

**DEMOCRACY, LAW, JUDGES AND SOLITUDE— SOME REFLECTIONS FROM WALDEN
AND THE LAKE ISLE OF INNISFREE**

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ABSTRACT:

The paper reflects upon Henry David Thoreau’s *Walden*; or, *Life in the Woods* and W.B. Yeats’s *The Lake Isle of Innisfree*. It aims at suggesting that the image of solitude and insulation pervading both works of literature functions as a good metaphor for the paradigm of judicial reasoning which is dominant among legal scholars, particularly among those who champion a prominent role of the judiciary in the interpretation of constitutional norms, as well as a control exercised by judges on other branches of government. This last assertion works as a methodological constraint for the paper, as I shall only be concerned with the way in which judges perform their duties in polities where judicial supremacy is the norm, i.e., where judges hold the final word in the interpretation of a constitution.

This paper focuses on a question familiar to most legal theorists who engage with political theory or political philosophy. The question is basically one about the reasons one could provide to justify an institutional practice which places a great amount of power in the judiciary, giving it the faculty of what champions of popular constitutionalism have referred to as “having the final word” in constitutional interpretation (Tushnet, 1999; Kramer, 2004; 2004; 2007; Donnelly, 2012).

This political problem must be analytically specified by distinguishing two different phenomena raised by the question of “the final word”. The first of these categories is traditionally known as *judicial review* of legislation, which in the words of Keith Whittington “refers to the authority of a court, in the context of deciding a particular case, to refuse to give force to an act of another governmental institution on the grounds that such an act is contrary to the requirements of the Constitution” (Whittington, 2007, p. 7). The doctrine of judicial review was most famously depicted by John Marshall in his 1803 decision *Marbury vs Madison* where he claimed that

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the court must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the essence of judicial duty.

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they may both apply¹

The notion is quite clear, and it puts emphasis on the idea that the judiciary – just as any other institution – is bound by the constitution and, to the extent that there is a normative conflict between legal sources, that it is the one with the highest hierarchy must prevail, in this case, the constitution. Not doing so would imply, in Marshall’s own words, that “written constitutions [be] absurd attempts on the part of the people to limit a power in its own nature illimitable”.

However, this thesis does not imply in itself granting judges a privileged role or position with respect to other organs of the state, at least not in the way the doctrine of judicial review has pervaded political practice thorough the 20th century, which is closer to a second concept or model, labeled as *judicial supremacy*. The difference was already clear to Thomas Jefferson who in a letter to Spencer Roane noticed that his understanding of the institutional dialogue as framed by the constitution was one in which

“each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the constitution in the cases submitted to its action; and especially, where it is to act ultimately and without appeal” (1819; 2008, pp. 134-135)

In the same vein, Madison begged to know

upon what principle it can be contented that any one department draws from the constitution greater powers than another, in marking out the limits of the powers of the several departments. The constitution is the charter of the people to the

¹ Likewise, Hamilton, 1948, p. 398.

government; it specifies certain powers as absolutely granted, and marks out the departments to exercise them. If the constitutional boundary of either be brought into question, I do not see that any one of these independent departments has more right than another to declare their sentiments on that point (Madison, 1789)²

These contentions by both *framers* suggest that judicial review should be distinguished from the different category of *judicial supremacy*. In such model courts' decisions do not limit themselves to settle a specific case, but also that the meaning they give to the constitutional provisions they apply to decide binds other political agents authoritatively towards the future (Hirschl, 2004). The theory 'culminates in the extreme position that (a) there is no constitutional problem that cannot be solved by the courts and (b) no constitutional problem is truly solved until is solved by a court' (Tomkins, 2010, p. 3).

Two different elements of both accounts are important: one *intrinsic* to judicial decision-making, and another *extrinsic*, and both have to do with the effects of the judicial decision. The intrinsic element of the decision relates to its *inter pares* effects, that is, to the fact that the decision generates rights and obligations for the litigants in a concrete case and for no one else, for a judge could refuse to give force to (say) an act of the legislature because she considered it unconstitutional in that specific case. Judicial review does not exclude this possibility. However in a model of judicial supremacy, judicial decisions include an extrinsic feature, in the sense that they generate obligations for other institutions which are not derived from the concrete case at hand, — e.g. “the court finds this person to be guilty”, or “the court considers this contract to be void”, etc. — but from abstract and general considerations regarding the *meaning* of constitutional clauses and from the *reasoning* employed by the court — e.g. “the clause of the constitution that guarantees the protection of the right to life does not include a permission to congress to ban abortion” —. This extrinsic element explains the position of courts in the interpretation of the constitution. Thus defined, judicial supremacy involves the determination of constitutional meaning together with the imposition of obligations on other governmental agents and citizens, resulting from that interpretive process.

