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The Countermajoritarian Difficulty Revisited —An Examination of Bickel's Theory of Judicial Review from Dworkin's Perspective

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Abstract

Alexander M. Bickel is famous for his theory of judicial review, which is based on the observation that judicial power is destined to be confronted with a so-called "countermajoritarian difficulty." Numerous discussions based on this observation have demonstrated the importance and influence of Bickel's argument. Nevertheless, the "resolution" his theory provides seems to be far from satisfactory, especially from Ronald Dworkin's perspective. This article thus aims to examine Bickel's theory of judicial review in light of Dworkin's constitutional theory. From the perspective of Dworkin's "law as integrity," the contradiction in Bickel's argument results mainly from his ignorance or misunderstanding of the true meaning of principles, community, and integrity. This misunderstanding leads to a focus on the protection of majoritarian democracy, which undercuts his initial argument for the defense of "principle" or of certain enduring values. Moreover, by advancing the "majoritarian premise," it even makes his notion of a countermajoritarian difficulty problematic. In

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Dworkin's view, judicial review is in essence compatible with democracy under law as integrity, since both the principle and the safeguarding of its values are important.

Key Words: judicial review, countermajoritarian difficulty, judicial passivism, judicial activism

I. Introduction

Many scholars have shared Professor Alexander M. Bickel's central concern with the "countermajoritarian difficulty" confronted by judicial review, ever since his "*The Least Dangerous Branch: The Supreme Court at the Bar of Politics*" was published in 1962.[1] Indeed, as Barry Friedman has pointed out, the countermajoritarian difficulty has been "the central obsession of modern constitutional scholarship" (Friedman, 1998: 334). According to Bickel, judicial review as a countermajoritarian force becomes a "difficulty" as it runs fundamentally counter to democratic theory and thus may threaten democratic politics (Bickel, 1986: 23). On the other hand, however, since judicial review is a constitutionally permitted and guaranteed power after all, what is crucial is not to eliminate the judicial force, but to figure out how it should operate in order to function within its proper limits under a constitutional democracy, that is, within the system of the separation of powers.

While numerous theoretical approaches were introduced to resolve the countermajoritarian difficulty, Bickel himself also developed his own distinctive theory. Based on the premise that democracy constitutes the core spirit of American constitutionalism, Bickel argued that although judicial review can be justified in the sense that the judiciary is the most suitable branch to pronounce and guard those "principles" or "enduring values" rooted in the American society, this justification cannot be successful if the judiciary fails to adhere to certain "passive virtues." As a result, the legitimation of judicial review should depend not only on the judiciary's functioning as the pronouncer and guardian of certain

[1] Of course, this is not to say that the countermajoritarian difficulty did not exist until it was demonstrated in Bickel's book. Instead, the difficulty can even be traced back to the early days of the Republic. *See* Choper (1974: 810; 1980: 4) and Friedman (1998: 339-340).

principles, but on these principles receiving the consent of the governed. Under Bickel's theory, therefore, the judiciary's "principle-oriented" function would lead to judicial passivism or judicial restraint, and the key point, as Paul W. Kahn has indicated, is that Bickel in the end "relies upon a quasi-electoral model of representation to overcome the countermajoritarian difficulty" (1989: 14).

Surprisingly, as a judicial "passivist," Bickel adopts many terms, ideas and concepts that are quite familiar to a reader of Dworkin in his argument for judicial restraint. For example, he believes that judicial review has to be "principled" in order to be justified, and that the principles on which judicial review relies represent certain enduring values rooted in and recognized by a "moral unity." Moreover, it also seems that he deems "coherency" and "integrity" to be important for the operation of judicial review.[2] In spite of these apparent "similarities," however, it is clear that Bickel and Dworkin are arguing for totally different (indeed, opposing) roles for the judicial branch of government. Although the difference is undoubtedly based on the two scholars' different understanding of the concepts mentioned above, the more crucial problem is that their respective understandings may be rooted in the theoretical backgrounds they presuppose.

