

Is judicial protection
of fundamental rights
a necessary condition
of democracy e...



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In many democracies, judicial protection of fundamental rights is afforded by, in addition to other safeguards, the principle of judicial review by which judges can review the legality of legislative decisions in the state. The principle can vary in application among democracies – the US Supreme Court can invalidate legislation which they deem to be unconstitutional while UK judges can in theory only make a declaration of incompatibility of legislation with Convention rights.

The democratic legitimacy of the unelected judiciary to serve as custodians of fundamental rights instead of an elected institution like the legislator has spurred endless debates among lawyers and other commentators, since in exercising this duty judges can in practice hold legislation contrary to these fundamental rights. The reasoning adopted by opponents of judicial review is that there is tension between judicial review and democracy, judicial review thus having to stand down.

This paper seeks to argue that a judicial protection of rights is necessary to achieve the ends of democracy, and that certain rights are essential to a sustainable democracy. I will then argue that while the very concept of judicial review may be undemocratic it is certainly not illegitimate. I will begin by briefly defining two concepts whose relationship form the crux of this essay – “ democracy” and “ rights”. Democracy and Rights The concept of democracy is a contentious issue for legal theorists. Richard Posner groups the different schools of thought into “ Concept 1” and “ Concept 2” democracy.

“ Concept 1”, deliberative democracy is based on an ‘ aspirational’ ideal of political decisions being the outcome of informed debate by the citizenry. “ Concept 2”, pragmatic or elite democracy is based on Joseph Schumpeter’s procedural view of democracy as system of arriving at political decisions by means of a competitive struggle for the people’s vote. Rights, like democracy, are ambiguous in concept. Although I accept its limitations, I will adopt Rawls concept of rights: that ‘ Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override.

Why is judicial protection of fundamental rights a necessary condition of democracy? My arguments in support of the necessity of judicial protection of fundamental rights in a democracy are based on a deliberative view of democracy, although not in the sceptical sense depicted by Posner, but in the sense of a political system which respects diversity and the need to protect diverse interests of fundamental importance. Imperfect state of nature According to John Locke’s liberal theory, people exist in a state of nature with certain natural rights to life, liberty and property.

This state of nature lacked a mechanism for protection of these rights against infringement. This necessitated a social contract between the state and its citizens whereby the rights of the subjects are protected in return for their loyalty to the ruler. Therefore, the state’s function was confined solely to aspects of behaviour necessary to ensure the protection of the public.

Although Locke did not specifically mention the process of judicial review, it is clear that he saw as democratic a state of affairs where the judiciary could strike down legislation that was incompatible with the protection of rights.
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Locke's theory was applied in many US cases of high constitutional significance such as *Marbury v. Madison*⁴, which established judicial review over the laws of Congress, and *Lucas v. South Carolina Coastal Council*⁵, which reiterated the right of a property owner to compensation where a regulation had the effect of denying him the property's economically viable use. Thus, an imperfect state of nature necessitated the presence of the judiciary to protect rights in the democracy. The danger of "external preferences"

Dworkin argues that political decisions in a majority system reflect 'not just some accommodation of the personal preferences of everyone, but the domination of one set of external preferences, that is, preferences people have about what others shall do or have.' ⁶ This fact is reflected in a comment made by Lord Devlin on the perceived immorality of homosexuality: 'If that is the genuine feeling of the society in which we live, I do not see how society can be denied the right to eradicate it'. ⁷

In arguing why a right prohibiting racial prejudice should trump a legislation enacted on racial prejudice Dworkin submits: "Any legislation that can be justified only by appealing to the majority's preferences about which of their fellow citizens are worthy of concern and respect, or what sorts of lives their fellow citizens should lead, denies equality" ⁸. External preferences go against the democratic principle of one man accounting for one vote, because it amounts to double counting in the legislature.

At first, it seems problematic as to how judicial review will correct this situation because judges make decisions on people, arguably relying on their

moral convictions. However, the negative effect of external preferences is limited if the judiciary is entrusted with protecting rights in a democracy because judicial review ' ensures that the most fundamental political issues of political morality will finally be set out and debated as issues of principle and not political power alone... '.

Thus, the knowledge that judicial decisions will be the subject of philosophical reasoning reduces the danger of external preferences. The positive effect of adopting a " constitutional conception" of democracy over a " majoritarian conception" The majoritarian premise of democracy states that the political procedures should be designed in such a way that's its decisions reflect the preference of the majority of citizens. Dworkin submits that when the majoritarian procedure respects the " democratic" conditions - equal status for all citizens - its decisions should be accepted.

However, when the majoritarian procedure fails to conform to these democratic conditions ' there can be no objection, in the name of democracy, to other procedures that protect and respect them better. '10 This leads us to accept the constitutional conception of democracy, '... that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect. Judicial protection of fundamental rights matches the criteria set out in these quotes.