² The same idea is reaffirmed in Helvidius I (August 24, 1793) JAMES MADISON, REPÚBLICA Y LIBERTAD 119-129 [Liberty and Republic], (Jaime Muñoz ed., 2005).

Now, provided that there are different arguments in favour and against judicial review and judicial supremacy, in this paper I will sidestep a general overview of those arguments and instead focus on one of them, to wit, the contention that judicial supremacy is a desirable thing given the judiciary's insulation from politics – call this, the *insulation argument*. To do so, I will rely on two literary works, namely W.B. Yeat's *The Lake Isle of Innisfree* and H.D. Thoreau's *Walden; or, Life in the Woods*, in order to assess why these author's eagerness of being isolated from the world in order to reach knowledge, cannot be transported into the political and legal domain. In a nutshell, my claim is that in law as well as in politics, the kind of knowledge needed to solve the problems raised within the core of those disciplines, cannot and should not arise in insulation.

In its traditional form, the insulation argument is linked to the principle of the independence of the judiciary. It highlights the value of isolating courts from electoral pressure. Hamilton underscored this in the *Federalist 78* when he claimed that if the courts are to be deemed “the bulwarks of a limited constitution against legislative encroachments”, it follows that the an independent judiciary is “requisite to guard the constitution and the rights of individuals, from the effects of those ill-humours which [may] occasion dangerous innovations in the government an serious oppression of the minor party in the community” (1948, p. 400).

The insulation argument rests on the hope that this seclusion “helps generate better outcomes than would a system of legislative supremacy” (Doherty & Pevnick, 2013, p. 1). It entails that it is preferable that some decisions be made in a judicial venue because it can help better protect rights and ease distortions in the democratic process (Doherty & Pevnick, 2013, p. 2). That is to say, roughly, that the kind of knowledge necessary to decide cases of constitutional salience, where rights and liberties are involved, is not of the kind that the judiciary, because of its insulation, is able to produce. The argument needs to meet two sort of requisites in order to reach that constitutional or essential knowledge: first, it needs individuals who are willing and able to live in that isolated setting and, second, it needs the existence of the proper institutional conditions where insulation can produce those outcomes we consider to be fundamental. The consequence, once such conditions are met, is that we will be in the presence of an epistemically competent subject, fit for making decisions about constitutional essentials, placed in a higher stage with regard to other bodies of government, a sort of institutional *Innisfree* or *Walden Pond*. Let's recall Yeat's poem:

I will arise and go now, and go to Innisfree,

*And a small cabin build there, of clay and wattles made:
Nine bean-rows will I have there, a hive for the honey-bee;
And live alone in the bee-loud glade.*

*And I shall have some peace there, for peace comes dropping
slow,
Dropping from the veils of the morning to where the cricket
sings;
There midnight's all a glimmer, and noon a purple glow,
And evening full of the linnet's wings.*

*I will arise and go now, for always night and day
I hear lake water lapping with low sounds by the shore;
While I stand on the roadway, or on the pavements grey,
I hear it in the deep heart's core.*

The very first line assumes that there is an ascension from the ordinary world towards a higher place, which Yeats envisions as the lake isle of Inisfree. For what he does when he imagines himself living in that place is *arising*, moving from an ordinary setting, i.e., the city, where noise, tumults, vain and trivial talk that impede a person from reaching philosophical and aesthetical knowledge, to one where that knowledge is possible to be attained. Indeed, Yeats's desire to move from the city to the country side, where the lake isle of Inisfree is located, is a sign of ascending to a morally and epistemically superior place - "I will arise and go now and go to Inisfree" - after which he proceeds to build those epistemic conditions - "and a small cabin build there, of clay and wattles made — nine bean-rows will I have there, a hive for the honey bee — and live alone in the bee loud glade". The insulation provoked by the solitude longed by Yeats puts him in a position where no noises are heard but those of what's essential for a life of contemplation.

