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Tribute

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Tribute

FRANCES R. HILL*

John Ely was a wonderful colleague. He understood the process of being a colleague in ways that gave that often-invoked and much-misused term “collegiality” a substantive meaning refreshingly at variance with its use as a tactical mantra in the petty interpersonal tussles that can absorb so much time in academic life.

It seems fitting to begin with process. John was always open to conversation on topics ranging from law to jazz, or vice versa. Yet, he protected his own time and respected others’ time as well. John was thinking and writing, and presumed you were as well. There was a kind of delightful efficiency to conversations with John. He was charming and witty and insightful and helpful, but he did not need an entire afternoon to be all of those things. With John, one could cover a lot of ground, constitutional or otherwise, in a limited amount of time. What surprised me most as I talked with John was his readiness to say that an issue was “hard” or that he “hadn’t decided yet” or simply, “I don’t know.” These statements bespoke reflection by a person who was fully engaged with a range of political and policy issues. John was neither disengaged nor disinclined to disagree. Make no mistake, John had strong ideas about issues that mattered to him, and many issues mattered to him.

Substance mattered to John. I came to know John through our common interest in elections, voting, participation, representation, and all of the other elements of representative democracy that no one really understands. When he came to Miami, he was working on the issues relating to minority majority districts.¹ As he had at Stanford, John offered a wide-ranging and much-respected seminar on election law. Here in Miami John invited me to the seminar to discuss political money. For me, political money is a topic implicating one Constitution and two statutes, one of which is the Internal Revenue Code. Some constitutional law scholars have found the Internal Revenue Code a code too far, and, more generally, have resisted thinking about democracy in statutory as well as constitutional terms. John took the sensible view that he had no intention of reading the Internal Revenue Code, or even

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1. John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607 (1998).

selected bits of it, but he certainly thought that someone should. Because he was here at Miami, I was that someone.

So, we talked about statutes and the Constitution, about political money and the rights of tax-exempt organizations to engage in political speech, about the attenuated jurisprudence of association, about whether political speech rights were rights of the organization or its members or both and the implications of varying views for democracy. We never decided anything. As John would remark from time to time, "Political money is hard — I'm not sure about it." This, of course, was the wise position.

When Congress enacted the Bipartisan Campaign Reform Act of 2002 (BCRA), John was already battling the disease that would take his life. He called me one day in Iowa City, where I was visiting, and left the following question on my voice mail: "Did Congress do anything that matters?" There, I thought, is the right question. So I called back and we talked. We talked about soft money and electioneering communications and coordination. We never did decide whether Congress had done "anything that matters," although I tried to persuade John that what it did was part of something that could matter.

By the time that the Supreme Court had decided *McConnell v. Federal Election Commission*,² John had died. When I first read the 298 pages of the slip opinion, I experienced John's absence as a profound personal intellectual loss. I wanted to ask John whether he thought the Court "had done anything that mattered." *McConnell* raises so many issues that John addressed in terms that managed to ignite conversations within academia and beyond: Congressional authority and constitutional limits, the role of the courts, the rights of citizens, the claims of economic elites, and, indeed, the nature of democracy and democratic processes. I do not know what John would have concluded, but I do know that he would have begun by asking if the Court "had done anything that matters." I think it did, but I regret that I will never know what John might have thought.

I regret that he will never have the opportunity to write, and I will never have the opportunity to read, one of those blessedly short, by academic standards, articles that present a series of alternative perspectives, each incisively analyzed. I think that he would have developed strong views on this case, but I have no idea whether his strong views would have paralleled my own. I regret not being able to call John to ask, "Did the Court do anything that matters here?" It is a tribute to John that we, or at least I, cannot say with certainty what he would have thought about

2. 124 S. Ct. 619 (2003).

a case implicating issues that he regarded as important. John's subtle and often surprising scholarship defies the final indignity attendant upon one's death — the presumption of others to sum up one's life, usually in a manner that reflects their own preoccupations.

John Ely was a wonderful colleague in another way as well. He was an enthusiastic and accomplished jazz fan and jazz musician. A Korg with a lead sheet open on it is not something I had ever seen in a colleague's office before John came to Miami. One shelf of his bookcase was devoted to CDs, which he readily shared. Eliane Elias, Thelonious Monk, Duke Ellington, Wynton Marsalis, Diana Krall, the Kennedy Center's Women in Jazz Festival became topics of lively conversations. John would listen to anything, and he felt free to explain why listening to two tracks provided a sufficient basis to conclude that he preferred not to listen to more. It always seemed to me that John would figure out what chords Thelonious Monk was playing. Perhaps he now knows. The one thing I do know about John is that he always thought this mattered.