistent with democratic government and in so doing reveals that the views of Ely and those who agree with him rest on a fundamental misunderstanding of the nature of democratic government. Lincoln's view, I shall argue, enables us to understand judicial review as a desirable, if not necessary, practice in a nation dedicated to the proposition that all men are created equal. We begin by considering Ely's argument.

The Traditional Justifications of Judicial Review According to Ely

As I have indicated, Professor Ely argues that there are two traditional alternatives to the theory of judicial review which he develops in his book. The first of these, the "interpretivist" position, argues that "'enforcing the Constitution' means proceeding from premises that are explicit or clearly implicit in the document itself."[17] Ely distinguishes between two positions compatible with this general proposition. On the one hand, one may regard the provisions of the Constitution as "self-contained units" and interpret each "on the basis of [its] language, with whatever interpretive help the legislative history can provide . . . ."[18] On the other hand, one might concede that the language of a provision and its legislative history cannot without more always determine the meaning of the clause, but that its meaning can be determined by "the general themes of the entire constitutional document."[19] Those who remember Chief Justice Marshall's appeal to the nature of a constitution in determining the meaning of the Necessary and

16. *See* J. ELY, DEMOCRACY AND DISTRUST 186 n.11 (1980).
17. *See id.* at 12.
18. *See id.* at 12-13.
19. *See id.* at 12.

Proper Clause might think that Ely would find a good example of the latter view in the great Chief Justice;[20] however, Ely asserts that it is the first view that interpretivists (apparently including Marshall) follow, and the second remains for Ely himself to be the first to elaborate.[21] By taking some of the more ambiguous and sweeping provisions of the Constitution, such as the fourteenth amendment's Privileges or Immunities Clause, Ely is able to argue that there are several clauses in the document whose meaning cannot be determined solely by reference to the words or to the legislative history of their enactment.[22]

Without going into the adequacy of Ely's reading of the words of particular clauses or his account of their passage, one can wonder whether or not he has set up a straw man. He has given us an account of what it means to interpret the Constitution which certainly excludes what interpretation was traditionally thought to mean. Blackstone, in his *Commentaries,* noted that all legal instruments should be interpreted according to the sense of the terms, and the intention of the parties.[23] The intention of a law is to be gathered from "the words, the context, the subject-matter, the effects and consequences, or the reason and spirit of the law."[24] In his *Commentaries on the Constitution,* Joseph Story applied Blackstone's general rules to the Constitution: "In construing the constitution of the United States, we are, in the first instance, to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts."[25] Further, Story goes on to explain that if the words are clear and determinate, they should be interpeted only to "escape some absurd consequence, or to guard against some fatal evil."[26] If the words admit of two or more meanings, then "that sense is to be adopted, which, without departing from the literal import of the words, best harmonizes with

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20. *See* McCullough v. Maryland, 17 U.S. (4 Wheat.) 316, 324-25 (1819) (framers did not intend to enumerate particulars).

21. *See* J. ELY, DEMOCRACY AND DISTRUST 12 (1980).

22. *See id.* at 14-41.

23. *See* W. BLACKSTONE, COMMENTARIES 344 (W. Browne 1892).

24. *Id.* at 15.

25. J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 405, at 387 (Boston 1833).

26. *Id.*

the nature and objects, the scope and design of the instrument."[27] In dealing with further complications, Story notes that the general rules one can formulate for interpretation, while narrowing the issues, may nevertheless leave room for disagreement. Some exercise of discretion on the part of the interpreter may be inescapable.[28]

Ely ignores the classic tradition of constitutional interpretation in the United States by asserting that those who argue judges should find their guidance within the Constitution also take the position that each clause must be treated as a discrete unit, not as a part of the whole. Thus, his argument does not refute this tradition, but only the much narrower position that the explicit words of a clause and its legislative history are always sufficient to determine its meaning. One wonders whether Ely's view does not reflect a general loss of a sense of how to read well-written texts.

Ely also argues that the "interpretivist" view is undemocratic. In order to view the words of a text written two centuries ago as authoritative, one must give greater weight to "the voice of people who have been dead for a century or two" than to that of the present generation.[29] Democracy, he argues, is the rule of living majorities. Why should a majority in the past have greater sway than the majority today?[30] I shall return to this point later.

