

2012

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Recommended Citation

Mohammed Saif-Alden Wattad (2012) "John Hart Ely: An Influential Constitutional Scholar—Protecting "Flag Desecration" under the First Amendment," *Barry Law Review*: Vol. 17 : Iss. 2 , Article 1.

Available at: <https://lawpublications.barry.edu/barryrev/vol17/iss2/1>

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JOHN HART ELY: AN INFLUENTIAL CONSTITUTIONAL SCHOLAR— PROTECTING “FLAG DESECRATION” UNDER THE FIRST AMENDMENT*

Mohammed Saif-Alden Wattad **

I. INTRODUCTION

He was the leading constitutional law expert of his time; a superb scholar and an even more superb individual.¹

The principle scholarly work of American legal academics is the production of articles in law reviews and other periodicals.² Legal scholarship, however, has become a vast enterprise in the American legal system. Despite the extraordinary level of production and immense influence, both on courts and other scholars, legal education continues to pretend that the two important branches of the system are solely legislation and appellate opinions.

A quick glimpse at the American legal system, including case law, makes it clear that the above-mentioned imbalance is incorrect. Articles in law reviews and books occupy immeasurable expanses of the American legal domain, not only for purposes of citation, but primarily for the sake of developing basic legal theories, such as: John Hart Ely on *Democracy and Distrust: A Theory of Judicial Review*,³ Ronald M. Dworkin on *Law's Empire*,⁴ Richard A. Posner on *The Economics of Justice*,⁵ Ronald H. Coase on “The Problem of Social Cost,”⁶ Oliver Wendell Holmes on “The Path of the Law,”⁷ and Samuel D. Warren & Louis D. Brandies on “The Right to Privacy.”⁸ Curiously, the vast majority, but not all, of the most cited

* The idea of articulating an article on this topic is the outcome of the ongoing philosophical discussion between myself and Professor George P. Fletcher, Columbia University School of Law, as part of his seminar on “Classics in American Law,” in 2005. Therefore, many thanks are due to Prof. Fletcher, to whom I am indebted.

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1. Lisa Trei, *Influential Law Scholar Dies At 64*, NEWS.STANFORD.EDU (Oct. 29, 2003), <http://news-service.stanford.edu/news/2003/october29/elyobit-1029.html> (quoting Professor Tom Campbell, former Stanford Law Professor, and now Dean of the Haas School of Business at the University of California-Berkeley).

2. Fred R. Shapiro, *The Most-Cited Legal Books Published Since 1978*, 29 J. LEGAL STUD. 397 (2000). Shapiro argues that there is substantial scholarly legal literature in book form as well.

3. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) [hereinafter ELY, *DEMOCRACY AND DISTRUST*].

4. RONALD M. DWORKIN, *LAW'S EMPIRE* (1986).

5. RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1983).

6. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

7. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

8. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

and influential academic writings focus on constitutional law, rather than law & economics or law & feminism, both of which are widely discussed by academics today. This is because, I believe, constitutional law, unlike other legal fields of study, is an interdisciplinary field, which contains multiple interplays between various legal issues.

In this article, I focus on one of the most distinguished legal scholars of the American legal system: John Hart Ely, an influential constitutional law scholar, for whose writings he is famed, and which reflect his unique personality as well as his sharp brilliance as a legal scholar. Among his outstanding and famous writings, I discuss his article on “Flag Desecration.”⁹ However, in my view, understanding the influential power of this article requires it to be read within the context of Ely’s biography as a constitutional legal expert, as well as within the wider context of his other publications, especially his most largely cited book, *Democracy and Distrust*.¹⁰

Therefore, in the first section I provide a biographical inquiry into John Hart Ely, his contribution to the American legal system, and his influential studies in constitutional law. In the second section, I address Ely’s article on “Flag Desecration,”¹¹ thus, inquiring into his scathing critique of the constitutional premises through which symbolic speech—as expressive conduct—was addressed by the Supreme Court of the United States. Finally, I consider the extent to which his article has influenced the American legal system since it was published in 1975, and subsequently the extent to which it has contributed to American constitutional law.

II. JOHN HART ELY: AN INFLUENTIAL CONSTITUTIONAL LAW SCHOLAR

John Hart Ely was the leading constitutional law expert of his time. Bristles of success and sharp, intelligent legal scholarship appeared already within his second year as a student at Yale Law School, where he assisted, as a summer associate, Abe Fortas in litigating *Gideon v. Wainwright*.¹² *Gideon*, a landmark Supreme Court decision, established the criminal defendant’s right to counsel. Following Ely’s graduation, he clerked for Chief Justice Earl Warren and then served as the youngest staff attorney on the Warren Commission, which inquired into the assassination of President John F. Kennedy.¹³

Ely taught at Yale Law School, Harvard Law School, Stanford Law School, where he served as Dean, and the University of Miami School of Law.¹⁴ As a legal scholar, Ely’s work includes contemporary scholarship on due process, judicial

9. 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) [hereinafter Ely, *Flag Desecration*].

10. ELY, *DEMOCRACY AND DISTRUST*, *supra* note 3.

11. Ely, *Flag Desecration*, *supra* note 9.

12. 372 U.S. 335 (1963). See John Hart Ely, ANSWERS.COM, <http://www.answers.com/topic/john-hart-ely> (last visited Feb. 20, 2012) [hereinafter, Ely, ANSWERS.COM].

