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PHIL 455 – Advanced Philosophy of Law

November 15, 2011

Topic One: Judicial Review

In discussions of democratic institutions, theorists have found it necessary to examine the practice of judicial review. Although an integral part of the current democracy of the United States, some theorists have argued that the practice does not, in fact, adhere with the conditions of a legitimate democratic institution. They have argued that judicial review, by placing checks on the will of the majority, contradicts democratic principles of self-governance and majority rule, thereby taking away all the authority democracy had as rule of law. Samuel Freeman, in "Constitutional Democracy and the Legitimacy of Judicial Review", however, argues that if we define democracy the right way, as a form of sovereignty, judicial review and constitutionalism are perfectly compatible with it. Despite ongoing disputes on the issue and the seemingly compelling counterarguments Freeman's account faces, I will argue that Freeman's position is emerges as most successful. I will examine Freeman's conception of democracy as a form of sovereignty in the social contract tradition in order to show that judicial review can be a legitimate constitutional mechanism developed and accepted by members of a democracy. I will show that for the people to have the sovereignty they deserve, their political arrangements need to have both democratic procedures and constitutionalism in the form of judicial review. To illustrate the ultimate strength of Freeman's account, I will put it up against Waldron's

direct counterargument in “Law and Disagreement”. I will show how Freeman, using his Contractarian justification of democracy, strikes down Waldron’s criticism that constitutionalism and democracy are in direct contrast because people disagree about all fundamental matters of politics. I will demonstrate, through Freeman’s argument, that we can, in fact, come together and unanimously accept basic mechanisms to ensure the protection of our sovereignty: something everyone wants. I will identify and describe Waldron’s argument that putting our political matters in the hands of a group of fallible human judges is aristocratic and unreasonable. I will then critique this by appealing to Freeman’s assertion that, under certain necessary conditions and consensus on political values, judicial review can be the best option we have for assessing the, often undemocratic, outcomes of majoritarian procedures in a democratic society. Finally I will examine Waldron’s point against Freeman that, despite the inconsistencies that result from such majoritarian procedures, we must rely solely on voting and legislative methods to settle our disagreements because such procedures are the only way democratic law can get authority. To respond to this criticism, I will focus on Freeman’s argument that, in order for any popularly enacted legislation to have actually gain authority in a democratic government, citizens must recognize that it coheres with their basic rights and if it does not, they must know that there are institutions in place to reverse it. While Waldron argues that law gets its authority simply from being the fact that it has been enacted by majoritarian procedures, Freeman goes more in depth and argues that it is actually legislation’s ability to be held accountable to fundamental moral and political values that give it authority. Therefore, I will ultimately show how Freeman resolves each of the

criticisms raised by Waldron and further asserts that judicial review and constitutionalism can not only be acceptable in a democratic government, but also important for that government to have legitimate rule.

It is helpful for the argument in favor of judicial review to first identify, discuss, and develop Samuel Freeman's basic theory. From the start, Freeman makes it clear that conceiving of democracy in a particular way can help us resolve the seeming incompatibility between democracy and judicial review. He proposes that instead of defining democracy in a merely procedural sense, we should try to see it, rather, as a form of sovereignty. Freeman does not believe that democracy is simply a form of government defined entirely by its procedural mechanisms. He calls upon the theories of past philosophers such as a Locke, Rousseau, Kant and Rawls, to illustrate his assertion here. Through their theories, he shows how democracy can a way for citizens to form a social contract that they can all accept and enter into in order to protect their basic rights and freedoms (Freeman 329-331). Democracy, then, in this context, becomes more than a system of equal political rights and majority rule mechanisms. It becomes a commitment people agree to in order to protect their values of freedom and independence and equal basic rights, as well the political rights protected by the procedural conception of democracy. Citizens, in Freeman's conception of democracy, might decide that it is necessary to develop mechanisms for ensuring that these equal basic rights are protected and reflected in legislation. The values and ideals inherent to democracy require certain institutions. While democracy requires majority rule decision-making procedures to justify the democratic principles of equal political rights, it might also, in the same sense, require judicial review as an institution that

both “maintains and promotes” democratic principles of equal basic rights (Freeman 339). This is how Freeman introduces judicial review as a legitimate constitutional mechanism. He says that, “[the] authority of American courts to review and declare unconstitutional popularly enacted legislation” can be consistent with democracy when the reasons for which we seek democratic governments in the first place become clear (Freeman 327).

