Judicial Review and Institutional Choice

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JUDICIAL REVIEW AND INSTITUTIONAL CHOICE

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It's an appropriate time to consider the legacy of judicial review. Only rarely do deeply entrenched doctrines and practices like judicial review become plausible candidates for rethinking. Yet two contradictory trends have restored this basic question to the intellectual agenda. On the one hand, judicial review has gained new vigor in European legal systems,[1] and the Rehnquist Court is currently in an aggressive phase.[2] On the other hand, prominent American jurists such as Mike Klarman, Richard Posner, and Mark Tushnet, and including Jeremy Waldron as an honorary American, have recently questioned judicial review root-and-branch[3]—a significant development given that even ten years ago a thoroughgoing opposition to judicial review was the mark of a crank. Judicial review is making gains abroad while losing a measure of intellectual respectability at home.

Is judicial review desirable? I shall supply a three-part answer to that question. First, normative analysis of judicial review is necessarily a consequentialist exercise in institutional choice. The question we'd like to answer is whether paramount authority to interpret the Constitution should be lodged in the judiciary or in the

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1. Bojan Bugaric, *Courts as Policy-Makers: Lessons from Transition*, 42 HARV. INT'L L.J. 247, 250-51 (2001).

2. Dahlia Lithwick, *The High Court's Eating Disorder*, SLATE, July 3, 2001, *at* http://slate.msn.com/default.aspx?id=111437.

3. RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 15-27 (2001); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS *passim* (1999); JEREMY WALDRON, LAW AND DISAGREEMENT *passim* (1999); Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145 (1998).

lawmaking process.[4] Nonconsequentialist commitments, for example a commitment to "democracy," usually prove too abstract to cut between institutional options of this sort. Second, however, institutional-choice questions of this magnitude are excessively information-demanding. The information necessary to make the assessment is unobtainable, or at best excessively costly to obtain; the scale of the questions is too large; the interaction between institutions is too dynamic and complex; and the possibility of unintended consequences from any choice of institutional arrangement is too great.

Third, the combination of the first two points creates the dilemma of institutional choice: we can't assess judicial review without answering questions that we lack the information to answer. The upshot is that, as I've argued elsewhere, institutional choice over questions of this magnitude must inevitably fall back upon a weak repertoire of techniques for practical reasoning under conditions of profound uncertainty.[5] I will apply some of those techniques to the question of judicial review, but they butt up against the region where consequentialism runs out of steam. In that region large-scale institutional reforms like abolishing judicial review require a leap of faith, and I'll conclude with a bit of positive theorizing about what causes us to take such leaps on the infrequent occasions that we do so.

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Start by assuming that we can costlessly obtain full information about the determinants of the institutional-choice question. Because we need some fixed starting points from which to reason, I will assume that the only issue at stake is whether *Marbury v. Madison*[6] should be overruled, leaving in place all other constitutional provisions and doctrines that regulate relations between the judiciary and other branches of government. For

4. A distinct question is whether the judiciary's interpretive authority, even if supreme, should or should not be *exclusive*. *See* Larry D. Kramer, *We the Court*, 115 HARV. L. REV. 1, 13 (2001) (arguing that supremacy does not entail exclusivity).

5. Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 113-28 (2000).

6. 5 U.S. (1 Cranch) 137 (1803).

expository clarity I'll exclude intermediate institutional forms like Robert Bork's proposal that Congress be empowered to override constitutional decisions by a majority vote of each House.[7] I will assume that the only options under consideration are full judicial supremacy, on the one hand, and political-branch supremacy, on the other. Now this procedure is mildly unrealistic—obviously various doctrines of standing, justiciability, and deference moderate the current regime—but it helps to isolate the relevant considerations.

With full information, the principal determinants of the institutional choice question are the agency costs of judicial review, its moral hazard effects, the optimal rate of legal change, and the transition costs of switching from a *Marbury* regime to a political-supremacy regime. Each of these considerations, however, implicates a tangle of subsidiary questions, and I hope it will become clear that the information needed for fully specified institutional choice far exceeds our present intellectual resources.

AGENCY COSTS

Hamilton's defense of judicial review in *The Federalist No. 78* supposes a simple principal/agent model with multiple agents: the people, as principal, appoint legislative representatives subject to the terms of the agency agreement (the Constitution), and also appoint the judiciary as another agent to enforce the agreement.[8] If the judges were both infallible and perfectly faithful, the Hamilton model would be persuasive; whether it is actually persuasive depends on the relative agency costs of judicial review and legislative action.

