

Douglas Edlin

Judges and Unjust Laws: Common Law Constitutionalism and the Foundations of Judicial Review.

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Though the practice of constitutional judicial review has always been controversial, Douglas Edlin boldly asserts an even more extensive judicial power. He calls for a far broader practice of judicial review, one based not merely on the constitution but on the common law tradition, and even claims that common law review is more fundamental than constitutional review (189). Judges, he says, have a positive duty to refuse to enforce unjust laws, and the common law tradition imposes an obligation on judges not only to apply but to ‘develop’ the law ever closer towards the ideal of justice. However, it seems unlikely that this argument will convince very many people.

Edlin partly grounds the idea of common law review in what he calls a ‘conceptual’ argument based on the role of the judge in the common law tradition. It is, however, hard to see just what the argument is, or in what sense it is ‘conceptual’ rather than say traditional or customary. It seems to be based on the idea that ‘justice is what the judicial process is proceeding towards’ (120). But this is merely a truism, and hardly entails judicial review, let alone the radical judicial power that Edlin favors. It is certainly not a conceptual or logical claim; indeed, no judicial system in the world actually permits common law review. Every judicial system in the world aims at justice, but judicial review of any sort is a relative rarity (and a historically recent phenomenon).

Edlin’s other argument is based on the social consequences of judicial activism; to fail to reject unjust laws would be, he says, to legitimate injustice and perpetuate social wrongs. But there are serious problems with this claim. For it depends on a highly idealized picture of the judge who can be relied upon to ascertain when laws are unjust, and to do so more reliably than legislators can. But Edlin provides no evidence that judges have superior moral perception to anyone else, and there is plenty of evidence to the contrary. One need only think of the *Dred Scott* case, where an activist judge intervened to overturn what he thought was the great legislative injustice of denying a slaveowner the right to his property. (Oddly, Edlin cites the *Dred Scott* case as an example of judicial *inaction!* (133)). It is telling that, despite the centrality of the notion of justice in his book, Edlin never attempts to define the term. Rather, he seems simply to assume that judges will intuitively recognize it when they see it (even while legislators will often fail to do so).

Edlin’s reluctance to engage in the complexities of the philosophical debate is

nowhere better illustrated than his brief mention of Jeremy Waldron's criticism of judicial review. Waldron sensibly points out that most countries do not have judicial review, and yet there is no good evidence their societies are any less just than ours. Waldron also notes that activist judges are capable of doing as much good as harm. Edlin's reply to these important points is to dismiss them as 'needlessly complicat[ing] a simple issue' (136). But if anything is clear, however, it is that this issue is far from 'simple'. It is certainly true that democracies are prone to tyranny of the majority, and judicial review can be a useful way to protect minority rights. However, the court in *Dred Scott* in fact was purportedly protecting the rights of minority slaveholders, and for most of its history the Supreme Court was more concerned to protect property rights than minority rights. Edlin states that 'even Waldron cannot deny' that courts have on some occasions 'improved the law by excising unjust legislation' (137). This is true but quite beside the point. The issue is not whether judges have sometimes done good, but whether overall judicial review has done more good than evil, and why we should believe that the even more radical version will be even better. On these points Edlin provides no evidence at all.

The most puzzling part of Edlin's argument is his vehement insistence that his support for extraconstitutional judicial review is based on common law, and most emphatically *not* on natural law. He desperately tries to marshal evidence that early American case law sharply and clearly distinguished between common and natural law, but his evidence tends to show the very opposite: that courts referred to 'fundamental law' as including all kinds of different and barely distinguishable elements, including common and natural law, natural rights, natural justice, and the principles of the 'social compact'. Nor does Edlin himself draw any clear distinction between common and natural law, despite insisting that they are 'drastically different' (106). He refers to common law as based on 'right reason', apparently unaware that the term right reason (*recta ratio*) in fact originates in *natural law* not common law. And the fundamental principles he cites as common law principles—e.g., that no one should be a judge in his own case—in fact have their origin in natural law. It is thus hard to understand his phobia of natural law.

Apparently Edlin is concerned to avoid the controversial 'metaethics' or 'extralegal' assumptions associated with the natural law tradition. Yet he holds that judges should apply their personal moral convictions to decide if a law is unjust. Unless he means judges can arbitrarily impose their subjective moral convictions, his position would have to assume an objective morality, and hence be indistinguishable from natural law. This simply distracts from the real issue at stake: should judges engage in extra-constitutional judicial review? There is indeed a genuine debate here, about the relative merits of legal positivism versus natural law, the role of an independent judiciary, and the excesses of majoritarianism. One just wishes that Edlin had engaged more in this debate, and not merely dismissed opposing views as too obviously wrong to need discussion.

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