THE DEMOCRATIC NATURE OF JUDICIAL REVIEW

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ABSTRACT. This essay explores the general legitimacy of judicial review. I analyze two central figures in the debate over judicial review, Samuel Freeman and Jeremy Waldron, in order to develop a proper conception of democracy that both demonstrates the usefulness of judicial review and the dangers of its overextension. I address the notion of sovereignty and the equal basic rights that grant citizens the ability to create their own participatory democratic institutions and argue that judicial review is useful in sustaining democracy, properly conceived. Judicial review can be a useful tool to correct the reality that certain interests can pose a threat to the democratic process. I conclude by addressing the largest obstacle to the legitimacy of judicial review – the potential for judges to insert their own individual preferences into their political decision making – and determine that what makes judicial review compelling and useful simultaneously requires that it not be overused.

INTRODUCTION

Judicial review is the practice whereby the judiciary assesses decisions or statutes made by either the legislative or executive branches of government and determines their constitutionality. The practice stems back over two centuries,[1] and it is so commonplace that it is used in decisions that generate outcomes favored by varying sides of the political aisle.[2] Yet, the fact that judicial review is an established bipartisan practice does not immunize it from controversy. Proponents claim that judicial review serves as a proper check by enabling the judiciary to invalidate any unconstitutional law the legislature might pass,[3] while critics argue that its exercise can lead to the creation of *de facto* laws, and thus unelected representatives – judges – essentially legislating without being held accountable by a constituency in a democratic election.

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[1] *See Marbury v. Madison* (1803)

[2] *See Lochner v. New York* (1905); *Brown v. Board of Education* (1954)

[3]https://www.law.cornell.edu/constitution-conan/article-1/section-1/separation-of-powers-and-checks-and-balances

The claim that judicial review is anti-democratic and therefore illegitimate[4] poses a serious challenge to the legitimacy of the practice. If judicial review is anti-democratic, its exercise would undermine the very essence of our system of government. Not purely in the sense that it would violate the separation of powers that the framers deeply valued and which the state seeks to adhere to and preserve,[5] but more plainly in the sense that we live in a democracy, and if a practice is anti-democratic, it is antithetical to and undermines the legitimacy of that system of government.

By legitimate, I mean permissible. A legitimate practice is not required, nor is it necessarily useful, but it is allowed. I do not utilize a majoritarian conception of legitimacy; legitimacy is not determined by how many people approve of the practice. I specifically refer to political legitimacy in terms of a "proper conception of democracy" and the legitimacy of the state's democratic institutions. Using the social contract tradition, I argue that democracy, properly conceived, preserves the self-rule of its subjects; it maintains the conditions of legitimate self-governance and the conditions when people can rule themselves established in the state of nature. Thus, democratic institutions not only gain legitimacy from responding to the will of the majority, but also protecting the rights of the minority. A democratic system needs to respond to the rights of all people, not just the majority thereof.

This paper does not present a conception of democracy that outlines specific actions a government ought to do in order to procure legitimate arrangements. Rather, it operates from the perspective of what governments ought to do to avoid illegitimate arrangements. For instance,

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[4] "[Judicial review] is politically illegitimate, so far as democratic values are concerned" (Waldron, *The Core of the Case Against Judicial Review*, 1353)

[5] https://www.law.cornell.edu/constitution-conan/article-1/section-1/separation-of-powers-and-checks-and-balances

for individual political participation in democracy (i.e. voting) to remain politically legitimate, such participation ought not to be discouraged, which is to say that the democratic institution ought to operate in accordance with sovereign self-rule. If participation in democratic institutions is discouraged, political legitimacy is undermined because that institution violates the conditions of legitimate self-governance when people can rule themselves. If a state devolves into a state of illegitimacy, the subjects can overthrow the state – this is the so-called “right to revolution.”

In order to prevent this need for revolution, I argue that judicial review is both useful and that its application is limited. I will argue that judicial review is a permissible and useful practice that can be helpful in securing legitimate arrangements, which in turn preserves the legitimacy of the government. I argue that judicial review is useful in securing legitimate arrangements, which is to say it is not absolutely necessary. To say that it is necessary to secure rights is to give judicial review too much power. Here is where checks and balances help maintain a sense of political legitimacy. Institutions are legitimate as long as they do not exceed their bounds. For example, the judiciary should not literally write laws, but should merely interpret their practical application instead.

This paper is divided into three parts. In part one, I argue that judicial review is not antidemocratic and is therefore generally legitimate by analyzing differing conceptions of democracy. I weigh the merits of these conceptions and outline a proper conception of democracy based on an analysis of social contract theory and two prominent theorists of judicial review. I prove that the exercise of judicial review is legitimate because it does not generally undermine this properly conceived democracy. In part two, I address the special nature of judicial review that makes it useful in preserving the legitimacy of liberal democracy like the United States. In part three, I address objections to the legitimacy of judicial review and

conclude that what makes judicial review compelling and useful simultaneously necessitates that it not be overused.

In addition, the scope of my paper will be an analysis of judicial review within the American political landscape and I therefore mainly rely on Locke's social contract theory. The argument that judicial review is not a necessary or useful democratic practice because there are democratic countries that do not have judicial review and are working very well[6] is not one that I address. I discuss judicial review within the context of the United States. In other contexts, judicial review might be deemed more or less useful.

PART I

THE SOCIAL CONTRACT AND A PROPER CONCEPTION OF DEMOCRACY

In order to frame whether or not judicial review is an antidemocratic practice, I first outline a proper conception of democracy to ensure that any assessment of the democratic nature of judicial review (or lack thereof) is motivated to do so by a correct definition. I use the phrase "proper conception of democracy" to refer to a system of government whose institutions operate with the understanding that the people it is governing are sovereigns who not only have the political right to participate in democratic institutions, but the basic right to create those institutions. This paper does not outline these basic rights, but I argue that within the abstract notion of basic rights, the government of a democracy, properly conceived, ought to act with the

[6] "In countries that do not allow legislation to be invalidated in this way [judicial review], the people themselves can decide finally, by ordinary legislative procedures… They can elect representatives to deliberate and settle the issue by voting in the legislature… The quality of those debates (and similar debates in Canada, Australia, New Zealand, and elsewhere) make nonsense of the claim that legislators are incapable of addressing such issues responsibly" (Waldron, *The Core of The Case Against Judicial Review*, 1349)

understanding that if it violates this self-rule, it is not legitimate and can be replaced by a new system of institutions established by its sovereign citizens.