Agency costs come in two forms, agent incompetence and agent self-dealing. The competence issue is whether faithful agents suffer informational and cognitive constraints that cause them to make mistakes, defining "mistake" according to the observer's preferred substantive theory of constitutional interpretation. Faithful but

7. ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 117-18 (1996).

8. THE FEDERALIST NO. 78, at 492 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

fallible judges will issue erroneous rulings of constitutionality and of unconstitutionality, and both weigh against judicial review: excessively lax review suggests that judicial review is unnecessary, while excessively stringent review suggests that it is affirmatively harmful. Nor can we optimistically suppose that random errors in either direction will wash out; even if that is so, we also care about the constitutional variance produced by our institutional choices. A judiciary that made a precisely equal number of errors in either direction would be far worse than one that made no errors at all.

The self-dealing issue is whether epistemically perfect agents will use their authority to divert gains to themselves; here too the consequence will be erroneous constitutional decisions by the judges, although caused by self-interest rather than incompetence. This is a touchy subject for constitutional law professors, because we like to maintain civil relations with the judges, but consider whether it is plausible that self-interest distorts judicial review of statutes that alter judicial compensation, as in *United States v. Will*;[9] or review of statutes that the Justices lobbied against in the legislative process, as in *United States v. Morrison*;[10] or review of electoral outcomes that will determine the identity of the Justices' colleagues, as in *Bush v. Gore*.[11] The latter two cases might also be described as examples of vanity rather than self-interest, and all of the cases emphasize that the distinction between incompetence and self-interest is fuzzy, for cognitive mechanisms such as motivated reasoning and the self-serving bias may transmute self-interest into "sincere" error.

It goes without saying that we can't restrict our attention to the agency costs inflicted by imperfect judiciaries. We need to compare the net agency costs of fallible legislatures and fallible courts under the two alternative institutional schemes of judicial and political supremacy. With or without *Marbury*-style review, legislatures may erroneously reject bills on constitutional grounds or erroneously fail

9. 449 U.S. 200 (1980).

10. 529 U.S. 598 (2000) (invalidating the Violence Against Women Act (VAWA)); *see also* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1005 n.322 (2000) (noting that Chief Justice Rehnquist and the Federal Judicial Conference lobbied against VAWA before its enactment).

11. 531 U.S. 98 (2000).

to do so. *Marbury*-style review adds the possibility that insufficiently vigorous constitutional review by legislatures will be corrected, but also adds the possibility that erroneous judicial invalidations will combine with erroneous legislative rejections to produce dramatic overenforcement of constitutional rules.

MORAL HAZARD EFFECTS

A further complication is the possibility of dynamic interaction effects between legislative and judicial determinations of constitutionality. One possibility is moral hazard: if judicial review is a constitutional insurance policy against erroneous legislative determinations, it may dilute rather than strengthen legislators' incentives to take precautions against erroneous enactment of unconstitutional statutes. This is Thayer's concern that judicial review would dilute the statesman's sense of constitutional responsibility.[12] The concern is parasitic on the assumption that judges are fallible: if judicial review catches all and only those unconstitutional statutes that responsible legislators would catch anyway in a regime without judicial review, then the moral hazard effect doesn't change any outcomes. But if judges are fallible, then moral hazard may act as a multiplier, causing a net increase in the number of constitutionally objectionable statutes that survive both legislative and judicial scrutiny.

OPTIMAL RATE OF LEGAL CHANGE

So far I have assumed that judicial review "invalidates" statutes, which is legally accurate but ignores the common view that the practical effect of review is merely to delay a statute's effectiveness until the process of presidential appointment aligns the Court's holdings with the nation's wishes.[13] That view makes strong assumptions. If the delay is a generation or so, as it was with the

12. JAMES B. THAYER, JOHN MARSHALL 107 (1901).

13. *See, e.g.*, MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 197-200 (1988) (describing the Realist argument that "in the medium-to-long run judicial review doesn't matter very much" because of political controls, the most important being the appointment of new Supreme Court justices).

child labor laws, then the difference between invalidation and delay has no cash value to anyone alive at the time of the initial decision. The Court's erroneous ruling may itself generate new interest groups and social movements that will subsequently immunize the ruling from reversal, which is one account of the aftermath of *Roe v. Wade*.[14] But even on its own terms, the delay point just changes the institutional-choice question from one about comparative agency costs and moral hazard to one about the optimal rate of legal change. We'd need to know whether delay, as measured from the no-judicial-review baseline, moves us closer to or farther from the optimal point.

