

COMPLETING ELY’S REPRESENTATION  
REINFORCING THEORY OF JUDICIAL REVIEW BY  
ACCOUNTING FOR THE CONSTITUTIONAL VALUES  
OF STATE CITIZENSHIP

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I. INTRODUCTION..... 220  
II. REPRESENTATION REINFORCING JUDICIAL REVIEW. 222  
III. PROFESSOR ERNEST YOUNG’S CALL FOR A *DEMOCRACY  
AND DISTRUST* FOR FEDERALISM ..... 225  
IV. AN ANEMIC VERSION OF AMERICAN REPRESENTATIVE  
DEMOCRACY..... 227  
V. ACCOUNTING FOR THE CONSTITUTIONAL VALUES OF  
STATE CITIZENSHIP ..... 230  
VI. SUPPLEMENTING ELY TO PROVIDE FOR A *DEMOCRACY  
AND DISTRUST* FOR FEDERALISM ..... 239  
    A. *United States v. Comstock* ..... 244  
VII. CONCLUSION ..... 245

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## I. INTRODUCTION

John Hart Ely famously proposed a representation reinforcing theory of judicial review.<sup>1</sup> Ely said that the Constitution embodies certain procedural principles that make the ideal of American representative democracy possible.<sup>2</sup> Thus, where courts find that the political process has broken down, putting that republican goal out of reach, they must step in and exercise judicial review to correct for the procedural breakdown and to reinforce the representational principles the Constitution embodies.<sup>3</sup>

Whether Ely's theory is constructed on a foundation of sand or stone depends—to a large extent—on the rigor of his conception of “American representative democracy,” which he gleans largely from a footnote in an old Supreme Court opinion written by Justice Stone.<sup>4</sup> Ely emphasizes breakdowns in the political process that burden discrete and insular minorities or impinge a fundamental right.<sup>5</sup> To be sure these are important elements of the republican ideal, and our history certainly indicates a need to pay attention to the elements Ely highlights. But I argue that Ely's vision of American representative democracy, by which his theory of judicial review stands or falls, is critically incomplete. Fundamental to the American system of representative government is its deep-seated federal character. Because Ely overlooks the role federalism plays in our representational scheme, his theory reflects only an anemic version of the robust notion of representative democracy the Framers' Constitution embodies. I intend to make Ely's theory whole by emphasizing the distinction between citizens of states and citizens of the United States—a distinction embodied in

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

2. *See id.* at 101–02 (foreshadowing his argument, later in the same chapter, that his representation reinforcing theory of judicial review supports his vision of American representative democracy).

3. *See id.* at 103.

4. *See* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

5. *See id.*

key provisions of the Constitution's text.<sup>6</sup> Just as judges should safeguard the American ideal by protecting fundamental rights and the federal political process, they should protect the participation of the citizens of the states at least insofar as the Constitution recognizes their unique value to its federal system.

Recognition of breakdowns in the political process that burden constitutional federalism values not only completes Ely's theory but also significantly contributes to current federalism scholarship. Herbert Wechsler's political safeguards of federalism theory has long been taken to mean that the process will secure the structural promises of federalism in the Constitution without any need for judicial review.<sup>7</sup> Without a clear textual hook in the Constitution for the exercise of judicial review on federalism grounds, those who would argue for such review are fighting an uphill battle. But Ely's theory powerfully answered a strikingly similar challenge. He gave compelling reasons for courts to exercise judicial review of substantive rights that were not clearly written into the Constitution's text. Those same arguments can and should provide a similar, fundamentally American justification for the exercise of judicial review on behalf of federalism values.

This Essay examines the Constitution's text and highlights many key provisions that embody what I call "the values of state citizenship." That term refers to the values embodied by a group of terms woven throughout the Constitution's text that reflect the Framers' intentional intertwining of state-based representation into their notion of American representative democracy. Terms like "citizens of the states," "inhabitants of the states," "the states in convention," "legislators of the states," and the like appear everywhere the Constitution deals with representation. Analysis of these terms reveals that healthy nation-level representation is impossible without healthy state-level representation. Hence, if we want to protect any legitimate

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6. *See, e.g.*, U.S. CONST. art. III, § 2.

7. *See, e.g.*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537–47, 551 n.11 (1985) (citing Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954)).

notion of American representative democracy, we must reinforce not only the representation of citizens of the United States but also the representation of the citizens of the States.

Part II of this Essay explains the nuts and bolts of Ely's representation reinforcing theory of judicial review. Part III explores one scholar's call for a *Democracy and Distrust* of federalism and explains that while that theory's essential insight is correct, it does not go far enough. Part IV explains how Ely's method for discovering his view of American representative democracy—the bedrock of his representational reinforcing theory—led him to an incomplete version of American representative democracy. This Essay's main contribution comes in Part V, where a close reading of the Constitution's text reveals an overlooked textual "hook" for such an Ely-an justification for judicial review of federalism. Having outlined a more complete vision of American representative democracy, Part VI goes on to show how courts might apply this beefed up version of the representation reinforcing theory to exercise judicial review on behalf of federalism more often, taking the Supreme Court's recent *United States v. Comstock*<sup>8</sup> case as an example of how these values might—and should—have been put into action.

## II. REPRESENTATION REINFORCING JUDICIAL REVIEW

The countermajoritarian difficulty is one the most important problems in legal scholarship, both because of its apparent intractability and because it threatens the most important judicial power in our system—the power of judicial review.<sup>9</sup> Ely's book, *Democracy and Distrust*, offers a solution to the countermajoritarian difficulty that not only justifies judicial review but also justifies the sometimes particularly controversial Warren Court's exercise of that

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8. 130 S. Ct. 1949 (2010).

9. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962). For further exploration, see also THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, *THE COUNTERMAJORITARIAN DIFFICULTY AND CONTEMPORARY CONSTITUTIONAL THEORY* (Kenneth D. Ward & Cecilia R. Castillo eds., 2005).

power.<sup>10</sup> Ely outlines the ordinary debate between what he calls interpretivists and non-interpretivists, explaining that interpretivists contend that judges deciding constitutional issues should confine themselves to “enforcing norms that are stated or clearly implicit in the written Constitution,” while non-interpretivists contend that courts should go beyond that restrictive set of references to “enforce norms that cannot be discovered within the four corners of the document.”<sup>11</sup> Ely argues that “clause-bound interpretivism” is impossible because of the open-textured nature of certain provisions of the Constitution.<sup>12</sup> Perhaps the prime example of such an open-textured provision is the Fourteenth Amendment’s Due Process Clause.<sup>13</sup> Ely argues that it is impossible to give meaningful content to that clause without reference to sources outside of the Constitution’s text and that, in fact, the text invites the interpreter to engage such sources to give the clause meaning.<sup>14</sup>

Having rejected clause-bound interpretivism, Ely searches for what sort of “values” ought to inform our understanding of these open-textured constitutional provisions. He looks at all of the popular modern options: the judge’s own values, natural law, neutral principles, reason, tradition, and consensus.<sup>15</sup> Ultimately, though, he finds none of them satisfactory.<sup>16</sup> The thesis of his book is that rather than either attempting to succeed in clause-bound interpretivism or in interpreting each open-textured constitutional provision to enhance or protect some fundamental value—both of which are futile exercises—the prescient interpreter ought to recognize that the Constitution is primarily meant to entrench a process that will give rise to “American representative democracy.”<sup>17</sup> In light of that recognition, judicial review is not only justified but necessary when the political process breaks down, when a fundamental right

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10. See ELY, *supra* note 1, at 73 (purporting to find the proper justification for judicial review in the Warren Court’s approach).

11. *Id.* at 1.

12. See *id.* at 11–41.

13. U.S. CONST. amend. XIV, § 1.

14. ELY, *supra* note 1, at 14.

15. See *id.* at 43–72.

16. See *id.* at 73.

17. *Id.* at 73–77.

necessary to participation in the political process is threatened, or when the political process fails to protect a discrete or insular minority.<sup>18</sup> Detached from politics and safeguarded by life tenure and salary protections, the Judicial Branch is particularly well-suited to the task of policing the political process—a role essential to realizing our goal of American representative democracy.<sup>19</sup>

I want to focus on Ely's concept of American representative democracy because it is the lynchpin of his representation reinforcing theory of judicial review. Even granting Ely's premise that the Constitution is a procedural document, one must additionally agree with his idea of American representative democracy in order to support his theory of judicial review. If we find that the Constitution's text actually endorses some other concept of American representative democracy, then we can question whether Ely's theory ought to be adjusted in order to ensure realization of *that* goal.

I contend that Ely's theory is incomplete because he does indeed fail to account for a constitutionally vital element of American representative democracy. Ely certainly recognizes the democratic value of citizens of the United States, but he fails to recognize several other constitutionally significant forms of representation. Having ignored several key aspects of the Constitution's vision of representation, Ely's notion of American representative democracy is anemic. Were the courts only to police the representational process according to Ely's vision, many key aspects of representation—as envisioned in the Constitution—would be left to languish. That is in fact what has happened. A more active and thorough protection of the political process would require the courts to acknowledge not just the aspects of American representative democracy embodied in the *Carolene Products* footnote but all aspects of representation enshrined in the Constitution's text. Such a version of representation reinforcing judicial review would indeed allow the courts to go beyond the current hands-off approach to process federalism endorsed by the *Garcia*

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18. *Id.* at 102–03.

19. *See id.* at 102–03.

majority and to exercise judicial review where the political process fails to fulfill the constitutional promise of representation of “citizens of the states,” “the state Conventions,” “the state Legislatures,” and the like.

### III. PROFESSOR ERNEST YOUNG'S CALL FOR A *DEMOCRACY* AND *DISTRUST* FOR FEDERALISM

Herbert Wechsler's famous article, *The Political Safeguards of Federalism*, is commonly thought to be the theoretical godfather of Justice Blackmun's landmark opinion in *Garcia*.<sup>20</sup> Wechsler argues that the existence of the states as independent governments and creators of the majority of this country's legislation is the primary determinant and protection of our federalism.<sup>21</sup> The *Garcia* Court took that thesis and ran with it—I argue too far—by inferring that because the political process offers a primary protection of federalism values, the courts should not exercise judicial review for federalism.<sup>22</sup> This entrenched view has come to define the Court's approach to federalism, but several scholars think it misconceives Wechsler's argument, that Wechsler's argument no longer applies with the same force it did at the time he wrote, or that there are good reasons to have some level of judicial review of federalism values anyway. This Part outlines one of those scholar's views on the subject with the purpose of introducing the idea of a *Democracy and Distrust* for federalism as a means of principled judicial review for federalism.

Professor Ernest Young has written extensively on the subject of process federalism, arguing that whatever Justice Blackmun may have intended with his *Garcia* opinion, his notion of process federalism leaves plenty of room for judicial review based on federalism values.<sup>23</sup> Professor Young draws heavily on Ely's theory of representation

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20. See, e.g., Russell A. Miller, *Clinton, Ginsburg, and Centrist Federalism*, 85 IND. L.J. 225, 252–54 (2010) (crediting Wechsler's process federalism theory as the rationale for Justice Blackmun's *Garcia* opinion).