As we know, Freeman posits that for judicial review to even be considered a legitimate democratic institution, one must conceive of democracy in a particular way. Freeman does not mean to say that judicial review is acceptable or even reasonable in all conceptions of democracy, but he does make a successful case for why the conception that does is the one we should hold true. The first alternative view of democracy that Freeman discusses and later refutes, is one that is based on “equal consideration of and responsiveness to everyone’s interests…” (Freeman 330). Such a conception of democracy is likely to be held by a Utilitarian. The theory of Utiliarianism seeks to maximize utility by incorporating the greatest range of individual preferences possible. Utilitarians argue that the majoritarian voting procedures justified by the ideals of a procedural democracy, although not completely accountable to everyone’s interests, are the closest we can come to equal representation and thereby a common good (Freeman 330). Since majoritarian procedures are the very foundation of a utilitarian conception of democracy, because of their ability to maximize utility in the best way we know how, any institution that undermines or reverses the outcomes of these procedures is labeled undemocratic and seemingly wrong. Thus, according to Freeman, opponents of judicial review often take up this argument to show how

judicial review in inconsistent with democratic principles (Freeman 331). However, Freeman asserts that, although getting to a common good is an important part of democracy, a strong case for the Utilitarian conception of democracy has not been made. Such a conception cannot stand up to important considerations to the contrary. Such a democracy, Freeman argues, has no mechanisms in place to weigh people's actual interests or the values most important to them. The Utilitarian conception of democracy would not produce the best outcomes because it does not solve the problem of impartiality or weighing of preferences. Therefore, Freeman argues, democracy has to be something more than bare majoritarianism in order to make sure that interests are properly weighed and protected. Freeman posits that not only do we want equal representation majority-rule procedures, but mechanisms for making sure the democratic values on which our governments are founded are not violated by these procedures. If we ask ourselves why we care about having a democratic government in the first place, we will be able to extract those fundamental political values that we seek to uphold and that a practice of judicial review can protect just as well as equal political procedures. Thus, Freeman offers a new way to understand democracy: the Contractarian conception (Freeman 331).

Akin to other natural law and social contract theorists like Kant and Rousseau, Freeman proposes the idea that when people come together to form governments, they enter also into a social contract. Freeman argues that democratic governments can be conceived of as a form of sovereignty because they are justified by a social contract of the people. The people establish this social contract when they come together, equally and identify the principles that everyone would want from the government; the rules

that they would all want to abide by in a government because such would benefit them (Freeman 342). These principles and rules become the basis for their commitment to a democratic government and democratic form. The people become sovereign, or in other words, are able to "rule" themselves, in that they are governed by law that reflect the very principles everyone would accept. Democracy itself becomes the people's way of remaining sovereign and being free to pursue their own good (Freeman 331).

Theorists of procedural conceptions of democracy think democracy is defined merely by the principle of equal rights of participation and the decision-making procedures that accord with it, (Freeman 335). In a procedural conception of democracy, maintaining citizens' equal right to take part in enacting legislation is the most important aspect. Therefore, in such a democracy, Freeman notes, there would either be no restrictions on procedures of equal political participation at all or restrictions only through the very majoritarian procedures that the restrictions are intended to constrain (Freeman 336). In Freeman's Contractarian view, however, although majoritarianism would be legitimated by the agreements of the social contract as a plausible decision-making procedure, certain non-legislative institutions, like the practice of judicial review, would also be justified. Mechanisms of constraint on majority-rule procedures would be justified because of their ability to uphold fundamental democratic ideals best. Freeman does not mean to undermine the importance of equal political rights in a democratic government, but rather, assert that, unlike in a procedural conception, other rights and freedoms can be just as important to our sovereignty. These generally accepted rights must be protected from the equal political procedures that do not always produce outcomes consistent with them and

