

Can judicial review be reconciled with democracy? essay

[Politics](#), [Democracy](#)



The issue of the judicial review in the United States of America and its compatibility with democratic values has been one of the most debated problems of the American legislative system today. The right for judicial review given to the Supreme Court in the USA is the focus of many philosophical and legal disputes.

The argument between various philosophers and judges occurs because there are different ways of looking at the nature of judicial review and its functions and purpose. In this paper the arguments of different legal experts and philosophers will be used to explore the discussion of this subject.

Supporting the position that judicial review is compatible with democracy and serves noble purposes of protecting human rights and that it actually supports democratic principle of the work of the government, I will argue with the points of view of such legislature experts, professionals and philosophers as Ronald Dworkin, Antonin Scalia, John Arthur and Richard Posner, all of whom view the issue of the right for judicial review and its compatibility with democracy logically, yet under different angles.

Over the last several decades discussions of constitutional theory have become very popular in the United States. The members of the Supreme Court refer to several different approaches to the functions of the government, the Court and the Constitution, their duties and obligations.

Among the main four approaches towards constitutional theory there are textualism - originalism, deference -restraint, independent - interpretivism and democracy reinforcement (Gillman, Clayton, 154). The first of these

approaches argues that the Court should stick to the original word of law as it is in the Constitution taking its text literally, looking for its initial meanings. The second approach states that the Court's decision making process should consider the decisions and views of the elected branches unless they are obviously wrong.

The supporters of the third approach have an opinion that the Court should make independent interpretations of the constitutional text according to the cases they are working with. Finally, last of these four approaches supports the idea that the Court should improve and protect the political democracy and its working process. Individual justices do not always stick with the same approach. On the contrary, their judgment varies considering the circumstances and cases they are solving.

Professor Ronald Dworkin discusses the constitutional theory exploring some of its standards he called "vague". Such standards, Dworkin notes, were applied and created deliberately because they referred to abstract cases, so providing vague standards the creators of the Constitution had in mind the principles but not the strict rules for their followers (Arthur, Shaw, 124).

This opinion makes professor Dworkin the supporter of the approach called independent – interpretivism, as he writes that the Court is to see beyond the literal text of the Constitution and apply the meanings behind the vague standards interpreting them according to the cases they study. This approach supports the idea that the Supreme Court is free to decide rationally considering the circumstances of the case.

Such approach avoids confusion that occurs whenever the vague formulations and parts of the Constitution are applied literally. According to independent - interpretivist point of view, the Court also is free to make decisions without being obliged to support the opinions of the elected branches.

Normally, such approach causes a lot of confrontation from the side of the democratically elected government that states that the decisions of the people's representatives legitimately elected by the masses are put under doubt and often revised and cancelled. In my opinion, the Supreme Court acts democratically because it is obliged to follow the Constitution only without getting under the influence of biased opinions of political powers, protecting the rights of specific individuals in specific cases.

Justice Antonin Scalia is the member of the Supreme Court that supports textualist views when interpreting statutes and originalist ideas in the interpretation of the Constitution. According to Scalia, the notion of the "living Constitution", which changes together with its readers and the periods of time it goes through, is incorrect. Scalia believes that the Constitution has an original meaning that cannot be changed, altered or forgotten.

Otherwise the Constitution would become a rather unstable set of orders transforming and flexible. Scalia believes that this should not be allowed as there is no certain agreement as to how exactly and according to which influences the Constitution should evolve and change. Justice Scalia's confrontation of the Voting Rights Act as the one inflicting racial

discrimination was based on his desire to protect human rights and equality solving a truly important problem for the nation.

Scalia argues that only in such extremely complex situations should the Court intrude into the work of the Congress and perform their expertise. Scalia's opinion is supported by several arguable cases taken to the Supreme Court. One of them is *Morse v. Frederick* case also known as "Bong Hits for Jesus" case, where a school principal suspended the student that placed a banner promoting illegal drug abuse on the school territory during a public event.