13. Ely, ANSWERS.COM, *supra* note 12.

14. *Id.*

review, and war powers.¹⁵ He has shown originality on topics at the heart of modern constitutional jurisprudence. Ely is the author of some of the most influential legal writings of the second half of the twentieth century. He is the author of *On Constitutional Ground*,¹⁶ which covers a variety of constitutional law issues; *War and Responsibility*,¹⁷ a comprehensive constitutional analysis of war powers for which he sought a solution to the enduring tension between presidential and congressional claims of authority over these powers; and *Democracy and Distrust*,¹⁸ where he developed a theory of judicial review that emphasizes the role of the judiciary in safeguarding the democratic process. Several of Ely's other works are also listed among the classics of legal scholarship. Among them are his constitutional analysis on "Flag Desecration,"¹⁹ where he sharply criticizes the Supreme Court's analysis on cases of "Flag Desecration," and his analysis of *Roe v. Wade*,²⁰ which provides a detailed and strong critique of the reasoning of Justice Harry Blackmun's opinion, arguing that, as a policy matter, the legislature should lift restrictions on abortion in most cases, especially because women, with their votes, can protect themselves in the political process.

Professor Ely is one of America's foremost constitutional law experts and theorists. He is one of the most frequently cited American legal scholars of all time.²¹ His method of presenting his views—balancing the often technical discourse of constitutional theory with colloquial humor and dry wit—set a standard for lucidity and good humor and does much to humanize the practice of constitutional law.

Ely's legal studies were, and indeed are, a huge contribution to the American legal system, especially to American constitutional law and constitutional legal thinking. In particular, Ely's book on *Democracy and Distrust* is his best-known and most often cited book since 1978,²² for which he received an Order of the Coif Award in recognition of the book's influence.²³ His book discusses key problems

15. Adam Liptak, *John Hart Ely, a Constitutional Scholar, Dies at 64*, NYTIMES.COM (Oct. 27, 2003), <http://www.nytimes.com/2003/10/27/national/27ELY.html?pagewanted=print#>.

16. JOHN HART ELY, *ON CONSTITUTIONAL GROUND* (1996).

17. JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993). Ely examines the overall constitutionality of America's role in Vietnam, and shows that Congress authorized each new phase of American involvement without committing itself to the stated aims of intervention. This book brought new clarity to a perennial problem.

18. ELY, *DEMOCRACY AND DISTRUST*, *supra* note 3.

19. Ely, *Flag Desecration*, *supra* note 9; see also John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

20. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) [hereinafter Ely, *Crying Wolf*]; see also *Roe v. Wade*, 410 U.S. 113 (1973).

21. *Prof. John Hart Ely Is 4th Most Cited Legal Scholar Ever*, 54 UNIV. MIAMI SCH. L. BARRISTER 1, 6 (2001) ("With 3,032 cites, he comes just after Oliver Wendell Holmes (who was cited 3,665 times) and ahead of Roscoe Pound (who had 3,018 cites). Richard A. Posner was in first place with 7,981 cites, and Ronald Dworkin in second, with 4,488."), available at http://www.law.miami.edu/alumni/pdf/barrister/barrister_spring2001.pdf.

22. It has been cited 1,460 times. Professor Ronald Dworkin's book on *Law's Empire*, which finished second, came in at 904 citations. *Id.* at n.21.

23. *Id.*

of modern constitutional law and the role of the United States Supreme Court.²⁴ Professor Kathleen M. Sullivan once argued:

Very few legal scholars get to write a classic book and watch a whole generation absorb it. . . . *Democracy and Distrust* is a masterpiece that combines elegant theory, raffish wit and heartfelt search to get the role of the Supreme Court in American democracy just right.²⁵

However, the fact that his theory is still being debated today, as strong as it was when the book first came out, is testament to the power of his ideas, and thus the simple elegance of his writing.²⁶

Democracy and Distrust is primarily famous due to Ely's successful endeavors to articulate a participation-reinforcing approach to judicial review.²⁷ On the one hand, Ely rejects the view that the Constitution could be interpreted based solely on its text and history.²⁸ On the other hand, he opposes those who maintain that judges might infer moral rights and values from the Constitution.²⁹ His novel proposal is that courts should infer only one sort of value from the Constitution, a procedural one.³⁰ In his view, the court, instead of serving as an independent source of moral and political values, should primarily concern itself with guaranteeing that "Democracy" remains open and fair.³¹ That is to say, the court's judicial review power is limited, but at the same time it is broad to the extent necessary to guarantee that democracy remains open and fair.

In sum, Ely paved a new path between judicial activism and those who seek strict interpretation of the Framers' intent. He stressed using procedural values for protecting the integrity of the democratic system as a guideline for judicial review. It is a new theory of judicial review, which stands in the middle of the traditional dichotomy of the two approaches to judicial review.

III. "FLAG DESECRATION"

Among Ely's publications, his article on "Flag Desecration" is one of the most cited articles in American legal studies.³² In this article, he addresses one of the most challenging and controversial constitutional issues, namely the extent to which the First Amendment applies to symbolic speech as expressive conduct, and the constitutionality of criminalizing "flag desecration."

