

Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court

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BOOK REVIEW

JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS by
Jesse H. Choper. Chicago, Illinois: The University of Chicago Press, 1980.
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*Ray J. Grzebielski**

President Truman described his job thus: "I sit here all day trying to persuade people to do things they ought to have sense enough to do without my persuading them That's all the powers of the President amount to."¹ President Truman, no shrinking violet in the exercise of the powers of his office, did not describe his authority in terms of his constitutional powers. Similarly, in his analysis of presidential powers,² Richard Neustadt focused not on the formidable official powers granted the chief executive by the Constitution or by statute, but rather on the use of influence and the limitations of office. In some sense, when a President relies on his official powers to command, it indicates that all else has failed.³ Neustadt quite properly directed his inquiry to the actual process by which a government operates, rather than to the formal allocations of power.

In *Judicial Review and the National Political Process*,⁴ Professor Jesse Choper also analyzed the political process rather than the formal allocations of power. Based on his analysis, Choper develops three major propositions for appropriate exercise of judicial review in constitutional adjudication. Each of the three proposals—the Individual Rights Proposal, the Federalism Proposal, and the Separation of Powers Proposal—will be discussed after Choper's analysis of judicial review in the context of the political process is set forth.

Various powers and sources of authority are distributed within the federal government. On the basis of the structure established in the Constitution,

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1. R. NEUSTADT, *PRESIDENTIAL POWER* 77-78 (1976).

2. Professor Neustadt found five common factors necessary for an effective exercise of the President's power to command. It must first be clear that the President himself has spoken. Second, the President's meaning in the command must be clear. Third, the object of the President's directive must be made aware by publicity that others expect a response. Fourth, the recipient of the order must have the means to carry out the command. Finally, the perception must exist that what the President wants is right, his claim legitimate.

The effectiveness of Supreme Court rulings on the constitutionality of statutes must depend on similar factors. Since orders are not self-executing, the decision on when to adjudicate constitutional claims must consider the political environment in which the Court exists. Professor Choper's analysis of the appropriate times for the exercise of judicial review follows Professor Neustadt's approach to analysis of power.

3. *Id.* at 95.

4. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980) [hereinafter cited as CHOPER].

judicial review appears to be an undemocratic feature in a democratic system. For example, both the President and members of Congress must regularly submit to the decisions of voters. Judges, however, are appointed by the President, with the advice and consent of the Senate, to lifetime terms during good behavior. Although jurists are not required to have their mandates extended by the people, they have the authority to rule unconstitutional, and thereby render void, acts of the elected branches of government. In this sense, the exercise of judicial review clearly runs counter to democratic tradition which teaches that choices should be made by the people or their elected representatives.

Professor Choper does not conclude that the judiciary is the least democratic branch of government by simply focusing on the formal distribution of powers. This approach essentially treats the three branches of government as monoliths operating only through the formally granted powers of government.⁵ A different, more functional approach is used by Professor Choper to explain why the judiciary is the least democratic branch of government.⁶ Professor Choper recognizes that neither the Congress nor the executive branch is without its undemocratic elements, and that the courts are not entirely immune to changes in the political climate.⁷

Although all the members of Congress are elected by the people, there are various undemocratic practices in effect. The first, and most obvious, is that the Senate is composed of two members from each state, regardless of population differences between states. The structural consequences of this constitutional mandate is that a voting majority may consist of members representing not more than fifteen percent of the nation's population and, at that, elected by only half of those.⁸ Other aspects of the legislative process are also antimajoritarian.⁹ For example, a minority of the Senate can frustrate the wishes of the majority through the filibuster. Moreover, the independent congressional committees and their chairmen effectively make decisions for the entire Congress.

Despite these antimajoritarian aspects, Choper believes that the Congress is essentially democratic. He first relies on empirical studies which tend to show that members of Congress conduct themselves to accommodate the

5. See G. ALLISON, *THE ESSENCE OF DECISION* (1971). Professor Allison analyzed the Cuban Missile Crisis from three perspectives; one viewing the Soviet and American governments as monoliths with single minds and voices; another as governments composed of competing organizations such as the Defense and State Departments, each with separate parochial views; and a third on the basis of the personal politics of individual actors. The analysis of the crisis varies with the perspective. Professor Choper views the American political process largely through the lens of the second model, where interests are represented by agencies and organizations.

6. CHOPER, *supra* note 4, at 4-59.

7. For a discussion of the extent that the executive derives its authority from elsewhere, see Professor Choper's Separation of Powers Proposal. *Id.* at 260-379. Choper limits his discussion of the political process to Congress since the executive either acts pursuant to statutory authority or in response to Congressional political pressure. See text accompanying notes 32-35, *infra*.

8. *Id.* at 16-17.