It's quite possible that the answer is "farther from." Madison was intensely concerned with slowing the rate of legal change, which he saw as excessive because of the "inconstancy" and "mutability" of legislative lawmaking,[15] but he said very little about judicial review; he sought to build in the necessary delay through bicameralism, small legislatures, and long legislative terms.[16] Adding judge-created delay to those structural features is very possibly excessive.

TRANSITION COSTS

A final consideration is that the question whether we should abolish judicial review is not the same as the question whether we'd want to institute it if we didn't already have it. The status quo position matters. The opponents of judicial review that I mentioned earlier elide this distinction, in Waldron's case because his basic concern is to prevent the *introduction* of judicial review into the British legal system.[17] This concern about the costs of transition to a regime of legislative supremacy interacts with the other considerations that I've mentioned. Thayer's moral-hazard concern that judicial review debases legislative responsibility,[18] for example,

14. 410 U.S. 113 (1973); *see, e.g.*, Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 95-96 (1998) (stating that social forces played a defining role in the Court's later refusal to overrule *Roe*).

15. THE FEDERALIST NO. 62, at 410-12 (James Madison) (Benjamin Fletcher Wright ed., 1961).

16. *Id.* at 409-10.

17. WALDRON, *supra* note 3, at 211-14.

18. THAYER, *supra* note 12, at 107.

suggests that a sudden switch from a regime of vigorous judicial review to one of legislative supremacy might prove disastrous. Legislators made constitutionally irresponsible by the previous regime could hardly adjust instantly to their new obligations, and if the moral hazard effect dissipated very slowly, the interim period might pose a real risk of legislative oppression. Even if the new long-term equilibrium were better than the old judicial-review equilibrium, the transitional disruption might prove so severe as to block any path from the latter to the former. In that case, the current regime of judicial review would constitute a local-maximum trap, akin to the problem facing subsistence farmers who are unable to switch to more productive technologies because they will starve to death in the meantime.

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It should be clear that the number and scope of the variables we'd need to consider, in a fully specified institutional-choice analysis of judicial review, is staggering. It's not feasible to acquire the necessary information, at least at any reasonable cost within the short or medium term. To be sure, comparative work on judicial review in the political science literature has outlined some of the relevant variables,[19] but it has not made much progress on specifying their magnitudes. Further, the complexity of social and political systems means that it's almost always possible to dispute a comparative analogy by pointing to an omitted factor—some plausibly relevant difference between the United States and the comparison country. What we can get out of comparative work are large-scale truths that verge on banalities, such as the truth that the absence of judicial review need not produce majoritarian tyranny, and a healthy exposure to the full variety of judicial-review arrangements.[20] The latter sort of information, however, adds options to the menu of institutional choice and thus makes the problem more, rather than less, information-demanding.

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19. *See, e.g.*, JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD (Peter H. Russell & David M. O'Brien eds., 2001).

20. *See, e.g., id.*

If the desirability of judicial review is an institutional-choice question, but an intractable one (at least on the current state of political science and legal theory, and probably for the foreseeable future as well), what conclusion should we reach? One reaction is to abandon consequentialist analysis altogether. If the complexity of "global net long-term equilibrium effects" makes institutional choice indeterminate, we ought on this view to choose institutions that comport with whatever nonconsequentialist theory of justice or theory of the good that we happen to hold.[21] Those theories, however, will in most settings prove too abstract to cut between the choices available to us at the level of constitutional design. A commitment to democracy, for example, is compatible with judicial supremacy if we jigger the institutional variables the right way;[22] that's the lesson of Hamilton's resolute discounting of the agency costs of judicial review in *The Federalist No. 78*.[23]

The only other recourse is to invoke an eclectic group of tools for practical reasoning under conditions of profound uncertainty, tools found in decision theory, rhetoric, and other disciplines. Some are spurious, for example the use of burdens of proof—a device that courts properly use to reduce decision costs and to allocate the risk of error in the face of uncertainty,[24] but that academics usually use as a rhetorical device to close down an argument. So when Judge Posner says that Waldron and the other skeptics have not proved that judicial review is a bad idea,[25] we're entitled to ask whether Judge Posner has proved that it's a good one.

A better technique is based on the principle of insufficient reason. It instructs the decision maker to count only known costs, eliminating other unknown and unknowable costs from both sides of the ledger by assuming they will wash out. This sort of reasoning,

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21. *See* Jon Elster, *Arguments for Constitutional Choice*, *in* CONSTITUTIONALISM AND DEMOCRACY 307-16 (Jon Elster & Rune Slagstad eds., 1988).