24. Trei, *supra* note 1.

25. *Id.*

26. Rick Hasen, *John Hart Ely and Election Law*, ELECTION LAW BLOG, (Nov. 2, 2003), <http://electionlawblog.org/archives/000178.html> (last visited Feb. 20, 2012).

27. Liptak, *supra* note 15.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. In the next section, I provide more details on the extent to which this article was cited by other American legal sources.

A. Background

Many legal scholars recall and continue to assert the tension between “free speech” decisions of the Supreme Court, which protect flag desecration, as an expressive conduct under the First Amendment, and the symbolic significance of the United States flag.³³

There are types of speech that have no criminal characteristics *per se*, like symbolic speech.³⁴ For example, the flag, namely raising, burning or “insulting” the national flag, as follows:

Flag burnings are an effective but peculiar method of political protest, and because of the nature of the act, the Court did not find first amendment protection until the law of symbolic speech had been more fully developed.³⁵

Comparative inquiry shows that this issue is under considerable dispute amongst worldwide legal jurisprudence. For example, in Israel, raising the Palestinian Flag by Israeli citizens is prohibited under *The Order for Prevention of Terror* of 1948,³⁶ notwithstanding the constitutional freedom of speech, which was recognized by means of constitutional interpretation of the Basic-Law: Human Dignity and Liberty of 1992.³⁷ This issue is also largely discussed in the context of Northern Ireland’s long historical and bloody conflict, regarding the use of national symbols by minorities, as well as in the context of Canadian Law³⁸ and the European Convention on Human Rights,³⁹ which is discussed under the mechanism of constitutional scrutiny.⁴⁰

33. *Flag Burning*, POLICYALMANAC.ORG, http://www.policyalmanac.org/culture/archive/flag_burning.shtml (last visited Feb. 20, 2012).

34. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969); *United States v. O’Brien*, 391 U.S. 367 (1968); *Stromberg v. California*, 283 U.S. 359, 369 (1931); GERALD GUNTHER, *CASES AND MATERIALS ON INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW* 832 (2d ed. 1976); CHARLES KAY OGDEN, *THE MEANING OF MEANING* 23 (8th ed. 1956).

35. James R. Dyer, *Texas v. Johnson: Symbolic Speech and Flag Desecration Under the First Amendment*, 25 NEW ENG. L. REV. 895, 921 (1991).

36. *Prevention of Terror Ordinance, 1948*, KT 33 (Isr.); see also Ronen Shamir, *Legal Discourse, Media Discourse, and Speech Rights: The Shift from Content to Identity*, 19 INT’L J. OF SOCIOLOGY OF LAW 45 (1991).

37. The freedom of speech is not explicitly protected by the Basic-Law: Human Dignity and Liberty of 1992, though it was recognized to be part of the right to “Dignity” (section 4). See H CJ 2481/93 Dayan v. The Commander of Jerusalem District, 48(2) PD 456 (Isr.); David Kretzmer, *Demonstrations and the Law*, 19 ISRAEL L. REV. 47 (1984); H CJ 73/53 Kul H-Am Co. Ltd v. Minister of the Interior, 7(2) PD 871 (Isr.).

38. *R. v. Ruzic*, [2001] 1 S.C.R. 687 (Can.).

39. *Grigoriades v. Greece*, App. No. 24348/94, 7 Eur. Ct. H.R. (1997), available at <http://www.echr.coe.int>.

40. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.); European Convention for the Protection of Human Rights & Fundamental Freedoms, June 1, 2010, C.E.T.S. No.5; see also Mohammed S. Wattad, *The Meaning of Wrongdoing—A Crime of Disrespecting the Flag: Grounds for Preserving ‘National Unity’?*, 10 SAN DIEGO INT’L L.J. 5, 28 (2008).

B. Ely's Constitutional Analysis of the First Amendment and Symbolic Speech

Challenging the constitutional analysis of “flag desecration” cases, Ely focuses on three landmark cases by which the United States Supreme Court reversed the convictions of persons who desecrated the American Flag as a symbolic means of political protest. These holdings avoided a broad holding that flag desecration for symbolic purposes is constitutionally protected under the First Amendment. These were: *Spence v. Washington*,⁴¹ *Smith v. Goguen*,⁴² and *Street v. New York*.⁴³ Ely argues that the Supreme Court focused on the burning conduct, thereby ignoring the expression provided by the burning act itself. He asserts that the Supreme Court's hesitation—that flag desecration for symbolic purposes is constitutionally protected under the First Amendment—stems from its decision in *United States v. O'Brien*,⁴⁴ upholding a conviction for draft card burning. That is, the act of burning the flag looks like the act of burning a draft card, which makes it difficult to deny the surface plausibility of the inference that the former can also be proscribed. Deeming the draft card burning as a case of imposing incidental restriction on free expression, the crux of the Court's opinion in *O'Brien* was that:

[A] government regulation is sufficiently justified . . . [1] if it furthers an important or substantial governmental interest; [2] if the governmental interest is unrelated to the suppression of free expression; and [3] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. [latter called *balancing approach*]⁴⁵

Ultimately, in *O'Brien*, the Court held that the governmental interest in criminalizing the burning of draft cards had mainly to do with the preservation of selective service records.⁴⁶ This interest is unrelated to the suppression of free expression, and the incidental restriction on alleged free expression, if any, is nothing more than essential to the furtherance of that interest.