often violate or ignore them. Freeman states, "[We] have criteria for assessing the rightness of outcomes resulting from any actual political decision-making procedure, no matter how fair or appropriate that procedure may be" (336). It is clear that majority rule is not perfect, that democratic procedures do not always give us democratic results. Because of this, these procedures need certain limitations on their powers. Freeman worries that people lose their sovereignty, their autonomy, when majority-rule outcomes violate their rights. People are only able to rule themselves when the law that govern them cohere with the basic rights, values and principles they have accepted and agreed upon in their social contract. Once populated enacted legislation begins to lose sight of the fundamental principles and rights the people agreed it should uphold, the people can no longer rule themselves. Thus, placing constraints on the legislative outcomes of majoritarian procedures, through constitutionalism and judicial review, does not hinder the will of the people, but fosters it by protecting constitutional rights agreed to under the conditions of a social contract (Freeman 337-338).

Opponents of Freeman's view argue that the constraints he poses are undemocratic since they are not done through the means of equal political procedures, such as voting. However, Freeman continues to assert that, if we look at democracy in the appropriate way, through the Contractarian conception, it will become clear that people want more out of democracy than merely equal political rights and representation. When people come together in a position of equality to decide on their social contract, they exercise their freedom and political authority as citizens by agreeing on certain values and ideals on which to found their democratic government.

These ideals are somewhat carried out and promoted through majoritarian voting procedures, but also, as Freeman shows, can be very successfully promoted by judicial review (Freeman 340). Freeman asserts that even though we, essentially, want equal participation and majority rule in a democracy in order to uphold the principle of equal political rights, we will not agree to these procedures if we were not sure that our equal basic rights and freedom to pursue our own good would be protected (Freeman 348).

Jeremy Waldron, one of Samuel Freeman's chief opponents on the issue of judicial review, argues, in Law and Disagreement, that Freeman's conception of democracy and assumptions about justice are wrong. He says, on the contrary, that there is no way we, as human beings in a pluralist society, could come to a consensus about what we want from our political arrangements because we disagree about all fundamental matters of politics (Waldron 1). We disagree, Waldron argues, about what rights we have and what justice means so much so that there is no common will. In the face of such disagreement, Waldron asserts that the only things we will agree upon are the principle of equal respect and the fact that we need common solutions to collective action problems. Thus, we turn to democracy and majoritarian procedures that give everyone equal representation, to provide us with guidance on how to act collectively. Waldron argues that since majority-rule legislative procedures uphold the principle of equal respect, they give us a reason to take the law they produce seriously. Enactment through majority procedures is the only way law gain authority (Waldron 1-2). This point will be discussed more in depth later as a criticism of Freeman's view.

A written constitution, on the other hand, is not necessarily legitimate, in

Waldron's view, when it is not consistent with legal rules produced through genuinely democratic majoritiarian decision-making procedures. For Waldron, the authoritative nature of such a document is questionable. Unlike Freeman's conception in which, in order to form a legitimate democratic government, we come together and identify rules and ideals everyone would want to put into a constitution, Waldron asserts that we disagree about everything down to such fundamental rights and thus, would not even agree about which certain rights should be constitutionally protected or about how their protection should be afforded or applied (Waldron Notes 9/15). For Freeman, a written constitution serves as the physical manifestation of our social contract. Its protections and rules are produced directly by our efforts to establish a social contract and reflect our consensus and agreement. Waldron, however, as is clear, would reject a constitution formed in such a way.