The second traditional alternative to his own view, according to Ely, is that of attempting to enforce values not articulated in the Constitution. This alternative cannot provide a sure guide in determining constitutional standards, nor is it democratic. Ely argues that the attempt to find a standard of values outside the Constitution to guide judicial decision making is always reducible to an attempt to enforce as law the judge's own arbitrary values. If this is true, Ely maintains, then one must ask why the arbitrary values of unelected judges should take precedence over the values of the elected representatives of the people in a democracy. He believes that there is no satisfactory answer to this question.[31]

Those belonging to the school of "discovering fundamental values," however, do not believe that they are merely enforcing their

27. *Id.*
28. *See id.* § 406, at 388-89.
29. *See* J. ELY, DEMOCRACY AND DISTRUST 11 (1980).
30. *See id.* at 12.
31. *See id.* at 44-48.

own arbitrary values. They argue that there is an objective standard of values which should determine the meaning of the Constitution. The standards men claim to have found, according to Ely, are "natural law," "neutral principles," "reason," "tradition," "consensus," or "predicting progress."[32] To the proponents of "natural law," Ely responds that our society does not accept "the notion of a discoverable and objectively valid set of moral principles."[33] Nevertheless, Ely does not tell us how he knows this, or why what people accept should be the standard guiding our understanding of the content of the Constitution. Herbert Wechsler's famed "neutral principles" provide, Ely correctly notes, no guidance as to the substantive content of the principled rules which are to guide the Court.[34]

To say we should be guided by "reason," Ely claims, is to say that we can identify the correct method of moral reasoning.[35] But we cannot, as is evident from the fact that the "two most renowned recent works of moral and political philosophy, John Rawl's *A Theory of Justice* and Robert Nozick's *Anarchy, State, and Utopia,* reach very different conclusions."[36] Thus, Ely identifies "reason" with reputation for reasoning. "Tradition" cannot guide us because there is more than one tradition and a choice among them must be made on grounds other than tradition.[37] As for "consensus," Ely states that it is not to be found on the issues with which judicial review is normally concerned.[38] To judge by predicting what values will reign in the future—"predicting the future"—is to say that the judgment of our children ought to rule our own. Ely attributes this view to Alexander Bickel, I believe incorrectly. But this is antidemocratic. "Controlling today's generation by the values of its grandchildren is no more acceptable than controlling it by the values of its grandparents . . . ."[39] (Thus, Ely skirts the touchy issue of the obligations of parents and children.) Finally, Ely concludes that there are no objective values outside the Con-

32. *See id.* at 48-72.
33. *See id.* at 54.
34. *See id.* at 55.
35. *See id.* at 56.
36. *See id.* at 58.
37. *See id.* at 60-62.
38. *See id.* at 63-69.
39. *See id.* at 70.

stitution which one may properly use to establish a standard for judicial review.

While I have tried to indicate that I do not think the arguments Ely uses to establish the nonobjective character of values are always very good ones, Ely is surely right that it is hard to see why judges should have the power to enforce standards which are not to be found either explicitly or implicitly in the Constitution. Again, is this not a straw man? Most of those who have argued that reason or natural law should guide interpretation of the Constitution have argued also that the Constitution is inherently reasonable or inherently based on natural law. For example, Justice Chase, in *Calder v. Bull,*[40] argued:

> There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.[41]

Justice Chase and others like him generally have not argued that judges should simply impose an external standard upon the Constitution, but that the nature of the Constitution implies a standard not explicitly stated.

Ely's assertion that the "discovering fundamental values" school neither provides a standard for constitutional judgment nor is democratic rests upon the argument that using reason or examining the nature of things is equivalent to putting forward one's own arbitrary values. In examining Lincoln's views, however, we will see that this argument in fact undermines democracy as we know it.

The Constitution—Democratic Procedure?