Ely rejects the Court's application of the *O'Brien* test in the “flag desecration” case. He proposes a doctrinal framework for First Amendment analysis of “flag desecration” cases.⁴⁷ As Ely argues, his proposal provides a stable basis for judicial resolution of free expression questions generally, as well as the immediate difficulty and ultimate resolution of the flag desecration problem particularly.

Unlike the Court's reading of the *O'Brien* test, Ely asserts that this test is not limited to symbolic expression, but rather is limited in the sense that it is

41. 418 U.S. 405, 406 (1974).

42. 415 U.S. 566, 568 (1974).

43. 394 U.S. 576, 594 (1969).

44. 391 U.S. 367, 386 (1968).

45. *Id.* at 377 (bracketed numbers and text added).

46. *Id.* at 377–78.

47. Ely, *Flag Desecration*, *supra* note 9, at 1484.

incomplete.⁴⁸ “That is, the fact that a regulation does not satisfy criterion [2] does not necessarily mean that it is unconstitutional.”⁴⁹ It means only that an approach rather than that of criterion [3] (balancing approach)⁵⁰ will apply, namely the categorizing approach, which does not forgo balancing altogether, but rather the balancing is performed at such a level of abstraction that the facts of any particular case cannot sway the evaluation.

Ely’s main argument, however, is that in *O’Brien*, the Court shifted from ontology to teleology.⁵¹ The Court abandoned the ontological—and perhaps impossible task of distinguishing between expression and action—and instead focused on the intent and effect of the state action.⁵²

Arguing that the Court in *O’Brien* dropped the “speech-conduct” distinction, by focusing on the act of burning rather than on the speech expressed throughout, Ely contends that an expressive conduct *e.g.* flag desecration, which is 100% expression and 100% conduct, should enjoy the constitutional protection of the First Amendment as a symbolic means of political protest.⁵³ This is conduct used to express an idea, at least by implication, unlike the type of conduct which by itself expresses no idea, and should be considered pure conduct for purposes of constitutional analysis.⁵⁴

Moreover, Ely argues that where the government’s interest is unrelated to the suppression of free expression, but rather messages are proscribed because they are dangerous, the balancing test is applied. This is contrary to where the interest is related to the suppression of expression, and the categorizing approach is applied.⁵⁵ Accordingly, Ely recognizes two categories of legislative protection for the American flag: (1) “desecration” provisions, which proscribe only ideological charged acts; and (2) “improper use” provisions, which are ideologically neutral on its face, and thus they are more complicated constitutionally than ideologically.⁵⁶

“Desecration” provisions provide that “no person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag”⁵⁷ These are ideologically related expressions, and they target, plainly, the suppression of free expression. Therefore, these provisions would be unconstitutional within the second criterion of the *O’Brien* test, namely that the governmental interest is related to the suppression of free expression, and consequently there is no further need to approach the third criterion, such as the

48. *Id.*

49. *Id.*

50. Critics of ad hoc balancing claim that it does not offer adequate certainty to speakers who cannot know how judges are likely to decide under specific circumstances, and that ad hoc balancing leads to an undervaluing of free speech in First Amendment cases.

51. Ely, *Flag Desecration*, *supra* note 9, at 1496.

52. *Id.*

53. *Id.*

54. See *Commonwealth v. Oakes*, 518 N.E.2d 836 (Mass. 1988).

55. Ely, *Flag Desecration*, *supra* note 9, at 1496; see also *Grossart v. Dinaso*, 758 F.2d 1221 (7th Cir. 1985).

56. Ely, *Flag Desecration*, *supra* note 9, at 1502–03.

57. *Street v. New York*, 394 U.S. 576, 578 (1969). The language outlawing contemptuous words was held unconstitutional in *Smith v. Goguen*, 415 U.S. 566, 568 (1974) and in *Street*, 394 U.S. at 594.

balancing test. However, Ely asserts that this is the easy case, because such provisions are not tailored to reach only expressions of incitement to immediate lawless action or any other recognized category of unprotected expression, and thus they must fall.

The more constitutionally complicated case is that involving “improper use” provisions, which outlaw affixation to the flag of any “word, figure, mark, picture, design, drawing or advertisement of any nature” or public display of “any flag so embellished,” *e.g.*, adding a swastika to the flag.⁵⁸ These provisions are ideologically neutral. The governmental interest is quite obviously not related to the suppression of expression. Ely asserts that the Court deems such provisions “akin to one involving the alteration of a publicly owned flag.”⁵⁹ In this case the state may assert an interest in preventing the jamming of signals. It is arguably the same interest that the state would assert in the case of interrupting an audience. That is, it is not the interest in preventing the defendant from expressing himself, but rather in keeping him from interfering with the expression of others, *i.e.* the interruption of others’ expression. The state does not care what message the defendant is conveying by altering the flag, all that matters is that he is interrupting the message conveyed by the flag.⁶⁰ Ely rejects this analysis. He argues that the “improper use” statute does not single out certain messages for proscription; it singles out one set of messages, *i.e.* the set of messages conveyed by the American flag. This is, of course, not true of a law that generally prohibits the interruption of speakers; such a law is neutral not only respecting the content of the interruption but also respecting the content of the message interrupted. An “improper use” statute, neutral in respect to the messages it would inhibit, though it may be, is not analogous to a law prohibiting the interruption of speech. It is, at best, analogous to a law prohibiting the interruption of patriotic speech, and that is a law that is hardly “unrelated to the suppression of free expression.”⁶¹

58. Ely, *Flag Desecration*, *supra* note 9, at 1503.

59. *Id.*

60. *Id.* at 1499–1500.

