

Judicial Review and its Limits: Examining Different Models of Constitutional Interpretation

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Abstract:

A hallmark of many contemporary democracies is judicial review, the authority of courts to determine whether or not acts of legislatures and the executive branch violate the constitution. However, the exercise of this power is not without controversy. The validity of unelected judges reversing elected representatives' choices, the judiciary's function in a democratic society, and how to interpret the vague wording of constitutions are all topics of ongoing debate. This paper examines different models of constitutional interpretation employed by courts worldwide, analyzing their strengths and weaknesses, and exploring the inherent tension between judicial review and democratic principles. From textualism's focus on original meaning to living constitutionalism's embrace of evolving societal values, we delve into the various lenses through which judges assess the constitutionality of laws. The article concludes by stating that judicial review is necessary to protect individual rights and maintain the rule of law, but that it should be used with caution and a continual awareness of the fine line between judicial authority and democratic legitimacy.

Keywords: *Judicial Review, Constitutional Interpretation, Textualism, Originalism, Living Constitutionalism, Democratic Legitimacy, Judicial Activism, Judicial Restraint, Separation of Powers*

Introduction

The principle of judicial review, while not explicitly mentioned in many constitutions, has become an indispensable pillar of constitutional democracies worldwide. This power, often described as the ability of courts to invalidate laws or executive actions deemed incompatible with a country's constitution, occupies a complex and contested space within the framework of democratic governance. The paper ends by emphasizing that judicial review is important for safeguarding individual rights and upholding the rule of law, but that it should be used cautiously and that we must always be mindful of the delicate balance between judicial power and the legitimacy of democracy. Conversely, critics question the legitimacy of unelected judges overturning the decisions of elected representatives, potentially undermining the principles of popular sovereignty and democratic accountability.

This paper delves into the complexities surrounding judicial review, focusing specifically on the different models of constitutional interpretation employed by judges when adjudicating constitutional matters. By examining these interpretative lenses, we aim to shed light on the various approaches courts adopt when engaging in judicial review, illuminating the strengths and weaknesses inherent in each. While recognizing the ongoing difficulties it creates within a democratic system, this research aims to promote a fuller understanding of the critical role of judicial review in maintaining constitutional ideals.

I. The Foundations of “Judicial Review”

Judicial review has its roots in earlier cases, with the seminal American decision of "Marbury v. Madison (1803)" being considered as a turning point in its evolution. A pillar of American constitutional law, the notion of judicial review was established in this case when the United States Supreme Court, presided over by Chief Justice John Marshall, used its power to examine the legality of laws enacted by Congress.

There are earlier instances of judicial review in other countries, even though "Marbury v. Madison" is often considered the landmark decision. In England, the concept of parliamentary sovereignty limited the scope of judicial review. However, courts still asserted the power to invalidate laws deemed incompatible with common

law principles or fundamental rights. Similarly, pre-revolutionary courts in France exercised a degree of judicial review, albeit limited by the influence of the monarchy.

The rationale behind judicial review stems from the fundamental principle of constitutional supremacy. In systems where a written constitution holds paramount legal authority, it follows that any law or action contradicting the constitution should be deemed invalid. One way to make sure this supremacy is maintained is via judicial review, which gives the courts the authority to protect the constitution and strike down legislation or policies that violate its provisions.

II. Models of Constitutional Interpretation

The exercise of judicial review necessitates a framework for interpreting the often-ambiguous language of constitutions. Over time, various models of constitutional interpretation have emerged, each with its own set of principles, strengths, and limitations.

A. *Textualism*

The fundamental source of interpretive authority according to textualism is the actual text of the constitution, as the name implies. Following this method, judges look for the simple and usual sense of the terms employed when the constitution was being drafted in order to determine the original meaning of the text. They often consult dictionaries, historical records, and other contemporaneous sources to ascertain the original understanding of the language.

Strengths:

Objectivity and Constraint: Textualism promotes a more objective and constrained approach to judicial review by limiting judicial discretion. Judges are less likely to inject their own subjective values into the interpretation process when they are bound by the text's plain meaning.

