

## Introduction

The proper conduct of judicial review has been intensely contested over the last few decades. While the issue has a longer history, the *Roe* decision in the 1970s and the Robert Bork nomination battle in the 1980s brought the stakes into sharper focus and invigorated the debate in ways that continue to pulse today. The basic question in dispute is: When courts are asked to clarify what a regime's laws mean and, correspondingly, the kinds of actions that its laws permit and forbid, what are the primary considerations that should guide courts' reasoning? What is the proper method for judges to employ in order to understand the law correctly?

While several answers have been offered over the years, all of them suffer from fatal defects. This book seeks to learn from their missteps – as well as from their kernels of truth – in order to elaborate a portrait of objective judicial review. Its scope is somewhat broader, however. For my exploration of the question has led me to conclude that we cannot understand the proper manner of conducting judicial review without understanding the objectivity of a legal system itself. That is, the essential requirements of objectivity in judicial decision making derive from the fundamental character of objective law. For it is only within a larger legal system that the courts play their vital role. Indeed, the failure to appreciate this is one of the principal ways in which the prevalent accounts of judicial review go wrong. While few would detach their accounts of proper review entirely from the larger legal system, theorists typically give insufficient attention to what objective law truly is and work with seriously misguided conceptions of it that distort their prescriptions for objective review. Accordingly, my purpose in the book is not to chart a how-to manual that can be neatly slotted into the existing debate, perfectly symmetrical with all the sorts of prescriptions offered by the advocates of Original Understanding or Strict Construction or Popular Constitutionalism,

for instance. While my theory does offer prescriptions for judicial review, it hopes to make a deeper contribution by showing the essential requirements of objective law and, on that basis, the guidelines that are essential for objective judicial review.

Before we proceed, I should note a few qualifications about the range of the book's ambitions. First, I am speaking of U.S. law. While some of my claims about proper review will apply in other legal systems, my primary object is to understand how judicial review should be conducted in the United States and I am taking for granted a basic familiarity with this legal system's structural and philosophical rudiments. (I will directly discuss some of its philosophical underpinnings in Chapter 4, however, and will refer to them in places throughout.) Second, I am speaking primarily of constitutional law, although some of my claims will extend to questions of meaning that arise for statutory, regulatory, contract, and other law. I will not take up the question of exactly which those are, nor the possible differences in proper review in these realms. My main aim is to illuminate an objective understanding of the Constitution, since that is the foundation of the U.S. legal system and, as such, it is what governs the legal status of particular statutes, regulations, and the rest.

Finally, a couple of terminological points. I will frequently speak of "the court," which might naturally lead a reader to think that I am speaking of the U.S. Supreme Court. While that will often be the case, because I believe that the basics that characterize proper judicial review are the same for all tiers of the judiciary, I will speak interchangeably of "the court," "courts," and "the judiciary." Since the tiers stand in a hierarchy of authority, legitimate questions arise about what differences might be appropriate for judicial review at the different levels. Because I see that issue as derivative from the core issue that I tackle, however, I will not address those questions in this book. Thus, nothing more should be read into my variable use of the plural or the singular. (When I say "the court" rather than "courts," for instance, one should not suppose that I am staking a claim about proper review that is necessarily unique to the Supreme Court or that differs at lower levels of the judiciary.) I will also occasionally use "adjudication" to refer to judicial review, although "adjudication" is obviously a broader term. I do this simply for economy of phrasing. As long as these parameters are borne in mind, I do not expect that any of what follows will be unclear.

### 1. WHO CARES?

The significance of our subject is plain. To do things by law is to do them by force. The government of a given society enjoys the exclusive authority to

compel people to behave in certain ways by physical means – by guns, shackles, prisons. It may coerce compliance with its edicts. A nation's laws, in turn, establish how that unique authority may be exercised. Courts, when asked to clarify the meaning of these laws, determine whether we actually live in a law-governed society and enjoy the attendant benefits. Because of what the law is, however, courts' power should be appreciated at a deeper level. Insofar as judges articulate what the laws mean, they control how government power is used. In practice, the way in which courts interpret the law translates into how individuals are treated by the legal system.

