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Just Recently, Back When

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ing true to his enduring principles was more important than any short-term political or career considerations.

And what a great judge he would have been. Guided by broad institutional principles, rather than narrow result-oriented considerations, Mr. Justice Ely would have brought needed credibility to a Court whose decisions have become all too predictable based on the ideological, political, religious, and partisan preferences of the individual Justices. But it was not to be. Instead, John lived out his life as an influential academic. Perhaps that was for the best, since he continued to make enduring contributions to teaching and scholarship until the very end.

Patrick O. Gudridge*

Just Recently, Back When

We did not know what to expect. John Ely's decision to join the University of Miami faculty was largely John's own idea.¹ It would not have surprised us — some predicted it — if he had used the law school simply as a base, taught a few classes but otherwise pursued his own agenda.

In fact, we were very lucky. Along with constitutional law courses that were filled to capacity, Ely taught a wide range of seminars on topics that changed from year to year. He was supposed to be shy — but John took a quick interest in the work of his younger colleagues, announcing early his support for ambitious lines of work.² These new colleagues, in turn, tested limits of some of John's own thinking.³ Ely took charge of the law school's faculty seminars. He played a sometimes prominent part in internal politics. He formed a fast, surreal friendship with Richard Hausler, the colleague Ely's chair honored. He celebrated his assistant Beth Hanson at every opportunity. He

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¹ From 1996 until his death this past fall, John Hart Ely was Richard A. Hausler Professor of Law at the University of Miami.

² See, e.g., A. Michael Froomkin, *The Metaphor Is the Key: Cryptography, the Clipper Chip, and the Constitution*, 143 U. PA. L. REV. 709 (1995). For a recent extension of this line, see A. Michael Froomkin, *Habermas@discourse.net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749 (2003).

³ See, e.g., Clark Freshman, *Whatever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between "Different" Minorities*, 85 CORNELL L. REV. 313 (2000); Jonathan Simon, *Ghosts of the Disciplinary Machine: Lee Harvey Oswald, Life-History, and the Truth of Crime*, 10 YALE J.L. & HUMAN. 75 (1998).

continued to write and publish challenging work.⁴ John Ely made himself at home at the University of Miami — more than we had hoped. It is a shock that he is gone.

But the life of the law is not just local color. John Ely was — is — John Ely. His work was — is — inextricably part of the constitutional law of the past quarter-century or so. With astonishing frequency, his writing displays deep premises and their implications with casual clarity. It is not surprising that, when Jürgen Habermas turned to American constitutional theory to find points of departure for his own theory of law, he started with Ely.⁵ It would also not be surprising if John Ely ends up quite close to John Rawls on whatever list someone compiles of great American contributors to twentieth-century philosophy, politics, and jurisprudence worldwide. (Ely greatly enjoyed such lists.)

I worked with John Ely, in a minor way, on one of his important projects, the *Flag Desecration* article published in 1975.⁶ This article discovered in Chief Justice Warren's opinion in *United States v. O'Brien*,⁷ in a passage easy to read as boilerplate, a "switch" differentiating and organizing two tracks through the Supreme Court's free speech jurisprudence — specifically, a distinction between those government concerns prompted by the content of communicative acts and those that would be pertinent even if the acts had no communicative content whatsoever.⁸ Ely argued that this distinction persuasively justified the differences in approach obvious in the long line of cases. His switch — usually credited to *O'Brien* itself — has been part of constitutional law ever since (as just about every law student learns).

In 1975, John was well into the process of assembling the sequence of articles that would, even before *Democracy and Distrust*, prove the power and originality of his thought. This *Review* had already published one of these articles — *The Irrepressible Myth of Erie*⁹ — but the rough and ready, oddly Runyonesque approach to editing in those days (it was thought) had disheartened Ely. Dan Meltzer, the outgoing president, concluded that I was likely to be the most oblique of the new Articles Editors, and arranged for me to work on the *Flag Dese-*

⁴ See, e.g., John Hart Ely, *Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U. MIAMI L. REV. 489 (2002); John Hart Ely, *Interclausal Immunity*, 87 VA. L. REV. 1185 (2001); John Hart Ely, *Standing To Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576 (1997).

⁵ See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 264–66, 287–328 (William Rehg trans., MIT Press 1996) (1992).