Predictability and Stability: By adhering to the original meaning of the text, textualism aims to provide a more predictable and stable legal environment. This predictability can foster greater certainty and consistency in the application of constitutional law.

Weaknesses:

Rigidity and Inflexibility: Critics argue that textualism can be overly rigid and inflexible, failing to adapt to evolving societal values and circumstances. Adhering strictly to the original meaning of the text may lead to unjust or impractical outcomes in light of modern realities.

Ambiguity and Vagueness: Constitutions often contain ambiguous or vague language, leaving room for interpretation. Textualism provides limited guidance in such cases, potentially leading to inconsistent or conflicting interpretations based on subjective assessments of the text's meaning.

Notable Cases:

“District of Columbia v. Heller (2008):” The U.S. Supreme Court, employing a textualist approach, struck down a District of Columbia law banning handgun possession. Since the phrase "right of the people to keep & bear Arms, shall not be infringed" is directly quoted in the Second Amendment, the Court reasoned that this language adequately safeguards an individual's right to own weapons.

B. Originalism

Originalism shares similarities with textualism in its emphasis on the original understanding of the constitution. However, while textualism focuses primarily on the text itself, originalism places greater emphasis on the original intent of the framers or the original public meaning of the constitutional provision at the time of its enactment. Originalists argue that the constitution's meaning is fixed at the time of its adoption and that subsequent generations are bound by that original understanding.

Strengths:

Democratic Legitimacy: By re-establishing constitutional interpretation on the wisdom of the framers and ratifiers, originalism maintains democratic legitimacy, according to its advocates. This approach, they contend, prevents unelected judges from imposing their own values on the Constitution.

Stability and Predictability: Similar to textualism, originalism aims to create a stable and predictable legal framework by anchoring constitutional interpretation in the past. This predictability, proponents argue, is essential for the rule of law.

Weaknesses:

Difficulty in Ascertaining Original Intent: According to those who support originalism, the legitimacy of democracy is preserved by establishing constitutional interpretation based on the wisdom of the founders and ratifiers. Historical records may be incomplete or ambiguous, and the framers themselves may have had diverse views on the meaning of specific provisions.

Static Interpretation: Critics argue that originalism can lead to a static and inflexible interpretation of the constitution, hindering its ability to adapt to changing social norms and values. They contend that this inflexibility can result in unjust or impractical outcomes when applied to contemporary issues.

Notable Cases:

In the 1954 case of *Brown v. Board of Education*: The seminal decision of the United States Supreme Court in *Brown v. Board of Education*, which upheld the constitutionality of state-sponsored segregation in public schools, offers an intriguing rebuttal to originalism, even if it is not precisely an originalist judgment. Some people believe that the Fourteenth Amendment, which forbids discrimination in laws but does not forbid segregation in schools, was not meant to forbid such practices by its authors. Nevertheless, in *Brown*, the Court took into account the changing social environment and conception of equality, going beyond the first interpretation of the Fourteenth Amendment.

C. Living Constitutionalism

Although it is not strictly an originalist ruling, the landmark 1954 Supreme Court decision in "*Brown v. Board of Education*," which maintained the legitimacy of state-sponsored discrimination in public schools, provides an interesting counterargument to originalism. Some argue that the architects of the Fourteenth Amendment did not intend to prohibit segregation in schools when they forbade discrimination in legislation but did not do so in reality. However, considering the evolving social

climate and idea of equality, the Court went beyond the first reading of the Fourteenth Amendment in *Brown*.

Strengths:

Adaptability and Flexibility: Living constitutionalism allows the constitution to adapt to evolving social norms, technological advancements, and changing societal values. The constitution's adaptability guarantees that it will continue to address modern issues.

Responsiveness to Social Change: Courts may handle challenges that might not have been anticipated during the constitution's formulation by taking modern ideals and situations into account, according to living constitutionalism. This responsiveness allows for the constitution to address new and emerging challenges effectively.

Weaknesses:

Judicial Subjectivity: Critics of living constitutionalism argue that it grants judges excessive discretion, allowing them to impose their own subjective values on the constitution under the guise of interpretation. This subjectivity, they contend, undermines the democratic legitimacy of the judiciary.