Because the law is a potent instrument, in other words, judicial review is a potent instrument. When judges do not apply the law as they should – when their reasoning is guided by inappropriate considerations, whether deliberately or inadvertently – legal power is misused and individual rights suffer. Those are the stakes.

Not surprisingly for such a vital issue, judicial methodology hardly wants for attention. While popular interest spikes when a high court vacancy looms or a presidential election seems likely to affect the federal bench's composition, legal scholars have spilled rivers of ink in efforts to identify the appropriate contours of judicial methodology, elaborating an array of theories that include Originalism of various forms (such as Original Intent, Textualism, and Original Public Understanding), Perfectionism, Minimalism, Pragmatism, Progressive Constitutionalism, Popular Constitutionalism, Common Law Constitutionalism, Justice-Seeking Constitutionalism, and Judicial Engagement. Broadly, the alternatives typically fall into one of three camps:

- some form of Originalism, which abhors the “judicial activism” that treats the law as malleable and calls, instead, for fidelity to the original meaning of the law
- some form of Living Constitutionalism, which resists the stifling “dead hand of the past” that would freeze words' meanings to those of a particular historical period and urges, instead, that law's meaning be alive to contemporary circumstances
- Minimalism, a prescription that urges courts to rule as modestly and narrowly as possible, in ways that will leave the lightest imprint on law's practice beyond what is absolutely necessary to resolve the immediate dispute

A rare strand of agreement emerges in the growing cries of frustration with the alternatives on offer – which tends to spur the proliferation of still further entrants that often turn out to be, at root, merely more of the same.<sup>1</sup>

<sup>1</sup> Truly, it is difficult to keep track. In addition to the continuous spawning of new variations (such as “Original Methods Originalism,” lately championed by Michael Rappaport and Michael

Cambridge University Press

978-1-107-11449-4 - Judicial Review in an Objective Legal System

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None of the existing theories succeeds. My account is not a variation of Originalism or Living Constitutionalism or any of the others. I do believe that several of the leading accounts offer important individual points. Yet the overall debate is a minefield of loaded terms, false dichotomies, half-truths, and straw men (evidenced in the prevalent charges of “activism,” “legislating from the bench,” and “making law,” as well as in calls for “deference to the democratic branches,” “flexibility,” “evolving meaning,” and “balancing”). To be clear: some of these ideas do have valid applications. Courts sometimes do engage in inappropriate activism, for instance, and balancing *by an objectively proper standard* is sometimes called for. Yet all too frequently, these tropes are hurled in ways that cloak invalid assumptions and thus obscure rather than illuminate. The climate of debate is thick with suspicion of ulterior ideological agendas, as many participants seem spring-loaded to read opponents’ words in their least tenable light.

The reason is not that all the parties are either fools or knaves. Objective adjudication is difficult, thanks to the abstractness of the ideal and the complexity of many of the cases to which it must be applied. Moreover, the stakes are large and emotionally charged, which can easily distract people from exercising their most careful judgment. Yet the deeper explanation for the sterility of debate lies in theorists’ failure to consider judicial review in sufficiently fundamental terms. The proper manner of conducting judicial review depends on the function of judicial review; that, in turn, depends on the function of the legal system itself. Further, precisely because they do not confront the basic function and the basic authority of a legal system, many theories harbor misguided assumptions concerning the legitimate place of value considerations in judicial review. And while nearly everyone in the debate agrees that courts’ primary responsibility is to objectively maintain the law of the land, their accounts of how to do that are distorted by misconceptions of what objectivity *is*.