Professor Ely, having argued that neither "clause-bound interpretivism" nor the search for "fundamental values" can yield an acceptable reading of the Constitution, provides us with a new theory. This theory is inferred from the opinions of the Warren Court

40. 3 U.S. (3 Dall.) 386 (1798).
41. *Id.* at 388.

and made coherent and authoritative by showing that it is consistent with the nature of democracy, as Ely understands it. In brief, Ely argues that the Constitution is not concerned with establishing substantive values, but only with establishing democratic procedures. Democratic procedures, as understood by Ely, require the widest possible participation in political processes on the one hand and the most equal sharing in the benefits and costs those processes assign on the other.[42]

The novelty of Professor Ely's view is to be found in his assertions that the equal distribution of benefits and burdens is as much an issue of process (rather than substance) as is equal participation in political decisions, and that equal participation should be judged by informal realities rather than formal power.[43] A burden placed upon a group should be regarded as presumptively unconstitutional if the group is one likely not to have had its fair share in the decision assigning the burden. Because formal status may hide informal reality, a group's share in the decision cannot be determined by its formal power. Majorities in pluralistic America are formed by coalition building. Voters and even officials may be excluded from the possibility of joining a majority coalition because of prejudice against them. Unconstitutional burdens are to be discovered by first identifying groups who have been the objects of prejudice and then assuming that any burdens placed upon them are the result of their likely exclusion from the process of coalition building, unless it can be shown otherwise.[44] The "discrete and insular minorities" of the *Carolene Products* footnote are to be identified not only by actual exclusion from the political process, but by whether they are groups against whom there has traditionally been prejudice.[45]

However much their power may rest upon a coalition of diverse groups, those elected in the political process will be inclined both to restrict the process to those groups who brought about their election and to advance the interests of those groups at the expense of those excluded from the coalition process—especially those against whom there is prejudice. It is the function of courts,

42. *See* J. ELY, DEMOCRACY AND DISTRUST 77 (1980).
43. *See id.* at 77, 92, 136.
44. *See id.* at 153-61.
45. *See id.* at 152-53; *see also* note 42 *supra.*

which are relatively immune from the electoral process, to secure for disfavored minorities their share in the political process and in the benefits that the political process assigns. Thus, for example, the Court is justified in reading the Equal Protection Clause of the fourteenth amendment as giving greater protection to blacks and other minorities than to whites because of the likelihood that these groups have been unfairly treated in the political process. The ability to be part of the majority must be defended against other prejudiced majorities by courts immune from the power of the majority. Judicial review is, thus, democratic because courts uphold only procedural requirements and leave to the majority the determination of the substantive values to be reached.[46]

There are two major difficulties with Ely's conclusions. First, in tacitly conceding that the power of judicial review is not democratic, he undermines its defense. According to his account, it requires a power divorced from democracy in order to insure the procedural conditions for democracy. But this, in the words of the *Federalist Papers*, is to secure part of society against the injustice of another part by "creating a will in the community independent of the majority—that is, of the society itself."[47] Additionally, it is open to the objection Publius makes: "[A] power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties."[48] What is to prevent the courts from serving particular interests under the guise of merely regulating procedures—for procedures often yield substantive results.

Secondly, Ely takes democracy for granted. He argues that there are no substantive values inherent in the Constitution; it is a document concerned only with process. Yet a process is always a means to an end. Why should we prefer a process, whether democratic or otherwise, unless it reaches a good end? In reducing the Constitution to a mere process, Ely cannot explain why we should obey either it or the judgments rendered about it by the courts. He cannot explain why we should prefer a democratic process to any other.

This is not a fault, perhaps, unique to Professor Ely. After all, as

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46. *See id.* at 102.
47. THE FEDERALIST No. 51 (J. Madison).
48. *See id.*

Americans there is a great tendency for us to take democracy for granted and, as a result, to lose our understanding of what it is and what the alternatives to it are. Abraham Lincoln, however, could not take democracy or its meaning for granted. Judge Douglas, Lincoln's great political rival, argued that democracy meant "popular sovereignty." Popular sovereignty is the doctrine that the majority has a right to do whatever it wants. Consequently, if the majority in a state chooses to have slavery, that is its right; if it chooses to prohibit slavery, that also is its right.[49] To defend a democracy which believed slavery to be an evil, Lincoln had to define democracy and distinguish it from something which plausibly could be regarded as the essence of democracy—majority rule. In so doing he showed the way toward understanding the place of judicial review in democratic government and, consequently, the standards which should guide that review in declaring laws unconstitutional.