Erosion of Constitutional Meaning: Opponents also argue that living constitutionalism can erode the original meaning and purpose of the constitution. By constantly reinterpreting the constitution to fit the present, they argue, its original meaning and intent become lost or distorted.

Notable Cases:

“Roe v. Wade (1973):” Many people point to the contentious *Roe v. Wade* decision, in which the United States Supreme Court upheld a woman's right to abortion, as an illustration of current constitutionalism. A right to privacy, which is not specifically stated in the Constitution but is considered fundamental in contemporary society, was understood by the Court in this decision as being included by the Fourteenth Amendment's Due Process Clause.

III. The Tension Between Judicial Review and Democracy

“The power of judicial review,” regardless of the model of constitutional interpretation employed, inherently creates tension within a democratic system. This tension stems from the fact that unelected judges are granted the authority to invalidate laws passed by democratically elected legislatures.

A. Arguments for Judicial Review:

Protection of Minority Rights: Those who believe in judicial review say it's necessary to prevent the majority from tyrannizing minority. In a democracy, majority rule can sometimes lead to the suppression of minority rights. All people, irrespective of their political authority, have their rights safeguarded by judicial review.

Upholding the Rule of Law: To maintain the rule of law and make sure that the government is answerable to the constitution, judicial review is also considered essential. By invalidating laws or actions that violate constitutional principles, courts help maintain a system where no one, not even the government, is above the law.

B. Arguments Against Judicial Review:

Undemocratic Nature: Critics of judicial review argue that it is fundamentally undemocratic. They question the legitimacy of unelected judges overturning the decisions of elected representatives, arguing that this undermines the principle of popular sovereignty.

Potential for Judicial Activism: Concerns about judicial activism also fuel opposition to “judicial review.” “Critics argue that judges, in their role” as interpreters of the constitution, may overstep their bounds, using their power to advance their own political or ideological agendas rather than faithfully applying the law.

IV. Balancing Judicial Review and Democratic Principles

Finding a middle ground between democratic norms and judicial review is critical for constitutional government because of the inherent conflict between the two. Several approaches have been proposed to address this challenge.

A. Judicial Restraint:

The concept of judicial restraint emphasizes the importance of courts exercising their power of judicial review cautiously and sparingly. Because they acknowledge that they are not alone in interpreting the Constitution, judges who use judicial restraint

respect the choices of the elected arms of government and, where feasible, defer to their rulings.

B. Legislative Overrides:

In some countries, constitutions provide mechanisms for legislative overrides, allowing elected legislatures to overturn or modify judicial decisions. This approach aims to restore a degree of democratic control over the interpretation of the constitution, ensuring that the final word rests with the people's elected representatives.

C. Constitutional Amendment:

Constitutional amendment provides another avenue for addressing the tension between judicial review and democracy. If the people disagree with a particular judicial interpretation of the constitution, they can amend the constitution through a democratic process to clarify its meaning or to overturn the court's decision.

D. Public Engagement and Dialogue:

Fostering public engagement and dialogue around constitutional issues is essential for maintaining a healthy balance between judicial review and democratic values. Educating the public about constitutional principles and encouraging informed debate on constitutional matters can help bridge the gap between the judiciary and the people.

Conclusion:

Judicial review, despite its inherent complexities and the tension it generates within a democratic system, remains a cornerstone of constitutionalism worldwide. The various models of constitutional interpretation employed by judges, from textualism to living constitutionalism, reflect the diverse approaches to balancing judicial power with democratic principles. While no single model provides a perfect solution, each offers valuable insights into the challenges of interpreting and applying often-ambiguous constitutional language.

Ultimately, the effective exercise of judicial review hinges on a delicate balance between judicial power and democratic legitimacy. Judges must approach their role as

interpreters of the constitution with humility, restraint, and a deep understanding of the democratic values they are entrusted to uphold. By engaging in thoughtful and principled constitutional interpretation, courts can safeguard “individual rights, uphold the rule of law,” and contribute to the ongoing evolution of a just and equitable society.

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