However, Waldron does not go as far as saying that a constitution would never be legitimate. Instead, it is quite possible for Waldron that a constitution that is established, crafted, applied, and interpreted by legislators through majoritarian decision-making procedures could be valid. The legal rules and principles enumerated in such a constitution would have to be those that were popularly enacted, would cohere with current popularly enacted legislation, and would not be able to overrule future popularly enacted legislation. The type of constitution Waldron would advocate would not be able to perform the same functions as Freeman's because Waldron, believing that majoritarian procedures are the only way law gets authority, would not want an institution in place to overrule them. Thus, constitutionalism and judicial review become illegitimate in Waldron's view because, he argues, the kind of

constitution Freeman proposes is neither supreme nor justified. Waldron believes, that, even with a constitution in place, it could not be a supreme document because, as soon as the majority voted something inconsistent with it, it would not be able to overrule this. Waldron does not doubt that the majority does some undemocratic things and that democratic procedures do not always guarantee democratic outcomes, but he thinks that majority procedures alone are the best mechanical way for dealing with disagreement. We have to vote, Waldron says, in order to make democracy a tool for dealing with and incorporating disagreement because we will never otherwise come to a consensus; even through political deliberation, our fundamental disagreements will remain. In the face of disagreement, we need to popularly enact specific policy that tells the government exactly how to apply and interpret the law (Waldron 11-12).

Waldron's criticisms, however, do not prevail when put up against Freeman's position in the social contract tradition. As we know, Waldron claims that Freeman and other theorists like him make assumptions about agreement between citizens in pluralist societies that don't actually exist. However, Freeman's case for agreement and, thus, a need for judicial review is strong. Freeman does not wish away disagreement and assume that everyone's interests are the same, but asserts that there are some basic principles, ideals, values that we all want out of a democratic government. Each of these principles, as Freeman notes, stem from the same, founding idea that people, when they enter into political arrangement, all want, at the very least, to be able to maintain their equality and the freedom to pursue their own goals. These principles are those that people can agree will help them maintain their freedom and

equality (Freeman 356). Citizens are only able to pursue their own ends when they have certain influence in enacting the rules they become subject to, and when such popularly enacted rules do not infringe on their civil and social rights without check. It is clear, then, that Freeman does not mean to say that people agree on one common good that should come out of every decision. Instead, that everyone has their own independent goals, interests, and perceptions of the "common good" that they agree they should all be allowed to pursue freely and equally. People then come together and agree on basic rights and values that must be fostered in order to guarantee this freedom and sovereignty. Since it is clear that Freeman does not deny that people hold conflicting interests and disagreement, Waldron's argument lacks credibility. It becomes quite difficult, for Waldron even, to dispute the fact that people would all want to be free to pursue their own ends and therefore be capable of agreeing, at the very least, to commit themselves to certain basic ideals to get this.

Freeman's arguments discredit Waldron's assumptions about disagreement in yet another way. Freeman posits that although citizens come together to determine the rules of their government through basic democratic principle and ideals, later on, people often lose sight of what these were. People recognize a need for sovereignty and the desire to be free to make their own choices, but as time goes on, they begin to disagree about the rights that accord with these principles (Freeman 355). Here, we see Freeman, again, admitting that there are certain disagreements, especially as people become tempted to act in ways that go against the just ends the democratic procedures seek to accomplish. However, Freeman thinks that such disagreements and deviations do not make judicial review incompatible with democracy, but exactly the

remedy that is needed. Often, people have begun to use their equal rights of political participation through majority rule procedures in unreasonable ways resulting in outcomes that "subvert the public interest in justice and deprive classes of individuals of conditions of democratic equality," (Freeman 355). Though people lose sight of the fundamental democratic values, it is still important, Freeman argues, that these values are upheld because they serve as necessary conditions to maintaining sovereignty and autonomy. Since we would have agreed, in the first place, to judicial review as a means by which to protect the equal basic rights and liberties of all people when our democratically enacted legislation goes astray, the disagreement we faced later on would not take away the legitimacy of judicial review. We would need something more than bare majority-rule decision-making procedures to help us stay on track and decide how certain principles and values should be interpreted and applied. Therefore, in ideal circumstances where everyone always agrees on and promotes the common good, we may not need judicial review, however, in more realistic situations as we are faced with in modern democratic societies, people naturally fall prey to disagreements and temptations and thus, judicial review becomes an important institution for protecting the sovereignty inherent to democracy (Freeman 355).