Here then I am going to examine Bickel's argument in light of Dworkin's legal theory, i.e. the conception of law as integrity. I will first explicate Bickel's theory of judicial review (Part 2); furthermore, I will examine his argument from Dworkin's perspective (Part 3). Finally, I will reexamine the issue of the "countermajoritarian difficulty" that has dominated discussions and debates in constitutional theory in recent decades by putting it into the context of "law as integrity"

[2] For Bickel, the reason that the neutral principle can be favorable is because it is "an intellectually coherent statement of a reason for a result which in like cases will produce a like result, whether or not it is immediately agreeable or expedient" (Bickel, 1986: 59).

introduced by Dworkin (Part 4). As a result, the following questions are to be answered: How would Dworkin's interpretive theory of law as integrity understand and respond to the concern for the legitimacy of judicial review? (More fundamentally, what is this theory's view of the Constitution?) Does the countermajoritarian difficulty still exist from its perspective? Or is this difficulty resolvable? On the whole, what does the notion of "law as integrity" imply for the debates over constitutional interpretation? What are the limits of this notion?

II. Overcoming the Countermajoritarian Difficulty? —An Explication of Alexander M. Bickel's Theory

A. The "Countermajoritarian Difficulty" Confronted by Judicial Review

As noted, Bickel's theory of judicial review begins with his notion that "[t]he root difficulty is that judicial review is a countermajoritarian force in our system" (Bickel, 1986: 16). In Bickel's view, while majority rule is the heart of democratic politics and the most important device for controlling leaders, the countermajoritarian character of judicial power exercised by non-elected judges runs in an "undemocratic" way and thus is problematic. More specifically, the countermajoritarian difficulty arises because judicial review runs so fundamentally counter to democratic theory that it may have a tendency to "weaken the democratic process" and cannot ultimately be "effective" (Bickel, 1986: 21-23).[3]

[3] Bickel's anxiety regarding the undemocratic character of judicial review thus seems to be rooted mainly in the fact that judges are not elected. It is also to be kept in mind, though, that the undemocratic accusation is closely related to the notion that "[w]hen a court invalidates an act of the political branches on constitutional grounds . . . it is overruling their judgement, and normally doing so in a way that is not subject to 'correction' by the ordinary lawmaking process" (Ely, 1980: 4).

Clearly, Bickel's explication of the countermajoritarian character of judicial review implies that he intends to develop his theory of judicial review *against the background of* the countermajoritarian difficulty. Indeed, it can be inferred from Bickel's description that judicial review must be justified in order to overcome the countermajoritarian difficulty; the problem is that his argument presupposes that both government by majority and the countermajoritarian character of judicial review are basically unchangeable and undisputed. Thus, even though Bickel's theory purports to resolve the counter-majoritarian difficulty of judicial review, it is to be noted that by regarding countermajoritarianism as a "difficulty," he has demonstrated his belief in the supremacy of democracy characterized by majority rule. It is then Bickel's underlying assumption that even the justification of judicial review must be compatible with democratic constitutionalism and majoritarian politics.

B. The Justification of Judicial Review

(A) The Judicial Review as a Way of Guarding Principles

Based on the perception that the judicial force is confronted with the countermajoritarian difficulty, Bickel went on to explicate how judicial review could be institutionally justified due to its countermajoritarian character. To do this, he indicated that a position peculiarly suited to the capacities of the courts must be found and recognized. He then argued that as the U.S. government should serve not only what we conceive from time to time to be our immediate material needs but also certain enduring values, i.e. "principles,"[4] there should be an

[4] Some scholars argued that "principles" in Bickel's theory refer to Wechsler's neutral principles. *See* Friedman (1997: 523) and Feldman (2000: 134). From my point of view, however, although it can be agreed that Bickel affirms Wechsler's argument to some degree, it is still not clear whether what Bickel called "principles" is identical with what Wechsler called "neutral

institution that is responsible for pronouncing and guarding such values. In Bickel's view, the constitutional role of the judicial branch could be legitimized precisely because the judiciary is the only institution that is capable of being "the pronouncer and guardian of such values." As he states:

> Courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government." (Bickel, 1986: 25-26)

Therefore, the justification of judicial review can be achieved through regarding the judicial review as the exclusive safeguard of principles:

> [J]udicial review is the principled process of enunciating and applying certain enduring values of our society . . . the root idea is that the process is justified only if it injects into representative government something that is not already there; and that is principle, standards of action that derive their worth from a long view of society's spiritual as well as material needs and that command adherence, whether or not an immediate outcome is expedient or agreeable. (Bickel, 1986: 58)

As noted, however, since Bickel is in fact more concerned with whether the operation of judicial review can eventually be compatible with democratic politics, the justification of judicial review is obviously not the end or even the key point of the story. Instead, in spite of his notion that judicial review can be justified because it is the most suitable or indeed "eligible" means of maintaining those principles or enduring values

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principles." It seems to me that while Wechsler intended to adopt "neutral principle" as an interpretive method to put the "attitude of judicial restraint" into practice, Bickel's argument for principles seems to derive more from a perspective that the Court is "institutionally entitled" to pronounce some fundamental values. For Wechsler's neutral principles, *see* Wechsler (1959: 15, 19).

rooted in the American society, Bickel emphasized that this function of judicial review would still be illegitimate if its exercise violates the spirit of democracy. Bickel thus leads us to the core of his theory, arguing for the so-called "passive virtue" that properly belongs to the judicial power.

