
The Constitution - Dworkin

Judicial Review \implies **Examining the “constitutionality” of law and uphold/strike laws on such a basis**

- Established in Marbury v. Madison
 - While the court didn’t apply Judicial Review for the case, Judge Marshall asserted the power of Judicial Review as real
- Could it be a power grab by Marshall?
 - The Constitution in Art. VI and Art. III do define some scope of judicial power
 - The conception of the Court is to interpret and apply the law, so Judicial Review does adhere to the role the judiciary branch plays
 - At this point, no argument can be really made against it due to the vast history backing it

Constitutions are special

- Our constitution establishes 3 main things
 - Protection of individual rights
 - Constitutionally limited democracy (which protects against...)
 - **Tyranny of the Majority**
 - * Prevent simple majorities from revoking the rights of legislative minorities
 - * Ex. Nazi march in a Jewish community cannot be made illegal
- The constitution is special in this way as it puts limitations on legislative majorities to protect individuals and legislative minorities
- All of this a promise from the government to individuals/citizens
- *Side Note:* Liberal Democracy \implies A tradition of government that is structured by the governed body and generally protects individuals. A.K.A. a democracy where everyone agrees to a government structure.
- The constitution turns democracy into a constitutionally limited democracy

How would Hercules interpret the Constitution?

- Hercules will *reject* Historicism
 - Understanding the constitution through the explicit and concrete intentions of the framers, something inherently conversational

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- Hercules will *reject* passivism
 - Understanding the constitution via the views of a democratic majority
 - * The constitution's most important feature is a protect from the tyranny of a majority, so such as view violates/subverts the constitution
 - The interpretation force of "popular morality" varies based on the demands of justice in cases
 - Commercial/private cases may weigh in popular opinion (Ex. McLaughlin)
 - Constitutional cases will tend to ignore popular/majority opinion (Ex. Brown)
 - Rejection of Historicism and Passivism does **not** make Hercules/judges judicial activists
 - Judges will still see themselves as interpreting the constitution, just in differing and potentially controversial ways
 - The question to ask is if a judge's *strategy of interpretation* is defensible
 - Hercules ask not whether to interpret or apply constitutional grantees, but how to do so

"Due Process" in the Constitution

- "Due process of law" has **no** plain meaning
 - Even attempts to use the intentions/history backing the amendments does not further an interpretation of the due process clause
- A potential interpretation: Procedural Due Process
 - Deprivation of life, liberty, or property must be done so via democratic means/legislation
 - Almost no constraints on the substance of what the laws say, just focuses on the procedure
 - The constraint is **Rational Basis Review**
 - * Legislation must reasonably pursue a legitimate state interest
 - P.D.P. is rejected in *Lockner v. New York* and is replaced by **Substantive Due Process**
 - * S.D.P. puts stronger constraints on the substance or what a statute can actually do
 - * Originated from economic conservatives on the Court that believed economic liberties deserved higher protections (Economic Substantive Due Process)
 - Ex. Liberty of contract in *Lockner v. New York* \implies Cannot put restrictions on contracts as it is "unfair"
 - * From *Lockner*, if the state limits a *fundamental right*, it must be for a compelling state interest and in the least restrictive manner possible (*strict scrutiny*)
 - * Non-fundamental rights only have to pass rational basis review
- An important note on terminology

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- Interests
 - * **Compelling Interest** \Rightarrow An interest that is important towards the health, safety, or well-being of your citizens
 - * **Legitimate Interest** \Rightarrow A credible want by the state
 - Manner
 - * **Least Restrictive Manner** \Rightarrow The method must be as minimal in scope and effect to accomplish the state's interest
 - * **Reasonable** \Rightarrow The method is not self-defeating or bat-shit insane

What are “fundamental” liberties?

- Economic Substantive Due Process said that economic liberties were fundamental, something considered as an embarrassment and failure of the judicial system
- Courts then said *civil rights* are the correct pool of rights to determine what is fundamental
 - Complicated by selected incorporation: not all rights enumerated in the Bill of Rights are fundamental, and some rights that aren't enumerated are still considered fundamental (Ex. Privacy)
 - Selective incorporation demands a rationale to function, eg. the fundamental liberties must make grantees meaningful