21. Wechsler, *supra* note 7, at 546.

22. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537–47, 551 n.11 (1985) (citing Wechsler, *supra* note 7).

23. Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1366 (2001).

reinforcing judicial review to make his argument and says that the same sorts of procedural protections that Ely argued protect individual rights also protect federalism values in the Constitution.<sup>24</sup> Thus, the courts are in the same unique position of ability and obligation to police the boundaries of the constitutional process when it comes to federalism as they are with regard to individual rights. Professor Young thus calls for a *Democracy and Distrust* for federalism.

Professor Young's version of process federalism is admittedly more open to judicial review for federalism values than is the received interpretation of Justice Blackmun's *Garcia* opinion.<sup>25</sup> He calls upon Ely's view of representation reinforcing judicial review to justify judicial review only when the political process meant to protect federalism breaks down. Professor Young acknowledges two different occasions when, under Ely's theory, judicial review is appropriate. First, judicial review is appropriate when "pervasive and enduring discrimination against 'discrete and insular minorities,' . . . might foreclose those groups from an adequate opportunity to protect their interests through politics."<sup>26</sup> Second, judicial review is appropriate where "a particular governmental measure, such as a restriction on free political debate, undermines the functioning of the normal political process so that its results are no longer trustworthy."<sup>27</sup> Professor Young argues that process federalism fits fairly easily under the second grouping, noting that when the federal government commandeers the state governments, for example, the people can no longer trust the results of the political process because "the lines of [political] accountability have blurred."<sup>28</sup>

Notice that Professor Young does not argue that Ely's notion of representation is flawed. Instead, he only argues that a working concept of process federalism—which even the "nationalist" justices have adopted—requires some level of judicial review for federalism. But just how much judicial

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24. *See id.* at 1364–65.

25. *Id.* at 1365–66.

26. *Id.* at 1364.

27. *Id.* at 1365.

28. *Id.*

review for federalism does Professor Young have in mind? He argues that some substantive judicial review must be possible as a backstop for the political processes protecting federalism values, but he openly acknowledges that the procedural safeguards the Rehnquist Court adopted will go a long way on their own—apart from any more substantive judicial review—to safeguard federalism values.<sup>29</sup> Particularly, Professor Young is fond of a normative canon of statutory construction requiring a “presumption against preemption” of state law.<sup>30</sup> He goes on to argue that enforcement of such a normative canon is actually a form of judicial review.<sup>31</sup> Even if this is so, is that all there is to *Democracy and Distrust* for federalism? What if Ely’s view of representation was incomplete and the Constitution actually contains more textual evidence that American representative democracy comes to us with the federalism values built in? That is what I go on to argue in Part IV, but first we must get a clear sense of just what Ely means by American representative democracy and how he came to his understanding of the concept.

#### IV. AN ANEMIC VERSION OF AMERICAN REPRESENTATIVE DEMOCRACY

Ely’s theory requires that he justify his view of American representative democracy. He begins his elaboration of the representation reinforcing theory by arguing that the Warren Court embodied it.<sup>32</sup> He goes on to argue that Justice Stone foreshadowed the Warren Court’s approach in his famous *Carolene Products* footnote four synopsis of the justifications for more searching judicial review.<sup>33</sup> But the *Carolene Products* footnote—whatever its ultimate merit—is little more than a principle completely untethered to any deeper theoretical justification. It does not, by itself, give us a complete argument or political theory upon which we can base a justification of judicial review. Instead, to understand how the footnote four values give rise to a coherent political

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29. *Id.* at 1390.

30. *Id.* at 1384–85; *see also* Miller, *supra* note 20, at 266.

31. Young, *supra* note 23, at 1387.

32. ELY, *supra* note 1, at 73.

33. *Id.* at 75.

theory, Ely tells us “it is necessary to focus . . . on the American system of representative democracy.”<sup>34</sup>

Ely begins his discussion of American representative democracy with a review of its historical roots. Noting that the Framers sought to create a particularly rich association between the rulers and the ruled, Ely says that “the representatives in the new government were visualized as ‘citizens,’ persons of unusual ability and character to be sure, but nonetheless ‘of the people.’”<sup>35</sup> He goes on to say that “[t]he principal force [the Framers] envisioned [for enforcing their vision of representation] was the ballot: the people in their self-interest would choose representatives whose interests intertwined with theirs and by the critical reelection decision ensure that they stayed that way, in particular that the representatives did not shield themselves from the rigors of the laws they passed.”<sup>36</sup>

But, according to Ely, the Framers did not want a system of pure majority rule because that would risk tyranny of the majority.<sup>37</sup> Thus, they put in place various mechanisms “to break up and counterpoise governmental decision and enforcement authority, not only between the national government and the states but among the three departments of the national government as well.”<sup>38</sup> The Bill of Rights also embodies a “list strategy” of protecting certain sacrosanct values from governmental encroachment.<sup>39</sup> It became clear, though, that these moves were not enough to protect minorities from overbearing majorities. This led to more official legal devices, like the Fourteenth Amendment, which was meant to ensure equal representation.<sup>40</sup>

Next, Ely discusses the Supreme Court’s willingness, even at an early stage of the country’s history, to protect the interests of minorities that were not literally voteless by constitutionally tying their interests to those of groups that did possess political power.<sup>41</sup> Interestingly, Ely points to the

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34. *Id.* at 77.

