Government 10
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Handout

Readings:
Ronald Dworkin, *Freedom's Law* (Harvard UP, 1996), pp. 1-35
Jeremy Waldron, "Judicial Review and the Conditions of Democracy," *Journal of Political Philosophy* 6:4 (1998), pp. 335-355

I. Is Judicial Review (Necessarily) Anti-Democratic?

a. Dworkin

- What's involved in judicial review?
    - Courts invalidating majoritarian policy (e.g. referenda, or laws properly enacted by elected legislators and executives) as unconstitutional
    - The "moral reading": interpret and apply the Constitution's abstract clauses by bringing moral principles (e.g. about justice) to bear (p. 2)
- The argument: **judicial review doesn't *per se* involve any democratic deficit**
    - Two conceptions of democracy:
        1. **Majoritarian conception**
            - Accepts the *majoritarian premise* that "political procedures should be designed so that, at least on important matters, the decision that is reached is the decision that a majority or plurality of citizens favors, or would favor if it had adequate information and enough time for reflection" (pp. 15-16)
        2. **Constitutional conception**
            - Rejects the majoritarian premise, holding instead that democracy requires *conditions of equal status* (p. 17), i.e. genuine moral membership (pp. 24-26), for all citizens
            - Query: Does this mean that majoritarian institutions are never preferable for Dworkin?
                - No. It's just that conditions of equal status must first be met "before majoritarian decision-making can claim any automatic moral advantage over other procedures for collective decision" (p. 23).
- Judicial review doesn't automatically involve any moral cost, whether to liberty (p. 23), to equality (p. 28), or to community (p. 31).

- Moreover, judicial review often involves ***moral gain***, by promoting conditions of equal status or moral membership, as in cases like Brown v. Board of Education (1954) and Lawrence v. Texas (2003).

    - Query: What about when the Supreme Court decides cases in such a way as to *undermine* moral membership, e.g. Bowers v. Hardwick (1986)?

b. **Waldron**

- Democratic Loss Thesis (p. 346):

    - "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. If it makes the right decision, then—sure—there is something democratic to set against that loss; but that is not the same as there being no loss in the first place. On the other hand, if an institution which is elected and accountable makes the wrong decision about what democracy requires, then although there is a loss to democracy in the substance of the decision, it is not silly for citizens to comfort themselves with the thought that at least they made their *own* mistake about democracy rather than having someone else's mistake foisted upon them. Process may not be all that there is to democratic decision-making; but we should not say that, since the decision is about democracy, process is therefore irrelevant."

- Judicial review doesn't automatically involve any gain in legitimacy:

    - "[I]f an appeal to the legitimacy of majority-decision to settle a disagreement about the conditions of democracy [i.e. what Dworkin calls conditions of equal status or moral membership] is question-begging, then an appeal to the legitimacy of judicial review (or any political procedure) to settle that disagreement is *also* likely to be question-begging." (p. 354)

Where does this debate leave us? How much depends on an empirical question about the comparative advantage of judiciaries (relative to majorities) in securing and promoting the rights that are conditions of democracy?