A proper conception of democracy should, like those of the social contract tradition, be founded upon the origin of society. As Louis Althusser puts it, philosophers of natural law and of the social contract all begin their theories by interpreting the origin of society or "the emergent state." They present differing conceptions – "rising from the earth like pumpkins" said Hobbes, "naked" said Rousseau – but use this same starting point: the state of nature.[7] Thus, addressing democratic institutions in the greater context of how they are conceived is something they all deem an integral precursor to the democratic process.

In addition, the common denominator of the social contract tradition as the origin of society generates a proper conception of democracy that closely adheres to the rights granted in this original state. Since we have rights in the state of nature, we ought to have them protected by the institutions to which we transfer those rights. As Althusser describes, the social contract replaces any facet of "nature" with "a contract between equals" that is self-made and can thus be re-made.[8] Althusser specifically notes that this contract "gives men the power to reject old institutions, to set up new ones and if need be to revoke or reform them by a new convention."[9] Again, the specific circumstances that warrant such reform and the specific means with which sovereigns are able to reestablish governance vary from philosopher to philosopher. However, since it is born out of the origin of society and the state of nature, a democracy, properly conceived, should generally preserve the self-rule of its subjects and those rights granted to citizens in the state of nature because it is in a government's best interest to do so; if these rights

[7] Althusser, *Politics and History*, 25
[8] *id.* 26
[9] *id.* 27

and conditions of self-rule are not preserved, that democracy can be legitimately overthrown and replaced.

I discuss this ability to overthrow current institutions and establish new ones that best represent its citizens in terms of the right to revolution secured by the social contract tradition. The social contract tradition outlines varying circumstances where the right to revolution justified. I use Locke's conception of the right to revolution because it is particularly relevant to our proper conception of democracy in relation to judicial review. Since Locke is often credited with influencing the preliminary revolutionary documents that led to the establishment of the United States,[10] his work is a precursor to the very concepts and document that judicial review secures: the constitution.

Locke believed that the purpose of establishing civil institutions is to protect basic rights, as the only moral powers a government has are the ones that are transferred to it by its citizens. Since the government is meant to secure our rights, it is true for Locke that there is a right to revolution when the government strays too far from protecting the basic human rights of its citizens. Specifically, Locke claims:

> "Whenever the legislators endeavor to take away, and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge, which God hath provided for all men, against force and violence. Whensoever the legislative shall transgress this fundamental rule of society; and either by

[10] https://www.history.com/topics/british-history/john-locke

ambition, fear, folly or corruption, endeavor to grasp themselves, or put into the hands of any other an absolute power over the lives, liberties, and estates of the people."[11]

Essentially, Locke believes that once citizens are stripped of the rights that "God hath provided" for them in the state of nature, that government is no longer legitimate. Once the government is illegitimate, Locke contends that it no longer can generate obligations, and its citizens have the right to revolt and replace their system of government.

What is most noteworthy about the Lockean right to revolution is not the specific circumstances that propel this right to revolution, but the justification for such a right. Locke concludes: "by this breach of trust they forfeit the power, the people had put into their hands, for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty."[12] When Locke discusses "original liberty," he not only refers to the state of nature, but to the specific right of free and equal people to establish democratic institutions to govern themselves.

Thus, a legitimate government is one that preserves the self-rule of its subjects. It averts illegitimate arrangements, such as those that undermine political participation, because it recognizes its citizens' natural right to self-governance and ability to establish new systems of government if those rights are transgressed. Illegitimacy is a condition where subjects have a right to establish new institutions. If this condition makes it more likely that subjects will revolt, a government has an interest in preserving conditions of legitimacy. Thus, in order to remain legitimate and not generate circumstances where current institutions can be destroyed for the establishment of new ones, governments should avoid illegitimate arrangements.

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[11] Locke, *Two Treatises of Government*, §. 222

[12] *id.*

TWO CENTRAL FIGURES IN JUDICIAL REVIEW

I argue that judicial review can be a useful tool in maintaining the legitimate conditions of democracy by analyzing the works of two dissenting theorists: Samuel Freeman and Jeremy Waldron. Freeman contends that judicial review is generally legitimate, while Waldron contends that it is generally illegitimate. They each rest their arguments on contrasting definitions of democracy and democratic sovereignty. In order to argue that judicial review is helpful in maintaining democracy, properly conceived, I analyze Freeman's and Waldron's individual conceptions of democracy and politics that ground each of their arguments in relation to a proper conception of democracy.

In arguing that judicial review is generally illegitimate, Waldron utilizes a conventional depiction of democracy that centers itself around its political institutions, such as representative legislatures. When Waldron places conditions on his argument that judicial review is anti-democratic, he highlights defining features of his conception of democracy. By requiring democratic institutions with "a representative legislature elected on the basis of universal adult suffrage" and judicial institutions "set up on a nonrepresentative basis to hear individual lawsuits," Waldron generates a conception of democracy that is centered around formal equal access to such institutions, otherwise known as equal political rights.[13] Securing equal political rights means that the same political abilities are granted to each citizen. For example, in electing legislators to represent them, every individual has the same stake in the process– one person, one vote. Political equality is also secured by Waldron's requirement that democratic institutions have elections on a "fair and regular basis."[14] With regular elections where every citizen can

[13] Waldron, *The Core of the Case Against Judicial Review*, 1360
[14] *id.* 1362

participate on the same scale (i.e. one vote per person), every individual has an equal opportunity for her voice to be consistently heard and represented in democratic procedures.