(B) The Passive Virtues

Although Bickel made a distinction between "immediate material needs" and "certain enduring values" and thus found an institutional role for judicial power, he stressed that expediency (referring to immediate material needs) cannot be abandoned by the assertion of principles (referring to certain enduring values). As he stated: "No society . . . can fail in time to explode if it is deprived of the arts of compromise, if it knows no ways of muddling through. No good society can be unprincipled; and no viable society can be principle-ridden" (Bickel, 1986: 64). According to Bickel, then, although Professor Herbert Wechsler's argument for "neutral principles" is favorable in the sense that it certainly promotes coherence in judicial decisions and thus helps judicial review function as guardian of enduring values (Bickel, 1986: 59), its lack of adjustability or flexibility or, more specifically, its insistence on "principled decisions" must lead to failure (Bickel, 1986: 63-64). Bickel thus argues that the courts are required to act prudently in order to minimize their conflict with the democratic process. In this way, he implies that prudence or the "passive virtues"—doctrines such as "standing", "mootness" and "ripeness"—are what enable judicial review to gain full legitimacy (Bickel, 1986: 111-198; Feldman, 2000: 134). That is, prudence (or the passive virtues) is the only way to justify judicial review as well as a principled government. In order to act in accordance with these virtues, the courts need either to avoid making decisions that have the potential to invade the political arena or to pronounce principles that are able to receive the consent of the governed: "The Court should declare

as law only such principles as will—in time, but in a rather immediate foreseeable future—gain general assent" (Bickel, 1986: 239). According to this view, then, reference to past judicial decisions or, more generally, an exploration of the history of a certain community, is indispensable because it helps the Court correctly evaluate the acceptability of its present decision(s) within the community. In the end, as Kahn puts it, Bickel "relies upon a quasi-electoral model of representation to overcome the countermajoritarian difficulty" (Kahn, 1989: 14) since he argues that a judicial decision is legitimate only when the principles it affirms can gain widespread acceptance.[5]

C. "Bickel's Difficulty"

Based on the above points, it may be observed that Bickel's theory of judicial review is aimed at mediating between "principled" and "responsible" views of government. Indeed, his distinctions between "reason" and "will," between "immediate material needs" and "certain enduring values," and between "principle" and "expediency" all reflect this intention.

[5] This is not to say that the role of the Court as the guardian of principles is not emphasized at all in Bickel's theory. To be sure, Bickel himself did stress this role at the very beginning of his theory, as Section (A) of this article has pointed out. *See* also Ely (1980: 69-72) and Sunstein (1999: 39-41). With his emphasis later on democratic consensus, however, it seems that in order to avoid the contradiction of his theory, Bickel's argument must subjugate the importance of the Supreme Court as a guardian of principles to its central concern with the majoritarian democracy to a certain degree. In other words, the interpretation of Bickel's argument as "relying upon a quasi-electoral model of representation to overcome the countermajoritarian difficulty" seems to be the only way to help Bickel out of contradiction or self-defeat. On the other hand, once Bickel's argument for the legitimate role of the Court as the guardian of principles comes into play, the problem of contradiction in his theory will become inevitable. From my point of view, then, "Bickel's difficulty," as I am going to discuss it in the next section, lies in the fact that in the long run he has to choose between the Court's announcement of principles and its passive virtues. Please refer to Section (C) for further explanation.

On the one hand, he argues that judicial review can be justified on the basis that it assures or guarantees the principled rules rooted in American society. On the other hand, however, he denies the priority of principles and argues for judicial restraint on the premise that the ultimate foundation of American constitutional order must be popular consent (Kahn, 1989: 7). Obviously, this argument purports to "comprehensively overcome" the theoretical difficulties confronted by both the approach that insists on the courts' "rigidly principled decisions" and the one that tries to "incorporate judicial review into the theory of democratic majoritarianism" (Friedman, 1997: 523-524; Kronman, 1985: 1578-1579). Nevertheless, such "eclecticism" seems to be self-defeating in the end, however ambitious it may be.

