

Judicial Review: Dworkin V Waldron

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April 15, 2015

What is Judicial Review?

Suppose that a democratically elected legislative body passes Law *L*. Suppose the majority of citizens support Law *L*. Should a court of unelected judges have the power to invalidate Law *L*?

- The court can overrule a policy, whether or not it's supported by the majority of citizens, if the policy is *unconstitutional*.
- What is it for something to be unconstitutional?
 1. *Originalism*. We should interpret the constitution in a way that is consistent with how one would have expected it to have been interpreted at the time it was written.
 2. *Moral Reading*. The constitution expresses "abstract moral requirements that can only be applied to concrete cases through fresh moral judgments." [D, 3]

If a court is granted the power to invalidate various legislative and executive acts, it is said to have the power of *judicial review*.

Is Judicial Review a good thing?

Is Judicial Review Anti-Democratic?

1. **Dworkin: *Judicial Review is not Anti-Democratic***. Not only does Judicial Review not undermine democracy, it can sometimes be more democratic.

TWO CONCEPTIONS OF DEMOCRACY.

- (a) **Majoritarianism**. "[P]olitical procedures should be designed so that, at least on important matters, the decision that is reached is the decision that a majority of or plurality of citizens favors, or would favor if it had adequate information and enough time for reflection." [D, 16]
- (b) **Constitutionalism**. The defining aim of democracy is "[T]hat the collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect." [D, 17]

"If it is true that self-government is possible only within a community that meets the **conditions of moral membership**, because only then are we entitled to refer to government by 'the people' in a powerful communal rather than barren statistical sense, we need a conception of democracy that insists that no democracy exists unless those conditions are met." [D, 24]

CONCLUSION: If the court makes the right decision, then there is no loss to democracy.

2. **Waldron: *Judicial Review is Anti-Democratic***. "There is something lost, from a democratic point of view, when an unelected and unaccountable individual or institution makes a binding decision about what democracy requires." [W, 346]
- o **Content:** The courts are making a decision *about democracy*.
 - o **Procedure:** The courts are not making a decision *made by democratic means*.

JUDICIAL REVIEW & LEGITIMACY.

- (a) There is a connection between rights and democracy.
- (b) There are some rights that are conditions on the legitimacy of majority-decision.
- (c) If there's disagreement about the conditions of democracy, appealing to the legitimacy of majority-decision to settle that disagreement is question-begging.
- (d) If appealing to the legitimacy of majority-decision to settle disagreements about the conditions of democracy is question-begging, then appealing to the legitimacy of Judicial Review is *also* question-begging.

CONCLUSION: "[T]here is always a loss to democracy when a view about the conditions of democracy is imposed by a non-democratic institution, even when the view is correct and its imposition improves democracy." [W, 355]

CONDITIONS OF MORAL MEMBERSHIP

- (a) *Structural*: "these conditions describe the character the community as a whole must have if it is to count as a genuine political community."
- (b) *Relational*: "they describe how an individual must be treated by a genuine political community in order that he or she be a moral member of that community."
 - i. You have a *part* in collective decision making.
 - ii. You have a *stake* in what happens.
 - iii. You have *independence* from it.

Suppose the people pass a law, which says "the court no longer has the power of judicial review".

If we try to adjudicate the disagreement by appealing to the fact that the law is supported by the majority, that begs the question.

But does it also beg the question to leave the issue of Judicial Review *itself* up to judicial review?