22. *See* FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY 19 (1999) (attributing this claim to Ronald Dworkin).

23. THE FEDERALIST NO. 78, at 489-96 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

24. *See* POSNER, *supra* note 3, at 363-79 (describing the use of burdens of proof in an adversarial judicial system).

25. *See, e.g.*, *id.* at 27 (stating that skeptics have not proved their case against judicial review).

like a burden-of-proof rule, may end up incorporating the status quo into the analysis, but it does so on more respectable grounds. If the costs of transition from one institutional arrangement to another, for example, are clearly positive, and the other variables on both sides are imponderable, this approach counsels against disrupting the status quo in the search for speculative gains. A sophisticated defense of judicial review along these lines is David Strauss' position: "[O]ur acceptance of [judicial review] outruns our belief that it is theoretically best .... One reason is that it works well enough, and it would be too costly and risky to reopen the question whether, abstractly considered, it is the best possible arrangement."[26]

Here, I think, consequentialism runs out of raw material. Strauss' position rejects the search for optimal institutions in favor of a satisficing approach, in which everything hinges on how the aspiration level is or should be set—what it means for a given institutional arrangement to work "well enough."[27] This just means that when the variables relevant to institutional choice proliferate faster than our information and computational capacities, as is frequently the case when fundamental reforms like the abolition of judicial review are at issue, change will occur when the costs of the status quo come to seem intolerable and when those costs are incurred in a particularly salient fashion.

In such circumstances we have sometimes rejected longstanding institutional arrangements, despite our inability to predict the consequences of the change. Consider the Court's decision in *Erie*[28] to overturn the *Swift v. Tyson*[29] regime, in part because of a consequentialist concern for vertical forum-shopping between federal and state courts.[30] The optimizer may protest that the switch to the *Erie* position may simply replace vertical forum-shopping with horizontal forum-shopping; the satisficer may say, a là Strauss, that the definite cost of transition from one regime to the other should dominate the speculative possibility that the new

26. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 913-14 (1996).

27. *Id.* at 913-16.

28. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

29. 41 U.S. (16 Pet.) 1 (1842), *overruled by Erie*, 304 U.S. at 79-80.

30. *Erie*, 304 U.S. at 74-77.

regime will minimize litigants' strategic behavior. By the time of *Erie*, however, there were highly salient examples of the costs of the *Swift v. Tyson* regime—*Black & White Taxi*[31] is the most famous case—and to many people it didn't in fact seem that the existing regime was working "well enough."[32] The Justices were willing to take an institutional leap of faith, one that consequentialism could neither endorse nor refute.

If this picture is right, however, judicial review is probably secure for now. To provoke legal elites into taking a leap of faith to a regime of legislative supremacy, a leap even longer than that involved in *Erie*, would require something like a string of highly salient judicial blunders akin to *Dred Scott*[33] or *Hammer v. Dagenhart*,[34] coinciding with an energized national majority in firm control of the national political branches and of the statehouses. But no current issues are likely to provoke that degree of passion, and in any event the Justices have become far too canny to blunder that badly. It is no accident that *Romer v. Evans*[35] was handed down the same day as *BMW v. Gore*[36]—the Justices are now more careful about appeasing constituencies and generating allies across the political spectrum.

If the normative analysis of judicial review is as opaque as I have portrayed it, however, we should also be wary of overconfidence in our ability to predict its staying power as a positive matter. That was a major lesson of the collapse of Soviet communism: Large-scale institutional changes often happen so quickly and unexpectedly that learned professors usually deny the possibility up to the very moment that the change occurs. The legacy of judicial review is secure for now, but I reserve the right to say that I

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31. Black & White Taxi Cab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928).

32. *Erie*, 304 U.S. at 73-77 (describing defects of the *Swift* doctrine and noting the widespread criticism of the doctrine following the Court's decision in *Black & White Taxi*).

33. Scott v. Sanford, 60 U.S. (19 How.) 393 (1856) (holding that slaves are not U.S. citizens), *superseded by* U.S. CONST. amends. XIII, XIV.

34. 247 U.S. 251 (1918) (construing the Tenth Amendment narrowly and limiting Congress' Commerce Clause power), *overruled in part by* U.S. v. Darby, 312 U.S. 100 (1941).

35. 517 U.S. 620 (1996) (striking down state constitutional classification based on homosexuality).

36. BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) (holding "grossly excessive" punitive damages a Due Process Clause violation).

predicted its demise, if only in this very contingent and qualified sense.