As noted, Bickel's argument reflects his ultimate concern that "government by majorities" needs to be maintained. Therefore, the statement that the institutional role of judicial review can be justified because the judiciary is exclusively eligible for guarding principles recognized by a certain moral community is actually not sufficient for legitimizing judicial review (Kronman, 1985: 1579). From this perspective, Bickel's argument for the Supreme Court's special function cannot even be the main point of his theory, though he did use it to distinguish himself from the so-called "process-based theorists."[6] Consequently, it can be inferred that the only thing Bickel wants to suggest is that the countermajoritarian difficulty can be overcome only if the principles asserted in judicial review gain consent from the whole community. In this way, however, it seems that the assertion of principles must become meaningless,[7] since it must be subject to popular consent and thus to democratic majoritarianism after all. As a result, it can even be argued that there is no great difference between Bickel's

[6] For a demonstration of the "process-based approach" or the "legal-process school," *see* Ely (1980: 73-104).

[7] *See supra* note 5 for explication of this problem.

theory as stated here and the process-based theories, inasmuch as both seem to reconcile judicial review with democratic majoritarianism eventually. In this way, however, the inconsistency between Bickel's emphasis on majoritarian democracy and his argument for the legitimate role of the Supreme Court as the guardian of principles becomes evident. In addition, his theory seems to be even weaker than "neutral-principle theories" inasmuch as it neglects the function and significance of principles due to its appeal for compromise, flexibility, and the supremacy of "government by majorities."

In sum, Bickel's theory is self-defeating in the sense that its argument for "prudence" or "passive virtues" contradicts its argument for judicial review as announcer and guardian of principles.[8] If we contrast Bickel's argument with Dworkin's theory, however, we may find that from Dworkin's point of view, Bickel's fallacy is still more fundamental. As noted in the Introduction, Dworkin's notion of the distinction between principle and policy and, furthermore, his view of the constitutional role of judicial review in light of "law as integrity" seem to resemble Bickel's argument at first glance, yet lead to a quite different conclusion. It is thus worth exploring Dworkin's theory of judicial review in order to examine the difference between these two theories and see why Bickel's argument is, in Dworkin's view, even more flawed than has so far been suggested.

[8] Dworkin also criticized Bickel's argument from this perspective. *See* Dworkin (1978: 145): "[Bickel's] theory is novel because it appears to concede an issue of principle to judicial activism, namely, that the Court is entitled to intervene if its intervention produces socially desirable results. But the concession is an illusion, because his sense of what is socially desirable is inconsistent with the presupposition of activism that individuals have moral rights against the state."

III. Examining Bickel's Argument from Dworkin's Perspective

A. Dworkin's Legal Theory

Dworkin's legal theory was not fully developed until *Law's Empire* was completed. In this book, Dworkin thoroughly introduced and defended the conception of law as integrity and thus enabled ideas he developed in earlier works such as *Taking Rights Seriously* and *A Matter of Principle* to be more well-grounded.

In *Taking Rights Seriously*, Dworkin found a basis for judicial review through asserting that there exists "principle" and that there must be a fundamental distinction between "principle" and "policy" (1978: 82-86). [9] According to Dworkin, the institutional role of judicial review within the constitutional framework is problematic if judicial decisions are generated by policy. On the other hand, if judicial decisions are grounded in or on principle, they can be justified on the basis that the right asserted by arguments from principle would trump the interests of the political majority (Dworkin, 1978: 85).

Dworkin's view of the role of judicial review gained a more complete and detailed explanation in *Law's Empire*. In this aggressive work, he developed a distinctive legal theory based on the core idea of integrity, i.e. the idea that we must treat like cases alike (Dworkin, 1986: 165-166). In addition to showing that the virtue of integrity fits into U.S. political practice, Dworkin further argued that integrity is normatively attractive due to its explicating of the idea of community which is essential to the argument for law as integrity. According to

[9] According to Dworkin's description, arguments of principle and arguments of policy are different in the sense that while the former are intended to establish an individual right, the latter are intended to establish a collective goal (Dworkin, 1978: 90).