9. *Id.* at 16-24.

wishes of their constituents.¹⁰ Without regard to how citizens actually vote, legislators act with the belief that voters will consider their voting records at election time. In addition, the undemocratic aspects of the legislature may protect minorities from majority tyranny. The antimajoritarian features of Congress tend to restrict passage of laws. The end product of the legislative scheme is more likely to be the result of consensus and less likely to be particularly harmful to represented minority interests.¹¹

Professor Choper contrasts the legislative process with the limited democratic accountability of the judiciary.¹² Impeachment of judges is a long, cumbersome process, not properly invoked for mere disagreement with judicial philosophy. Budget controls over judicial staffs and salaries are rarely able to be so finely drafted or pointed in effect that court decisions in troublesome areas can be met directly. Control over appellate jurisdiction is not without constitutional difficulty. Divestiture of Supreme Court jurisdiction or total federal court jurisdiction will give rise to varying interpretations of the Constitution among the fifty states; not an administratively appealing outcome. Constitutional amendment is also a long and difficult process. History teaches that proposing a change in the composition of the Supreme Court has been political dynamite in this century.

Professor Choper concludes that, although these political processes can influence the judiciary, the judiciary, when compared to the structure and operation of the legislature and the executive, is the least democratic of the three branches. There is little direct political control over the judiciary. This institutional feature of antimajoritarianism provides one reason for cautious exercise of the powers of judicial review.

Another institutional reason for limited exercise of judicial review upon which Professor Choper dwells is that the political capital of the courts is limited and should be spent only in the areas in which it is institutionally necessary.¹³ The risks to the Court for wasteful or inappropriate spending of

10. *Id.* at 29-38.

11. *Id.* at 38-47. Professor Choper's review of the undemocratic features of the legislative process creates the impression that, merely because these processes are antimajoritarian, they are bad. He views with favor the moves to diminish the strength of these features such as the weakening of the authority of committee chairmen and political parties. This part of Choper's analysis is unnecessary to his conclusions. The essential point is that Congress in operation is not able to abuse minorities regularly. But effective government may require organizational features which are undemocratic. The size of each body of the Congress probably requires some such features. Four hundred thirty-five members of the House going their own way can result in anarchy. A more "democratic" approach may mean no government whatsoever.

Garry Wills recently has maintained that the three writers of *The Federalist*, Alexander Hamilton, James Madison, and John Jay, did not view the Constitution as directed towards participation. Instead, elected representatives, by removal from specific instructions from the people on specific issues, could act for the good of all and not for factions. The lack of direct democratic participation is desirable for good government. See generally G. WILLS, *EXPLAINING AMERICA* (1981).

12. *CHOPER*, *supra* note 4, at 47-55.

13. See *id.* at 129-70. But see J. ELY, *DEMOCRACY AND DISTRUST* 47-48 (1980). Professor Ely takes the position that, since the exercise of power begets power, the argument that courts should conserve institutional capital is essentially false.

this capital are manifold. One clear risk is to the Court's credibility if it makes a decision as wrong as in the *Dred Scott* case.¹⁴ The repair of the damage to the Court's reputation caused by that case took decades.¹⁵ Another risk is the invitation for the imposition of blunt political controls, such as limiting the Court's jurisdiction, which will hamper drastically the work of the judiciary.¹⁶

In addition, there is what Professor Choper calls the phenomenon of the progressive transference of antagonism, by which the public will gradually develop a strong reaction against all of the Court's decisions if the decisions often run counter to majority sentiment.¹⁷ This antagonism builds pressure for the exercise of political controls over the Court or simply results in the ignoring of the Court's mandates. To preserve its influence, the Court should only decide constitutional issues when it is uniquely qualified to bring something to the process, when the political process has failed, and when the Court's action may make a difference.

Against this background, Professor Choper develops three proposals for the proper exercise of judicial review, which he labels the Individual Rights Proposal, the Federalism Proposal, and the Separation of Powers Proposal. Professor Choper's Individual Rights Proposal is based on his belief that the core function of the judiciary in constitutional adjudication is to protect the rights of individuals. He reaches this conclusion by analyzing the Court in our system of government and by relying on empirical studies. He tries to demonstrate that the Court's contributions in this area have been positive.

Whatever may have been the original intentions of the Framers regarding the desirability of judicial review, it is a fact of life.¹⁸ The insulation of the courts from the political process, precisely that feature which makes the judicial system the least democratic of the three branches, places the courts in the best position to withstand the pressures of the moment and thus to protect minorities from the excesses of the majority. Professor Choper contends that this function is the central one of judicial review and, as will be seen, almost the only function in the area of constitutional adjudication which he concedes to the courts.

Professor Choper finds that the historical record supports this proposal even though the data are difficult to interpret. Although the political insulation with which the Court is endowed cannot prevent individual jurists from mirroring the stresses of the time, nor can the courts stand alone for long against popular, repressive action of the other two branches of government, the judiciary can make positive contributions to individual freedoms. Professor Choper finds that although there may be judicial retrenchment on human rights issues at times, there is more liberty after a limitation than before.

