

Gov 97

Section Handout : Feb 25, 2014

Where does JR authority come from?

- Article III (the constitution)?
- Marbury v. Madison

Advantages/Disadvantages of JR:

- Fed 78
- Marbury v. Madison
- Bickle
- Waldron

Do all democracies have JR, or JR as strong as it is in the US?

No. Refer to Waldron

Is the judiciary political? Or if so, in what way? Why do other branches obey rulings?

- Dahl (through Linda Greenhouse)

Debate: Is JR democratic?

Section notes:

Where does JR authority come from?

- Article III (the constitution)? No.

- Marbury v. Madison: The Constitution is the fundamental law, (otherwise it means nothing), and "it is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.

Advantages/Disadvantages of JR:

- Fed 78:

- Judiciary the least dangerous branch. Judiciary has neither force nor will, but merely judgment.
- Judges enforce the constitution as a check on the legislature, guard against "ill humors" which occasionally lead to "serious oppressions of the minor party in the community."

- Marbury v. Madison: protecting the constitution, checking the legislature.

- Bickle:

- anti-majoritarian; the court can declare unconstitutional the laws or actions of the people's representatives. the legislature cannot overturn the court's ruling.
- who consented to JR?
- legislature and voters may act more irresponsibly, knowing that there is JR
- not needed if society respects democratic theory
- **on the other hand**, judiciary better positioned to consider long-term values because not tied to the electoral marketplace
- JR acts as the voice of the constitution, preventing too much division in society
- JR provides legitimacy (its "mystic function"), helps to reassure minorities (because there exists a check on majorities, should it be needed)

- Waldron:

- Weak JR could take care of the problem that legislators may overlook issues of rights
- Outcomes are mixed; protection of minority rights often serve conservative interests
- Courts think about rights with legal reasoning, rather than approaching the issues directly. The reason-giving is artificial and distorted.
- Why do we give rights included in the Bill of Rights so much more weight than those excluded from it? Who consented to this?

Do all democracies have JR, or JR as strong as it is in the US?

No. Refer to Waldron:

Strong JR: courts can decline to apply a statute, or modify the effect of a statute

Weak JR: courts can scrutinize legislation and make suggestions, but they cannot decline to apply statutes. E.g., Great Britain and its Human Rights Act.

Is the judiciary political? Or if so, in what way?

Dahl (through Linda Greenhouse): political in the sense that it is an institution for arriving at decisions on controversial questions of national policy.

Other thoughts?

Why do other branches obey rulings?

Dahl: the main task of the court is to confer legitimacy on the fundamental policies of the successful coalition.

Examples? Affordable care act?

The implication of Dahl's statement is that the other branches should not often have to enforce a ruling that they disagree with; that the Court should not often make unpopular decisions.

But sometimes they do: *Brown v. Board of Education* (1954). So why?

Debate: Is JR democratic? [Pre-assign students to "yes" or "no" sides.]

Dahl: not a problem because it is inevitably part of the dominant national alliance; must take into account its own legitimacy. Because the court is rarely out of sync with the political majority, its exercise of its power of JR shouldn't be seen a threat to democratic theory.

Bickel:

- need some federal agency that has power to declare and apply federal law
- courts best positioned to do it (see above)

Waldron:

- no decision-procedure is perfect, but JR loses out on both outcome and process grounds
- legislature is more legitimate
- majoritarianism mitigates tyranny, because it indicates that there was at least one non-tyrannical thing about the decision: it was not made in a way that tyrannically excluded certain people from participation as equals.
- tyranny of the majority is possible. but the term should not be used simply to mark the speaker's disagreement with the outcome of a majority decision. the most fruitful way of characterizing tyranny of the majority is to say that it happens when topical minorities are aligned with decisional minorities. but we shouldn't expect this outcome to happen often... we assume that most people, and therefore most members of any given decisional majority, care about rights just as much as the members of a given decisional minority.

Quiz:

1. In lecture, Feldman said that there was a cynical view about why judicial review and its attendant focus on human rights have spread so widely around the world. In a few words, what is that view?
2. *West Virginia v. Barnette* was brought to the Court as a case about free exercise of religion. What's the argument against granting the Jehovah's Witnesses' an exception to state law on these grounds?
3. What is a key difference between strong and weak JR?