61. This is unlike burning a draft card, which is not necessarily related to the suppression of free expression. See Ely, *Flag Desecration*, *supra* note 9, at 1506–07. In sum, it is to divide

legislative regulations within the zone of the First Amendment protection as those ‘encompassing government actions aimed at *communicative impact*’ and those ‘encompassing government action aimed at *non-communicative impact* but nonetheless having adverse effects on communicative opportunity.’ Where a regulation falls within the second category, the constitutional test is one of ‘balancing’ of the competing interests,’ and the regulation’s restrictions on speech will be ‘acceptable so long as they do not *unduly* constrict the flow of information and ideas.’

(emphasis added); see also *Jim Crockett Promotion, Inc. v. City of Charlotte*, 706 F.2d 486, 491–92, n.5 (4th Cir. 1983) (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 580–82 (1978)).

IV. "FLAG DESECRATION": AN INFLUENTIAL ESSAY IN THE AMERICAN LEGAL SYSTEM?

Among Ely's fabulous academic writings, his article on "Flag Desecration" is located in the center of the most cited articles in American legal studies. Ely's article provides an acid and critical constitutional point of view. In this section, I provide a research study on the extent to which his article has influenced the American legal system, both the judiciary and the academics, and thus endeavor to point out the contribution that it provided to American constitutional law.

Since it was published in 1975, Ely's article was cited and discussed more than 500 times,⁶² both by American courts and by legal scholars. Nevertheless, it has been rarely cited by the United States Supreme Court,⁶³ however, it is cited and discussed by other American state courts, and more often in articles.

A. Ely's "Flag Desecration" and the United States Supreme Court

Following Ely's article, the United States Supreme Court was confronted again with the constitutionality of criminalizing flag desecration.⁶⁴ Given that Ely offered a challenging constitutional analysis on this issue, one may plausibly anticipate that the Court would address this analysis, either by adopting or rejecting it. Addressing this issue in *Johnson*, the United States Supreme Court held that it was a violation of the constitutional right of freedom of speech to criminalize desecration of the United States flag.⁶⁵ Apparently, it seems that the Court was adopting the essence of Ely's analysis, at least as to the broad view of protecting "flag desecration" under the First Amendment. Nevertheless, Ely's essay was not cited in any context. Later, the Flag Protection Act of 1989, which was enacted to overturn the *Johnson* decision, was also abolished in *United States v. Eichman*,⁶⁶ since the Act violated freedom of speech.⁶⁷ Again, there was no reference to Ely's article, though one may assert that Ely had anticipated, already in 1975, what the Court did later in these cases.

Curiously, the only time the Supreme Court referred to Ely's article was in Justice Marshall's dissenting opinion in *Ward*.⁶⁸ *Ward* was not a case of "flag desecration," but rather a case of expressive conduct, namely a case that challenged the constitutionality of governmental guidelines for band shells.⁶⁹ The majority held that the municipal noise regulation—designed to ensure that music performance in band shells would not disturb surrounding residents by requiring performers to use sound systems and sound technicians provided by the city—did

62. This data is based on an intensive inquiry on *Westlaw* (last visited July 1, 2011).

63. *Ward v. Rock Against Racism*, 491 U.S. 781, 806 (1989) (Marshall, J., dissenting). I return to the essence of this citation in the following sub-section.

64. *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

65. *Id.*

66. 496 U.S. 310, 318–19 (1990).

67. *Id.*

68. 491 U.S. at 806 (Marshall, J., dissenting).

69. *Id.* at 784.

not violate the free expression right of performers. In criticizing the majority holding, Justice Marshall invoked the same critique asserted by Ely in regard to *O'Brien*.⁷⁰ That is

[t]his weak formulation [“less restrictive alternative” . . . could require only that there be no less restrictive alternative capable of serving the state’s interest as efficiently as it is served by regulation under attack] would reach only laws that engage in the gratuitous inhibition of expression, requiring only that a prohibition not outrun the interest it is designed to serve.⁷¹

“[T]he majority states that [g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals,” but this means, as Ely articulated, that only those regulations that engage in the gratuitous inhibition of expression will be invalidated.⁷² However, despite the impressive attempt by Justice Marshall to follow Ely’s critique, this was the only time that the Supreme Court had recourse to Ely’s analysis.

All in all, the constitutionality of “flag desecration” is no longer in dispute, and therefore it may be inferred ultimately that Ely’s contribution to constitutional law, by providing constitutional analysis of the First Amendment to “flag desecration” cases, was well acknowledged, though, one may argue, “implicitly and indirectly.”