Waldron, in "Law and Disagreement," takes up the idea of precommitment that is at the center of Freeman's argument. He examines whether or not it is legitimate to precommit ourselves in accordance with certain standards and, in doing so, protect certain rights from majoritarian decisions. Waldron asserts that there are two types of precommitment: causal mechanisms in which we commit ourselves to a course of action through some causal constraint, and an exercise of judgment, in which we bring

in a third party to adjudicate our issues (Waldron 358). Waldron believes that people, naturally, have temporary temptations that keep them from accomplishing their true goals and thus, may need certain mechanisms in place to keep them on track and keep rights protected (Waldron 259). However, Waldron does not think it appropriate to commit ourselves to institutions in which our actions are adjudicated by others, like Freeman proposes we do through the institution of judicial review. As soon as we bring in that third party, Waldron argues, we begin to lose our own personal interests and stakes in the matter because our judgment is replaced for theirs. Waldron uses the Bridget example to illustrate this argument.

Waldron's example highlights the character, Bridget, who is trying to enhance her personal autonomy by giving away her keys to her friend so that she cannot read certain books that she has locked up. However, months down the road, she decides that she actually wants to read these books and asks her friend for the keys back. In this situation, her friend is now faced with a dilemma. What would best enhance Bridget's autonomy? Would keeping Bridget's keys do so or should she heed Bridget's requests and give them back? Waldron wants to show us that giving the keys back would be the only way to enhance Bridget's autonomy, her ability to govern herself. Even though she agreed to having her friend keep the keys from her, her views about what should be done may have changed since then. Through this example, Waldron wants to show us how the idea of precomittment, of constraining oneself to prior decisions, does not foster self-rule. It is too difficult in politics, Waldron argues, to distinguish between when people are simply acting through weakness of will, (or in his terms, "akrasia"), and when they sincerely disagree about what ought to be done. We cannot, in a self-

governing society, block what people what to do now because the majority agreed to something different in the past, on assumption that people are akratic. We have no basis for distinguishing between akrasia and genuine disagreement so we must allow people to act autonomously and not restrict potentially valid changes in their view of the right thing to do (Waldron, 267-269).

Waldron believes judges participating in judicial review act as such a third party constraining us to past decisions. According to Waldron, these judges are human beings and are capable of making decisions just as biased and reflective of their own moral convictions and interests as any average person (Waldron 262-263). In this way, they begin adjudicate matters in terms of what they think rather than what the people may think and thus, go against a crucial principle of democracy: autonomy (Waldron 259). The autonomy, or the right to govern yourself and determine for yourself what ought to be done in your circumstances, that democracy guarantees is thrust aside when judicial review practices come into the picture. The presence of a institution like judicial review, Waldron argues, ultimately morphs democratic arrangements into aristocracies because a small group of judges are now changing and deciding the matters of law, not the people (Waldron 263). In the face of the inherent disagreement that Waldron assumes is present in democratic societies, he wants all decision-making procedures to be neutral and equally representative. Although he realizes that majority-rule decisions are merely numbers and do not always do the best job to represent the interests of everyone, he asserts that they do not ignore relevant judgments as judicial review does when judges act paternalistically. The only way we should be able to alter or fix majoritarian outcomes, if any, by Waldron's theory, are

through even more majoritarian procedures that resolve our disagreements with respect to everyone's view about what should be done.