Dworkin, integrity establishes a special form of community and is further supported and maintained by the community. Moreover, the special form of community based on the virtue of integrity must be a "true" community, meaning that in addition to being a "bare" community,[10] it should meet certain conditions a society that recognizes fraternal or associative obligations would require.[11] By meeting these conditions, "[t]he responsibilities a true community deploys are special and individualized and display a pervasive mutual concern that fits a plausible conception of equal concern" (Dworkin, 1986: 201). On this view, the only community that can accept and assure law as integrity is the community of principle. In this model of community,

> they accept that they are governed by principles, not just by rules hammered out in political compromise. . . . Members of a society of principle accept that their political rights and duties are not exhausted by the particular decisions their political institutions have reached, but depend, more generally, on the scheme of principles those decisions presuppose and endorse. (Dworkin, 1986: 211)

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[10] According to Dworkin, a "bare" community refers to a community that merely meets the genetic or geographical or other historical conditions identified by social practice as capable of constituting a fraternal community (Dworkin, 1986: 201).

[11] These four conditions, according to Dworkin, are as follows. First, the members of a group must regard the group's obligation as *special*, as something that holds distinctly within the group rather than as general duties its members owe equally to persons outside it; second, they must accept that these responsibilities are *personal*: that they extend directly from each member to each other member, not just to the group as a whole in some collective sense; third, members must see these responsibilities as flowing from a more general responsibility each has for *concern* with the well-being of others in the group; fourth, members must suppose that the group's practices show not only concern but an equal concern for all members (Dworkin, 1986: 199-201).

Understanding law as integrity, then, Dworkin argued that unlike legislators, who do not need reasons of principle to justify the rules they enact inasmuch as they may ground their decisions in sound policies, judges are always required to stick to principles. As he stated:

> Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards. That style of adjudication respects the ambition integrity assumes, the ambition to be a community of principle. But . . . integrity does not recommend what would be perverse, that we should all be governed by the same goals and strategies of policy on every occasion . . . . (Dworkin, 1986: 243)
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> Law as integrity assumes, however, that judges are in a very different position from legislators. . . . Judges must make their common-law decisions on grounds of principle, not policy: they must deploy arguments why the parties actually had the "novel" legal rights and duties they enforce at the time the parties acted or at some other pertinent time in the past. (Dworkin, 1986: 244)

According to Dworkin, because principles are crucial to the fulfillment and maintenance of a true community as well as integrity, and further because judges are institutionally responsible for safeguarding principles, the role of judicial review becomes not only justifiable but also important. In Dworkin's view, therefore, the Supreme Court has the authority to enforce the Constitution and to strike down a legislative act just because in the process of its interpretation of the Constitution, it is guided by a sense of constitutional integrity and thus is able to accurately make arguments on grounds of constitutional principles. From this perspective, the argument from passivism is to be rejected on the basis that it cannot provide a satisfactory interpretation of the constitutional practice by failing to properly answer the question of what the

Constitution actually requires. More specifically, it can be inferred that passivism is weak as it ignores the significance of the Constitution to U.S. political culture. To Dworkin, the spirit of the Constitution or constitutional integrity lies in its demonstration of principles, particularly the principle that what is "right" may trump majority rules (Dworkin, 1986: 355-379; 1978: 149; 1996: 15-20).[12] As he suggested: "The United States is a more just society than it would have been had its constitutional rights been left to the conscience of majoritarian institutions" (Dworkin, 1986: 356).

B. What is Wrong with Bickel's Argument in Light of Dworkin's Theory?

Through Dworkin's analysis and defense of the role of judicial review within the constitutional framework, it may be easier to see what Bickel's problem is. Indeed, as Bickel is evidently arguing in favor of judicial restraint, Dworkin's critique of passivism can no doubt be applied to Bickel's theory. However, it is more important to point out that Bickel's difficulty results from his misunderstanding of the circumstances of judicial review. More specifically, Bickel's theory becomes self-defeating not merely because it neglects the significance of the Constitution while overstating the value of majoritarianism, but because it fails to correctly understand and interpret the U.S. political culture and constitutional practice and thus is unable to provide a "suitable" interpretation of principles, community and, most fundamentally, integrity. If Bickel had merely overlooked the significance of the Constitution, thereby failing to answer the question of what the Constitution actually requires, he would not claim that judicial review could be justified because it performs the special function of

[12] This principle, according to Dworkin, should be derived from his notion of "equal concern and respect," and I try to provide a more detailed explication in Part 4.

guarding principles. Therefore, the key question regarding Bickel's argument is this: how does his initial justification of judicial review lead to his argument for judicial restraint?