Freeman, on the other hand, integrates the notion of sovereignty into his conception of democracy. Freeman utilizes the philosophy of the social contract tradition to define sovereignty as a system where individuals can set up the political institutions of their choice. These philosophers assert that a democracy does not merely focus on its procedural institutions, but is "more fundamentally, a form of sovereignty, one in which free and equal persons combine and exercise their original political jurisdiction to make the constitution."[15] Freeman acknowledges that a democracy ought to not only account for equal political rights, but for the rights that initially generated those equal political rights, as well. Freeman continues: "equal rights of participation in government are an extension of the equal freedom and original political jurisdiction of sovereign democratic citizens."[16] This addition distinguishes Freeman's conception of democracy from Waldron's because it emphasizes sovereignty to secure equal basic rights in addition to the equal political rights secured by a procedural conception of democracy such as Waldron's.[17]

Equal basic rights, otherwise known as natural rights, are rights that exist for all people, in all circumstances, under all conditions. This set of rights which Freeman utilizes in his definition of democratic sovereignty were originally outlined by John Locke, who claimed that "each person has the right to do whatever she chooses with whatever she legitimately owns so long as she does not violate the rights of others not to be harmed in certain ways—by force,

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[15] Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 342
[16] *id.*
[17] "a procedural conception of democracy, according to which democracy is essentially a form of government defined by equal political rights and majority rule" (*id.* 327)

fraud, coercion, theft, or infliction of damage on person or property."[18] Since people have the right to do as they choose, they have the right to set up the government of their choice, as well. Freeman integrates this notion of choice in his emphasis on sovereignty to highlight the fact that members of a democratic sovereignty are not merely granted the political right to participate in its institutions, but the basic right to conceive of those institutions in the first place.

The differences in these conceptions of democracy underscore both Waldron's and Freeman's assessments of political participation within their respective arguments. Waldron crafts two central arguments against judicial review. Firstly, he rebuts the argument that judicial review can protect individual rights, claiming that such rights would not be any more protected by judicial review than they would be by democratic legislatures. Secondly, he contends that judicial review is democratically illegitimate since it is countermajoritarian and enables unelected officials – judges – to unilaterally void or effectively create laws.[19] In doing so, Waldron highlights a purely rights-based conceptualization of politics, explaining that when individuals participate politically (i.e. vote), they express different understandings of rights in order to make their decisions. Waldron argues that disagreement about the definition of a certain right indicates the value of that right.[20] For Waldron, so long as the members of a society display a commitment toward some conception of rights, the nuance in their respective differing conceptions of rights are irrelevant. This means that in order for a society to be democratic, people must have a shared commitment towards valuing rights more generally but need not agree on what those rights are specifically. Waldron requires that individuals in a democracy consider the interests of others when voting and conceives of political participation as a mere expression

[18] https://plato.stanford.edu/entries/egalitarianism/#LocRig
[19] Waldron, *The Core of the Case Against Judicial Review*, 1346
[20] *id.* 1367

of individuals' differing conceptions of rights. However, he does not factor in any variable other than "views of rights" into the equation of political decision-making. In other words, Waldron explains voting as an expression of an individual conception of rights but does not account for any other factor that could influence that decision. Waldron does not necessarily deny that other factors influence people's voting decisions. However, his conception of politics does not accommodate the reality that factors apart from the individual's conceptions of rights will influence people's voting patterns.

Through this pragmatic conception of democracy, Waldron arrives at his argument that judicial review is illegitimate. If the first two conditions of his argument are met, Waldron sees no need for judicial review since the legislature is just as equipped as the judiciary to procure fair decisions that adhere to and preserve individual rights. Waldron's rights-based conception of democratic politics is the base of this argument that legislatures are no less equipped than the judiciary to protect rights. Since Waldron requires that members of a democracy display a general commitment to rights and conceptualizes individual political participation as reflecting each participant's personal conception of rights, rights-based violations do not seem to arise through the democratic process. Since everyone is displaying a commitment to rights and is making individual political decisions solely on the basis of rights, Waldron sees no need for the judiciary to enforce the rights that the legislature can effectively protect on its own.

Moreover, Waldron believes that this role should be reserved to the legislature, since they are a democratically elected institution. To Waldron, deferring such a role to a non-elected body, would transgress democratic ideals. This argument that judicial review is countermajoritarian stems from Waldron's procedural conception of democracy. Waldron defines democracy as having a formal sense of equality where every individual is granted access to political

participation, including fair and regular elections where every individual vote counts equally.[21] This system emphasizes the value of the individual vote and majority rule. This is in line with his rights-based conception of politics that conceives of the legislature as being able to effectively protect rights. Judicial review would enable unelected officials – judges – to extraneously do that which Waldron believes democratically elected officials – legislative representatives – are more than capable of doing. Since Waldron only addresses equal political rights in his conception of democracy, a practice like judicial review would transgress the most basic principles of democratic society by usurping the political rights of individuals and supplementing their views with those of unelected officials. Thus, Waldron contends that judicial review is illegitimate.

Freeman, on the other hand, contends that judicial review is legitimate. By integrating equal basic rights into his conception of democratic sovereignty, Freeman addresses forms a conception of government in which sovereign people are fundamentally able to establish that government's power. Freeman explains that in a democratic sovereignty, as opposed to a mere democracy, sovereign people "have the power to create and define the nature and limits of ordinary political authority" by virtue of the legitimate decision-making powers secured by their equal basic rights.[22] With the footing of this conception of democratic sovereignty that includes equal basic rights and emphasizes the ability of sovereigns to use those rights to define authority, Freeman contends that judicial review is one of the many procedural aspects of democratic sovereignty that "free and equal sovereign persons" might agree to establish.[23] This Rawlsian argument assumes that, all things considered equal, people would agree to establishing the democratic procedure of judicial review as a protective measure to secure their equal basic

[21] *id.* 1362
[22] Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 349
[23] *id.* 353

rights. In Freeman's words, judicial review can be understood as "a shared precommitment by free and equal citizens to maintain the conditions of their sovereignty" and can thus be legitimately conceived.[24]

In making this argument, Freeman highlights a conceptualization of politics that recognizes factors beyond differing conceptions of rights that influences their decisions. Freeman speaks of democratic participation with the understanding that people have their own personal interests that can influence their political decision-making. Freeman states, "rational individuals concerned with the freedom to determine and the social conditions for the advancement of their ends have an *interest* in influencing the political processes that determine the laws significantly affecting their prospects."[25] Freeman recognizes the reality that various circumstances or preferences of individuals can affect their political decision-making.

