

The Countermajoritarian Difficulty Revisited — An Examination of Bickel’s Theory of Judicial Review from Dworkin’s Perspective

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Abstract

Alexander M. Bickel is famous for his theory of judicial review, which is based on the observation that judicial power is destined to be confronted with a so-called “countermajoritarian difficulty.” Numerous discussions based on this observation have demonstrated the importance and influence of Bickel’s argument. Nevertheless, the “resolution” his theory provides seems to be far from satisfactory, especially from Ronald Dworkin’s perspective. This article thus aims to examine Bickel’s theory of judicial review in light of Dworkin’s constitutional theory. From the perspective of Dworkin’s “law as integrity,” the contradiction in Bickel’s argument results mainly from his ignorance or misunderstanding of the true meaning of principles, community, and integrity. This misunderstanding leads to a focus on the protection of majoritarian democracy, which undercuts his initial argument for the defense of “principle” or of certain enduring values. Moreover, by advancing the “majoritarian premise,” it even makes his notion of a countermajoritarian difficulty problematic. In

Dworkin's view, judicial review is in essence compatible with democracy under law as integrity, since both the principle and the safeguarding of its values are important.

Key Words: judicial review, countermajoritarian difficulty, judicial passivism, judicial activism