The student's claim that his freedom of speech was violated by the decision of the principal was rejected by the Court. Instead, the Court ruled that the student's suspension was not a violation of his freedom of speech right, as according to the Court, the school administrative had a right to adjust the policies of the territory of the school to maintain order and protect the students from negative influences.

Another case of similar kind is *Texas v. Johnson*, where a citizen burnt the American flag as a political protest and was convicted in violation of Texas law forbidding the desecration of a state symbol (Arthur, Shaw 593). The Court ruled that Johnson's free speech right was violated by this accusation.

Such decision can be morally perceived as unpatriotic. I disagree with this opinion and support the decision of the Court because in this case the act committed by the citizens was not openly harmful, whereas the freedom of speech is declared by the first Amendment and has to be provided.

This is also true for the cases such as *Rockwell v. Morris*, where the Court prohibited banning of the anti-Semitic speeches as long as they were not calls to action. In these cases the Court acted independently from moral, social or political pressure and subjectively preserved the human rights, which, in my opinion, is its main function (Arthur, Shaw 599).

The Court avoids limiting actions of the citizens based on standard moral beliefs of the majorities, yet at the same time in such cases as *Paris Adult Theatre v. Slaton* are based mainly on the moral judgments of the majority and allow the court restrict adult shows and movies with sexuality displays as obscene and invaluable. The rule that says “ if one does not like the content of a certain address, one should not listen or view it” that applies to racist speeches does not seem to work in cases with adult movies shown in cinemas (Arthur, Shaw 599).

Judge Richard Posner argues that one of the main and most important features of an American judge is pragmatism. According to Posner, the Court is to provide help and supervision in cases when the conventional legal documents and materials fall short (Ursin, 1270). Posner opposes legal formalism or originalism stating that these theories have little to do with the actual judicial way of thinking and the work of the constitutional theory concerning judicial lawmaking.

I support Posner’s view opposing originalist approach to the judicial decision making. First of all, vague descriptions of some statutes do not allow strict

understanding of their contents. Besides, the abstract understanding of the statutes provides the judges with wider understanding of the diverse cases.

John Arthur emphasizes that pure democracy works through the choices of the majority that assembles the Congress and the government, and this way it discriminates the opinion of the minorities or separate individuals (Arthur, Shaw, 526). Discrimination of any individuals or social groups is unacceptable according to the principles of democracy, this is why the Supreme Court and its judicial review right were established.

John Arthur views the Court as the organ that becomes active in cases when the democratic government cannot provide democratic political decisions for its citizens for some reasons. I agree with this opinion, to my mind, the Supreme Court is an institution assigned to revise the undemocratic or unconstitutional decisions of the Congress in cases such as the Voting Right Act or “Bong Hits for Jesus”.

I do not support the opinion that the Court’s right for judicial review is illegitimate because it is based on the voting of a small non-elected group of people because, to my mind, the Supreme Court assigned by the President is the product of democratic voting of the citizens as the President himself was chosen by the society democratically. Many philosophers share the point of view that states that the voting of judges is valued more than the voting of the citizens (Kyritsis 734).

In my opinion, the Supreme Court exists to monitor and control the work of the Congress and its decision making. The Court’s main function is to detect

violations of the constitutional rights. This way the Supreme Court and its right for judicial review do not clash with the principles of democracy but support and preserve them from being overlooked, forgotten or misinterpreted.

At the same time, the Court faces a number of serious moral issues solving contradictory cases where anything the Courts decides would be criticized by the society, a good example of such cases is *Paris Adult Theatre v. Slaton*. In cases like this it does not matter which side the Court may support, there would be a lot of protesting in the society anyways.

Providing decisions for moral cases the Court is to act as the distributor of virtue, which does not seem to be the role of the Court and its members. In my opinion, the search for legislative intent in the Constitution leads of its personification and biased interpretation, which according to common belief, contradicts with democratic principles, yet, since democracy is based only on the ideas supported by the majorities, the decisions of the Supreme Court should be considered democratic.

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