Freeman's conception of politics as a manifestation of competing interests enhances his Rawlsian argument that judicial review could be understood as this "shared precommitment" by pointing towards evidence that would incentivize sovereigns to implement such protections. In highlighting the fact that interests can influence individual decision-making, Freeman points to a tangible threat to the equal basic rights secured by a democratic sovereignty. This threat could undermine Waldron's condition that members of a society display a commitment to rights. Waldron's definition of a commitment to rights requires that citizens acknowledge the fact "that individuals have certain interests and are entitled to certain liberties that should not be denied simply because it would be more convenient for most people to deny them."[26] In essence, it requires that individuals consider the interests of others when politically participating. Yet, it

[24] *id.* 329
[25] Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 343
[26] Waldron, *The Core of the Case Against Judicial Review*, 1364

neglects to address that individuals can simultaneously potentially consider their own individual interests when doing so.

Freeman does not conclude that all individual political decision-making is constantly decided out of pure selfishness. Rather, he recognizes the plain reality that individual interests are a variable that can influence and motivate individual political decision-making.[27] Waldron fails to stress the fact that a personal conception of rights or a societal commitment to rights is not the only driving force of political decision-making. Freeman characterizes political equality, a facet of both Freeman's and Waldron's conceptions of democracy, as "a way of insuring that everyone's *interests* are represented, heard and taken into account in processes of legislation."[28] Thus, Freeman acknowledges the existence of individual interests in relation to politics. However, when Waldron discusses equal political representation, no such notion of individual interests is mentioned. This distinction will become important in highlighting a proper conception of democracy. I will argue that minoritarian concerns can legitimately be a part of a healthy democratic system and cannot be protected as well in a purely majoritarian system or in a conception of democracy that merely secures equal political rights.

THE ROLE OF INTERESTS IN REVEALING A PROPER CONCEPTION OF DEMOCRACY

In order to assess which stance on judicial review is correct, we must assess which theory operates within a proper conception of democracy. As Freeman puts it, "ultimately, the case for

[27] "The focus here is not upon individuals' unconstrained preferences and their equal consideration in (maximizing) the aggregate satisfaction of interests, but upon the capacity and interest of each person to rationally decide and freely pursue his interests, and participate on equal terms in political institutions that promote each person's good." (Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 331)

[28] *id.* 343

or against judicial review comes down to the question of what is the most appropriate conception of a constitutional democracy."[29] Evaluating the merits of each of these conceptions of democracy will ultimately frame whether or not judicial review is an antidemocratic practice. Any argument surrounding the democratic nature of judicial review is moot if it does not correctly define the key word "democracy."

As we have seen, Freeman believes that a democracy is composed of sovereign people who are not only granted equal political rights to participate in its democratic institutions, but the equal basic rights to conceive of and establish those institutions in the first place.[30] Like Locke, Freeman would contend that if such rights are violated, citizens can utilize their sovereign ability to establish new institutions. Waldron, on the other hand, leaves the notion of sovereignty and the social contract tradition entirely absent from his argument. Instead, Waldron concedes that "democracy cannot exist without the right of rights – the right to participate in the making of the laws."[31] For Waldron, this right to participate is satisfied by equal political rights. In such a society, free and equal people are able to express their personal conception of rights with the same means as every other citizen (i.e. voting). However, Waldron does not provide citizens with the form of sovereign protection that conceptions such as Freeman's and the social contract tradition provide. Waldron's conception of democracy does not adequately account for the "right of rights," as in the right to establish the institutions in which citizens can then participate in the making of the laws. Though Waldron contends that there are some rights that ought to be

[29] *id.* 331
[30] "In a constitutional democracy all political authority is understood to derive from the sovereign people who, conceived as equals, exercise their constituent power to create and define the nature and limits of ordinary political authority." (*id.* 349)
[31] Waldron, *Law and Disagreement*, 282

preserved in order for a government to exist, his conception allows for other rights to be violated yet leaves the government legitimately intact.

A democracy, properly conceived, ought to preserve the rights granted to citizens in the state of nature in order to remain in existence and not be reestablished. I understand this ability in terms of political legitimacy. A democracy does not merely gain legitimacy from the fact it rules people, but also that it protects all of its citizens' rights, even those in the minority. In referring to self-rule and the basic rights granted to us in the state of nature, I describe a democracy's general ability to have institutions that are in what Waldron might call "reasonably good working order." Although he does not explicitly define this term, Waldron notes that such democracies include "a representative legislature elected on the basis of universal adult suffrage."[32] As this embodies the equal political rights secured by every conception of democracy, Waldron's requirement that democracies be in reasonably good working order ought to be included in the notion of self-rule.

However, I simultaneously do not limit self-rule to Waldron's single example. Self-rule cannot be solely contingent on equal political rights, since there are other basic rights that must be secured when a conception of democracy begins by interpreting the origin of society. Under the guise of the social contract tradition, I argue that a proper conception of democracy begins from this point, as well. If a conception of democracy is limited to equal political rights, it merely secures its citizens' ability to participate in democratic institutions, without acknowledging the basic rights that stem from their natural ability to establish these institutions in the first place. Thus, certain rights, beyond political rights, are necessary to secure the sovereignty of the people, Although I do not wish to definitively outline a complete list of what

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[32] Waldron, *The Core of the Case Against Judicial Review*, 1360

these rights are, I concede that some of these rights, at least in very basic outline, might include rights of the person, such as the right to integrity, autonomy, and due process.

In addition, there are various circumstances that can violate a democracy, properly conceived, but I discuss this phenomenon primarily in terms of the dissenting points in Freeman's and Waldron's arguments. The fundamental difference between Freeman's and Waldron's conceptions of democracy is that Freeman's includes equal basic rights and Waldron's does not. Similarly, the fundamental difference in their conceptions of politics is that Freeman accounts for individual interests and Waldron does not. Freeman's conception of democratic sovereignty accounts for citizens' natural right to establish its own democratic institutions and highlights a realistic factor – interests – that could warrant the exercise of this natural right.