Waldron also discounts the institution of judicial review by asserting the claim that, as human beings in a pluralist society, judges have just as much disagreement about matters of political morality as the average person does. Waldron mentions, as is the common objection to judicial review, that judges are not elected through democratic procedures or accountable to such procedures and thus, their decisions defeat our ability to be self-ruling. Waldron does not see why a small group of appointed judges should be able to trump the decisions of the majority within a democratic government. He believes that judges, with all different interests, views and conceptions of morality, are not capable of producing any better solutions to disagreement than simply majoritarian procedures. In fact, he argues that judges may ultimately, even turn to their own type of voting procedures to make decisions. If this is the case, constitutional law will not hold authority over popularly enacted legislation. Instead, it will only be reflective of the views of a small number of judges, yet be applicable to all the people in the society (Waldron 264). In addition, it will seem arbitrary itself because its interpretation was decided in an arbitrary way (Waldron, 90-91).

Freeman responds to these claims with his arguments that the practice of judicial review is an extremely important precommitment made in democratic societies and, under certain conditions, can be the best alternative for performing necessary functions of justice. As previously mentioned, Freeman believes that we would have no reason to respect law or abide by it if the only thing democracy cared about was equal

political participation and there were no checks on the majority. Freeman does not mean to say that judicial review is always necessary or legitimate, but when we have legitimate reason to believe that our legislative decision-making procedures may give us outcomes inconsistent with the rights we have agreed upon, it becomes the best way to combat this (Freeman 361). Freeman, like Waldron does not deny that often, we are tempted to go astray from the things we really want to achieve in our political arrangements. Waldron agrees that sometimes our legislative decisions do not always end up being what is morally right but does not find judicial review adjudication of such decisions appropriate or consistent with democratic forms. Freeman, on the other hand, defends his position by arguing that judges are the most impartial means we have for adjudicating citizens' potential deviance "from their agreement and commitment to a just constitution" and their "unreasonable exercise of their political rights in legislative processes" (Freeman 353). Judges are isolated from normal political processes, as they are not elected through majoritarian procedures, and, thus, are not worried about appealing to certain interests or factions or making certain decisions for selfish reasons. They seek only to keep citizens from losing their sovereignty through oppressive legislative decisions. Also, unlike Waldron's assumption, Freeman makes it clear that judges are not *creating* law when they exercise their judgment and make decisions about popularly enacted legislation, they are simply interpreting the constitutional rights we have all unanimously agreed to in our original social contract. We have already decided on the basic ideals upon which to found our government and the basic civil, political and social liberties we want to maintain, so judges, using their expertise are just applying and interpreting our own

guiding principles. The high level of experience and training of judges makes them experts in their field. Freeman does not deny that judges are human, too, and capable of sometimes making mistakes, however, he feels that their expertise as a result of their extensive practice in law makes them better equipped to judge moral matters. Judicial review is not perfect, but it is an extremely plausible way of protecting rights. Thus, self-rule is not lost in the process of judicial review because judges considering the constitutionality of statutes do so using their expert judgment with regard to protecting the people's sovereignty as the people unanimously and equally agreed to (Freeman 353). Bare majority decisions may be effective as a mechanism for giving everyone a voice and giving their interests equal respect in government, but they should not stand unconstrained in a democratic government as Waldron's position suggests. Although designed to give us outcomes consistent with equal political rights, we cannot always rely on majority rule procedures to meet these goals (Freeman 354). Freeman sums it up sufficiently when he states,

> "…to maintain legislation that most effectively promotes each person's good and the public good, while providing that the basic rights of citizens are not violated in the process, free and equal persons could rationally agree to bare majority decisions on condition that they be subject to review by an independent body set up for these purposes," (Freeman 354).