35. *Id.* at 78.

36. *Id.*

37. *Id.*

38. *Id.* at 80.

39. *Id.* at 79.

40. *Id.* at 82.

41. *Id.* at 83.

Privileges and Immunities Clause as an example of this aspect of American representative democracy.<sup>42</sup> There, according to Ely, the Framers intended to restrict state legislatures from treating out-of-staters less favorably than they treat locals.<sup>43</sup> This method of tying the plight of the politically powerless—here, nonresidents—to that of the politically represented majority serves to ensure that their interests will be represented and well looked after.

Having thus laid out his idea of what American representative democracy looks like, Ely promises to go on to show, first, that his representation reinforcing theory of judicial review is well-grounded in the Constitution's text and, second, that it is "entirely supportive of . . . the underlying premises of the American system of representative democracy."<sup>44</sup> I argue that Ely got the order wrong. He should have looked to the Constitution to determine what "the American system of representative democracy" looks like and *then* asked what the proper representation reinforcing theory of judicial review should hold with that constitutional concept as its lodestar. To go through the entire Constitution in an effort to determine what American representative democracy should look like is beyond this Essay's scope. Instead, I grant that Ely's version is right as far as it goes, but I argue that his theory is incomplete in at least one fundamental way. Ely is surely right that the Framers considered the concept of democratic representation to be, among other things, a sort of pluralist protection against tyranny of the majority. But Ely fails to factor in perhaps the most important sense in which the Constitution embodies pluralist representation, namely its recognition of the dual identity of the American people. The Constitution repeatedly and independently draws on two notions of identity when setting up its representational structure. First, it looks to the various ways people identify themselves with the United States. Second, it looks to the various ways they identify themselves with their respective states. Without careful attention paid to both of these senses of representation, no theory of American representative

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42. *Id.*

43. *Id.*

44. *Id.* at 88.

democracy can be complete. Because Ely leaves out one half of this equation, it does him little good to show that his representation reinforcing theory of judicial review comports with his notion of American representative democracy. Once his lacking notion of the American republican system is corrected through proper attention to the overlooked constitutional provisions, his representation reinforcing theory can be supplemented to reflect a proper and complete theory of participation-oriented judicial review. In the end, this supplementation leaves plenty of room for a robust theory of process federalism—one that enhances Professor Young’s theory and calls for more substantive judicial review for federalism.

#### V. ACCOUNTING FOR THE CONSTITUTIONAL VALUES OF STATE CITIZENSHIP

This Part surveys the Constitution’s text and highlights each time the Framers provide for representation of individuals in the state-based half of their American identity. Hopefully, after the evidence is in, it will be impossible to deny that the Framers’ notion of American representative democracy necessarily includes emphasis on state citizenship. If that is so, then we must supplement Ely’s notion of American representative democracy and extrapolate the effects of the supplementation on his representation reinforcing theory of judicial review.

Before going through each of the state-based representation provisions, though, it is necessary to justify the importance of the distinction between representation of “We the People” through state-based mechanisms as opposed to national mechanisms. This is particularly true in light of a rarely observed but important feature of the Constitution. Contrary to modern parlance, the Framers did not think of the term “the United States” as singular. Throughout the Constitution they refer to “the United States” as “them” or otherwise refer to “them” as a plural noun.<sup>45</sup> What’s the significance of that? One might infer

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45. U.S. CONST. art. I, § 9; *id.* art. II, § 1; *id.* art. III, §§ 2, 3; *id.* amend. XI; *id.* amend. XIII, § 1. It is important to note that explicit references in the text are just as telling as those omitted. There is not one counterexample to the plural United States phenomenon to be found anywhere in the Constitution’s text. There are

from the “plural United States phenomenon” that the term “citizens of the United States” refers to citizens of each of the states. In other words, the Framers did not think they were creating a new entity, only linking several smaller entities. If that is so, then there is no real distinction between citizens of the states and citizens of the United States and certainly no reason to rethink our understanding of federalism doctrine based on use of both terms. But there are several persuasive reasons to reject that argument.

First, as will be shown, “citizens of the States” is not the only term the Framers deployed to highlight the dual nature of representation they had in mind. They also refer to state legislatures as mechanisms for making political decisions such as amendments, choosing electors, and the like.<sup>46</sup> Furthermore, they refer to people of the States and inhabitants of the States.<sup>47</sup> Finally, the Constitution sometimes mentions citizens of a state as opposed to citizens of the States, plural.<sup>48</sup> No United States analogue to these other terms exists (or even could exist) in the Constitution. Think of it: You couldn’t reasonably refer to a “citizen of the United State” because the “State” you refer to isn’t in any rational sense “United.” For “United” to make sense, there must be several “United States.” Thus, even if it were true that “citizens of the United States” included “citizens of the States,” several other constitutional phrases reflect the Framers’ purposeful recognition of the distinction between representation of an individual at the national level and representation of that same individual at the state level.

Second, the Constitution contains certain provisions that utilize both terms, thereby signaling a meaningful distinction between them. For instance, the Fourteenth Amendment says “[a]ll persons born or naturalized in the

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references to the Union that refer to a singular noun, but any concept of the United States as singular is in our interpretation and modern parlance only—not the Constitution’s actual text.

46. *See, e.g., id.* art. II, § 1 (regarding electors); *id.* art. V (regarding amendments).

47. *Id.* art. I, § 3 (referring to “[i]nhabitant[s]”); *id.* amend. XIV, § 2 (referring to “persons”).