THE CONSEQUENCES OF WALDRON'S AND FREEMAN'S VIEWS ON POLITICS

Although Freeman's conception of democracy is idealistic and utilizes a normative lens, that does not automatically mean he conceives of democracy properly. Moreover, his integration of the social contract tradition might compel us to accept his conception wholeheartedly, since it establishes a strong historical precedent for his argument. However, this alone is not enough to assume that his conception is accurate, as historicism or maintenance of status quo can never be the sole determinant of a practice's validity.[33] In order to evaluate the merits of each conception of democracy, we must evaluate the practical ramifications of both Waldron's and Freeman's understandings of democracy and how they align with reality.

[33] There are many examples for this; antebellum slavery, for instance, cannot be justified on the grounds that it was a centuries old practice.

To highlight the differences between Waldron's and Freeman's conceptions of politics, let us look at a hypothetical individual political decision. Jane is a politically inclined citizen with a strong commitment to rights. Jane is also a single mother who depends on food stamps to feed her children. The congresswoman in her district is up for re-election. The congresswoman's opponent centers her campaign around cutting taxes and slashing the budget of various government services in order to supplement such tax cuts. The congresswoman centers her re-election campaign around preserving such services. Let us assume that if the congresswoman's opponent is elected, Jane will be among the group of people who will lose their food stamps or have them severely reduced. Jane heads to the ballot box and votes to reelect the congresswoman. Let us assume further that when Jane does so, she has a both complete understanding of each candidate's campaign plans and her own conception of rights, including the right to feed her children. Is Jane's political decision a pure reflection of that conception of rights? Or, would Jane's own personal interest that the budget for food stamps not be reduced play a role in her political decision, as well?

Perhaps Jane's decision to vote for the congresswoman reflected her own personal conception of rights. Perhaps her conception of the right to bodily integrity includes the right of every individual to be clothed and fed. Here, Waldron's conception of politics is too simplistic. His understanding of politics as a mere expression of differing individual conceptions of rights not only assumes that all members of democratic societies display a commitment to some conception of rights when they vote, it also ignores any other considerations people might make when doing so. It is plausible that Jane took the financial issue into account when she voted for the congresswoman, since she knew she would be adversely affected by the congresswoman's opponent's plan to slash the budget of various government services. Therefore, Jane could have

been motivated by something other than a personal conception of rights; Jane is plausibly politically swayed by her personal interests.

While Waldron's conception of politics is not completely inaccurate, his conception of individual political participation as a mere expression of differing conceptions of rights ignores an important consideration that people might realistically make when politically participating. In part two, I argue that by not accounting for individual interests in his conception of democracy, Waldron neglects to support his argument that judicial review is anti-democratic, and therefore illegitimate, within a proper conception of democracy. I analyze how Waldron's conception of democracy does not account for the illegitimate arrangements that can be garnered from the overextension of individual interests, nor does it acknowledge citizens' ability as sovereigns to establish their own system of government. In analyzing the practical ramifications of each of these theories, I then highlight the special nature of judicial review.

PART II

PROCEDURES AND THE IMPROPER CONCEPTION OF DEMOCRACY AS EXEMPLIFIED THROUGH BROWN V. BOARD OF EDUCATION

A proper conception of democracy is one that averts an overextension of individual interests. If individual interests permeate political decision making, the equal basic rights sovereigns are granted in the state of nature and transferred to the government can be transgressed, which in turn devolves any conception of democracy that is born out of the social contract tradition into an illegitimate state. Since procedural conceptions merely secure equal political rights, they cannot adequately mitigate against potentially dangerous majoritarian interests that infringe on citizens' basic rights and delegitimize a democracy. To illustrate the

fact that interests play a role in political participation and how they can compromise political legitimacy, let us analyze the following scenario:

Linda is a black high school student from Kansas, where the state constitution specifies separate schools for black students. Linda is legally required to go to a school designated for black students, to which she must walk five miles each day. It is illegal for her to enroll in the school designated for white students across the street from her house. The Kansas state constitution is written by and is subject to change (via ratification) by the Kansas state legislature. The Kansas state legislature consists of representatives who are democratically elected by citizens who are granted equal political rights. Under a purely procedural conception of democracy, this outcome of state-sponsored school segregation would be considered politically legitimate; the majoritarian establishment of the state legislature reflects equal political rights and is therefore democratic.

Returning to the analysis of Freeman's and Waldron's conceptions of politics in part one, Waldron argues as if when someone votes, her vote reflects only her own individual view of rights. Freeman, however, argues that her vote is also influenced by her own interests. The law to segregate schools cannot possibly embody Waldron's conception of politics as a pure expression of differing conception of rights. Regardless of what the specific interests are at play in this instance of equal political participation, it is clear that something other than a conception of rights is being manifested through political participation. The mostly white legislature was interested in maintaining school segregation as a means of upholding separation from people whom they deemed inferior. Perhaps this decision was also made under the guise of an individual conception of rights. However, the legislature's vested interest in maintaining segregation is plausibly manifested in this policy, as well.

The outcome of such a policy creates a situation where a significant portion of the population is blatantly unrepresented by its representatives. If a democratically elected state legislature blatantly discriminates against its citizens, those citizens can feel that their individual political decision-making is ineffective and this sentiment of being unable to represent yourself politically deters individual political participation. Even the perception of a lack of representation can deter political participation. It is in a government's best interest to not actively undermine its citizens' ability to feel confident that they are being represented; that their individual political decision-making carries some weight. Otherwise, those citizens might feel compelled to establish a new form of government that actually represents them and cares about what they say. Thus, interest-based voting is sometimes a threat to legitimacy because it threatens citizens ability to effectively participate in democratic institutions. This undermining of equal political rights, in turn, threatens citizens' right to self-rule.

However, deterrence of political participation might not on its own be problematic. A procedural conception of democracy secures equal political rights and thus would plausibly void circumstances that violate the exercise of these rights. What is more importantly at play in this scenario is the violation of basic rights. With certain background conditions – such as entrenched racial inequality – general political deterrence can devolve democracy into an illegitimate state that warrants its replacement because a proper conception of democracy demands that certain other rights be protected. In this scenario, citizens' fundamental basic equality is undermined because black students are not being provided the same equal opportunities to education as everyone else in the society. Since political participation is susceptible to influence of factors other than differing conceptions of rights, such as interests, a conception of democracy that

allows for individual interests to pervert its systems is antithetical to the right to self-governance secured by the social contract tradition.

