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### Democracy and Its Critics

Cary Coglianese

*University of Pennsylvania Carey Law School*

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DEMOCRACY AND ITS CRITICS. By *Robert A. Dahl*. New Haven: Yale University Press. 1989. Pp. viii, 397. \$29.95.

What limits, if any, should an unelected judiciary respect in a democracy? Although *Democracy and Its Critics* will not settle the perennial debate over this question, this thoughtful defense of democratic values does provide a theoretical justification for leaving public policy decisions squarely in the domain of democratically elected representatives. In this most recent of his many works, Robert Dahl<sup>1</sup> reaffirms the democratic process “as the most reliable means for protecting and advancing the good and interests of all the persons subject to collective decisions” (p. 322). He also defends democracy against what he sees as its most threatening competitor: guardianship, or the view that only a specially qualified elite can govern for the common good (p. 52). Dahl’s defense of democracy is of particular interest to the legal community since the arguments others have made to justify judicial policymaking often resemble those justifying guardianship. Time spent with *Democracy and Its Critics* will repay both the scholar and the general reader with insight into the issues of democratic theory that bear on the continual debate over the proper role of an independent judiciary in a democratic society.

Simply put, democracy means rule by the people. Dahl elaborates on this literal definition by specifying the requirements for democratic decisionmaking (pp. 108-14). For Dahl, a democratic process must make effective participation and voting equality available to all adults who are subject to the binding collective decisions of society. A democracy must also provide citizens with opportunities for understanding civic issues, as well as allow them to have control over the matters that reach the decisionmaking agenda.

Dahl builds his case for the democratic process from the fundamental notion of the intrinsic equality of all persons. Intrinsic equality, in Dahl’s view, means that the interests of all persons should be given equal consideration in making collective decisions (pp. 85-88). The best way to assure the equal consideration of interests is through a democratic process where each person is entitled to participate in collective decisionmaking. Dahl favors a strong presumption that every adult is the best judge of his or her own interests (p. 100). After all,

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1. Robert Dahl, the Sterling Professor of Political Science Emeritus at Yale University, is author of numerous books, including *A PREFACE TO DEMOCRATIC THEORY* (1956); *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961); *POLYARCHY: PARTICIPATION AND OBSERVATION* (1971); *DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL* (1982); and *DEMOCRACY, LIBERTY, AND EQUALITY* (1986). He has also authored many articles, including *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

Dahl argues, no one else has the same privileged position as I do to understand what my interests are. Moreover, historical experience shows that even if others fully understood my interests, they would not have the same incentives as I have to defend these interests in the decisionmaking process (p. 104).

The idea that the interests of all persons should be given equal consideration, when combined with the presumption that each person is the best judge of his or her own interests, leads to what Dahl calls the “Strong Principle of Equality” (pp. 31-32). This principle holds that

[a]ll members are sufficiently well qualified, taken all around, to participate in making the collective decisions binding on the association that significantly affect their good or interests. In any case, none are so definitely better qualified than the others that they should be entrusted with making the collective and binding decisions. [p. 98; italics omitted].

The necessity for democratic process follows directly from this principle. Since no person or group of persons is uniquely qualified to govern — because each person is the best judge of his or her interests — anything short of full participation will not adequately ensure the equal consideration of everyone’s interests.

The democratic process is justified, argues Dahl, because it best serves the interests of all individuals in society (p. 322). Democracy maximizes freedom by embracing basic political rights and liberties, such as free expression, and allows “persons to live under laws of their own choosing” (pp. 88-89). Political participation by the public in a democracy fosters the desirable qualities of “independence, self-reliance, and public-spiritedness,”<sup>2</sup> and it provides opportunities for individuals to develop their full capacities. Finally, because participation in collective decision making is open to all, democracy — more than any other alternative — gives citizens the opportunity to satisfy other important social, cultural, and economic interests. In Dahl’s estimation, “a democratic government provides an orderly and peaceful process by means of which a majority of citizens can induce the government to do what they most want it to do and to avoid doing what they most want it not to do” (p. 95).

Despite his conviction that democracy is the best available means of collective decisionmaking, Dahl never claims that implementing democratic ideals is easy.<sup>3</sup> He quite openly acknowledges that no nation today fully satisfies the theoretical requirements of a perfect de-

2. P. 92. Dahl notes that John Stuart Mill also made this claim over a century ago.

3. Indeed, Dahl devotes chapters 10 through 14 of *Democracy and Its Critics* to the problems presented in implementing democratic decision making. He gives particular attention to the problems associated with majority rule, including cyclic voting patterns and majority domination of minorities. See, e.g., pp. 144-52. Despite the “inevitable imperfections” (p. 177) of democracy in practice, Dahl remains convinced that no better alternative form of collective decision making exists.

mocracy (p. 117). One fundamental criticism often leveled against democracy is that in practice it can lead to unjust outcomes, especially when a majority deprives a minority of its substantive rights or interests. Dahl responds to this objection first by emphasizing that the democratic process itself requires the protection of many fundamental rights and interests, either as integral to the democratic process (such as free speech or free assembly) or as external to the democratic process but still necessary for its effective operation (such as a broad distribution of a minimum of economic and political resources) (pp. 175-76). Dahl believes that even an imperfect democratic process cannot be achieved without the commitment of the citizenry to a wide array of substantive rights, and therefore a strong commitment to democracy is the best possible means of protecting these rights. In any case, he argues, even though real world democracies may at times mistakenly infringe on substantive rights and interests, "the risk of mistake exists in all regimes in the real world, and the worst blunders of this century have been made by leaders in nondemocratic regimes" (p. 78).