48. *See, e.g., id.* amend. XI (“The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>49</sup> This is plain evidence that the authors thought of these two concepts as separate and distinct. Otherwise, mentioning citizens “of the State in which they reside” directly after “citizens of the United States” would be redundant.

In light of these arguments, it is clear that the Framers recognized a conceptual difference between state citizenship and United States citizenship despite the plural United States phenomenon. I would argue that the plural United States phenomenon, when understood in light of the various state-based and nation-based representational mechanisms the Framers deployed, reveals that their understanding of representation at the constitutional level was more subtle and complex than it has come to be understood today. At the very least, the plural United States phenomenon, with its emphasis on *States* as opposed to *United* in “United States,” should alert us that our modern understanding (misunderstanding?) of the state–federal balance has shifted entirely too far in the national direction and therefore that greater emphasis on the provisions emphasizing state-based representation is particularly necessary today. The evidence suggests that this slide toward a more nationalized identity occurred rather recently. For example, Professor Wechsler argued that people identify primarily with their state—not with the United States—as recently as 1954.<sup>50</sup> While the conclusion requires empirical proof, it seems all but certain that people today identify themselves primarily as citizens of the United States—not citizens of their states. On the other hand, just because there has been a shift in how we identify ourselves as Americans does not mean that that shift is bad or undesirable. But if that shift has occurred at the expense of fidelity to the Constitution’s text, then there is a colorable argument that its legitimacy is questionable.

This Essay does not demand that we return to some old concept of the state–national balance just because that was how it was in the “good ol’ days.” Instead, it asks only that

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49. *Id.* amend. XIV, § 1.

50. Wechsler, *supra* note 7, at 546–47.

we not run roughshod over several provisions of the Constitution's text at the expense of American representative democracy rightly understood. Put another way, this Essay does not ask for a return to an old conception the state–national balance, but it does claim that fidelity to the Constitution's text requires any interpreter using Ely's representation reinforcing theory to justify the Warren Court's more famous exercises of judicial review must also recognize that representation reinforcement demands equal attention be paid to the values of state citizenship that are central to any robust account of American representative democracy.

Everywhere the Constitution provides for representation it includes an element of one of the values of state citizenship. This Part catalogues and explores those provisions. My hope is that by putting them all in one place and by showing their state-based aspects, this Part will leave the reader with no choice but to acknowledge the centrality of the values of state citizenship to American representative democracy.

Article IV, Section Four is a simple provision and one not much talked about in constitutional scholarship, but it proves that an understanding of American representative democracy that is faithful to the Constitution's text *must* recognize the importance of the values of state citizenship. It says, "The United States shall guarantee to every state in this Union a Republican Form of Government."<sup>51</sup> Rather than leaving the manner of political representation Americans would have at the state level to chance, the Framers guaranteed it would be of a particular sort. This was very important because—as will be discussed at length later—under our Constitution adequate and effective representation at the state level is a prerequisite of healthy representation at the national level. Because the Framers recognized the critical function the values of state representation would play at the national level, they went out of their way to guarantee that the states would have a republican form of government.

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51. U.S. CONST. art. IV, § 4.

The Constitution did not have a “national” birth. Instead, its origins trace back to a properly functioning act of the state-level republican system guaranteed by Article IV, Section Four. Article VII says, “The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”<sup>52</sup> In his Records of the Federal Convention, James Madison reports the following:

[T]he amendments which shall be offered to the Confederation, by the Convention ought at a proper time, or times, after the approbation of Congress to be submitted to an assembly or assemblies of Representatives, recommended by the several Legislatures to be expressly chosen by the people, to consider & decide thereon.<sup>53</sup>

On the same question Mr. Patterson spoke similarly:

I came here not to speak my own sentiments, but the sentiments of those who sent me. Our object is not such a Governmt. as may be best in itself, but such a one as our Constituents have authorized us to prepare, and as they will approve. . . . All [the States] therefore must concur before any can be bound.<sup>54</sup>

The Constitution began with an act of state-level republicanism, and insofar as it did, its legitimacy depends on proper state-level representation. Chief Justice Marshall—a well-known champion of an expansive national government—recognized as much in *Owings v. Speed*:

In September, 1787, after completing the great work in which they had been engaged, the Convention resolved that the Constitution should be laid before the Congress of the United States, to be submitted by that body to Conventions of the several States, to be convened by their respective legislatures, and expressed the opinion, that as soon as it should be ratified by the Conventions of nine

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52. *Id.* art. VII.

53. 4 THE FOUNDERS' CONSTITUTION 648 (Philip B. Kurland & Ralph Lerner eds., 1987).

54. *Id.* at 649.

States, Congress should fix a day on which electors should be appointed by the states.<sup>55</sup>

Imagine a breakdown in political process at this fundamental level; were it to occur, the Constitution would be illegitimate. Thus, as important as representation at the national level is, it would have never been were it not for adequate and healthy representation at the state level. Again then, any concept of American representative democracy that ignores the values of state citizenship is fundamentally flawed.

Consider the Article V Amendment Process. A proposed amendment “shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof.”<sup>56</sup> Consider also the Twenty-Second Amendment—and the others like it—that require that “[t]his article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States.”<sup>57</sup> Thus, at the founding and in 1951, the Framers of the Constitution have relied on representation at the state—not the national—level to ensure the legitimacy of fundamental changes to the Constitution.

