

2004

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Discussing the Allegedly Democratic Nature of Judicial Review

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Defined as the function of the court to interpret and apply the constitution to particular circumstances and legal issues, judicial review has become a noteworthy expression of the power of the judiciary. Nearly 200 years old, this seemingly simple doctrine has instigated a substantial amount of political controversy and debate from which three individuals should be recognized for their contributions. Ronald Dworkin, a proponent of judicial activism, believes in “leaving issues to the court’s judgment” and investing our faith in their decisions (Dworkin 526). Supporting Dworkin, John Arthur asserts that judicial review promotes democracy, and more importantly, imposes safeguards against unauthorized decisions made by the legislative branch. Staunch opposition to support for judicial review is apparent in arguments from Jeremy Waldron. Affirming that external authority is unreliable and consistently fluctuating, Waldron alleges that judicial review is just a social construction ... a façade used by the masses to fool themselves into believing that culture is legally self-binding. Careful review of the strengths and weaknesses of judicial review, however, prove that a legal system possessing such a function allows one to feel more secure and safe. Albeit judicial review may be a charade, it comforts the common man in the confusing land of legal studies.

Defending judicial activism, Dworkin maintains that the constitution of the United States leaves controversial issues to the judgment of the court. “Designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make,” the court functions as an authoritarian, interpreting the language of the constitution in legal issues (Dworkin 526). Noting the “vague standards” chosen by the founders of the Constitution, Dworkin bases the Supreme Court’s judicial review and decision-making in “the *concept* of fairness, [rather] than specific *conceptions* of fairness” (Dworkin 527). Essentially, Dworkin links the authority of the court to their opportunity to construct social policy while interpreting the Constitution. While maintaining fidelity to the historic text and recognizing outdated conceptions, the judiciary has the power to change what the Constitution enacted, forging an innovative conception of an established law.

In comparing and contrasting judicial activism and restraint, Dworkin communicates the importance of consistent functionality and activity on the behalf of the courts. While “accepting the directions of the so-called vague constitutional provisions, ... [the courts] should work out principles of legality, equality, and ... revise these principles from time to time” (Dworkin 529). This activist prerogative results in a system where the courts actually analyze the acts committed by Congress, the states, and the President. Conversely, the agenda of the judicial restraint program, which Dworkin thoroughly refutes, is contingent upon the courts submission to the rule of other branches of government. This policy consists of

two theories that attempt to substantiate such behavior: political skepticism and judicial deference. The former attacks the activist standpoint in asserting that individuals lack moral rights against the state that governs them. This skeptical viewpoint claims that individuals “have only ... legal rights as the Constitution grants them, and these are limited to plain and uncontroversial violations of public morality that the framers must have had actually in mind” (Dworkin 530). Dworkin, however, tackles the skeptic attitude by stressing the fact that according to the theory of moral rights, men *must* have moral rights against those who have the power to abuse them or treat them in a negative manner (Dworkin 530).

Another theory of judicial restraint focuses on deference to other authorities in constitutional and legal matters. Based in the philosophies of Richard Nixon, judicial deference admits that individuals *do* have moral rights other than what is specifically defined in the Constitution, but political institutions other than courts wield the power to establish these rights. Simply enough, this form of judicial restraint relinquishes the power of courts in establishing the law. Instead, “controversial issues of political morality ... [are left] to other departments of the government” (Dworkin 531). Those in favor of deference rely upon an argument from democracy, which ascertains that responsible, elected state legislators, rather than appointed, politically irresponsible judges, reserve the right to establish law. At first glance, this theory may appear very fair and the decisions made by legislators might seem sound and complete. The lack of fairness, however, is indicated in the definition of

Constitutionalism, “the theory that the majority must be restrained to protect individual rights” (Dworkin 532). In this case, fairness is apparent in a judicial activist model rather than in accordance with democratic theory. Nevertheless, legislators tend to create what is desirable rather than what will actually benefit the population. Dworkin, conversely, supports the judicial activists whom simply create social policy. Although such a point of view may not necessarily consider the future, it successfully interprets and applies the interests the founders expressed in the constitution, and ultimately “frames and answers questions of political morality” (Dworkin 534). This activist view passionately supports the use of judicial review in ascertaining the constitutionality of a particular situation.

Supplementing Dworkin’s activist support of judicial review, Arthur’s conception of “self-incapacitation” establishes a reliable form of self-government, which combines with judicial review, fostering the preservation of a healthy democracy (Arthur 545). Laying a foreground upon which a comprehensive definition of democracy can be created, Arthur’s primary focus concerns the fairness and openness of participation that will allow all individuals to participate in unbiased, democratic government. Under unbiased guidelines, the courts enable the common man to express his point of view and express disapproval of public officials (Arthur 547). Such is evident in the eliminating “unfair districting patterns at both the state and local government levels,” and “abolish[ing] laws imposing literacy requirements on voters and college students, and rejected residency requirements for members of

the military who wishes to vote” (Arthur 547).

Focusing on curbing the temptation of man to do things he will probably regret, self-incapacitating rules substantiate Arthur’s argument. Because “elected officials, under pressure ... sometimes act in haste ... decisions may reflect prejudice towards [minorities] that, on further reflection would know to be wrong” (Arthur 548). In such a situation, by incapacitating oneself, there is a guarantee that constitutional rights of individuals will be upheld. Curiously, however, against the prerogatives of elected officials and the masses, the Supreme Court may make a decision that fiercely opposes the desires of the majority. Examples include Supreme Court approvals of abortion and prayer in school, both of which instigate questions concerning how “the mythical political self ... made unpopular self-incapacitating decisions” (Arthur 549).