Nevertheless, as Dahl concedes, the democratic process can be and has been used by majorities to deny others a variety of substantive rights and interests. These include those fundamental rights and interests that are integral and necessary to democracy, as well as other interests — like economic equality or efficiency — that are valued on independent grounds. Dahl finds it inevitable that, in the real world, democratic processes will on occasion lead to the denial of some persons' fundamental rights or interests. The level to which democracies of the world today have advanced, he writes, "is far from complete judged by the criteria of the democratic process" (p. 177).

When the democratic process is used to deprive others of their fundamental rights or interests, many "American lawyers typically assume that the solution must include a supreme court with the authority to strike down national legislation that violates fundamental rights and interests." (p. 192). The standard argument advanced is that an independent and unelected judiciary serves as a countermajoritarian check on democratic decision making via its authority to declare legislation unconstitutional. Although Dahl concedes that nonmajoritarian arrangements, including judicial review, do not necessarily violate the requirements for democracy, he does caution against relying on judicial review as a correction for failures in the democratic process. When fundamental rights and interests in a democracy are protected by judges who are not democratically accountable, the result, according to Dahl, is a form of quasi guardianship (pp. 187-88). And quasi guardianship faces the same objection that pure guardianship does, namely that when it comes to making moral judgments or balancing between competing values, judges (like any other guardians) simply do not have privileged claims to absolute knowledge.

Moreover, Dahl presents four additional arguments against relying on judicial guardianship (pp. 188-91). First, he argues that judicial guardianship is simply not necessary to correct failures in the democratic process. After all, no other country has as expansive a judicial review power as the United States, and a number of democratic countries have no judicial review at all. According to Dahl, it simply cannot be said that fundamental rights and interests are less protected in these other countries than they are in the United States (pp. 188-89). Furthermore, Dahl identifies other ways to prevent or alleviate problems in the democratic process without resorting to guardianship: for example, changing the size of the citizenry so that minority rights and interests may be protected; establishing safeguards in voting, election, or legislative procedures (such as by creating bicameral legislatures or requiring majorities of two thirds); and relying on public opinion to evolve (as historically it has on many issues) to the point where particular minority rights and interests are ultimately vindicated (pp. 184-87).

Second, Dahl makes the obvious point that judicial guardianship encroaches on the democratic process. "The broader the scope of the rights and interests the quasiguardians are authorized to protect, the more they must take on the functions of making law and policy" (p. 189). Judicial review takes some matters out of the domain of democratic decision making. Consequently, the more a nation relies on judicial review, the less it can utilize the democratic process.

Third, Dahl maintains that the more judicial guardianship encroaches on the democratic process, the less need democratic representatives may see to exercise self-restraint: "Quasi guardianship may therefore require less self-restraint on the part of the [citizenry] and its representatives and more externally imposed restraint by judicial guardians. Over time, the political culture may come to incorporate the expectation that the judicial guardians can be counted on to fend off violations of fundamental rights. . ." (p. 189). In other words, the problems of quasi guardianship may become self-perpetuating, as the public comes to rely on unelected judges for protection of rights and interests rather than on the democratic process.

Finally, Dahl reminds us that judicial guardians have not always stood steadfast in the protection of fundamental rights.<sup>4</sup> "The reputation of the U.S. Supreme Court [for protecting rights]," Dahl observes, "rests mainly on a period of judicial activism beginning in 1954 when

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4. P. 189. Although Dahl does not discuss specific cases, *Korematsu v. United States*, 323 U.S. 214 (1944), undoubtedly provides the twentieth-century American paradigm of judicial failure to protect minority rights. The vindication of minority rights in this instance has come not from the Supreme Court, but from the evolution of public opinion recognizing the wrongfulness of the internment and from action (albeit belated) by the majoritarian branches compensating those who were injured. See Civil Liberties Act of 1988, 50 U.S.C.A. app. §§ 1989-1989b (West Supp. 1989).

the Court was presided over by Chief Justice Earl Warren” (pp. 189-90). Dahl would undoubtedly agree that the changing composition of the Court during the Reagan-Bush years may well detract from the attractiveness of judicial guardianship in the eyes of many observers. As Dahl notes, “[I]t is striking how much attitudes toward the power of the Court during any given period depend on whether the Court’s decisions fit the ideological perspective of the observer” (p. 358 n.5).