Article I, Section Two says, “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”<sup>58</sup> It goes on to say, “No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of the State in which he shall be chosen.”<sup>59</sup> These provisions inject a state-based representational element into the system that gives rise to national representation. The fact that a representative must be an inhabitant of the state in which

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55. 18 U.S. (5 Wheat.) 420 (1820).

56. U.S. CONST. art. V.

57. *Id.* amend. XXII, § 2.

58. *Id.* art. I, § 2.

59. *Id.*

he is chosen ties representation at the national level to representation at the state level by aligning the interests of the national representative to the interests of those whom he represents, namely the people of the state that elected him. To ignore the state-based element of this representation and to characterize American representative democracy as purely national would not be faithful to careful mechanisms like these that the Framers built into the constitutional clockwork. Article I, Section Three does the same thing for the Senate.<sup>60</sup>

Article III, Section Two says, in part, “The judicial Power shall extend . . . to Controversies between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States . . . .”<sup>61</sup> Perhaps it is not obvious how text defining the extent of the judicial power could have anything to do with the finer points of American representative democracy. But consider that the Framers found only six “controversies” worthy of specific mention when defining the judicial power, and half of them include mention of state citizens as parties. To the extent that Ely is right that one important role of the Judiciary is to police the border of political participation under the Constitution, Article III’s specific provisions emphasize a particularly acute need for patrol of the borders of *state*-level political participation. Perhaps the fear was that the states would not provide fair or adequate judicial processes under the listed circumstances. If that was the case, then it is possible that the Framers intended Article III judicial review to police particular breakdowns in the state-level political process.

Article IV, Section Two says, in part, “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”<sup>62</sup> While this provision has essentially been read out of the Constitution, it highlights an important aspect of American representative democracy. The Privileges and Immunities Clause requires states to give outsiders the same advantages and benefits that they

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60. *Id.* art. I, § 3.

61. *Id.* art. III, § 2.

62. *Id.* art. IV, § 2.

give to their own citizens, avoiding one of the surest potential representational breakdowns threatening realization of the American republican goal. Importantly, it recognizes the necessity of national-level protection of citizens of each State. In other words, this is another example of the Constitution's explicit concern for the plight of Americans in the state-based sense of their identity.

The Sixth Amendment says, in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."<sup>63</sup> The democratic values undergirding the jury system are well-documented. The Constitution's version of representative democracy consistently ties vital national practices and processes to a state-based sense of American identity. Here, it requires that the composition of the jury—one of the abiding symbols of American democracy—be determined on state-based considerations. To the extent that the jury is an icon of American democracy, American democracy is inextricably intertwined with state-based considerations.

Section Two of the Fourteenth Amendment requires that representatives be apportioned according to the number people in a given state.<sup>64</sup> Nothing could more clearly link constitutional representation to considerations of state-based representation. The more citizens that can be counted within the "number" of any state, the greater the amount of national representation those people will gain. It is a specifically state-based consideration that determines their representational potency—not a national consideration. To ignore the state-based element of representation in light of the consistent efforts of the Framers and drafters of the Amendments to give political voice to people in their state-based capacities as well as their national capacities is to be irresponsible with the Constitution's text.

Finally, the Constitution repeatedly relies upon the state legislatures' cooperation to ensure that American representative democracy is realized.<sup>65</sup> This reliance

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63. *Id.* amend. VI.

64. *Id.* amend. XIV, § 2.

65. Article I, Section Four mandates that the "Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each

underscores the role of citizens of the states in the national representative scheme by placing the political hammer of accountability in the hands of state citizens, who alone control the fates of state legislators. Were a breakdown in the political process to occur at the state legislature level, several key aspects of the American representative machine would malfunction. Thus, a robust vision of American representative democracy—and one that is faithful to the Constitution’s text—must not give short shrift to state legislatures and the state citizens to whom they are accountable.

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State by the Legislature thereof.” *Id.* art. I, § 4. This provision gives a significant level of control over the national representational scheme to the state legislatures. Intentional overtures toward a cooperative representational apparatus like this one, especially when the Constitution contains so many of them, reveal a concerted effort on the Framers’ part to involve state legislatures and, concomitantly, state citizens in American representative democracy.

Article II requires that each state appoint presidential electors “in such Manner as the Legislature thereof may direct.” *Id.* art. II, § 1, cl. 2. Just as they relied upon state citizens and representatives to provide for the elections of senators and representatives in Article I, here the Framers rely on them for the election of the President. In this way, the two “political” branches—also the two most responsible for American representative democracy—cannot function without the cooperation and effective action of the citizens of the states and their legislatures. It is no accident that each and every time the Framers provided for representation they explicitly tied that representation to a state-based entity that is itself accountable to the citizens of the states. After all, what good would Madison’s “double security” against tyranny be if one of the sentinels left its post? The Framers linked the state governments and citizens into their scheme of American representative democracy to ensure, to the extent possible, that both levels of the “double security” remained in place for good. To be sure, this mechanism passively limits the state governments—they may not veer too far off the republican path laid out in the Constitution. But in another sense it provided the states assurance that they would exist as states through whatever unexpected ups and downs might arise during the Constitution’s tenure because the Constitution itself employs them and their citizens in its representational scheme.

Article II goes on to provide that “in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; a quorum for this purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice.” *Id.* This provision only makes clearer the link between presidential elections and state-level representation. It is explicitly “the Representation from each State” that votes, and just who makes up that “representation” is chosen by citizens of the states. The Framers could have made national elections like the one that chooses the President completely independent of the States. One might argue that they relied on the states only for convenience sake, but the rationales mentioned above argue the other way. Furthermore, even if it was all a matter of efficiency at the time, that surely cannot be the modern justification. Today it would be easy enough to implement any number of technologies to make presidential elections purely national affairs that do not rely at all on the states. But that has not happened. Furthermore, even if it were purely a matter of administrative ease, the scheme still undeniably links American representative democracy inextricably to state-based processes and state citizens.