B. Ely’s “Flag Desecration” and American State Courts

Unlike the Supreme Court, American state courts have invoked Ely’s analysis on several occasions.⁷³ Viewing these decisions generally, it is already clear that Ely’s essay had—and still has—considerable influence on the judiciary in all cases where freedom of speech was involved. This influence was not limited to “flag desecration” cases, but rather extended to all cases issuing expressive conduct.⁷⁴ It is important to note that Ely’s article was not cited in all cases as a “binding authority;” sometimes it was cited merely as a scholarly writing that addressed the issue of expressive conduct;⁷⁵ sometimes it was cited jointly with *O'Brien*,⁷⁶ solely because it challenged *O'Brien*’s decision; sometimes it was cited in the context of the general scope of the First Amendment; and sometimes it was cited in the general context of the required constitutional test for scrutinizing governmental limitations on expressive conduct. Whether it is because of Ely’s famous and

70. *Id.* at 806.

71. Ely, *Flag Desecration*, *supra* note 9, at 1485.

72. *Ward*, 491 U.S. at 806; *see also* Ely, *Flag Desecration*, *supra* note 9, at 1485.

73. *E.g.*, *Griffin v. State*, 396 So. 2d 152, 158 (Fla. 1981); *Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm’n*, 390 N.E.2d 749, 754 (N.Y. 1979).

74. *E.g.*, *Spiritual Psychic Sci. Church of Truth, Inc. v. City of Azusa*, 703 P.2d 1119, 1128 (Cal. 1985).

75. *Majors v. Abell*, 361 F.3d 349, 356–57 (7th Cir. 2004) (Easterbrook, J., *dubitante*); *Mabey v. Reagan*, 537 F.2d 1036 (9th Cir. 1976); *Consol. Edison*, 390 N.E.2d at 754.

76. *E.g.*, *Blount v. S.E.C.*, 61 F.3d 938, 942, n.2 (D.C. Cir. 1995); *Able v. United States*, 88 F.3d 1280, 1295 (2d Cir. 1996).

distinguished personality as a constitutional scholar or because of the intelligent analysis of his article, it is prominently notable that state judges are making efforts to cite or refer to his essay.⁷⁷ This sub-section addresses decisions given by state courts, which refer, cite, discuss or rely on, to a certain extent, Ely's article, and it points out the extent to which Ely's constitutional analysis affected the judiciary, especially in regard to expressive conduct cases. Nonetheless, it does not pretend to discuss the factual ground of each decision, nor does it evaluate the legal analysis and constitutional consequences of either of these cases. Rather, it intends to determine the general view with which Ely's analysis provided a new perspective to the judiciary, and thus to sketch out the level to which his constitutional critique succeeded to achieve the core of the judiciary's decisions. With this objective, this analysis provides four categories of inquiry: (1) decisions that address the "flag desecration" issue specifically; (2) decisions that address the expressive conduct in general; (3) decisions that address the required constitutional test for scrutinizing states' regulations that limit expressive conduct; and (4) decisions that address *O'Brien*, and thus Ely's article as a challenge to *O'Brien*.

1. "Flag Desecration"

Curiously, out of the several cases that cited Ely's article, only one decision did so in the context of "flag desecration."⁷⁸ Not only that, where one might plausibly anticipate that the court would take advantage of Ely's essay, or at least challenge Ely's critique, the court cited his article for the mere purpose of mentioning that many states have adopted some form of a flag desecration statute.⁷⁹ Nevertheless, it is important to note that the court accepted Ely's critique partially, though implicitly,⁸⁰ by recognizing the protestor's act of burning the American flag as a type of symbolic speech within the purview of the Free Speech Clause of the First Amendment, and that the state's interests in suppressing the protestor's activity were related to suppression of free speech.⁸¹ The court only accepted Ely's critique "partially," because the Court eventually applied the *O'Brien* balancing test, holding that the state's interest in protection of the flag as a symbol of the nation was not sufficiently substantial to permit the state to infringe the protestor's right to free speech.⁸² The court did not challenge Ely's categorizing approach, though supposedly it was aware of its existence.⁸³

77. *Griffin*, 396 So. 2d at 158; *Consol. Edison*, 390 N.E.2d at 754; *City of Azusa*, 703 P.2d at 1128.

78. *Monroe v. State Court of Fulton County*, 739 F.2d 568, 570, n.1 (11th Cir. 1984).

79. *Id.*

80. The court did not refer to or cite Ely's article in this context. *See id.*

81. *Id.* at 573.

82. *Id.*

83. *Id.* at 570 (The protestor did not challenge the constitutionality of the statute in itself, but rather its application to the protestor.).

2. Expressive Conduct

Several state and federal courts referred to Ely's essay as an authority for discussing the borders of the First Amendment with regard to expressive conduct, and the domain of symbolic speech and its constitutional protection, especially to the extent it has to be constitutionally protected.⁸⁴

These cases supported the position that Ely asserted, that the First Amendment rights are not confined to verbal expression, but also embrace appropriate types of action.⁸⁵ In addition, state courts explicitly adopted Ely's view that where conduct forms a clear and particularized political or social message, the expressive behavior should be deemed 100% action and 100% expression.⁸⁶ Nevertheless, other courts have referred to Ely's article in order to emphasize the difficulty in treating expressive conduct, namely to distinguish the expressive part and the action part of the expressive conduct.⁸⁷

3. Balancing *versus* Categorizing

Though Ely's categorizing approach was not really adopted, several state courts referred to his article once it was required to address the traditional and conservative balancing approach.⁸⁸ However, akin to Ely's point of view, dissenting opinions of state courts seem to agree that the balancing test is employed only to denounce effects on speech regulation seemingly limited to action.⁸⁹ That is, in general, Ely's categorizing approach has not been adopted yet, though every time it has been rejected, either explicitly or implicitly, state courts have mentioned expressly their awareness of his approach by referring to his article.⁹⁰

Nevertheless, a positive tendency toward the adoption of Ely's categorizing approach was heard expressly in *American Bookseller*,⁹¹ where the court stated in support of its opinion:

84. *Blount*, 61 F.3d at 942, n.2.