Finally, it is essential that we look at Waldron's objection to judicial review that says that majority-voting procedures alone give democracy its authority, making "undemocratic" institutions, like judicial review, neither necessary or appropriate. Waldron wants us to respect the law we get from democratic procedures because it

represents a majority opinion that gave everyone an equal opportunity to voice their interests, and equal political rights are one of the only things we would all be able to agree to have in place. It is not necessarily the case, Waldron asserts, that "allowing the majority to prevail" will result in an oppression of the minority. Waldron asserts, about majority procedures that result in decisions that leave out the interests of the minority are not something to worry about (Waldron 13). To Waldron, being in the minority simply means that your opinion will not be represented in that particular piece of legislation, but it does not imply oppression, as long as people in the majority are making well-reasoned decisions on these matters and as long as the majoritarian procedures properly account for the wide array of preferences and interests that exist (Waldron 13). Waldron assumes that people will often vote impartially and in "good faith", leading to outcomes, which, although they do not include every single person's personal opinion on the issue, are not necessarily bad because of this (Waldron 13).

Despite these assumptions, however, Waldron does realize possible objections to saying that majority opinion makes us respect law. He takes into account the arbitrariness of voting procedures, the merely numerical nature of majority-rule outcomes and the fact that majority opinion can sometimes result in morally inconsistent outcomes. However, he argues, that, in spite of all these things, it is the only way we can try to overcome our disagreements and have achieve a legitimate political arrangement. We will never, Waldron says, even through deliberation, come to a consensus on what the law should be or what values it should uphold (Waldron class notes 9/15). Voting, thus, is necessary to give us the equal respect for our views that is needed to create good, legitimate legislative decisions. Since everyone values law and

hopes to achieve it somehow, people will be motivated to, even in the face of disagreement, work together, through democratic decision-making procedures, to achieve a government with justice, fairness and equality. Although we will all disagree about what these values entail, and be aware that our particular conception may end up in the actual law that is passed, the law has authority because we would rather have some law than no law at all. "A piece of legislation deserves respect because of the achievement it represents… : action-in-concert in the face of disagreement…[also] because it is achieved in a way that is respectful of the persons whose action-in concert it represents," (Waldron, 108-109). Therefore, majoritarian procedures are all we need because they give equal weight to each person's view and they respect the fact that we all disagree about matters of justice and the common good. Since we cannot come to a consensus on any of these issues, we must turn to voting through majority-rule (Waldron 111).

Freeman responds to this criticism with his own, more compelling position on why we should care about democracy. Freeman argues that democracy cannot simply be people exercising a vote in majoritarian procedures. This, as we know from his previous arguments, is insufficient in ensuring that we maintain the sovereignty inherent to participants in a democratic government. Majoritarian procedures will often go against what we agreed to in our original social contract and this can, in Freeman's view, result in an oppression of certain basic rights. The minority group whose interests are not reflected in the decisions of these procedures could very well be losing the very rights that everyone agreed were crucial for the freedom to pursue one's own good. How can minorities freely pursue their goals, as was decided is the

reason we commit ourselves to democracy over any form of government, if their rights are violated by a certain statute or piece of legislation? We cannot assume that everyone will act in good faith and enact laws that cohere with our basic rights of freedom and equality all the time. Thus, the things we want to protect make it reasonable to put limits on the outcomes of majoritarian legislative procedures. For law to have authority, we must respect it and, as Freeman argues, if it does not protect the rights we lay out in our constitution, there is no reason for us to respect it or abide by it. If we know, however, that the law will not only be a representation of our will through democratic decision-making procedure, but also responsive to the maintenance of our constitutionally protected rights, we will *want* to respect and abide by the law. In a constitutional democracy, Freeman asserts, the law is the will of the people as it has manifested itself through voting procedures. Thus, people recognize that law has authority because by following the law, enforcing the law and interpreting the constitution, we are carrying out what is ultimately, the people's will. Although Waldron holds the principle of equal respect under the law to be a controlling factor of how law can claim authority, Freeman wants us to see that there are more principles and requirements of democracy than just equal respect. Waldron does not want any institutions, like the constitution, that protect our rights from majoritarian procedures because he believes that majoritarian procedures, in themselves, will produce the outcomes that democracy requires: good, democratic decisions in the face of perpetual disagreement. Freeman, at this point, however, has made quite a compelling case as to how and why democracy requires much more than just equal political representation. Freeman does not wish to "silence views" through judicial review or a precommitment

to the conditions a social contract, but foster other important values in conjunction with the principle equal respect in political participation. By having both majority-rule decision-making procedures as well as mechanisms of constitutional adjudication to ensure the protection of rights, Freeman believes we are satisfying all of the requirements of a democracy. To be sovereign, people need to be able to exercise their political jurisdiction and have some basic constitutionally protected rights.