Lincoln, the Declaration, and the Constitution

Reflecting on mob violence over the slavery issue, Lincoln in 1838 called upon every American to "swear by the blood of the Revolution, never to violate in the least particular, the laws of the country" and to pledge in support of the Constitution "his life, his property, and his sacred honor."[50] Throughout his subsequent political career Lincoln believed that the salvation of his country lay in its remembering that the spirit of the Constitution was identical to the spirit of the Declaration of Independence. Perhaps Lincoln's most beautiful statement of his understanding of their relationship is found in the passage we have used as an epigraph to this essay. The Constitution is the picture of silver meant to preserve and enhance the apple of gold—the principles of the Declaration.

Lincoln held to both. He scrupulously obeyed the Constitution as he understood it. Perhaps the most vivid reminder of this fact is found in the Emancipation Proclamation.[51] Despite his fervent hatred of slavery and his belief that it was contrary to the fundamental political and moral principles of the country, he issued the historic Emancipation Proclamation solely on the grounds of military

49. *See* III THE COLLECTED WORKS OF ABRAHAM LINCOLN 290 (R. Basler ed. 1953).
50. *See* I *id.* at 112.
51. *See* VI *id.* at 28-31.

necessity because he did not think he had the authority under the Constitution to issue it on any other grounds. He thus denied himself the opportunity presented by a moment of high drama to make a statement that might have emblazoned itself and its author upon men's minds for centuries—an opportunity Lincoln was fully capable of exploiting as the Gettysburg Address reveals. But loyalty to the Constitution restrained personal ambition. This Constitution, he thought, was the necessary embodiment of the principles of the Declaration. The principle that all men are created equal was at the heart of Lincoln's understanding of free government. "The principles of Jefferson [he said] are the definitions and axioms of free society."[52] His opposition to the extension of slavery into the new territories in the West was grounded in the belief that the principles permitting that extension after 1854 were in direct contradiction to the principle of human equality.[53] He led the nation in war to save the Constitution which promised the eventual triumph of that principle.[54]

In what way do the principles of the Declaration enable us to understand the character of the Constitution? The argument of the Declaration justifies the revolt of the colonies against Great Britain by establishing a right of revolution against their governments possessed by all peoples. Its argument thus centers on the question of when men do or do not owe obedience to other men. The claim that all men are created equal must be understood in light of this concern. It does not mean that men are equal in all respects, but that they are equal in being their own rulers. No man by nature owes obedience to another. Whatever the differences between men, those differences do not justify one man's claiming the right to rule over another. Each man owns himself and may exercise his right to life, liberty, and the pursuit of happiness as he sees fit. As Jefferson said:

> All eyes are opened, or opening, to the rights of man. The general spread of the light of science has already laid open to every view the palpable truth that the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready

52. *See* III *id.* at 375.
53. *See id.* at 14-15.
54. G. THUROW, ABRAHAM LINCOLN AND AMERICAN POLITICAL RELIGION 81 (1976).

to ride them legitimately, by the grace of God.[55]

Or, as Lincoln phrased it in discussing racial equality:

> There is no reason in the world why the negro is not entitled to all natural rights enumerated in the Declaration of Independence, the right to life, liberty and the pursuit of happiness. I hold that he is as much entitled to these as the white man. I agree with Judge Douglas he is not my equal in many respects—certainly not in color, perhaps not in moral or intellectual endowment. But in the right to eat the bread, without leave of anybody else, which his own hand earns, *he is my equal and the equal of Judge Douglas and the equal of every living man.*[56]

Implied in this claim is that ruling necessarily involves inequality, for the difference between rulers and ruled is that between superiors and inferiors. Rulers establish rules governing other people's lives, liberty, and happiness, and others must obey. This is as true of democratic government as of monarchy. Aristotle noted that democracy is the rule of the many. In democracy the few are ruled. The only difference in this respect is that democracy has many rulers while monarchy has but one.[57] It is because Marx recognized this universal truth about government that in his search for the equality of perfect communism he saw that government would have to wither away—for as long as there were government, there would be superior and inferior and that meant, he thought, oppressors and oppressed.[58]

But men with no natural rulers among them stand in need of government, according to the Declaration. For their rights without government are very insecure. For what one man may think will make him happy—to swing in a hammock while someone else slaves in his field—may infringe on the pursuit of happiness of another. This clash is not less because men are created equal; it only makes them more competitive because all have an equal claim to the exercise of their rights as they see fit. Men who are equally free are also men who equally need government in order to secure their freedom. Yet government, as we have noted, means inequality. The harsh truth taught by the Declaration is that equal men stand in