Let's move now to the main influence Yeats had when he wrote this poem, namely Thoreau's *Walden*. In this work, he also praised the advantages of living in this sort of setting, in a place where contemplation and (relative) insulation from the city where possible:

Let us consider for a moment what most of the trouble and anxiety which I have referred to is about, and how much it is necessary that we be troubled, or, at least, careful. It would be of some advantage to live a primitive and frontier life, though in the midst of an outward civilization, if only to learn what are the gross necessities of life and what methods have been taken to obtain them; or even to look over the old day-books of the merchants, to see what it was that men most commonly bought at the stores, what they stored, that is, what are the grossest groceries. For the

improvement of ages have had but little influence on the essential law of man's existence; as our skeletons, probably, are not to be distinguished from those of our ancestors (Thoreau, 1995, p. 7).

I think there are good reasons to identify this sort of reasoning with the way we usually envision the work of judges, even more especially in a setting where judicial supremacy is the norm, which takes judges to be the embodiment of the ideal procedural and deliberative conditions for making decisions involving pervasive constitutional disagreements and that, conversely, holds a discredited image of legislatures (Rawls, 1996, pp. 231-240; Habermas, 1996, pp. 240-224; Eisgruber, 2001, p. 171). Jeremy Waldron famously dedicated a book to make this claim explicit:

People have become convinced that there is something disreputable about a system in which an elected legislature, dominated by political parties and making its decisions on the basis of majority-rule, has the final word on matters of right and principle. It seems that such forum is thought unworthy of the gravest and most serious issues of human rights that a modern society conforms. The thought seems to be that the courts, with their wigs and ceremonies, their leather-bound volumes, and their relative insulation from party politics, are a more appropriate place for resolving matters of this character (1999, p. 5).

Now compare Waldron's statement with Dworkin's claim in what follows:

We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally become questions of justice. I do not call this religion or prophesy. I call it law (1981, p. 518).

Champions of the insulation argument would say that there is an additional feature of this argument which is of benefit for democratic government. They would claim that the exercise of strong judicial review can correct distortions in the democratic process. Ely famously made an analogous argument in *Democracy and Distrust*. There, he claimed that the function of the US Supreme Court is to police the processes of representation and exercise its reviewing powers when the political process excluded discrete and insular minorities, echoing the wording of the also famous footnote four of Justice Stone's *Carolene Products* decision (1980, pp. 77-78). According to this feature of the insulation argument, judges would police the democratic process in order to avoid the discrimination of those minorities during the process of decision making, deciding

without pressure from electoral politics, which was what originated the problem in the first place. Examples include legislation related to term limits, campaign finance and gerrymandering (Doherty & Pevnick, 2013, p. 2).

The key claim of the insulation argument is that there are reasons “grounded in the ideals of individual rights and democratic governance – that speak in favour of having certain kinds of policy decisions made in an environment in which actors are immersed in a legal framework and to some degree insulated from electoral pressure” (Doherty & Pevnick, 2013, p. 3).

There is, perhaps, some truth in these remarks. It may be the case that these admittedly important decisions require a deeper level of reflection, time to discuss them, willingness to hear others and – although this is more arguable – a certain level of expertise which would aid the decision maker to adopt those delicate rulings. It requires, the insulation argument goes, some peace and time to perform this duty, which explains why we have come up with an image of the judiciary as “the forum of principles” (Dworkin, 1981), as scepters of reason (Hamilton, 1948, p. 284) and the like. Legislatures and citizenries are far from living up to this ideal, as the notions we have created of them are “pervaded by imagery that presents ordinary legislative activity as deal-making, horse trading, log-rolling, interest-pandering, and pork-barreling – as anything, indeed, except principled political decision making” (Waldron, 1999, p. 2). Insulation thus provides us the possibility to cope with those deliberative vices.

Living in a small cabin, of clay and wattles made, where one shall have a peace that does not come fast through checkerboard legislation, but slow, dropping from the veils of the tranquil court-room from where reason speaks, a place where the adjudicator arises and lives unaware of the noisy world of politics; where he (yes, usually he) stands afar from those mundane things, hearing in his deep heart’s core, the enlightened reasoning of constitutional thinking. This is the aesthetical model that here seems to be followed.