Although judicial review is an institution that prevails in the United States constitutional democracy today, this does not necessarily mean that scholars still do not debate on the subject. Questions of its legitimacy as a "non-democratic" institution within a democratic form of government continue to be brought up. Samuel Freeman, advocate of constitutionalism and judicial review truly believes in the importance of understanding the role the institution of judicial review plays, in constitutional democracies, in clearing up even more pressing controversies about constitutional issues that stem from inherent misunderstanding (Freeman 329). He argues that if we conceive of democracy as more than its procedural mechanisms for realizing equal political participation we will find judicial review to be a democratically legitimate and quite important mechanism. Democracy should be conceived of as a form of sovereignty, in which we come together, in equality, to establish principles on which we can unanimously agree should be enshrined in our constitution. These very basic principles will be the basis for the rights we decide to protect under our political agreement. Thus, we could very well decide, as free and equal citizens, "judicial review as one of the constitutional mechanisms for protecting [their] equal basic rights," (Freeman 327). What we ultimately want from democracy is our sovereignty to be

upheld in every aspect. For this reason, Freeman proposes that a constitutional democracy, conceived of as a form of sovereignty in which democratic procedures do not always produce democratic outcomes, should consist of both democratic legislative procedures and mechanisms for the adjudication of such legislation by constitutional interpretation. After careful evaluation of Freeman's position in light of Waldron's objections and criticisms, it is clear the Freeman provides the more compelling argument. Although Waldron introduces some interesting points about democratic governments, his arguments prove to be continually lacking. Waldron makes assumptions about Freeman and other advocates of judicial review that are not properly justified and he fails to give us good alternatives to the practice of judicial review Freeman successfully presents as crucial to the protection of our sovereignty, our authority to govern ourselves in accordance with democratic ideals. Waldron's seemingly procedural conception of democracy leaves out the importance of democratic principles other than equal political rights and asserts equal respect as a separate key principle, as opposed to merely an extension of free citizens' "equal political jurisdiction" as Freeman lays out in his Contractarian conception. In Freeman's view, we accept what the constitutionally protected equal basic rights should be in our social contract in terms of the broader principle of freedom to determine our own ends that sovereignty and democratic government guarantee us (Freeman 343). Thus, Freeman's position provides a more substantial view of democracy that gives us circumstances in which judicial review is justified and quite helpful to promote the ideals of the government. Alongside all of Waldron's critiques and arguments, Freeman's positions stands tall and provides thorough justification for

constitutionalism and judicial review. Freeman's position is not as extreme as Waldron makes it out to be, as never posits that judicial review is always necessary or that in every conception of democracy there is a need for such. Instead, he successfully highlights why it is that judicial review can be the best solution available for protecting sovereignty against the tyranny of the majority and why his conception of democracy as a form of sovereignty is the appropriate one. Ultimately, Freeman states, with eloquence, "There is nothing undemocratic (and it is disingenuous to claim there is) about the judicial review of laws that infringe against the equality of such fundamental moral rights …and, more generally, the freedom to pursue one's own plan of life" (367).

Works Cited

Freeman, Samuel. "Constitutional Democracy and the Legitimacy of Judicial Review." *Law and Philosophy* 9 (1990-1991): 327-70. *JSTOR*. Web. 9 June 2011.

Waldron, Jeremy. *Law and Disagreement*. Oxford: Oxford UP, 2001. Print.

Reeves, Anthony. "Advanced Philosophy of Law Class." Binghamton University. 15 Sept. 2011. Lecture.