In order to explain the foundations that are necessary to understand proper judicial review, therefore, this book examines the essential nature of objectivity and the specific ways that objectivity should guide a legal system. My account pays particular attention to the authority of law. For without a firm grip on a legal system’s authority, we cannot understand what legitimately qualifies as the law that judges (and other interpreters) are to be faithful *to*. It

McGinness, *Originalism and the Good Constitution*, Cambridge, MA: Harvard University Press, 2013), several of these schools go by various names and portions of some overlap with portions of others. All of this makes an accurate, up-to-date catalog elusive. For a few helpful, if inevitably incomplete, taxonomies, see Sotirios Barber and James Fleming, *Constitutional Interpretation: The Basic Questions*, New York: Oxford University Press, 2007, p. 64; and Philip Bobbitt, *Constitutional Fate*, New York: Oxford University Press, 1982, pp. 3–7.

is only when informed by a sound understanding of all of these, we will see, that we can appreciate what objectivity in judicial review demands.<sup>2</sup>

## 2. DISTINCTIVE PERSPECTIVE

My approach makes several distinctive claims. Foremost, I argue that an understanding of objective judicial review requires a thorough understanding of objectivity itself as well as of objectivity's particular demands of a legal system. Judicial review is but one significant activity within a larger legal system whose parts are designed to work in tandem to perform a specific task. As a single component of a coordinated enterprise, the proper exercise of judicial review is determined by its role in serving that mission. Prescriptions for judicial review, accordingly, can only be evaluated in that context – by reference to the fundamental principles of a proper, larger system.

Objectivity, I will argue, is not (contrary to its usual portrait) passive assent to ready-made truths. Elaborating on the insights of Ayn Rand in this sphere, I explain how objectivity consists of a specific manner of using one's mind in order to “get one's conclusions right.” It is only by achieving a particular relationship between subject and object that a person can accurately understand the aspects of reality relevant to his inquiry and can claim objective validity for his conclusions.

Further, I show how the authority of a legal system is critical both to the objectivity of that system and to objectivity in judicial review. The purpose of judicial review is to ensure governance by the law; courts police the lawfulness of a government's use of its power. Without a firm grip on what constitutes valid law, however, this would be impossible. And we cannot understand what counts as valid law (law that *should* be upheld by courts) without understanding the authority of the law. We must understand what legitimates the legal system's unique power to compel obedience to its strictures in order to know exactly how far that power extends and what constitutes its objective use.<sup>3</sup>

<sup>2</sup> While the term “objectivity” is not always featured in debates about competing methods of judicial review, the concept is virtually always implicit in claims concerning fidelity to law. Judges must follow *this* method, most theorists will argue, or this other method, in order to maintain objective law. Part of my larger thrust, in fact, is that objectivity's position in the shadows is one of the barriers that obstructs a correct understanding of judicial review. We need to confront the nature of objectivity head-on in order to appreciate its requirements for jurists. The failure to understand correctly objectivity's fundamental character and correlative requirements is largely responsible for the missteps that have marred efforts on this subject.

<sup>3</sup> In claiming that the authority of a legal system is critical to the objectivity of that system, I mean that unless the system's exercise of power is grounded in valid authority, the legal system is not objective. At the same time, a legal system would forfeit its authority if it strayed

Legal philosophy is derivative from political philosophy, I believe, and the basic framework of a proper legal system is determined by more fundamental issues addressed in that field – most pivotally, by conclusions concerning the purpose of government. I explain the moral authority of a legal system in these terms, therefore, arguing that law’s moral authority is grounded in individual rights. The only legitimate use of the kind of power that a government wields – and the only valid reason for any institution’s having such power in the first place – is its necessity to protect individual rights.

When it comes to the question of judicial review, we will see how misguided images of objectivity and misconceptions of law’s authority distort the debate. Originalists, for instance, tend to project artificial expectations of what objective law is and of what courts must do to interpret it faithfully. By underappreciating the role of judgment in an objective process, they adopt an overly rigid image of what fidelity to law actually is. Living Constitutionalists, on the other hand, tend to give too great a role to personal judgment and thereby release review from the constraints imposed by the enduring law.

### 3. OVERVIEW

The book falls into two parts. The first examines the fundamental character of objectivity in a legal system. It begins, in Chapter 1, by examining objectivity itself. Drawing from arenas in which its basic character is most readily recognized, I puncture the mystique of objectivity by breaking down the simple essentials of what objectivity consists of, why we should seek it, and what we must do in order to be objective. In doing so, I distinguish objectivity not only from its obvious alternative, subjectivism, but also from “intrinsicism,” the belief that that which is objective is simply given and capable of being known in a relatively passive, effortless way.<sup>4</sup> In truth, I argue, objectivity consists in a volitional, deliberate

from the demands of objectivity. So in this respect, the inverse is also true: the objectivity of a legal system – in its actual operation – is critical to the authority of that system. In different ways, objectivity and authority each support the other. Authority questions will be explored in depth in Chapters 4 and 5.

