

# WHAT WOULD JOHN DEWEY SAY ABOUT COURT PACKING?

In footnote 2 to the first post in this series, I noted that the American philosopher John Dewey rejects what we now call Social Contract Theory. I was taught this theory in school as an explanation of the rationality of the State, and it was reinforced when I read John Rawls' *A Theory Of Justice*. Once again I find myself unlearning a principle I never thought to question.

When I say I was taught Social Contract Theory in school I overstate. My teachers in law school occasionally mentioned it without really arguing it out or describing alternatives. I'm certainly no expert on it. This article in the Stanford Encyclopedia of Philosophy gives an overly detailed discussion of contemporary views of the theory. Here's the article I linked in the previous post from the Internet Encyclopedia of Philosophy which is more readable. As I noted, the social contract approach is dominant in political thinking.

Dewey flatly rejects this idea. I linked to one source for this in the first post. He discusses it in passing in his book *Experience and Nature* (1925). [1] Dewey discusses the nature of the mind of the individual, and illustrates it with a discussion of what he calls "social compact" theory. [2] Dewey thinks that human beings have changed as our understanding of nature and human nature have grown and changed.

The conception of the individual changed completely. No longer was the individual something complete, perfect, finished, an organized whole of parts united by the impress of a comprehensive form. What was prized as individuality was now something moving, changing, discrete, and above all initiating instead of

final. P, 271 (references are to the Kindle Edition.)

He takes up what he calls the social compact, as a way of illustrating this change. He describes it this way:

The [social compact theory] declared that [the state] existed by means of agreements between individuals who willed the institution of civil order. P. 273.

Dewey says that the originators of this idea might have thought that their forms of government came about through war, accidents, personal interests and other natural occurrences, so naturally they were corrupt and warlike. A new arrangement brought about by actual agreements and enforceable covenants would be better. Dewey agrees with one aspect of social contract theory.

... [S]ocial institutions as they exist can be bettered only through the deliberate interventions of those who free their minds from the standards of the order which obtains. The underlying fact was the perception of the possibility of a change, a change for the better, in social organization. P. 274.

Dewey says that once people became aware of this, they began to change social conditions,

Social conditions were altered so that there were both need and opportunity for inventive and planning activities, initiated by innovating thought, and carried to conclusion only as the initiating mind secured the sympathetic assent of other individuals. P. 274-5

He is careful to point out that new innovative ideas don't become reified until other

individual minds come to agreement.

The wrong part of social contract theory is that once people established a form of government, the newly created form became fixed and immutable. The wrong idea is that there is only one right form, and that once it is in place, we don't have to think about it again. Dewey thinks this idea is derived directly from social compact theory. It makes it difficult to change as time reveals new needs, new problems. It becomes a barrier to change. [3]

What does this have to do with court-packing?

Corey Robin says that the conservative movement has developed a three-legged stool to gain and hold power. He says they rely on the Electoral College, the Senate, and the courts, especially SCOTUS. Each of these is tilted grossly toward the power of the minority. They exploit these ruthlessly to control the exercise of government power. Robin calls this Gonzo Constitutionalism. That seems right.

It isn't just the Constitution, though. Over the past centuries we have evolved a set of institutions and general theories of government to flesh out Constitutional provisions. Some are simply rules of varying degrees of formality, such as Blue Slips and the filibuster, or at the state level, the convention that redistricting is done only once every ten years following the census. Others are statutory, like the SEC and the Centers for Disease Control. Still others are the result of SCOTUS decisions, like the currently disfavored idea of substantive due process. [4] Robins says that conservatives exploit these, increasing their scope or destroying them as gives them more power.

Robin concludes that the Democrats will have to recognize that the institutions and norms that got us this far are failing because the conservatives have refused to accept them, and to work within their limits. Dewey would add that the point of government is to solve collective problems faced by the public, such as

the climate crisis, the pandemic, the ugly disparities in wealth, income and life chances, and the failure to hold elites accountable for their actions. Conservatives deny that these are problems and do not offer any solutions.

Robin says that if the Democrats ever take control of government, they will have to be just as relentless in replacing failed norms as the conservatives are in destroying them. The Democrats will have to create new norms, new institutions, and new ways of understanding our democracy, all of which they will have to enforce remorselessly.

I'll just add that if Robin's solution includes court-packing, Dewey would approve. And so would I.

=====

[1] This book is difficult even by Dewey's standards. It's a sort of Pragmatist metaphysics. I have hardly scratched the surface, but this part makes sense on its own.

[2] To put this in context, I'm reading from Chapter 6 titled *Nature, Mind and The Subject*. Dewey describes the views of Plato and Aristotle concerning the nature of the individual. He concludes that they did not look at psychological states. They say that the objects in the world and the patterns they create, and the patterns humans need to recreate them, all are given by nature. The mind of the individual is an observer and learner of those objects and patterns. The artisan follows those patterns to create objects. That is as true of the maker of clay pots as it is of the philosopher looking at human society. I think this means the self is not a subject as we use the term, not exactly a self-driven agent, but simply another kind of object in the world. I could easily be wrong.

He then turns to more modern ideas of the individual.

The idea that generalization, purposes, etc., are individual mental processes did not originate until experience had

registered such a change that the functions of individualized mind were productive of objective achievements and hence capable of external observation. P. 270-1, Kindle Edition.

This is a tipping point in our development as a species.

[3] Dewey writes: "The fact that the intent of the perception was veiled and distorted by the myth of an aboriginal single and one-for-all decisive meeting of wills is instructive as an aberration...". P. 274. So much for John Rawls' Original Position. Dewey accepted the basic idea of evolution: that there is no purpose to natural evolution, no drive to some perfect state. Purpose comes from people.

[4] Another example is *Marbury v. Madison* in which the slave-holder John Marshall decided that SCOTUS was the final arbiter of questions of constitutionality. That hasn't worked out well especially in the protection of our democracy. Consider the absurd holdings in *Shelby County v. Holder* and *Citizens United v. FEC*. For serious criticism see *The Case Against The Supreme Court* by Erwin Chemerinsky.