85. For example, the right to protest in a peaceable and orderly manner by silent and reproachful presence. *See Cmty. for Creative Non-Violence v. Watt*, 703 F.2d 586, 599 (D.C. Cir. 1983) (holding that a regulation against sleeping in public parks was unconstitutionally applied to demonstrators where sleeping was part of the demonstrators' expressive conduct).

86. *See Young v. New York City Transit Auth.*, 903 F.2d 146, 153 (2d Cir. 1990); *see also* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 827 (2d ed. 1988).

87. *Chase v. Davelaar*, 645 F.2d 735, 739 n.12 (9th Cir. 1981) ("We are hesitant to rely uncritically on the speech/conduct dichotomy. In part, our hesitancy arises from the conceptual weakness of the distinction. 'Speech' communication of ideas or attitudes is itself a form of 'conduct.'"); *see also White House Vigil for the ERA Comm. v. Clark*, 746 F.2d 1518, 1540 n.127 (D.C. Cir. 1984); *Nova Univ. v. Educ. Inst. Licensure Comm'n*, 483 A.2d 1172, 1181 n.4 (D.C. 1984).

88. *See, e.g., American Jewish Cong. v. City of Chicago*, 827 F.2d 120, 139 (7th Cir. 1987); *American Bookseller Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 331-32 (7th Cir. 1985); *Cal. Med. Ass'n v. Fed. Election Comm'n*, 641 F.2d 619, 645 n.21 (9th Cir. 1980); *Baldwin v. Redwood City*, 540 F.2d 1360, 1367 n.16 (9th Cir. 1976).

89. *E.g., American Jewish Cong.*, 827 F.2d at 139.

90. *Id.*

91. 771 F.2d at 331-32.

The Court sometimes balances the value of speech against the costs of its restriction, but it does this by category and not by the content of particular works.⁹²

4. *O'Brien* and Ely

Finally, it is remarkable that state courts tend to refer to Ely's article almost every time they address *O'Brien*, which is the subject of Ely's essay.⁹³ While that indeed does not grant his article any legal authoritative significance, it does show, eventually, the importance with which state courts deem it as a meaningful and competent challenger to the holding in *O'Brien*. That could be a fundamental rhetorical step, or incentive, toward a much more powerful influential position in the American case law.

Given all that, it is therefore not a surprising argument that Professor Ely's article occupies one of the most influential positions among state court decisions. His article is a "guide" essay for addressing any case of expressive conduct. One does not have to adopt his arguments, and thus you may strongly reject them. Yet, his article provides the judiciary with a means of constitutional thinking, or at least constitutional analysis.

C. Ely's "Flag Desecration" and American Academics

Among the hundreds of academic writings in which Ely's article is cited and discussed, several advanced and distinguished constitutional treatises have an important place. In these treatises, Ely's article is cited in the general context of freedom of speech, as well as in the specific domain of symbolic speech. It is also cited in the context of Ely's challenging proposal of the *O'Brien* decision.⁹⁴ It is remarkable thus, that treatises recognize Ely's proposal on the categorizing approach, as it applies to governmental regulations that limit the practice and performance of expressive conduct.⁹⁵

However, the major legal source that recognizes the outstanding remarkableness of the influential legal power of Ely's article is law reviews. Indeed, this article does not purport to address each one of these hundreds of articles, but rather to point out how widely and deeply academics were influenced by Ely's essay. In reading the hundreds of articles, in which Ely's article was cited and discussed, one finds that it is so akin to case law that there are four categories

92. *Id.*; see also *Cal. Med. Ass'n*, 641 F.2d at 645 n.21; *Baldwin*, 540 F.2d at 1367 n.16; *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 48 (D.C. Cir. 1977) (discussing Ely's approach and explaining "[T]he important inquiry . . . turns on the purpose for which government regulates. Regulations intended to curtail expression either directly by banning speech because of a harm thought to stem from its communicative or persuasive effect on its intended audience, or indirectly by favoring certain classes of speakers over others, can be justified (if at all) only under categorization doctrines such as obscenity, 'fighting words,' or 'clear and present danger.'"); *Aryan v. Mackey*, 462 F. Supp. 90, 93 n.4 (N.D. Tex. 1978).

93. *E.g., Able*, 88 F.3d at 1295.

94. RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 11:7 (2004).

95. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE § 20.49 n.135 (1999).

in which Ely's article was cited: (1) articles that address symbolic speech cases⁹⁶ or the "flag desecration" issue specifically;⁹⁷ (2) articles that address expressive conduct in general;⁹⁸ (3) articles that address the required constitutional test for scrutinizing states' regulations that limit expressive conduct;⁹⁹ and (4) articles that address *O'Brien*, and thus Ely's article as a challenge for *O'Brien*.¹⁰⁰ Nonetheless, what is interesting in the academic articles, unlike case law, is the seriousness with which Ely's article is cited, namely as an authority for a new approach, to one or both of the arguments he provides in his essay. The emphasis of the academics was not solely on Ely's general contribution to the constitutional issue of symbolic speech, but rather on the constitutional analysis of the freedom of speech. In sum, I would say—insofar as my reading of all these articles is correct—whereas case law merely cited Ely's article, academics seriously discussed his arguments and addressed his analysis, either by rejecting or by adopting his arguments. Discussing his arguments, rather than merely citing them in a general context, gives at least the impression that legal scholars regard his article as providing important legal arguments.

V. EPILOGUE: ELY'S ARTICLE—WHY SO INFLUENTIAL?

Curiously, though Ely's article was published in 1975, it was rarely cited between the years 1975 and 1980. Somehow, at the beginning of the 1980s, Ely's article became increasingly cited and discussed. It is really difficult to know why. Nonetheless, it is remarkable that in his 1975 article, Ely provided a coherent notion of judicial review, as was later demonstrated in his book *Democracy and Distrust*.¹⁰¹ However, this article does not argue that his article is not influential in itself, or that it is influential merely because of the subsequent fame he received by the publication of his book. But, it asserts that within his book, Ely pointed out the methodology behind his essays, namely his theory on judicial review. The question thus is, how is that? Reading Ely's article on "flag desecration" within the larger framework of his perspective on the role of the Court, it is for the legislature to provide extensive protection to the constitutional freedom of speech; otherwise, it

96. See, e.g., Darren Bush, *The "Marketplace of Ideas": Is Judge Posner Chasing Don Quixote's Windmills?* 32 ARIZ. ST. L.J. 1107, 1142 n.227 (2000); David S. Day, *The Hybridization of the Content-Neutral Standards for the Free Speech Clause*, 19 ARIZ. ST. L.J. 195, 207 n.76 (1987); Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 B.C. L. REV. 1071, 1085 n.49 (2002).

97. Articles on the "flag desecration" cases cited his article, both largely and deeply, see, e.g., Geoffrey R. Stone, *Flag Burning and the Constitution*, 75 IOWA L. REV. 111, 120 n.45 (1989); Ronald F. Wright, *Kent Greenawalt and the Border Skirmishes of the First Amendment*, 39 EMORY L.J. 1245, 1246 n.9 (1990).

98. Keith Werhan, *The O'Briening of Free Speech Methodology*, 19 ARIZ. ST. L.J. 635, 636 n.4 (1987).

99. See, e.g., H. Scott Fairley & Brian R. Fraser, *Tobacco Advertising, Public Welfare, and Commercial Free Speech: Some Comparative Insights from the Canadian Experience*, 16 AM. J. TRIAL ADVOC. 497, 508 n.56 (1992); John T. Haggerty, *Begging and the Public Forum Doctrine in the First Amendment*, 34 B.C. L. REV. 1121, 1124 n.33 (1993).

100. See, e.g., James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 796 n.101 (1995); John A. Carr, *The Difference Between Can and Should: Able v. United States and the Continuing Debate about Homosexual Conduct in the Military*, 46 A.F.L. REVIEW 1, 40 n.229 (1999).

101. ELY, *DEMOCRACY AND DISTRUST*, *supra* note 3.

will be for the judiciary to do.¹⁰² In the same vein, in Ely's famous essay on *Roe v. Wade*,¹⁰³ he provides that the Court should lift restrictions on abortion in most cases, especially because women, with their votes, can protect themselves in the political process.¹⁰⁴ That is to say, his theory in *Democracy and Distrust* is: when it is possible, it is better to solve the legal problems through legislative alternatives, namely to use democratic voting power.¹⁰⁵ Nonetheless, that would be true only when you recognize a certain group that can protect itself by voting. Therefore, where such alternatives do not exist, it is for the judiciary to guarantee that democracy remains open and fair, *i.e.* where those whose expression is suppressed, but are unlikely to be able to protect themselves by voting, it is for the judiciary to do so, unless the legislature does so by itself.

To end, in view of the foregoing, if there was any word to describe faithfully Ely's contribution to constitutional law, I would not be able to provide more influential words than the following:

Yours is the work that sets the standard for constitutional scholarship in our generation. With forceful argument and impeccable scholarship, you have given clarity to our concept of democracy, by exploring when and how the Supreme Court should exercise its extraordinary power to declare legislation unconstitutional. As a teacher, scholar, and dean, you have made significant contributions to the education of countless lawyers and judges. Your record of service and accomplishment includes the Yale Law School, where you studied and taught with distinction. We are proud to award you, as one of our own, this degree of Doctor of Laws.¹⁰⁶

102. *Id.* at 181 (This position is coherent with his later proposal that the role of the court is to provide protection to the democratic process, given his main argument is that the Constitution is not about substantive values.).

103. Ely, *Crying Wolf*, *supra* note 20.

104. *Id.* at 933.

105. ELY, *DEMOCRACY AND DISTRUST*, *supra* note 3, at 182.

106. *Honorary Degrees*, YALE BULLETIN & CALENDAR, <http://www.yale.edu/opa/arc-ycb/v31.n31/story103.html> (last visited Feb. 15, 2012).

