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Words That Bind: Judicial Review and the Grounds of Modern Constitutional Theory

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WORDS THAT BIND: JUDICIAL REVIEW AND THE GROUNDS OF MODERN CONSTITUTIONAL THEORY. By *John Arthur.* Boulder: Westview Press. 1995. Pp. viii, 236. Cloth, $77.50; paper $23.50.

For some time now, discussions of judicial review and constitutional interpretation have been held hostage to partisan political debate. On the one hand, political conservatives urge judges to stick to the so-called "original intentions" of the Constitution's authors when making constitutional decisions. On the other hand, political liberals challenge judges to peer behind the words and to engage the "spirit of the Constitution." It would be difficult to overstate the stakes of the debate. Unfortunately, however, it often seems that no one knows what these phrases mean or what their concrete implications for constitutional interpretation are.

John Arthur's *Words that Bind*[1] takes a valuable step toward clarifying our understanding of judicial review. Arthur discusses judicial review as a topic in its own right, independent of result-driven politics, and asks what can be said for and against various prominent theories of constitutional interpretation. Consequently, *Words that Bind* is an excellent place to begin piecing together the abstract, complex issues involved in judicial review. The book will be especially useful for readers with an undergraduate-level background in modern analytic philosophy.

At 236 pages, *Words that Bind* is a relatively short work. Nevertheless, its scope is comprehensive. In successive chapters Arthur covers theories of original intent, proceduralism, the critical legal studies movement, Utilitarianism — including a discussion of the law and economics school — and contractualism. The book is well written and the philosophical concepts involved are clearly explained.

There is more to *Words that Bind* than can be covered in this review. Arthur's book is primarily a work of legal philosophy; thus, I confine myself to addressing the philosophical issues he raises. It should be noted, however, that *Words that Bind* contains much that would be of interest to the intellectual historian, and this review ignores the book's historical content.

Arthur makes short work of his first target — constitutional originalism. Constitutional originalists make some version of the familiar claim that when a dispute arises about the meaning of a constitutional provision, it should be interpreted as the Framers

1. John Arthur is Professor of Philosophy and Director of the Program in Philosophy, Politics, and Law at Binghamton University.

originally intended it to be interpreted.[2] For example, if the Framers regarded thumb screws, but not executions, as cruel and unusual punishment, then the Eight Amendment should be read to prevent the states or Congress from imposing the former but not the latter form of punishment. Originalists tend to be moral skeptics who put great stock in majority rule. In particular, originalists seek to prevent judges from imposing their subjective preferences and values on the majority. Originalists also tend to see the Constitution as a kind of contract or covenant among the people; they believe the role of the judge is to enforce the terms of the contract on behalf of the people. Judges act consistently with the ideal of democratic governance when they stick closely to the Constitution's text, tie their decisions to history, and refrain from creating new rights. In other words, judges should decide disputes in accordance with the terms of the agreed-upon constitutional contract, not replace that contract with something they happen to think preferable.

Arthur catalogs originalism's well-known woes (pp. 7-43), and in so doing makes a convincing case against it. For instance, if the Constitution is a contract, in what sense can we be said to have consented to it? Certainly most of us have not expressly accepted its terms. If we somehow *tacitly* consent to the constitutional contract, what is the relationship between our tacit consent and original intent? Most of us are in no position to answer the historical question of what was in the minds of the Framers at the time of the Constitution's ratification.[3] Even historians cannot agree about such matters. How can we be said to have consented to the specifics of the Framers's original intentions, then, when most of us have at best a very general, hazy idea of what those intentions might have been?

Even if we can be said to have consented to the Framer's original intent, it is far from clear that originalism can provide judges with a coherent definition of the phrase "original intent." Accordingly, it is far from clear that originalists can provide judges with a clear set of instructions for actually deciding cases. For example, judges need to know who should be counted among the Framers in order to determine their original intentions. The Framers, however, could be the actual constitutional drafters, everyone attending the constitutional convention, or all those who ratified the Constitution.

Another problem arises when one attempts to discover a univocal "intention" of any of these groups of "Framers." Even if the

2. For a useful discussion of the loosely related ways in which originalists have characterized their theories, see GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION 17-37 (1992).

3. For an interesting historical perspective on the actual intentions of the Constitution's Framers, see generally JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996).

"original intent" behind a constitutional clause is identified with whatever the majority of the Framers would have said its meaning was, there is simply no reason to believe a "group intention" must exist for any clause. People can vote for the same provision for sharply divergent reasons. Thus, absent some reason to think that the group defined as the Framers had a majority position concerning the meaning of each disputed clause of the Constitution, originalism may have trouble getting off the ground.