My claim is that the analogy fails precisely because the insulation argument neglects one fundamental trait of democratic government: that democratic decisions are collective decisions, and such sphere of decisions should be distinguished from individual decisions and personal choices which are not binding on others. In short, the realm of democracy is the realm of collective decisions (Beetham, 1999, p. 4).

The fact that judicial decisions in contexts of judicial supremacy affect large groups of individuals jeopardizes the insulation argument. Both Thoreau and Yeats

wanted to achieve a sort of knowledge that affects no one but them, not other individuals. Likewise, in their isolation, courts lose sight of certain elements of moral discourse for the sake of respecting features that are internal to the practice of law. Put another way, the higher one goes in the hierarchical structure of judicial procedures, the more judges distract themselves from the parties affected by a certain case. Higher courts, supreme courts, or constitutional courts, when placed in a position of judicial supremacy, find themselves in a position regarding their audiences which is in tension with their functional orientation towards individual cases. On the one hand, they need to decide and settle a dispute between two individual parties. On the other, judicial supremacist schemes force courts to take into account the systemic effects of their decisions. This requires a standoff from the specific process that ignited the decision in the first place. Higher courts then become interpreters of constitutional provisions whose linguistic indeterminacy and normative abstraction have thin conversational context, for “constitutions do not form part of an ordinary conversation between parties sharing a great deal of background knowledge” (Marmor, 2014, p. 149).

In the constitutional context, where the effects of a decision extend beyond those who are parties at one specific trial, courts leave their isolation, come back to the world, and abandon Walden pond, as it were. Decisions cease being a matter of private conversation, solvable through the private language of law, and become of the interest of many other agents affected by the court’s decision. No more isolation is permissible in that context.

What follows from the recognition that courts need to leave their insulation when cases reach higher courts? In a context of judicial supremacy, two alternatives come to mind. First, the rejection of the idea of judicial supremacy as such. This would lead researchers to think of ways in which institutional dialogue can be reframed, so that courts no longer have the final word in constitutional interpretation. Settlement would then be provided by a different institution. Second, to the extent that our empirical research tells us that the rule of law is better secured when embodied in the courtroom, we should drop the insulation argument. As I have argued, the context in which courts decide at the constitutional level puts them in a position of deciding with little conversational context, in the abstract and with reference to an array of individuals who shall become recipients of their decisions. Granting this power is incompatible with a rather naïve view that sees courts as impervious to politics. More importantly, should we take this second path, we should be willing to accept a loss in democracy.

Coda

By employing a metaphor, I have attempted to show that the insulation of courts from the political process is a desideratum pervading a good number of scholarly accounts. I have also provided reasons to reject such argument when the exercise of judicial powers is made against other branches of government or against *the people themselves*, to use Madison's wording.

I believe the metaphor is a plausible and correct one. It clearly relates in aesthetic terms the virtues that legal and political theorists see in courts with the idea that knowledge is reached away from social and political pressures, without hearing others. There are good reasons to challenge this view, which are not exclusively limited to the philosophy of aesthetics or to literature. Law, as Dworkin himself argued, can be read in literary terms, that is true. What I claim, however, is that judges are not the only readers and writers of the chain-novel of law that he thinks represents the best way to understand our legal and political systems in terms of constitutional interpretation (1982).

The idea of living on the edge of the world of politics, isolated from society, safeguarding fundamental values and reaching the ideally best moral answers to hard cases is, I have suggested, a flawed conception of how justice should be distributed in a contemporary democracy. In *Walden* and in *The Lake Isle of Innisfree*, wisdom is achieved via running away from the world of others, escaping from society. Thus conceived, this process, if arguably adequate for aesthetic reflection, distorts the kind of justice imparted in a judicial setting insofar as such an account of justice implies not only wisdom of a specific kind, but knowledge of, and concern for others. Accordingly, political wisdom and political justice are better achieved in a democratic deliberative setting.

Admittedly, these lines are insufficient to cover the whole debate brought about by judicial review, judicial supremacy, the relationship of courts with other branches of the state and so forth. I am not suggesting otherwise. What I do suggest is that this is a helpful metaphorical way of understanding those categories. More research is, nonetheless necessary to explore them in their entirety.

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