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]

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]

- **Content**: The courts are making a decision about democracy.
- **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]