⁶ John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

⁷ 391 U.S. 367 (1968).

⁸ See Ely, *supra* note 6, at 1483–84, 1496–1502.

⁹ John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

creation manuscript he had somehow secured. Ely and I took no chances.¹⁰ One or the other of us devised a procedure whereby I would type up my criticisms and suggestions and walk over to John's office in Langdell Hall, pushing the papers through the mail slot in the office door. Ely would telephone when he was ready with his responses, I would return to Langdell and take away his typed reactions (sticking out from the mail slot). We worked this way through several iterations (primitively foreshadowing e-mail). I entered his office once during this process. The office was huge, largely empty, with a dramatically clean desk, on which sat only an electric typewriter. Or so I remember.

This picture of his office, I think, communicates something especially pertinent now. In his writing, John Ely revealed in much more obvious ways the full force of his imagination, his intellect, his criticism, and his humor. In his writing, he remains vividly alive. His writing was hard work, we should remember, however easy, informal, and close to conversation it appears to be. Its force and effects were products of concentration, ruthless self-criticism, and much revision, processes that were likely difficult and not surprisingly isolating. There was, we can see, a personal morality implicit in these processes, and also an obvious paradox. Democratic participation, at least of the sort that Ely undertook — accessible, incisive argument aimed for widespread influence — first demanded a rigorous self-government, an obligation to self-judge, to put in question, reject, and revamp the terms of that participation before the fact. Democracy and distrust?

This picture, though, is also in one sense false. John Ely wrote *audaciously*. His work, however informal in style, took for granted both its own authoritativeness, and the possibility that the legal materials that were the subjects of the work were open, if approached properly, to thoroughgoing reformulation. These assumptions were not unique to Ely. It seemed to me then that this audacity was also often evident, sometimes notwithstanding other and considerable differences, in faculty teaching and works-in-progress in and around Harvard at that time. I assembled this list (along with John Ely): Professors Bator, Chayes, Fried, Horwitz, Kennedy, Michelman, Monaghan, Sargentich, Stewart, Tribe, and Unger.

This is not, I realize, a grouping that many of these individuals would have recognized. But the juxtaposition might still be worth considering — we now associate a remarkable body of work with these individuals. Sometimes, to be sure, we bring to that work the

¹⁰ The *Law Review*'s then-culture found a way to assert itself nonetheless. At the faculty-*Law Review* softball game (even in 1975 a throwback institution) one of the members (now too distinguished to name) knocked Ely nearly unconscious with a body block aimed at breaking up a force play at second base.

expectations of succeeding decades, seek out divergences we now assume to have been always present. It may be useful, for purposes of history it is still too soon to write, to suspend those expectations. We rightly celebrate John Ely and his work here. We may also want to recall the uncommon bustle of the place and time within which much of that work was done.

Henry Paul Monaghan*

John Ely: The Harvard Years

John Ely's life ended too soon, on October 25, a few weeks before his sixty-fifth birthday. Six months earlier, Yale had awarded him an honorary Doctor of Laws. The citation accompanying the award stated, "Your work set the standard for constitutional scholarship for our generation." It is, I believe, particularly appropriate that this *Law Review* dedicate an issue to John's memory. John taught at Harvard Law School from 1973 to 1982. During that time he produced his signature work, *Democracy and Distrust*,¹ and the articles most closely associated with his name, several of which appeared in this *Review*.

I met John shortly after his arrival at Harvard Law School, at a forum on *Roe v. Wade*.² We argued that *Roe* was an abuse of judicial power, not because the decision conflicted with our ideas of progress but because nothing in the text, structure, or history of the Constitution suggested that the abortion issue fell within the Court's domain. Moreover, no metric existed by which the Court could resolve abortion-related issues in a principled way. (As John later wrote, *Roe* "is not constitutional law and gives almost no sense of an obligation to try to be."³) From that point on we saw a good deal of one another.

I lack the literary skills of a biographer necessary adequately to describe John's personality. John was quite proud of his considerable academic achievements, but he wore the marks of success quietly. He was private and wholly unassuming in manner. Endowed with a gentle and playful wit, he greatly enjoyed good humor. In his judgments,

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¹ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

² 410 U.S. 113 (1973).

³ John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973).