<sup>4</sup> This threefold distinction between objectivity, subjectivism, and intrinsicism is taken from Ayn Rand. Realists, such as Plato, who regard the referents of concepts as universals inherent in things, would exemplify the intrinsicist position, in her view, while nominalists who regard concepts’ referents as wholly products of man’s consciousness would be subjectivists. The “view from nowhere” model of objectivity associated with Thomas Nagel, among others, would be a contemporary instance of intrinsicism. Nagel, *The View from Nowhere*, New York: Oxford University Press, 1989. Rand explains the three alternatives more fully in *Introduction to Objectivist Epistemology*, ed. Harry Binswanger, New York: Penguin, 1990, 2nd edition, pp. 52–54 and 79; and, in its particular application to questions of value, in “What Is Capitalism?” in *Capitalism: The Unknown Ideal*, New York: Signet-Penguin, 1967,

method of using one's mind so as to apprehend accurately the object(s) of one's concern. It demands scrupulous adherence to relevant evidence and strictly logical inference therefrom. While this chapter delves into the characteristically difficult terrain of epistemology, it is crucial to position ourselves to understand objectivity in the law.

Chapter 2 tackles the core conditions necessary for objectivity in a legal system, arguing that three features are crucial: law's content, law's administration, and law's justification. In more colloquial terms, a legal system's propriety turns on what the system does, how it does it, and why it does it (*why*, in the sense of the authority beneath all that it does). Deviations in any one of these areas, we will see, undermine the integrity of the system and compromise its objectivity.

Chapter 3 highlights a particular implication of a legal system's objectivity that is rarely appreciated, but which is especially significant for judicial review. Nearly everyone agrees that the touchstone of judicial fidelity is the Rule of Law. That is the ideal that judges are obligated to uphold. Contrary to its prevalent portrayal, however, this ideal is not value neutral. I argue that the Rule of Law is, in fact, a moral ideal. Indeed, the reason why the law *should* be objectively upheld is that doing so serves a morally valuable end. And that end must factor into the reasoning of courts that are charged to interpret the law. Far from impeding the objectivity of judicial decision making, a clear understanding of values' role in proper law is what makes possible its objective interpretation. In practice, the insistence that judicial review should be sterilized of all traces of value only invites the influence of inappropriate values by default, since the leverage of *some* values in a legal system is inescapable.

In order to understand the justification beneath an objective legal system, Chapters 4 and 5 explore the law's authority. Chapter 4 addresses the moral authority of a legal system, explaining the basic moral premises that underwrite the legitimacy of its very enterprise. This chapter is thus somewhat different in kind from the others, addressing the questions of political philosophy that lay the foundation for the conception of proper law that my account relies upon. Specifically, this chapter grounds a legal system's warrant to coerce in the purpose of government and identifies that purpose as the protection of individual rights. It explains how the initiation of force is inimical to human life and, correspondingly, why it must be removed from human interactions. If men are to flourish while living together in society, they must be free from

pp. 21–23. Also see elaboration in Leonard Peikoff, *Objectivism: The Philosophy of Ayn Rand*, New York: Dutton, 1991, pp. 142–150, 245–247.

Cambridge University Press

978-1-107-11449-4 - Judicial Review in an Objective Legal System

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the arbitrary imposition of force. This is what authorizes the protective rule of a government.

Chapter 5 examines a system's internal legal authority, that which is properly bedrock *as law*. What should serve as the ultimate arbiter of how legal power may be used? I answer by examining the two leading candidates, common law and constitutional systems. Notwithstanding the considerable contributions that common law has offered to sound legal practices, by identifying a number of its severe shortcomings (including its overvaluing stability and confusion of wisdom with authority), I show how the sovereignty of a constitution is a superior means of fulfilling the legal system's function. Such an explicit, definitive repository of a system's ultimate authority allows that legal system to integrate its fundamental principles better, to discipline its practices more strictly to conform to those principles, to guide better everyone living under it, and, by all these means, simply to govern better – that is, to govern more consistently and more effectively in accordance with the proper principles.