For example, the Burger Court has vacillated on the constitutionality of capital punishment. The Court first ruled that capital punishment as applied

14. 60 U.S. 393 (1857).

15. CHOPER, *supra* note 4, at 156-57.

16. *Id.* at 157.

17. *Id.* at 158-60.

18. *Id.* at 63.

through most state statutes was unconstitutional.¹⁹ Upon re-examination of the amended state statutes, however, the Court upheld those statutes that permitted capital punishment with proper jury guidance and after full consideration of mitigating factors.²⁰ Among other cases, Professor Choper uses this example to show that the effect of the Court's decisions has been to increase the scope of personal freedoms. Re-examination of the statutes has resulted in a ruling that the imposition of the death penalty for the rape of an adult woman is unconstitutional.²¹ Choper believes these limitations may have resulted in a smaller scope for capital punishment.²² The example, however, only weakly supports Choper's proposition. It is not clear whether in all capital cases the incidence of the imposition of the death penalty is less. To the extent the judge may fully consider all mitigating factors, the sentence is difficult to review closely due to the discretion accorded the sentencer. At best, some lives were saved while the Court vacillated. The net result is not clearly an increase in personal freedoms. Perhaps the Court can make a useful contribution to personal freedoms, but the historical data remain inconclusive.

Interestingly enough, Professor Choper provides no prescription of standards or methods for judicial review to ensure the protection of individual rights. He merely concludes that this area is a proper one for the exercise of judicial authority and maintains that the implementation of the proposal is beyond the scope of his book. Although this gap makes it difficult to accept his proposals as a whole, it does provide a focus for further work to flesh out the full theoretical underpinnings of judicial review.

But more importantly, since a major premise of Professor Choper's analysis is that judicial review should only be employed cautiously to preserve judicial capital, the area where that power to review is to be exercised is precisely the one where, at least today, political capital is most easily spent. The kinds of issues which the Court will still decide—race, abortion, rights of criminal defendants, to name but a few—are high in emotional content. The various complaints against the Warren Court, for example, were due in large measure to decisions in these areas. To limit the scope of judicial review to individual rights probably fosters greater political risks and dangers to the judicial system than a wider ranging scope for judicial review.

Professor Choper justifies this burden on the Court, knowing that the Court cannot decide cases only after assessing their political impact, once it is determined that the exercise of judicial review is essential. The courts cannot premise decisions on predictions of how the decisions will be received.²³ These arguments, however, are used to justify contrary results in the recommendations Professor Choper makes in support of his Federalism and Separation of Powers Proposals.

19. *Furman v. Georgia*, 408 U.S. 238 (1972).

20. *Lockett v. Ohio*, 438 U.S. 586 (1978).

21. *Coker v. Georgia*, 433 U.S. 584 (1977).

22. CHOPER, *supra* note 4, at 113-15.

23. *Id.* at 123-27.

Professor Choper's Federalism Proposal concerns the courts' determination of the scope of national power vis-à-vis the states. He proposes that courts should deem these issues nonjusticiable and decline to decide the merits of the claims. This proposal rests on several considerations. The accepted construction of the scope of federal powers, such as the congressional power to regulate interstate commerce, is so elastic that almost all regulations which can be statutorily enacted are within the scope of the power.²⁴ This full political power has rarely, if ever, been employed.²⁵

The primary reason for this circumspection appears to be that the interests of the states are adequately represented in the political process and no special consideration need be given to them. The Senate, by its very composition, considers states' interests²⁶ and the state delegations in the House of Representatives often unite to represent the interest of their respective states.²⁷ Due to the political powers of state parties, Presidents will recognize state interests.²⁸ There also is an effective intergovernmental lobby which assures that the concerns of states and cities are considered in the political process.²⁹

With the political process functioning, there is no need for the exercise of judicial review in this area. When an act is challenged as an abridgment of states' rights because the method chosen by Congress is improper, a decision by the courts to strike down the act will not prevent the activity. Another method may be chosen. There is no need to interpose the judicial power when the same results can be obtained by different means and the states already have an adequate voice in the political process.³⁰

Professor Choper maintains that in the unlikely event the federal government does something outrageous to destroy the states or their powers, the judiciary will not be able to stand alone against those pressures.³¹ Even in egregious cases, Professor Choper would treat all issues of federal power vis-à-vis the states as nonjusticiable. The judiciary should not expend its political capital under those circumstances because it would be to no avail. Professor Choper, however, does not so limit the exercise of judicial review concerning individual rights, no matter what consequences may be visited on the Court.