I do not wish to imply that a proper conception of democracy is one that mitigates against all kinds of interests. I only urge that a proper conception of democracy mitigate against the kinds of interests that delegitimize democratic institutions, therefore warranting their replacement. I contend that interests only delegitimize democratic institutions when they infringe on the right to self-rule granted to citizens in the state of nature.

The earlier example of Jane demonstrates the existence of interests in political participation. Since she has a personal stake in the issue, it is plausible that she has an interest in the matter. Jane could think that everyone in a society like ours has a right to a basic minimum. Her vote might not be motivated by a personal vested interest for money; her conception of rights might include a basic minimum, which as it happens, gives her money. It could be a conception of rights that motivates that, but it doesn't have to be. That very potential, that plausibility, for interests to affect individual votes and thus permeate the legislative process, is what propels the value of checks and balances even further. However, this scenario does not exemplify the potential for interests to negatively affect political participation because of the specific nature of her particular interest. Jane's vested interest in her own financial security does not violate a proper conception of democracy because she does not undermine anyone's political or basic rights by doing so. However, in the Linda scenario, the vested interest of the Kansas state legislature to maintain segregation does undermine such rights.

A conception of the right to education could include the right to pick your own schools or the kind of education you are receiving, or the equal political right to pick representatives. Another expression of rights could include a conception of states' rights as the right to regulate

its own schools by state legislation, free of federal intervention. They could source this right in the equal political rights granted to all citizens to elect the legislature that passed this amendment to the state constitution and justify the statute as a manifestation of the will of the majority. However, such political decision making generates illegitimate arrangements that violate equal basic rights.

Thus, a procedural conception of democracy cannot possibly embody a democracy, properly conceived, because it does not actively secure legitimate arrangements in the same way that a conception of democracy that accounts for interests and sovereignty does. What Waldron might call a personal conception of the right to education in this scenario with the Kansas state legislature is supplanted by the notion of superiority and inequality that is fundamentally transgressive of the equal basic rights sovereigns are guaranteed in the state of nature by the social contract.

JUDICIAL REVIEW IN THE CONTEXT OF THE SOCIAL CONTRACT

Since judicial review is a means of checking the legislature, it can be useful in preserving the legitimacy of democratic institutions by averting the Lockean right to usurpation and replacement of governmental institutions. This is evidenced by the earlier scenario with Linda. This scenario is not hypothetical; it is a historical example of Kansas in the 1950s and reflects other means of segregation that were legally enshrined throughout the U.S. at that time. The illegality of state-sponsored segregation was famously decided before the U.S. Supreme Court in 1954, where the justices decided that “separate but equal” schooling is inherently unequal and violated the equal protection clause of the fourteenth amendment. In interpreting the constitutionality of a statute, the court exercised judicial review and provided a check on a statute that has the potential to garner political illegitimacy.

Judicial review can be a useful tool to maintain legitimacy by ensuring that a document which grants the self-rule and many of the basic rights secured by the social contract tradition is preserved. The constitution represents a document established by free and sovereign people. As Freeman notes, "a democratic constitution is a natural extension of social contract view."[34] A constitution is a document that embodies democratic sovereignty. It is a contractual agreement established by sovereign individuals outlining the conditions of their system of government. One such condition is the equal protection clause of the fourteenth amendment that is addressed in *Brown*. In a Lockean sense, it enforces the rights that people are granted in the state of nature but transferred to the government. Thus, it is in a government's best interest to preserve the constitution. Otherwise, its citizens would legitimately garner a Lockean right to revolution and could threaten the government's continued existence.

Judicial review can be a useful tool in averting citizens' right to political revolution. The constitution and the bill of rights embody the social contract notion that free and sovereign individuals are able to form a system of government for themselves. Without the Supreme Court decision in *Brown*, for instance, it could be reasonably argued that citizens would be entitled to establish new institutions. The decision in *Brown* procures legitimate arrangements because it mitigates against interests and makes sure that people don't feel completely alienated and can actually participate in the democracy that they have every right to participate in. Moreover, it enforced the equal protection clause of the fourteenth amendment, thus protecting the constitutional right to self-rule transferred to the government from the state of nature.

Since judicial review is the practice whereby the judiciary can deem laws unconstitutional, the judiciary can appropriately intervene when individual interests transcend

[34] Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 350

not only a Waldronian conception of rights, but explicitly enumerated constitutional rights. This role is especially useful since such rights can easily be usurped by individual political decision-making and can be integral to maintaining the conditions of a proper conception of democracy. Since judicial review assesses decisions or statutes made by either of the other two branches of government and determines their constitutionality, it is a useful practice in preserving the constitution and, in turn, political legitimacy.

JUDICIAL REVIEW AS A SPECIAL CHECK

Not only is the ideal of checks and balances fundamentally ingrained in the American legal tradition,[35] it is helpful in maintaining a legitimate state of government. As evidenced by the harmful abilities of interests, there are clearly reasons that the legislature is not perfect and needs to be checked, which happens in various ways. For instance, bicameralism ensures that there is oversight between each house of the legislative branch. Perhaps most notably, free and fair regular elections ensure that legislators are held accountable and are susceptible to the opinions and preferences of their constituents. However, such checks do not adequately mitigate against the dangers of interests. History tells us that merely securing procedural processes does not sufficiently protect against illegitimate arrangements that warrant replacement.

In Kansas, and many other states during the Jim Crow era, it is entirely plausible that a majority of that state's overwhelmingly white population was in favor of segregation. No amount of free and fair elections or manifestation of equal political rights would have sufficiently mitigated against this reality. Thus, judicial review can be a useful tool for mitigating against the threat to the sovereignty of democratic institutions that comes from interest-based voting.

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[35] https://www.history.com/topics/us-government/checks-and-balances#section_2

Judicial review can mitigate the danger of interests permeating the political process in a way that other means of checks and balances, such as bicameralism, cannot because of its unique ability to directly interpret the constitution.