Having established the defining elements of an objective legal system, the second part of the book traces the implications for judicial review. Chapter 6 critiques the leading schools of thought on proper judicial methodology. It examines Textualism, Public Understanding Originalism, Popular Constitutionalism, Perfectionism or Living Constitutionalism, and Minimalism, focusing the critique, in each case, on the ways in which these theories misconstrue either the basic nature of objectivity or the requirements of objectivity in a legal system (or both). In highly abbreviated terms: Textualism misunderstands the objective meaning of language; Public Understanding Originalism confuses objective meaning with original-ness of intended meaning; Popular Constitutionalism misconstrues the authority of the law and the role of the Constitution; Perfectionism misconstrues the relationship between the philosophy that animates the law and the law itself; and Minimalism steers courts away from the proper object of judicial review.

In Chapter 7, I present an account of objective judicial review. Drawing on the explanations of objectivity and objective law given in Part One, this chapter identifies the most basic guideposts that must steer a court, if it is to honor objective law. Using the function of judicial review as an abiding compass, I emphasize two factors as vital for proper review: unswerving focus on the law (as opposed to attention to a number of extraneous considerations that are commonly invoked); and scrupulously logical respect for the full context of the law – including its animating principles – in order to glean the meaning of any of its individual elements. I also discuss those features of personal character, intellectual and moral, that best suit a person to adhere to the regimen of objective review.



My account of proper review in Chapter 7 is premised on a wider legal system whose several parts are all basically functioning as they should. Because the proper functioning of the courts cannot be understood apart from the actions of the other branches, however, Chapter 8 considers how justices should proceed when those branches are not living up to that ideal – in other words, the situation that courts face today. Without attempting comprehensive details prescribing how judges should proceed within a flawed system, I chart the most significant measures that courts should employ if they are to begin to restore greater objectivity to our law. Principally, I argue, courts should reject the doctrine of three-tiered scrutiny that has reigned for roughly a century and revive strict scrutiny (rationally strict), across the board.<sup>5</sup> Doing so would go a great distance toward restoring valid presumptions to legal determinations of government authority. Further, judges must exert the courage that is often required to resist various ancillary pressures and to acquit the full responsibilities of their obligation to the law.

Consistent adherence to my counsel for judicial review would carry far-reaching repercussions for certain entrenched social arrangements and is thus likely to trigger concerns about unfairness in disrupting people's associated expectations. In addressing these concerns, I stress the difference between finding the law and identifying the legal remedy that is most just, in such circumstances. The practical changes necessitated by objective methodology, I argue, need not be imposed at a stroke, without warning. At the same time, it is important to appreciate that the longstanding familiarity of unjustified legal practices does not justify the maintenance of such practices.



The reason to care about the proper exercise of judicial review is the same reason to care about objectivity in a legal system: to enable that system to fulfill its function. The power of a legal system is immense. To do things by law, as we observed, is to do them by force. Thus it is equally imperative that a legal system not exceed its mandate, that it not stray beyond the specific reason for its having the power that it does. A clear understanding of what the mission and authority of a legal system are, therefore, along with an understanding of the objective exercise of its power, are prerequisites for understanding the distinct requirements of judicial review. That is what I hope to provide.

Most theories of proper review profess that their methodologies are faithful to the law. Because they have not adequately grappled with what objective law

<sup>5</sup> *US v. Carolene Products Company* 304 US at 152 (1938) is widely seen as the font of tiered scrutiny.

is, however, they are not. Only the kind of account that I offer here, I think, by virtue of its grounding in a sound understanding of objectivity – both objectivity in principle, as it applies in any sphere, and objectivity in its particular application to a legal system – truly honors the law. Consequently, this account offers a prescription for judicial review uniquely capable of delivering the value that is properly sought by a legal system, namely, the protection of individual rights.