Arthur moves on to a second, and initially more promising, theory of judicial review — democratic proceduralism (pp. 45-73). Like originalism, proceduralism places heavy emphasis on the value of majority rule and the need to hold in check judges who, if unconstrained, would impose their personal values on others. Proceduralism parts company with originalism at the suggestion that the Constitution should be read as a contract, the terms of which we can fairly be said to have accepted. According to the proceduralist, the role of judge is not to enforce a contract, but rather to ensure that the democratic process has worked properly. Proceduralists start with the assumption that democratic political processes are self-legitimating; thus, whatever laws ultimately emerge from fair and open democratic elections are necessarily just laws. No matter what a judge thinks of the wisdom of a given piece of legislation, the law cannot be rejected on constitutional grounds if it is the result of a genuinely democratic process. Put another way, democratic proceduralists sees constitutional interpretation as an exercise in what John Rawls called "pure procedural justice."[4]

Arthur's main complaint against proceduralism is its inability to protect minority interests from tyranny by the majority (pp. 62-68). Suppose a duly elected legislature passes laws undermining certain fundamental rights of a despised minority. The government takes care, however, not to undermine the democratic processes in which the minority members may participate. For example, the majority preserves the rights of minority members to vote, hold political office, and exercise freedom of speech. The fundamental problem for proceduralism is that as long as this hypothetical situation is the result of a regular, open, and fair election process, there is little the proceduralist can say to condemn it.

Proceduralists may attempt to blunt the criticism by appealing to the constitutional doctrine of strict scrutiny under the Equal Protection Clause. At least when it impacts certain groups, burdensome legislation will be carefully scrutinized to make sure that it is necessary for achieving a compelling state interest. Thus, our legal system provides some built-in protection against the kind of legislation in question.

4. JOHN RAWLS, A THEORY OF JUSTICE 85-86 (1971).

Arthur argues that appealing to strict scrutiny in this context undermines the proceduralist's view of judges as neutral parties who refrain from imposing their personal views on others (pp. 66-68). Consider the example of a judge asked to decide whether a state's anti-sodomy law burdening homosexuals violates equal protection.[5] The judge must first determine if homosexuals are a discrete and insular minority. Arthur argues that this determination cannot be made independently of the judge's personal view of homosexuality (p. 67). Homosexuals will seem prejudiced and strict scrutiny triggered if the judge believes that there is nothing wrong with homosexual acts between consenting adults. If, on the other hand, the judge believes that homosexual acts are an illegitimate form of sexual expression, laws against such acts will not seem to be the result of mere prejudice and the judge will not invoke strict scrutiny. Arthur's example suggests that proceduralism will not be able to honor its commitment to judicial neutrality without a significant revision of current constitutional law.

Arthur explores some of the ways in which proceduralists might try to overcome their inability to protect the fundamental interests of minorities (pp. 68-74). For example, the proceduralist might insist that all citizens be granted an equal opportunity to influence the political process, thus enabling the proceduralist to challenge discriminatory laws on the basis of their inevitably negative impact on access to the political process (pp. 71-72). But whatever success the proceduralist can expect to have with such a move, an underlying problem remains: proceduralism focuses on the wrong thing. The failings of discriminatory laws are not limited merely to their adverse effects on the political process. Violations of minority rights would be objectionable even if the violations did not affect the political process. Proceduralism fails to give us a way to capture this point.

Arthur's treatment of the critical legal studies (CLS) movement in his third chapter may strike the reader as a bit idiosyncratic. While it is difficult to give a nutshell version of CLS, CLS proponents tend to see the rule of law as illusory. Statutes and case law do not constrain judges in any meaningful sense; judges are free to reach whatever decisions they like on almost any basis they like. In a phrase, the law is "indeterminate." Legal Realists made similar claims years ago.[6] Unlike Legal Realism, however, CLS does not use the personalities and individual traits of particular judges to explain legal decisions. Instead CLS stresses the political and ideolog-

5. Due process concerns with such a law were presumably settled in Bowers v. Hardwick, 478 U.S. 186 (1986) (finding no due process violation).

6. *See, e.g.*, Karl N. Llewellyn, *Some Realism About Realism — Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

ical tensions at work in the law. As a result, CLS adherents tend to view judicial review in starkly political and pragmatic terms — judicial review is a tool for social change; judges should acknowledge their nearly unfettered decisionmaking power and then use that power to fashion a better world (p. 81).

CLS must contend with a crucial question: Why do its proponents think that the law is indeterminate? Arthur suggests the answer is that CLS is really a form of moral skepticism (pp. 86-88). In particular, CLS proponents do not believe that legal, conventional, or human rights exist. They believe that talk about political rights is merely an expression of personal, subjective preferences on the part of the speaker. There can be no correct answers in disputes about rights, much as there can be no correct answers when children debate whether vanilla is a better flavor than chocolate. Thus, legal decisions balancing one — nonexistent — right against another are no more than unconstrained acts of judicial will in thin disguise.

Arthur's answer to all of this is relatively straightforward. Using the action of an ideal observer as a foil, he points out that noncognitivist moral philosophers long ago developed a variety of ways that allow us to provide correctness conditions for statements that are at bottom nothing more than expressions of a speaker's attitudes.[7] Thus, even if one were to grant that rights discourse is essentially a subjective matter, it would be fallacious to infer that any notion of correctness is therefore inapplicable to rights talk. Statements concerning rights are meaningful according to the noncognitivist, it is just that the conditions under which those statements are correctly assertable are not what moral realists would take them to be. In other words, if CLS is trading on the idea that no statement about the existence or applicability of a legal right can be correct because such statements simply express the preferences of judges and advocates, then CLS has gone too far.