VI. SUPPLEMENTING ELY TO PROVIDE FOR A *DEMOCRACY AND DISTRUST* FOR FEDERALISM

This tour of the Constitution has admittedly been tedious, but it has been more than worth it if, as is hopefully the case, it is now clear that it is impossible to understand American representative democracy apart from the values of state citizenship. Professor Ely's theory is brilliant, but because its conception of American representative democracy failed to account for this essential, life-giving element, it is incomplete. While most Ely scholars would describe themselves as nationalists, this Essay seeks to show that the most principled and consistent Elyan scholar must make room for judicial review of federalism issues or else admit adherence to an anemic and unrealistic vision of American representative democracy. What good is pursuit of a republican goal if that goal is illegitimate? Hopefully, open-minded scholars will consider pursuing *all* aspects of American representative democracy with equal zeal—even those that tend to result in judicial review for federalism. The rest of this Essay is dedicated to seeing what such a commitment might look like.

Ely's theory justifies searching judicial review in favor of discrete and insular minorities, for fundamental rights, and where the political process otherwise breaks down. That rationale, though, has never been applied enthusiastically in favor of judicial review for federalism. In light of the textual evidence discussed above, however, which indicates that American representative democracy requires healthy representation of state citizens, one might wonder whether this situation is a healthy one. Take, for example, the common practice of conditional spending.<sup>66</sup> A robust judicial review for federalism along the lines that this Essay calls for would require a presumption that conditional spending is unconstitutional.

Conditional spending bypasses the role of the "citizens of the states" and thereby undermines what has been shown to be a key feature of American representative democracy. In light of the evidence discussed at length above, conditional

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66. See *United States v. Dole*, 483 U.S. 203, 206–07 (1987) (discussing the nature of conditional spending in some depth).

spending cannot be abided because it is unquestionably a serious breakdown in the political process. When Congress pays willing states to abide by its laws—often ignoring their own democratically made laws—it essentially enacts novel state laws in each of the cooperating states. But what it does *not* do is go through the political hurdles normally necessary to effectuate such a change of state law. Furthermore, it removes one level of political accountability from the overall process. Normally federal legislators are accountable for the laws they pass while state legislators are accountable for their own. These multiple layers of accountability are often cited as a key feature of federalism because Americans have multiple microphones for their political voices. Here, though, one move takes away the state law that was in place and replaces it with a federal law. Because it required a form of state–federal cooperation not provided for in the Constitution, citizens do not know who to blame or whom to vote out of office.<sup>67</sup> True, they could vote both entities out, but that would be a more difficult task. And even if they did, the deeper problem would remain—voters and their votes are ideally supposed to govern political decisions in this country, not federal legislators and their money.

Conditional spending has the effect of creating state law without engaging state citizens. Because state citizens are such a key element of American representative democracy, it would be proper for an Ely-minded judge to reinforce representation by exercising judicial review of conditional spending laws and thus clearing the channels of political change that would otherwise be open to state citizens. This does not mean that absolutely every conditional spending provision is unconstitutional. Just as a law could require strict scrutiny and pass it, a conditional spending law could be subject to the presumption of unconstitutionality and survive. To do so, though, the Court must be able to assure itself that the particular conditional spending provision was not implemented in order to avoid engaging citizens at the

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67. Professor Young cites this blurring of the lines of accountability as one of the key justifications for judicial review for federalism. Young, *supra* note 23, at 1360.

state level or to ignore political discontent in a state.<sup>68</sup> Courts should also assure themselves that the conditional spending provision does not greatly benefit some states at the expense of one or several others either because of the relative need for the funds or because of the relative negative effects of the law the spending provision purchases.

I recognize that good Wechslerians will cringe at my view of conditional spending. Wechsler's political safeguards argument was, after all, an account of the manner in which the national legislative process takes into consideration and protects state preferences to either have state law or national law control.<sup>69</sup> If state law is chosen, then Congress would decide not to preempt and not to impose a spending condition. If national law is deemed the better path, then a preemptive federal statute or a spending condition would result. There is, in short, a notion of state citizen consent to exercises of national power, where they occur, underlying the classical political safeguards account.<sup>70</sup> After all, the alternative to conditional spending seems to be flat-out preemption of the state law in question. Thus, the Wechslerian will see conditional spending as a lovely illustration of the political safeguards of federalism in action. The state citizens' preferences are translated through their state legislators up to the national level.

I reject the Wechslerian idea that the views of state citizens are translated up to the national level. Professor Young argues that there are some instances in which the national legislative process does not fully protect the preferences of state citizens because of predictable errors in governmental decision making or in the process of "translating" state constituents' preferences up to their national representatives (for example, the argument that national politicians come to view state governments as competitors rather than constituents fits here).<sup>71</sup> So on Young's view, Wechsler's theory must be revised to incorporate reinforcements of the process by which state

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68. *Cf. Printz v. United States*, 521 U.S. 898 (1997) (holding as unconstitutional certain provisions of the Brady Handgun Violence Prevention Act).

69. Wechsler, *supra* note 7, at 545.

70. *Id.*

71. Young, *supra* note 23, at 1360–61.

interests are accounted for in the national political process. I argue that we should reject the notion of translated preferences altogether because the very act of conditional spending itself is such a plain failure of the political process and one that is often meant to ignore the role of state citizens in the political process.