In exercising judicial review, judges directly deal with the document that embodies the philosophy of Locke. As Locke argues, rights are transferred from the state of nature to the government. The constitution embodies some of these rights and provides checks and balances to ensure those rights by maintaining a balance of power. Historians trace the constitutional system of checks and balances to Locke's insistence of separation of powers in *The Two Treatises of Government*. In addition, the constitutional provision for impeachment of democratically elected officials is often understood as a product of the Declaration of Independence's guarantee to remove kings who "lose the consent of the governed," which directly paraphrases Locke.[36] Since Locke and the social contract is an essential precursor to a proper conception of American democracy, a proper conception of American democracy must be centered around the rights granted to us in a Lockean state of nature. Thus, a proper conception of American democracy needs to account for the Lockean right to revolution if said rights are not secured.

In this light, judicial review is special because it specifically addresses the constitutionality of laws. The constitution not only secures Lockean ideals of and rights and natural rights, it also symbolizes the right to self-rule and other basic rights granted to us in the state of nature. Thus, judicial review can be a crucial tool, and a democratic state without such a feature can be more likely to descend into illegitimate arrangements because there is no constitutional check. The decision of *Brown v. Board of Education* can secure a substantial right

[36] https://www.history.com/topics/british-history/john-locke

to equal opportunity and a right against discrimination, perhaps. It secured that right which shows us that judicial review can heed legitimacy.

PART III

OBJECTIONS AND REPLIES

If we are to advocate for judicial review as a means of protecting against individual interests, we must address the notion of judicial interests to ensure that we are not merely diverting the same problem to a different branch of government. I have argued that we should preserve democratic sovereignty in the face of a realistic conception of how people are going to behave in politics and secure the legitimacy of judicial review to protect against these competing interests. Textualists, such as Antonin Scalia, warn against granting the judiciary extensive powers, including judicial review. Scalia claims that doing so enables judges to "pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field"[37] Scalia does not argue against judicial review generally. Rather, he argues against a certain form of judicial reasoning in exercising the capacity for judicial review. His argument suggests a more general, and commonly expressed, worry about judicial review that challenges our argument that judicial review protects against individual interests.

If judges pursued their own interests and exceeded the scope of their designated role, they would impurify any idealistic conception of law. This would seem to be no different than the potential contamination of politics from individual interests that Freeman addresses. Yet, the notion of judicial interests is not wholly comparative to individual ones. Unlike individual

[37] Scalia, *A Matter of Interpretation*, 18

political decision-making, judicial decisions are made in the context of judicial oath and judges are susceptible to the public accountability and general principle of *amour propre*, Jean Jacques Rousseau's term for a person's concern with her own public standing.

Before a judge is sworn into her position, she takes an oath of office that describes the underlying themes of her role, more so than its logistical procedure. One of the predominant themes in the judicial oath is the political equality and equal basic rights secured by the social contract tradition.[38] The judge embodies a somewhat Rawlsian sense of justice in swearing to "administer justice without respect to persons and do equal right to the poor and to the rich,"[39] affirming a universal basic freedom and conceiving of everyone as equals. This oath cannot possibly completely guarantee that every judge will adhere to this conception of rights, or any other idealistic assessment of the proper role of judges. However, since judicial decision-making is preceded by an oath and individual political decision-making is not, the fear against judges inserting their preferences is more formally protected than society is from people inserting theirs.

It can similarly be argued that judges are disposed to address questions in terms of a judicial ethos in a way that average citizens are not because the locations in which judges and citizens exercise their political decision-making differ fundamentally. There is still a broad expectation among institutions that they carry out their decisions responsibly, but judges are subject to a form of accountability that cannot be generated via electoral pressure. Rousseau accounts for such a phenomenon with "*amour propre*," his term for the "self-interested drive, concerned with comparative success or failure as a social being… [that] makes a central interest

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[38] "This family of ideas - equal freedom, equal rights, and equal political participation - is central to the natural rights theory of the social contract tradition of Locke, Kant, and Rousseau, and to the modern version of that tradition, Rawls's justice as fairness" (Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 331)
[39] https://www.law.cornell.edu/uscode/text/28/453

of each human being the need to be recognized by others as having value and to be treated with respect."[40]

By virtue of their public position and public decision-making, judges have a sense of accountability and demand to be consistent that regular citizens do not. This sense of accountability is not born out of a physical sense of deterrence. Instead, it is born out of a form of social pressure. Judges must adjudicate properly so that they can look people, and other legal professionals, in the eye in public. *Amour propre* is fundamental to every person (or for argument's sake, a high majority of people), since no rational person would want her public standing to be compromised. Judges do not want to be on the wrong side of public accountability measures and have their status compromised.

Perhaps this question of judicial ethos and responsibility can act as a kind of constraint on judicial decision-making that cannot be expected to be part of the political culture of democracy generally. Since judges' decisions are made public and citizens vote privately, citizens might feel more licensed to vote on the basis of all kinds of considerations precisely because they do not have this sense of responsibility that comes from a public formalized role. An individual's *amour propre* is not at stake when she goes into the voting booth, but when someone exercises any kind of public official role, her public standing is at issue. With judicial decisions being made publicly, it could be reasonably argued that a judge is implicitly compelled to conduct herself properly. This would rebut Waldron's core argument that judicial review is superfluous,[41] as it would enable judges to protect rights in ways that political decision making coming out of the legislative branch – both on part of the voter and their elected representatives – cannot.

[40] https://plato.stanford.edu/entries/rousseau/
[41] Waldron, *The Core of the Case Against Judicial Review*, 1346

However, such arguments also create a slippery slope because they can imply that judges are equipped to make unilateral decisions at any given period. If we paint this picture of judges as having a superior sense of decision-making and ability to be uninfluenced by their individual interests, we might as well reserve all political decisions to them. Thus, any argument for the special role of judges must not make their role too special to the point that they are able to become a super-legislature and usurp the equal political rights granted to citizens in any conception of democracy. Therefore, judicial review's legitimacy must be contingent on a specific kind of judicial reasoning that exists under a specific set of conditions.