Arthur's diagnosis of CLS's ills is not compelling. The noncognitivist strategies he describes are so old hat at this point that one has to wonder if a raw, unsophisticated moral skepticism could really be what drives the CLS movement. Surely at least some CLS proponents have absorbed the noncognitivist lessons contained in almost any decent introductory ethics textbook published in the last thirty years.[8] If Arthur is correct, then the very existence of CLS can be neatly explained by the amusing thought that CLS's guiding lights failed to pay attention in their college eth-

7. By the "correctness conditions" of a statement, I mean simply those conditions that would have to obtain for the statement to be correctly assertable.

8. *See, e.g.*, RICHARD B. BRANDT, ETHICAL THEORY 211-14 (1959). For an up-to-date discussion of noncognitivism and the notions of correctness, truth, and objectivity, see Stephen Darwell et al., *Toward* Fin de siècle *Ethics: Some Trends*, 101 PHIL. REV. 115, 144-52 (1992).

ics courses. I submit that there is more to CLS than Arthur allows, although I will be the first to admit that I am not entirely certain what more there is.

Chapter Four contains a lengthy discussion of utilitarianism and its application to judicial review. Utilitarianism is a theory of the right. In particular, utilitarians believe that to determine what the morally right act is in a given situation, one ranks possible states of affairs by their levels of utility; the right act is the act that brings about the highest ranked state of affairs. What "utility" refers to is a heavily debated issue among utilitarians. Arthur argues that utility is best understood as experiences that are desirable, rather than those that satisfy desires or promote economic efficiency, definitions used by law and economics scholars.

Arthur employs rule utilitarianism to explore the notion of judicial review from the utilitarian's perspective. A utilitarian might argue that instead of looking directly at the consequences of individual acts, judges should seek to make their decisions in accordance with the rule that would maximize utility if followed generally. Utilitarian judges would normally follow past legal precedent because of the need to maintain the institutional integrity of the judicial system in combination with the fact that judges will recognize their relatively limited abilities to evaluate the ultimate consequences of a given rule. In certain clear cases utilitarian judges will put these scruples aside and overturn laws that obviously burden the general welfare, but such cases are likely to be rarities.

Utilitarianism's Achilles' heel, argues Arthur, is what it leaves out of its account of moral and judicial reasoning (pp. 140-43). Is torture cruel and unusual punishment according to the utilitarian? Let's say that it can be proven that widely televised torture has a terrifically strong deterrent effect and that society would experience a net gain in utility by publicly torturing its criminals. Utilitarians would then agree that such torture is an appropriate form of punishment because it maximizes welfare. This analysis, however, leaves something out, viz., many people share the intuition that it would be wrong to torture criminals whatever the utility calculations show. Torture is an affront to human dignity. Human dignity may not be the dispositive consideration in deciding whether our society should employ torture, but that is not the point. The point is that it *is* a consideration and it is a consideration ignored by the utilitarian calculus. The best that the utilitarian can do is to treat the desire to preserve human dignity as one more desire to be weighed against all other desires. Thus the utilitarian is not in a position to account for typical intuitions about the importance of human dignity. Of course, the utilitarian is free to deny the moral significance of dignity. But for those of us who wish to treat moral

intuitions as data to be explained by a moral theory, rather than explained away, utilitarianism is not a satisfying normative basis for an account of judicial review.

Arthur's final chapter reveals his sympathies for democratic contractualism. Arthur recommends contractualism as a way to account for what utilitarianism could not account for, namely, the intrinsic value of certain fundamental rights. Under Arthur's version of contractualism, we are to think of the Constitution as akin to a Rawlsian social contract (p. 155). A social contract is justified if it would be agreed to by people communally deciding how to structure a society but who are ignorant of all the factors that distinguish them as individuals. In other words, a distribution of wealth and rights is legitimate just in case it would be chosen from Rawls's "original position."

Unfortunately, Arthur does not clearly state how contractualism relates to judicial review. For one thing, it is entirely implausible to think that the United States Constitution is rooted in contractualism. It strains credulity to think that the members of the constitutional convention were ignoring the fact that they were white, male property owners. The political circumstances surrounding subsequent amendments of the Constitution do not approximate the ideal of Rawls's original position to any greater degree.

Furthermore, even if one were to believe that the Constitution is a product of contractualist philosophy, contractualism says very little about how the Constitution should be interpreted. Arthur considers capital punishment and the right to privacy from the contractualist standpoint, but his contractualist vision offers no unique insight into these topics. Consequently, contractualism's powers to help solve the dilemmas of judicial review seem quite limited. Contractualism may be an interesting moral theory, but it leaves much to be desired as either a descriptive or prescriptive theory of judicial review in our legal system.

Although *Words that Bind* occasionally lapses and becomes too vague to be informative, the book's strengths overcome its weaknesses. For the most part, it is clear, scholarly, and well written. Anyone interested in the foundations of judicial review and who has a basic background in modern philosophy can find something worthwhile in this book.

— *John A. Drennan*