As noted, Bickel assigns the special function of guarding principles or enduring values to judicial review for the purpose of demonstrating that "a legitimacy independent of the basic premise of majoritarianism itself can be ascribed to judicial review" (Kronman, 1985: 1578-1579). In doing this, he recognizes that there exist principles which stand for certain fundamental and enduring values deeply rooted in the U.S. community and that these principles, along with short-term interests, should guide the government. As his whole theory is premised upon the countermajoritarian "difficulty" of judicial review, however, he notes that this special function assigned to the judicial branch is unable to dissolve the conflicts between judicial review and majoritarian decisions. In light of Dworkin's theory, this notion not only misconceives the meaning and position of principles and community, but ignores the virtue of integrity.

As Dworkin says:

> Integrity becomes a political idea when we make the same demand of the state or community taken to be a moral agent, when we insist that the state act on a single, coherent set of principles even when its citizens are divided about what the right principles of justice and fairness really are." (Dworkin, 1986: 166)

Law as integrity thus is to be maintained through the assurance of principles accepted by a true community. In this way, principles serve not merely as one of the elements of the "moral unity" of a true community, but also as the very foundation of that unity. From this perspective, Bickel's statement that "[the moral] unity makes possible a society that accepts its principles from on high. . . . But the Lockeian consensus is also a limitation on the sort of principles that will be accepted" (Bickel, 1986: 30) seems to confuse the relationship between principles

and public consensus. Under law as integrity, there is no balance between principles and public consensus; neither are principles exercised according to public consensus, past or future. Rather, principles establish and are recognized and enforced by the true community or community of principle that is maintained on the basis of the sense of fraternity or obligation, and thereby become the guidelines for the community. Arguments of principle are fundamental to the notion of law as integrity just because they represent U.S. political morality and, at the same time, demonstrate the spirit of the U.S. community.

As a result of his poor comprehension of principles, community, and integrity, Bickel is unable to avoid being perplexed by the idea of majoritarianism and even that of democracy. Accordingly, Bickel wrongly indicates that the countermajoritarian difficulty cannot be overcome unless the principles asserted by the Supreme Court gain (potentially) the public's consent. Bickel's theory fails in the end because by making the judicial decisions conditional on the public's consent, it surrenders the special function of judicial review to majoritarianism and thus virtually abandons judicial review. It may thus be concluded that in Bickel's theory, the counter-majoritarian difficulty confronted by judicial review is not "overcome" but rather "avoided"; even worse, this avoidance results in the violation of the constitutional order and the destruction of constitutional morality.

IV. The Countermajoritarian Difficulty Reexamined in Dworkin's Theory

A. What Does the Countermajoritarian Difficulty Look Like Assuming Law as Integrity?

Law as integrity is assured by a coherent set of principles, which are presented most generally in the Constitution. Accordingly, the constitutional interpretation exercised by the

judges is a process of demonstrating principles that the Constitution requires. But what is the most fundamental principle? Dworkin mentioned the "equal concern for all members" which is essential to the community of principle in *Law's Empire* (1986: 200-201), yet went further in his more recent work. In *Freedom's Law: The Moral Reading of the American Constitution*, he explicitly argued that the general principle laid down by the Framers is the principle that "government must treat everyone as of equal status and with equal concern" (Dworkin, 1996: 10). As a result, a judge operating within the framework of law as integrity would satisfy the virtue of constitutional integrity by basing his "constructive interpretation" [13] on the principle of equal concern and respect. Since this principle constitutes the foundation of the political morality rooted in the U.S. political community, it cannot be sacrificed for the sake of majoritarianism. Instead, this egalitarian argument expressly demonstrates that the true spirit or image of the conception of democracy, accurately understood, is "constitutional" rather than "majoritarian." While a majoritarian conception of democracy presupposes that "it is always unfair when a political majority is not allowed to have its way," a constitutional conception of democracy requires the majoritarian procedures "out of a concern for equal status of citizens, and not out of any commitment to the goals of majority rule" (Dworkin, 1996: 17). [14] As Dworkin clearly stated: "The constitutional conception of democracy, in short, takes the following attitude to majoritarian government. Democracy means government subject to conditions—we might call these the 'democratic'

[13] For a detailed explication of constructive interpretation, *see* Dworkin (1986: 53-86).

[14] As a matter of fact, Dworkin also pointed out that "most people who assume that the majoritarian premise states the ultimate definition of and justification for democracy nevertheless accept that on some occasions the will of the majority should *not* govern," though it seems that this recognition is not enough in Dworkin's view (Dworkin, 1996: 16-17).

conditions—of equal status for all citizens" (Dworkin, 1996: 17).