If the sole concern of a democracy, properly conceived, was to ensure that our laws did not lead to an infringement of basic rights, perhaps it would be appropriate to reserve all political decision making to a few select highly trained judges. But that is not its only concern. A democracy, properly conceived, is concerned with maintaining legitimacy of government and institutions, including the people's right to self-rule. Vesting too much power in a small number of judges might dissuade the role of voting and campaigning and protesting and lobbying and all the other things citizens might do to politically participate. Thus, vesting too much power in a small number of judges would not adhere to a proper conception of democracy. To illustrate how the overextension of the judiciary can negatively affect democratic institutions, let us analyze the following scenario:

Citizens are granted equal political rights to participate in free and fair regular presidential elections. Those who choose to exercise this right, do so during an election year. Those votes are tallied according to the procedure laid down by the democratic constitution; each state tallies its votes. A winner is declared. The losing candidate challenges the election by suing states he presumes to have fraudulently tallied ballots. The case is presented to the Supreme

Court, whose justices serve lifelong terms and are appointed by the president. The court makes a decision that definitively determines the outcome of the election.

If the court were to make such a decision, they would unilaterally decide a presidential election and undermine self-rule. Such a decision would invalidate one of the fundamental ways sovereigns are able to rule over themselves: individual political decision making. In maintaining a state where citizens have a sense of vested faith in institutions, trust in the process of institutions should not be undermined. I do not address this notion of trust on an individual scale. Rather, through the lens of democratic sovereignty and the ability to conceive of institutions, I argue that those institutions should be trustworthy in order to remain legitimate (and thus, in existence). If a Supreme Court decides a procedural issue about an election or an issue about the substance of our legal rights, that would undermine individual political decision making. If there were such a situation, citizens would plausibly have a right to revolt. Formally, one has these equal political rights, but they are effectively undermined because another entity is exercising that political decision making on their behalf. In the Lockean sense, citizens' ability to participate politically has been so undermined that they could legitimately say "this is not a democracy anymore." Since they have a right to determine the institutions that they live under, they have a right to replace this system of government with a new, more politically effective, one.

The same factors that make judicial review useful is what simultaneously makes it dangerous. While judicial review can mitigate against the expression of individual interests in the legislature, there is a fear, as expressed by Antonin Scalia, that justices can insert their own interests into decisions. In addition, while judicial review can secure legitimacy, if judicial preferences are exerted, the practice of judicial review can counterintuitively propel the

democracy into an illegitimate state that warrants its replacement. Since no other forms of checks and balances can effectively ensure the constitutionality of laws, judicial review is a useful practice. However, the usefulness of judicial review can be generally permissible so long as it is exercised in accordance with the recognition of the possibility that certain decisions can devolve democratic institutions into a state of illegitimacy that can warrant their replacement.

CONCLUSION

This essay does not fully summarize the parameters of the permissibility for the practice of judicial review. The aim is not to provide a litmus test for what kind of cases or methods of adjudication secure legitimacy, nor to specifically outline a normative recommendation for judicial reform. Rather, this essay presents a sober analysis of the legitimate arrangements within a proper conception of democracy, as defined by the social contract tradition. It provides a general analysis of what a system of government would want to maintain; not the specific ways of how to go about maintaining it. I recognize that democratic institutions must function knowing they can be replaced via the right to revolution. I do not outline what specific circumstances generate this right to revolution nor do I provide a complete list of the rights violations that would deem a system illegitimate. Rather, within that general understanding, I argue that judicial review ensures that institutions remain legitimate. In other words, this essay is a defense of judicial review's potential to be useful in maintaining the legitimacy of democratic institutions within the United States.

I recognize that many of the arguments about judicial review fall into one of two camps – entirely in favor of or entirely against its general use. This essay attempts to break away from that binary by presenting a general defense of judicial review while simultaneously questioning its limits. I have done so by addressing the works of two theorists, Samuel Freeman and Jeremy

Waldron. Freeman laudably secures equal basic rights and the social contract into his conception of democracy. However, for the most part, his understanding of politically legitimate arrangements romantically ignores the ability of institutions to generate illegitimate arrangements from within. Specifically, he ignores the ability of the judiciary to overextend its bounds and transgress rights. Waldron, on the other hand, recognizes the potential for the violation of equal political rights, and recognizes the need that they be secured. However, Waldron neglects to address the potential for an institution to transgress its participants' basic rights because he does not account for the dangerous potential of interests in exercising these equal political rights. Neither Freeman nor Waldron painstakingly addresses the flip side of their arguments. This essay is founded on the philosophical ideal of legitimacy and the social contract; arguing that judicial review can be a useful tool within that philosophical framework but should not be overextended lest it violate the same legitimacy that it can be helpful in securing.

I do not outline how governments should actively procure legitimate arrangements or how much to actively encourage political participation. I merely argue that governments ought not to actively transgress rights. For instance, they ought to not blatantly interfere with political participation, as that would transgress equal political rights. Although I phrase many of these issues in terms of the social contract tradition from the seventeenth century, they are relevant to the current American political landscape. To illustrate this, let us place the earlier hypothetical scenario in the context the 2020 presidential election:

The Supreme Court decides that tens of thousands of mail-in ballots in various counties in Pennsylvania that arrived three days after election day are too late to be counted. The candidate that originally won that state now loses, tipping the scale of the general election in favor of the losing candidate.

If a court were to make such a ruling, they would blatantly undermine individual political participation on an institutional level: an institution – the judiciary – would undermine the free and fair electoral process of another branch – the executive branch. This not only undermines the ideal of separation of powers – that each of the branches of government remain separate and within their own realm; it also warrants the right to revolution as the equal political rights of sovereign citizens have been negatively affected because the judiciary has *de facto* decided the outcome of the election and has thus usurped American citizens' of their equal political rights and the right to self-rule to determine their representatives.

In sum, democracy ought to avoid illegitimate arrangements in order to avoid generating circumstances that warrant their sovereign replacement. Although this can make judicial review useful, it can also make it dangerous. With these foundational arguments, detailed arguments for specific reforms can and should be crafted. A healthy democracy is one filled with ample exercise of equal political rights, founded by an institutional safeguard to political rights with the oversight to protect the breach of any and all rights. Judicial review can be a useful tool in maintaining this healthy democracy.

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