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55. XVI THE WRITINGS OF THOMAS JEFFERSON 182 (A. Lipscomb ed. 1903).
56. III THE COLLECTED WORKS OF ABRAHAM LINCOLN 16 (R. Basler ed. 1953).
57. ARISTOTLE, POLITICS 1279a22 (Berlin ed. 1831).
58. *See* K. MARX & F. ENGELS, THE COMMUNIST MANIFESTO 53 (D. Ryasanoff ed. 1930).

need of inequality in order to secure their equal rights. Because this inequality is not justified by any natural difference among men, however, it can only be justified by the agreement—the consent—of those to be bound by the government established. Because everyone has a right to consent or not consent to the establishment of government, government is rightfully instituted only by unanimous agreement.[59] As the Massachusetts Bill of Rights states: "The body politic is formed by a voluntary association of individuals."[60] The people also have the right to choose the form the necessary inequality is to take. They have the right in establishing government to lay "its foundation on such principles" and organize "its powers in such form, as to them shall seem most likely to effect their safety and happiness."[61] However, the form that government takes is determined simply by a majority. This is because a body of people must have some way of settling on a particular form of government. Since men are not likely to agree unanimously, that question can be decided only by the majority as the form of rule most closely approximating natural equality.[62] This majority, then, stands in the place of all. It is a majority representing the whole and doing for the whole what the whole cannot do for itself—determine a particular form of government. Hence, the majority cannot rightly choose simply in its own interest, but must serve the reason why the whole society agreed to let the majority represent them—the protection of everyone's inalienable rights. Government must not only be based on consent; it must also serve the purpose, and be limited to the purpose, of protecting the equal freedom of all.

The Constitution and Majority Rule

These principles enable us to understand what a constitution is. It is an act of the majority, speaking in behalf of a society of equals, which establishes the form of government (a form of inequality) which is necessary in order to secure to all their equal rights. A constitution establishes a representative government. When a democracy is instituted, it is not chosen because the many

59. H. JAFFA, THE DOUGHFACE DILEMMA 26-27 (1983).
60. MASS. CONST. preamble.
61. The Declaration of Independence para. 2 (U.S. 1776).
62. H. JAFFA, THE DOUGHFACE DILEMMA 27-28 (1983).

have the inherent right to rule over the few, but because it is the best way to serve the end of the whole, to harmonize and secure the equal rights of all. In American democracy, the majority rules not because it has a right to pursue its own interests at the expense of others, but because it is thought the form of rule most consistent with men's natural equality and most likely to protect the equal rights of all. The majority represents the whole. Consequently it has the duty to rule in behalf of all, not only the right to rule as it sees fit. In a famous passage, Jefferson succinctly expressed this thought in his First Inaugural Address:

> All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate which would be oppression.[63]

It is through recognition that rule by the people is not merely a right but a duty that constitutional democracy becomes possible. A constitution which establishes popular government can rightfully place limits upon the popular will because the majority does not have the right to do everything it may wish. Its right is limited in exercise by its duty to protect the equal rights of all. A constitution is above all recognition of this fundamental truth. It expresses the conditions for a kind of democractic government that is not merely the triumph of the party of the many over the party of the few, but the rule of a majority which represents everyone, both rich and poor, both black and white.

Our Constitution, therefore, is an expression of our democracy. Professor Ely argues that a constitution whose words would bind men today cannot be considered to be a democratic instrument because it represents "the voice of people who have been dead for a century or two." Why should majorities of the past have greater sway than majorities of the present?[64] There are two answers to this query. The first is that it is not true that the Constitution represents only the voice of the dead. The original ratification procedure required the consent of conventions chosen by the people in nine of the thirteen states. Any state not agreeing would not be a

63. III THE WRITINGS OF THOMAS JEFFERSON 318 (A. Lipscomb ed. 1904).
64. J. ELY, DEMOCRACY AND DISTRUST 11 (1980).

member of the Union.[65] This requirement for passage of the Constitution is roughly equal to today's requirement for amending it. It now requires three-fourths of the states voting either in convention or through the regular legislatures, and the decision binds all of the states.[66] In other words it can be said that the present generation of Americans consents to the Constitution in as full a sense as did the original generation of Americans. Were those alive today as determined to change it as those alive in 1787 were to make it, they could so do.