24. Professor Choper's Federalism Proposal makes sense today since the courts have already expounded on the breadth of various constitutional provisions. In the early days of the Republic, the Court's voice on these matters was more consequential in the establishment of the powers of the federal government and, therefore, Professor Choper's proposal would carry much less force for that day. This tailoring of approach for when judicial review is appropriate to the realities of the day provides strength and dynamics to Professor Choper's methods since there is implicit a methodology to adapt judicial doctrine to differing circumstances.

25. CHOPER, *supra* note 4, at 215-17.

26. *Id.* at 176.

27. *Id.* at 177.

28. *Id.* at 179-80.

29. *Id.* at 180-81.

30. *Id.* at 217-19. Professor Choper indicates that, despite *National League of Cities v. Usery*, 426 U.S. 833 (1976), which did limit congressional power under interstate commerce to regulate state business, other means such as federal grants conditional on certain state behavior could obtain the same results.

31. CHOPER, *supra* note 4, at 222-23.

For controversies concerning the division of powers between the legislative and executive branches, Professor Choper puts forward his Separation of Powers Proposal.³² This proposal is similar to the Federalism Proposal in that the federal judiciary should deem separation of powers issues nonjusticiable and decline to decide them.

Under Choper's analysis of the political environment, the risks inherent in the Separation of Powers Proposal are minimized. One risk is that swift and arbitrary action by the executive may abridge personal freedoms.³³ The political process of compromise generally reduces these dangers. Both Congress and the electorate are provided with various powers to inhibit grabs for power by the executive, which in some circumstances may impinge on the individual rights of minorities. Congress need not resort to impeachment to force the President to compromise. In addition to other powers, Congress can sabotage a President's entire legislative program if sufficiently provoked.³⁴ Consequently, Choper maintains that the dynamics of the political process minimizes the risks if courts do not review issues relating to separation of powers.

Professor Choper also minimizes the number of cases arising under these circumstances. He notes that in almost all litigation in this area, the executive has not merely claimed a raw constitutional power to justify his actions.³⁵ Instead, the claim is usually based on some statutory enactment. Under Professor Choper's proposal, courts would retain the authority to interpret statutes on which executive claims are based.

If the executive knows, however, that a court will not decide an issue premised on the exercise of constitutional powers, the issue may be posed in that fashion. After all, under that approach Professor Choper's proposal results in a victory for the executive. Rather than promoting compromises and political accommodation, Professor Choper's proposal may escalate the conflict. The judiciary can reduce the political pressure and levels of confrontation by deciding some of these cases rather than transferring jurisdiction over this subject matter to the coordinate branches of government.

In both the Federalism and Separation of Powers Proposals, one reason for having the Court decline to decide the issue is conservation of political capital. In practice, however, the Court's role in implementing these proposals may be to accept the views of the party who in fact prevails even though the judicial approach is to decline to decide the issue. Political capital may be spent regardless of which approach is taken. Further, in a situation like that presented in the *Steel Seizure Case*,³⁶ failure of the Court to decide the case could cause greater institutional damage than an incorrect decision. Basing the exercise of judicial review on the risks to the Court's political capital is a weak reed on which to rest such radical proposals. The conse-

32. *Id.* at 260-379.

33. *Id.* at 270.

34. *Id.* at 282-314.

35. *Id.* at 324-25.

36. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

quences to the Court of its decisions in various areas are difficult, if not impossible, to determine.

Professor Choper rounds out his proposals with the recommendation that the courts be able to protect their domain by deciding the constitutionality of limitations on judicial review. This argument fits neatly with the other proposals because the Court needs this power to protect itself and to permit the branches of government to remain separated.

Of Professor Choper's three proposals, the Federalism Proposal is the most attractive. He provides impressive historical, political, and pragmatic reasons for this proposal. Even if one disagrees with his conclusions that a ruling from the Court legitimating a congressional act is an unnecessary expenditure of institutional capital and that the Court would be better served treating these issues as nonjusticiable, the result of permitting this legislation to stand is appropriate because no fundamental interests are served by the exercise of judicial review in this area.³⁷

In summary, I wish to express my admiration for the scholarly breadth and depth of Professor Choper's work. It is lucidly written and exhibits a perceptive grasp of the complexities of the American political process. Perhaps most importantly, even if one does not agree with some or all of its conclusions, the book provides a thoughtful consideration of the exercise of judicial review within our constitutional structure.

37. The exercise of judicial review over state legislation which may be contrary to the federal constitution as, for example, an undue burden on interstate commerce, stands on different ground. Congress can reverse a court decision by legislation; a constitutional amendment is unnecessary to alter results. In order to conserve the Court's political capital, Professor Choper proposes that an agency or other body be established to review state legislation so the Court could be relieved of this area of review as well. CHOPER, *supra* note 4, at 209-11. Professor Choper concedes that the Court's activity has been "generally praiseworthy." *Id.* at 209. Since that is the case, why initiate another governmental bureaucracy which is unlikely to perform better?