However, the implications of incorporating the values of state citizenship into our notion of American representative democracy do not end with conditional spending. Such a theory provides extra support for many of the norms of statutory construction that have grown to become vital protections for federalism values. The presumption against preemption, for instance, ought to be more vigorously enforced. Preemption of state law—especially when it occurs as a result of regulations created by unaccountable federal agencies—silences the political voices of state citizens. Presumably, preempted state laws were put in place through a democratic political process at the state level. When an agency regulation renders such laws void, it also effectively erases the votes of the state legislators that enacted those laws and those of the state citizens who put them there to enact the laws. A presumption against preemption recognizes the serious implications of such measures, which tread dangerously close to an all-out breakdown in the political process that makes American representative democracy possible. It requires judges to recognize state citizens' votes as meaningful rather than brushing them to the side simply because a federal agency has a conflicting idea.

It is beyond the scope of this Essay to delineate precisely how courts might put more heft behind that presumption against preemption than currently exists, but some suggestions are certainly called for. First, we could require clear statements on behalf of Congress. The role of clear statements themselves is discussed below, but Courts could require them absolutely in order to overcome the presumption against preemption. Furthermore, Courts could fashion a sort of tiered scrutiny structure that recognizes that some laws or regulations preempt a greater number of state laws or affect some states much more than others. In instances where one or a few states are disproportionately

affected by a certain preemptive federal law or regulation, there is a greater fear that the most affected state citizens will have no chance to have their political voices heard regarding the things that affect them most. In those instances, it seems the presumption should require some sort of judicial effort to ensure that those citizens' voices have been taken into account in the passage of the law before they recognize its legitimacy. Otherwise, an overbearing national majority could seek a national goal at the expense of a national minority that happens to be a majority in the most affected state or states. Courts must ensure that before such a law is passed that those state citizens had a chance to bind together to be heard or at least be heard individually regarding the regulation or law in question.

The canon of statutory construction that requires a clear statement before the courts will interpret a federal statute to preempt state law similarly reinforces the representation of state citizens.<sup>72</sup> Just as the presumption against preemption requires federal judges to recognize the importance of state citizens in American representative democracy, the clear statement rule requires *Congress* to recognize their importance as well when drafting such statutes. The argument put forward in this Essay, which hopefully makes even clearer the link between representation at the state level and American representative democracy, gives Congress even greater reason to act intentionally when legislating in a way that threatens the political projects of state citizens. Much of this argument has been made before, but up to now, no one has clearly shown that pursuing these goals is more than just a charitable cause benefiting states. Instead, it is an essential aspect of fidelity to the Constitution's text and of ensuring realization of our common goal of American representative democracy.

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72. *See id.* at 1381–82 (discussing the Court's application of clear statement rules in federalism cases).

A. *United States v. Comstock*

It is impossible for any constitutional thinker to anticipate or fully grasp the wide range of applications any theory might have if put into use. The world has a way of forcing altogether reasonable theories into awkward corners that would have been almost entirely unforeseeable to their inventors. Thus, my list above of suggested methods of implementation of *Democracy and Distrust* of federalism is not meant to be complete. The Elyan judge who keeps the theory in mind when viewing cases that bring representation of state citizens into question will certainly encounter novel situations that I cannot anticipate or account for. The Supreme Court of the United States recently wrangled with one such case, *United States v. Comstock*, and because of the current tendencies of courts to run roughshod over the interests of state citizens—even if those interests are firmly grounded in the Constitution’s text—I would argue the Court got it wrong.

In *Comstock*, the Supreme Court held that a federal district court can order a federal inmate who is deemed sexually dangerous to be committed to a mental facility, even if that means an increase in the person’s detention beyond the limits of his sentence.<sup>73</sup> The Court’s expansive view of congressional power led it to hold that the Necessary and Proper Clause permits Congress to exercise this power.<sup>74</sup> Had the Justices considered the effects such a national law has on the political representation of state citizens, though, they might well have decided the case the other way.

Two political voices are silenced when any person is incarcerated: that of a citizen of the United States *as well as* that of a state citizen. Whatever the merit of the Supreme Court’s novel and expansive reading of the Necessary and Proper Clause in *Comstock* may be, it is unquestionably a controversial one. I would argue that where a controversial

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73. *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010).

74. *Id.* at 1956–59, 1961–65 (reasoning that the explicit breadth of power granted by the text of the Necessary and Proper Clause, federal historical practices, the accommodation of state interests, and the fact that the statute was narrowly tailored justified constitutional sanction for the federal government to enact a statute such as the one at issue).

question requires the Court either to expand national power in a novel way or to maintain the status quo through judicial review, the Court ought to inquire into the ramifications the expansion of federal power will have on representation of state citizens. Where, as here, expanding federal power means silencing the political voice of state citizens, an Elyan judge should exercise caution—perhaps even a presumption against—expanding federal power. Had the Supreme Court done so, it would have exercised judicial review for federalism and reinforced representation of state citizens.

#### VII. CONCLUSION

Professor Ely's theory left out something important. Proper attention to the Constitution's text reveals that American representative democracy has many distinctly state-based features that the Framers made clear were essential to its realization. State citizens and legislatures play key roles in every aspect of representation the Constitution establishes. Fidelity to the Constitution's text requires that we supplement Ely's theory to emphasize this overlooked aspect of American republicanism, and doing so provides an arsenal of new arguments for judicial review for federalism.