The second and more fundamental reply is that a constitution represents a decision of a people to limit themselves, as well as their representatives. Because they see that they do not in themselves have a right to rule, but rule only on behalf of all, they can also recognize that there are limits to their own rule which they may be likely, in the flush of their passions or the blindness of their interests, to forget. Hence they are willing to put limitations upon their own rule, which will at least have the effect of allowing time for greater reflection before the determined will of an oppressive majority can reign. But because—and only because—these are limitations which they impose upon themselves in a solemn moment of constitution-making, they do not become less self-governing in limiting their actions, but more. For they establish the means to govern their own interests and passion on behalf of their reason. As the authors of the *Federalist Papers* note, "[I]t is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government."[67]

A majority limits itself because it recognizes the rights of the minority; however, it also limits itself because it recognizes the requirements of effective government—because it recognizes that government requires qualities which the majority itself does not possess.[68] When Jefferson suggested to Madison that constitutions should become invalid with the passage of each generation,[69] his friend called Jefferson's attention away from the rights of the liv-

65. *See* U.S. CONST. art. VII.
66. *See id.* art. V.
67. THE FEDERALIST No. 49 (J. Madison).
68. *Cf. id.* No. 35 (A. Hamilton).
69. *See* XV THE PAPERS OF THOMAS JEFFERSON 392-97 (J. Boyd ed. 1969).

ing majority to the requirements of effective government:

> Would not a Government ceasing of necessity at the end of a given term, unless prolonged by some constitutional Act, previous to its expiration, be too subject to the casualty and consequences of an interregnum?
>
> Would not a Government so often revised become too mutable and novel to retain that share of prejudice in its favor which is a salutary aid to the most rational Government?
>
> Would not such a periodical revision engender pernicious factions that might not otherwise come into existence; and agitate the public mind more frequently and more violently than might be expedient?[70]

Jefferson may have been correct in arguing that it was the right of the people to change the Constitution every generation, but would they be prudent to exercise that right?

The Standards of Judicial Review

In setting limits upon themselves people do not turn their power over to other individuals to do as they will, for this would be to establish the tyranny they seek to avoid. Rather they give their power to be guided by the rules they themselves have set down in a constitution. A constitution, therefore, is not only fundamental, but it is a fundamental law. It is a settled, known, established law to govern both the people and their representatives.[71] One's equality is recognized in the rule of constitutional law.

It is because the Constitution is a law having binding force upon the whole community that it becomes plausible to suggest that courts have the duty to interpret it, for it is the duty of judges to interpret the law. The classic argument for judicial review found in *Marbury v. Madison* is in fact rooted in the principles of the Declaration of Independence. The relative immunity of judges to threats of popular displeasure only makes the judges more competent to carry out their democratic mission—to defend the people's settled judgment against fleeting majorities. It does not make them undemocratic unless they forget that they are the representatives of the people's will as expressed in the Constitution.

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70. XVI *id.* at 151.

71. *See* J. LOCKE, *The Second Treatise Of Government*, in TWO TREATISES OF GOVERNMENT § 124, at 396 (P. Laslett rev. ed. 1967).

Nevertheless, it must be remembered that judicial review is not the chief means of guarding liberty, but rather, in the terms of the *Federalist Papers,* an "auxiliary precaution."[72] As an auxiliary, judicial review is subordinate to the main precaution—the right of the people to choose their representatives—and does not have the necessity which that free choice has for freedom. Judges can serve the cause of freedom, which is identical as I have shown to the cause of self-government, only if they do not prevent people from governing themselves.

It is possible now to see that Ely's standards for constitutional adjudication rest upon an incomplete understanding of representative government. To recall his argument, the Constitution, as he understands it, is concerned only with processes. It is the function of the courts to interpret it in such a way as to allow the greatest possible access to the political processes on the part of those likely to have been excluded from their share in the processes. Whether the political decisions imposing burdens or granting benefits is constitutionally equitable is to be determined by whether burdens are imposed or benefits denied to those groups whom prejudice may have excluded from the political process. Since the crucial element of a fair, democratic process is whether each group is adequately represented, Ely's position relies upon a theory of representation.