In this view, therefore, the countermajoritarian character of judicial review is in fact never an "undemocratic" or "antidemocratic" force, and the institutional role of judicial review thus is not confronted with the countermajoritarian difficulty, now that it does not "run counter to the democratic theory." What judicial review demonstrates in the process of constructive interpretation is not a resistance to democracy, but rather a commitment to reflecting the political virtues based on the principle of equal concern and respect and thus to enforcing the true, constitutional conception of democracy. Consequently, the countermajoritarian difficulty is constitutionally or institutionally not even a "difficulty" at all under the assumption of law as integrity, since the understanding of law as integrity actually allows the countermajoritarian character of judicial review to be a mechanism to assure the enforcement of principles, particularly egalitarianism, and thus to maintain the U.S. political community. From this perspective, Bickel's theory may be fallacious even from the very beginning, as it is developed from what Dworkin calls the "majoritarian premise,"[15] which tends to overstate the significance of the political majority to democracy while at the same time ignoring the fact that democracy means government subject to conditions of equal status for all citizens. Thus, in Dworkin's view, the majoritarian premise cannot be justified on the grounds of liberty, equality, or community (Dworkin, 1996: 21-30).

B. Arguing for Judicial Activism

Dworkin argued that a judge under law as integrity is in favor of neither passivism nor activism:

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[15] Still, we may say that Bickel's "majoritarian premise" stems from his different understanding of community and integrity.

> [Hercules] is not a passivist because he rejects the rigid idea that judges must defer to elected officials, no matter what part of the constitutional scheme is in question. He will decide that the point of some provisions is or includes the protection of democracy, and he will elaborate these provisions in that spirit instead of deferring to the convictions of those whose legitimacy they might challenge. He will decide that the point of other provisions is or includes the protection of individuals and minorities against the will of the majority, and he will not yield, in deciding what those provisions require, to what the majority's representatives think is right.
>
> [Hercules] is not an "activist" either. He will refuse to substitute his judgement for that of the legislative when he believes the issue in play is primarily one of policy rather than principle, when the argument is about the best strategies for achieving the overall collective interest through goals like prosperity or the eradication of poverty or the right balance between economy and conservation. . . . (Dworkin, 1986: 398)

The passages quoted above clearly express Dworkin's viewpoint on the role of judicial review. It is to be noted, however, that while Dworkin explicitly rejects an active approach to interpretation, his argument actually implies that he expects Hercules to be an activist, as Hercules is after all entitled to make judgments on whether an issue in play is one of policy or principle. From my point of view, judicial activism is a natural and even necessary inference from law as integrity and therefore need not be hidden.[16] Since law as integrity means that principles are to be taken seriously and that judges

[16] It seems that Dworkin (1996: 7-12) denies himself as a "judicial activist" for fear of being accused of leading judicial review to judicial tyranny. However, it is to be inferred from Dworkin's (1986: 398) viewpoint that the Judge is not an activist *only* when he/she faces a case of *policy*, namely when the case is essentially not the business of the judiciary. Thus, as long as a case of *principle* is at issue, that is, under the condition that the judiciary is entitled to function, *such a judiciary* must then be active. In fact, it seems that Dworkin sometimes also explicitly argued for judicial activism (Dworkin,1978: 131-149).

are institutionally responsible for deploying arguments of principle, judicial review is destined to be active in order to function in accordance with constitutional integrity.[17]

V. Conclusion

Bickel's notion of the countermajoritarian difficulty of judicial review indicates a crucial and fundamental issue in U.S. constitutional theory and practice, and has therefore sparked numerous discussions. The resolution that his theory provides, however, seems to be far from satisfactory. From the perspective of Dworkin's conception of "law as integrity," the contradiction in Bickel's argument results mainly from his ignorance or misunderstanding of the true meaning of principles, community, and integrity. This misunderstanding leads to his focus on the need to protect majoritarian democracy, which then outweighs and negates his initial argument for the defense of principle or of certain enduring values. Moreover, the "majoritarian premise" advanced by Bickel renders problematic his notion of the counter-

[17] Although judicial activism is thus continuously criticized for leading to judicial tyranny, it could not be denied that the argument from activists exactly mirrors the dilemma of American constitutional theory and practice. With the common-law tradition on one side, in which the "power" of judicial review, namely the "judge-made law," is necessarily stressed, and the countermajoritarian difficulty of judicial review on the other side, which is caused by the institutional background of the strict separation of powers according to American constitutional law (*Marbury v. Madison* was influential here), the Supreme Court cannot help being confronted with the dilemma that while it is required by the constitutional arrangement of a strict separation of powers to act "restrainedly" so as to be compatible with majoritarian democracy, its advantage compared with that of the legislature is nonetheless strongly supported by the Common Law. The Common Law, in fact, always provides the Court with the power of making a choice between *stare decisis* and case-by-case judging, so that an "active" judicial review seems to be inevitable. For the characteristics of the American Common Law tradition, *see* Eisenberg (1988: 14-161) and Schauer (1991: 174-196).

majoritarian difficulty. In Dworkin's view, the counter-majoritarian character of judicial review is in essence compatible with democracy under the system of law as integrity, inasmuch as principle and the safeguard of principle matter.