Despite these problems with judicial guardianship, Dahl concedes that such guardianship can be reconciled with democratic process, but only “if the authority of the judicial guardians is sufficiently restricted” (p. 190). The authority of the judicial guardian to protect rights integral to the democratic process, he states, is consistent with democracy: “The criteria for the democratic process do not specify how the process itself is to be maintained. For a court to strike down laws that violate the criteria themselves would surely not be inconsistent with those criteria” (p. 191).

However, when it comes to allowing judicial guardians to have authority over interests that are not essential to the democratic process, Dahl finds the conflict “irreconcilable” (p. 191). Decisions about advancing or balancing substantive interests, he argues, are policy decisions and should be made through the democratic process. “Once the rights and other interests necessary to the democratic process have been effectively secured, then the more the quasi guardians extend their authority to substantive questions, the more they reduce the scope of the democratic process” (p. 191).

Dahl’s theory leads to a way of reconciling a limited form of judicial guardianship with democracy, but it rejects any broad form of judicial policymaking. In this respect, Dahl’s political theory provides a foundation for a theory of judicial review similar to that found in John Hart Ely’s *Democracy and Distrust*,<sup>5</sup> a work which Dahl himself cites (pp. 191, 359 n.9). Judicial review is justified when it is properly used to maintain the democratic process; it is not justified as a substitute for a democratic policymaking process. Thus, giving the judiciary the authority to strike down laws that violate rights of free speech or free assembly does not necessarily contravene the democratic ideal. However, permitting unelected judges to make substantive policy decisions under the guise of constitutional or statutory interpretation clearly raises serious problems for democratic theory.

In recent decades, a noticeable trend has developed in which unelected judges have adopted such an active role, and have taken to setting — and at times administering — public policy.<sup>6</sup> Interest

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5. J. ELY, *DEMOCRACY AND DISTRUST* (1980).

6. See, e.g., D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 19 (1977); *COUNCIL ON THE ROLE OF COURTS, THE ROLE OF COURTS IN AMERICAN SOCIETY* 19 (J. Lieberman ed. 1984). Perhaps one of the clearest examples of a judge establishing public policy can be found in Sierra

groups have discovered the courts as an alternative forum for policymaking when they lose their battles in the legislature.<sup>7</sup> And some observers apparently even think that judicial policymaking is justified precisely because of the inability of the democratic political process to achieve certain substantive results.<sup>8</sup>

In *Democracy and Its Critics*, Dahl responds to the danger that this trend toward judicial guardianship poses for democracy. He brilliantly defends democracy against its critics, including those who would have judges play the active role of guardians in our society. Lawyers and legal scholars will benefit from the theoretical context this book brings to the debate over judicial policymaking, and the reader will appreciate the clarity and thoroughness of Dahl's entire argument. In the end, *Democracy and Its Critics* reminds us that, although democratic regimes have been far from perfect, they are nevertheless the best available form of collective decision making.

— Cary Coglianese

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Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972). In this case, the district court judge required the Environmental Protection Agency to develop what turned out to be a large, cumbersome, and detailed program to prevent the significant deterioration of air quality in areas of the country with pristine air. The judge found nothing in the operative text of the Clean Air Act that would justify his policy choice, but claimed that the program was required mainly because the purpose of the Act, as stated in the preamble, was to "protect and enhance" air quality. 344 F. Supp. at 255.

Some of the clearest examples of judges administering public policy can be found in *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala.), *enforced*, 344 F. Supp. 387 (M.D. Ala.), *modified sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1972) (state mental health facilities), and *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *affd. and remanded sub nom.* *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *revd. in part per curiam sub nom.* *Alabama v. Pugh*, 438 U.S. 781 (1978) (state prisons). In both of these cases, the district court judge assumed an active role in managing state institutions by issuing decrees that imposed painstakingly detailed standards on the operation of the institutions.

7. See, e.g., H. JACOB, *JUSTICE IN AMERICA* (4th ed. 1984). As Herbert Jacob has commented:

The fact that courts make policy conditions the political process in the United States. It opens another avenue for seeking favorable decisions for those who are unsuccessful with the legislature or executive. If a group fails to capture or hold a legislative majority, and if it fails to elect its candidate as chief executive of the state or nation, it may nevertheless seek to alter public policy through litigation.

*Id.* at 45; see also L. FISHER, *CONSTITUTIONAL DIALOGUES* 20-24 (1988); M. KLEIN, *LAW, COURTS, AND POLICY* 158-59 (1984).

8. See, e.g., R. MELNICK, *REGULATION AND THE COURTS* 69 (1983) ("Some writers have suggested another Constitution-based rationale for judicial activism, that courts should correct 'political failure.' According to this argument the judiciary has an obligation to counterbalance the political biases of Congress and the executive branch."); Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1313 (1976) ("[T]he growth of judicial power has been, in large part, a function of the failure of other agencies to respond to the groups that have been able to mobilize considerable political resources and energy."); Cramton, *Judicial Law Making and Administration*, 36 PUB. ADMIN. REV. 551, 554 (1976) ("Nature abhors a vacuum and the inaction of the executive and lawmaking branches creates pressures for judicial action. . . . Judicial activism, it appears, has the approval of the intellectual elite who have become disillusioned with the effectiveness of social change by other means.").