Ely's theory of representation relies upon that of the British in the American Revolution. When the Americans complained that they were unrepresented in Parliament, England replied that the Americans enjoyed "virtual representation." The members of Parliament, they argued, did not represent merely their districts but the nation as a whole, including those who did not vote. The Americans overwhelmingly rejected this idea; people must *choose* their own representatives. "No taxation without representation" was *the* revolutionary slogan.[73] Ely argues, however, that the idea of representation in the United States came to be that of virtual representation, although no one until Ely dared use the discredited name. Ely sees the essence of representation American-style to be found in the identity of interest between represented and representative, usually guaranteed by popular vote. But courts can enhance repre-

72. *See* THE FEDERALIST No. 51 (J. Madison).

73. *See* E. MORGAN, THE BIRTH OF THE REPUBLIC: 1763-89, at 16-17 (1956).

sentation for those excluded from voting or coalition making by tying the interests of the politically powerless class to the interests of those who do have power. Article IV's Privilege and Immunities Clause, which has been interpreted to mean that state legislatures cannot treat out-of-staters less favorably than they treat locals, is seen by Ely to be an instance of virtual representation because the politically powerless class is protected by requiring that the powerful harm their own interests if they are to harm the out-of-staters.[74]

The essence of virtual representation, however, does not lie in the identity of interest between represented and representative; rather, it rests in the claim that one person, not chosen by another, has the right to govern in that other's name. Virtual representation was rejected because it is contrary to self-government, to that free choice a free people have a right to make. What ties the representative to our interests is not that his interest is the same as ours, but that his is different. He desires to be elected; we do not. If we shared this interest, we would be rivals. It is because we do not share it that he can be our representative. He is tied to us, not because he shares our interests, but because he desires our votes.

In *Federalist Paper No. 35* one can see the true theory of representation in the Constitution. Publius notes that a mechanic may be likely to vote for a merchant even though their interests, though similar, are not identical because he knows that a smooth-talking salesman is more likely to have the knowledge of people and persuasive skills necessary in a legislative hall than is one of his fellow mechanics. Or citizens in general may vote for lawyers, not because lawyers' interests are identical to their own, but because lawyers are plausibly people who may be good at deliberating, persuading, and making good laws. If people are left free to vote for whomever they want, as they should be in a democracy, they will vote for people who are different from themselves because they recognize that the tasks facing their representatives are different from the tasks they themselves face. It will be the ambition of the representatives, not their sameness, that will tie them to their constituents.[75]

The consequence of this is that one cannot conclude from the

74. *See* J. ELY, DEMOCRACY AND DISTRUST 82-87 (1980).
75. *See* THE FEDERALIST No. 35 (A. Hamilton).

fact that the representative is not the same as the people he represents, that he does not represent their interests. Legislative assemblies may be predominantly white but one cannot conclude, as does Ely, that they, therefore, do not adequately represent the interests of blacks but do represent the interests of whites. The interests of the representatives are not likely to be the same as those of either group. A representative may well unjustly burden other whites even though he himself is white. The white legislator who requires affirmative action for a factory is not himself going to be the one who has to give up his job to a less qualified black. If there are fifteen percent black voters in his district, he may favor them (even if he has prejudice against blacks) over the two percent assembly-line whites (despite his goodwill towards whites). He does not share in the loss but harvests that food of ambition—votes. In assuming an identity of group interests, one forgets the fundamental implication of the Declaration that we are a nation of equally free individuals.

The standards for judicial review, I have tried to show, must be "interpretivist" if we are to remain, as Lincoln hoped and fought for, a nation dedicated to the proposition that all men are created equal. The words of the Constitution are authoritative because they express the fundamental choice of the American people acting in their sovereign, constitution-making capacity. Because they do reflect a fundamental, coherent choice, those words can also reveal their spirit. Judges perform their duty when they read the words to reflect the end those sometimes imperfect words seek to attain. But that end is to be found in the words of the document as a whole and in remembering that the Constitution is the picture of silver meant to enhance and secure the apple of gold—the fundamental principles of the Declaration upon which free government must eternally rest.