I believe that Dworkin's account of integrity provides a more fitting interpretation of the conception of law, and the notion of law as integrity implies that the countermajoritarian difficulty presents no difficulty. The internal coherence of Dworkin's theory is perhaps its greatest strength.[18] On the other hand, of course, the coherence of a set of arguments also means that these arguments would *all* be rejected *unless* their premise, namely the presupposition of the virtue of integrity, is accepted.[19]

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[18] But *see* Kahn (1989: 64-79), who argues that Dworkin's theory is self-defeating in the sense that the "two functions of community" that are stressed in his "law as integrity" are inconsistent, i.e. the community of interpretation "undermines" the special claims to authority of the true community. From my point of view, however, Kahn's argument seems to stem from his misunderstanding of or disagreement with Dworkin's explication of the conception of "law as integrity."

[19] Most critics of Dworkin's legal theory seem to derive their viewpoints from their disagreement regarding Dworkin's presupposition of the virtue of integrity, even though the critiques may be presented in different ways. *See* Kahn (1989: 64-79), Dorf (1997: 142-143), and Stack (1996: 2245).

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再訪「抗多數困境」——從Dworkin憲法理論的角度檢視Bickel的司法審查理論

黃舒芃

摘 要

Alexander M. Bickel於六十年代提出司法審查面臨「抗多數困境」的觀點，而在美國憲法學界聲名大噪，隨後並主張司法消極主義的審查理論，這些論點在這半世紀以來也一直受到高度重視。儘管如此，其理論的缺陷是不容否認的，尤其當對照於另一位當代美國重要憲法理論學者R. Dworkin的主張時，似乎更顯而易見。本文擬從簡介Bickel對司法審查的基本觀點與主張出發，繼而透過Dworkin的理論角度，檢視Bickel主張的根本缺陷。本文試圖說明，何以兩人都認為司法審查的基本價值應奠基於「主張原則論證」之上，但對於司法審查在權力分立架構下所應扮演的角色，卻有南轅北轍的見解。從這個分析過程中，本文期能清楚地說明Bickel理論為何面臨困境的根本原因。

關鍵詞： 司法審查、抗多數困境、司法消極主義、司法積極主義

Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the â€œCentral Obsessionâ€ of Constitutional Theory. Ilya Somin. 03-47.Â writers, â€œjudicial review is a deviant institution in American democracyâ€ because it enables an unelected. *Assistant Professor of Law, George Mason University School of Law; B.A., Amherst College, 1995; J.D., Yale Law School, 2001; M.A. Harvard University Department of Government, 1997; Ph.D. expected.Â On the development of Bickelâ€™s views on the countermajoritarian difficulty, see Anthony Kronman, Alexander Bickelâ€™s Philosophy of Prudence, 94 YALE L. J. 1567 (1985); John Moeller, Alexander M. Bickel: Toward a Theory of Politics 47 J. POL. 113 (1985). 4 Bickel, supra note 3 at 16. Alexander Bickel summed up the issue in the well-known phrase, "the counter-majoritarian difficulty."7 We can try to mitigate this difficulty, Bickel said, by showing that existing legislative procedures do not perfectly represent the popular or the majority will. But, he continuedÂ As Ronald Dworkin puts it- and he is a defender of judicial review-on "intractable, controversial, and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries," the people and their representatives simply have to "accept the deliverances of a majority of the justices, whose insight into these great issues is not spectacularly special."' Â°. In recent years, a number of books have appeared attacking judicial review in America." Recent scholarship in political science and law challenges the view that judicial review in the United States poses what Alexander Bickel famously called the â€œcounter-majoritarian difficulty.â€ Although courts do regularly invalidate state and federal action on constitutional grounds, they rarely depart substantially from the median of public opinion.Â This Article examines that question from an interpretive perspective. It asks whether there is a normatively attractive account of the practice of judicial review that takes account of the Courtâ€™s inability to act in a strongly counter-majoritarian fashion.