Further justification of the decisions made by the Supreme Court can be attributed to the special competency possessed by judges. “Not only are judges better situated *legally* to make [decisions concerning constitutional issues], they are also *politically* better suited for it” (Arthur 550). Concerning the constitution, in a legal sense the justices occupy a position of authority over legislators. Such can be attributed to the rule of law. Because Congress represents one of the two parties involved in making the law, they are unable to preside over cases of constitutionality. “To allow either party, [Congress or the masses,] to decide the case ... seems contrary to basic principles of the rule of law” (Arthur 550). Politically, the federal judges are also better situated in making the law. Because federal judges are given life

tenure when they are appointed, they are relieved of a constituency of whom they must gain approval. This “insulates [justices] from electoral politics and the need for reelection” (Arthur 550). Additionally, with decisions made by justices, there is often an emphasis on precedent, consistency, and most importantly, moral judgment. Simply, “judges rule in such a way to protect the moral and political legitimacy of government”(Arthur 551). The competency, reliability, consistency, and honesty associated with the Supreme Court substantiate and qualify judicial review as a political process contingent upon preserving the rights of individuals and safeguarding against the masses corrupt majoritarian politics.

Although slightly similar to the theories of Arthur in some respects, Waldron’s analysis of judicial review results in a denial of the aforementioned compatibility with democracy. “Beginning with a distinction between popular sovereignty (a constitution chosen by the people) and democracy (a government that is itself democratic), Waldron discusses the [lack of] legitimacy of judicial review” (Waldron 535). Primary distinctions between popular sovereignty and democracy established that popular support does not imply democratic overtones, and conversely, democratic voting of an issue does not necessarily mean an issue is democratic in nature. For example, a democratically elected dictatorship is not democratic in nature. Specific to the constitution, although events over the course of a period may occur democratically, the nature of the change may or may not necessarily be democratic.

Precommitment, a theory very similar in nature to Arthur’s self-

incapacitation, focuses on self-restraint. Waldron's precommitment is simply a system of "constitutional constraints and mechanisms of judicial review and other mechanisms that responsible rights bearers [take] against their own imperfections" (Waldron 538). Utilizing the example of Ulysses' crew tying him to the mast of a ship, individuals similarly put themselves at the hands of the judiciaries. Waldron says that because individuals are not always capable of indifference concerning legislature that affects them, individuals possess the moral capacity to devise a system by which precautions against temptation can be organized. "The people agree to a safeguard that prevents them, in the future exercise of their equal political rights, from later changing their minds and deviating from ... a just constitution" (Waldron 538).

Waldron feels, however, that the system possesses a number of flaws, such as the premeditation involved in "deciding to decide" (Waldron 539). A common solution to such a problem would typically involve the delegation of power to an external structure. But even then, Waldron argues, individuals will still not be bound to certain actions, because "they can always undo their ties should they want to" (Waldron 539). Instead, external power prominent within the framework of constitutional provisions inadvertently restrains the agencies that represent the people. At least in this sense constitutional legislation seems a little more promising.

Nevertheless, Waldron renounces the efficacy of casual mechanisms in guaranteeing constitutional practices and legislation. Waldron's mention of Jon Elster's theory involving casual processes in external environments only serves to provide a basis for debasing

precommitment. The example of the drinking man relinquishing possession of his car keys serves perfectly, such that the precommitment of the drinker operates solely on the discretion of the friend possessing his keys. In this sense, the mechanism is not entirely under the drinker's control. Waldron poses the possibility of a child in need of emergency medical treatment while in the midst of a drunken parent. Should the friend give the keys to a drunk driver, or prevent the possibility of further catastrophe?

Such confusion and inflexibility paves the way for noncausal mechanisms that uphold a true conception of external authority. The aforementioned example of the drinker exemplifies that "constitutional constraints do not operate mechanically, but work instead by vesting a power of decision ... whose job it is to determine as a matter of judgment" the nature of the situation (Waldron 540). Less rigid in nature, this form calls upon the competency of a body of individuals in ascertaining the constitutionality of a specific situation. Simply, "the arrangement amounts to a deliberate decision by various agents ... to have themselves constrained by others' judgment" (Waldron 541).

Even then, however, Waldron still claims the system is faulty. Primarily, opinions and viewpoints change over the course of time. Eventually, "it becomes unclear or controversial what the people have committed themselves to" (Waldron 542). This inconsistency renders reliance on precommitment obsolete. Additionally, Waldron proposes that the judiciary cannot prevent individuals from "judging their own case" (Waldron 542). In the Ulysses example,

individuals can only settle disputes by *asking* Ulysses. Similarly, the judiciary can only clarify the nature of precommitment by *asking* the people. In this sense, the people become the authority of their own circumstance, which staunchly opposes the designated roles specified in the rule of law. Moreover, Waldron ascertains that in upholding precommitment, majorities may disagree in deciding the solution to a particular problem. "It is particularly problematic when such disagreements can be expected to persist and to develop and change in unpredictable ways" (Waldron 543). As a result of these complications, the judiciary is no more qualified to uphold the precommitment of the people any more than the individuals are themselves. Simply, judicial review becomes a façade by which the common man tries to convince himself that issues are under scrutiny by the government that rules them. "In these circumstances, the logic of precommitment must simply be put aside, and we must leave the members of the society to work out their differences and to change their minds in collective decision making over time" (Waldron 544).

Although Jeremy Waldron's logic provides substantial reasons to question precommitment and judicial review, certain charades and processes, regardless of their flaws, are necessary in maintaining order amongst the masses. Ronald Dworkin and John Arthur may not present the most sound arguments, but review of the constitutionality of legislation by a seemingly external body *does* seem more efficient and preferable to millions of opinionated Americans trying to get a piece of the political pie. Realizing that no solution is ever perfect, judicial

review promotes the most consistent form of balance among the populous.

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