Pre-Commitment This is the idea that individuals can impose restraints on themselves as far as future decision-making is concerned. 11 Dworkin in A Bill of Rights for Britain¹² argues, using a public opinion poll in favour of his

assertion, that the British people want constitutional entrenchment of their rights because they realise that 'Something crucially important to them ... might one day prove inconvenient to the government of the day'.³ Since the British citizens realise the possibility and ability of their elected representatives in Parliament to legislate against their favour on issues such as religious freedom, they choose to erect a barrier in advance in the form of a codified document of rights which will be protected by a separate institution (such as the judiciary).

Institutional Competence Dworkin argues that the best institution for protecting rights is that the one 'best calculated to produce the best answers to the essentially moral question of what the democratic conditions actually are, and to secure compliance to these rights.'¹⁴ 'The courts handle real cases and thus can test more effectively the particular implications of abstract principles and discover problems the legislature could not forecast.'¹⁵ Judicial decisions are meant to 'turn on principle, not on the weight of numbers or the balance of political influence.'¹⁶, which leaves them without the pressure of conforming to majoritarian expectations whereas legislatures are more vulnerable to financial and political pressure'.¹⁷

I hope that these arguments help to establish judicial protection of rights as a necessary condition of democracy. Rights that require protection in a democracy "The idea of democracy cannot adequately be explained without devising rules concerning political participation, and these must inevitably be expressed in the language of rights."¹⁸ Political and Civil Rights Although "

Different theories will identify different individual rights - to freedom, independence, dignity, etc - as having fundamental and abiding importance
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... . 19, most theorists seem to agree that political rights need to be protected in a democracy, but they disagree on the extent of these rights requiring protection. Dworkin's constitutional conception of democracy demands 'equal concern for the interests of all members'²⁰ and that each person have the opportunity to contribute meaningfully to collective decisions irrespective of his convictions or ability. This is reflective of a "Concept 1" deliberative type of democracy.

Posner, however, disagrees that rights of political participation other than those which are directly necessary for electing the representatives (the right to vote and to form political parties) are necessary for protection in a democracy. ²¹ He argues that since democracy is 'a system of delegated governance', 'The Participation required of people is minimal'. Voter apathy destroys any need for the protection of other such rights enhancing deliberative democracy. Citizens are more concerned with private interests than political participation.

Civil rights are more controversial among theorists when determining whether they need to be protected in a democracy. Ely argues that discrimination on grounds of sexual orientation, for example, does not require protection in a democracy because like criminal statutes they are rightly based on sincerely held moral objections to the prohibited act²² and they do not present any 'systemic bars ... to access.'²³ However, as Dworkin argues, discriminatory laws are often advanced on grounds of the sophisticated reasoning of the legislatures which pass such laws. Ely thus contradicts himself because it requires judges to make a moral decision on whether those 'reasons' are indeed valid.

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Economic and social rights David Beetham argues that ‘ the most fundamental condition for exercising our civil and political rights is that we should be alive to do so, and this requires both physical security and access to the necessities of life’’. 24 Beetham concludes that civil and political rights constitute an integral part of democracy, but the absence of economic and social rights compromises ‘ the long-term viability of democratic institutions themselves. 25 Dworkin clarifies this by stating that equality of resources and not of resources is vital to democracy because it creates equal access and opportunities to wealth. 26 It is obvious that the rights deemed necessary for protection in a democracy are dependent on the particular concept of democracy considered. Concept 2 democracy argues only for those rights which allow people to vote and contest for elections while Concept 1 involves a wider range of rights. Is judicial review of legislation illegitimate?

Some critics have attempted to discredit these arguments, postulating a necessary tension between judicial review and democracy. My analysis in this section will take the view that although judicial review may be an undemocratic process in the strictest sense of the concept because it allows unelected representatives to make collective decisions for the citizenry, it is not illegitimate because any tension between it and democracy is justified by a higher objective of achieving a truly democratic state of affairs.

Constitutional conception” of democracy Majoritarian democracy, argues Bellamy, presents an opportunity for open dialogue, where proposals can be contested and so the laws reflect the multiplicity and complexity of the society which the citizens have to deal with. 27 Waldron, like Bellamy, <https://assignbuster.com/is-judicial-protection-of-fundamental-rights-a-necessary-condition-of-democracy-essay-sample/>

argues that the determination of rights should be based on process rather than substance because the substances of rights are a source of disagreement. 28 A theory of authority is therefore necessary to establish a body that will determine these rights.

He submits that judges are in no better position than citizens to determine rights because of a misconception that their thinkings are more reasoned and profound than those of politicians and their constituents. He says that ‘ Participation by all is valuable because the sheer experience of arguing in circumstances of human plurality helps us develop more interesting and probably more valid opinions than we could manufacture on our own. ‘

How then can Waldron account for decisions made by the majority which have turned out to be defective, and have been repealed? 0 There needs to be some sort of process by which the decisions of the deliberative process can be assessed for its compliance with fundamental rights, and judicial review is that process. Waldron must move away from his mindset of all decisions emanating from the judiciary as undemocratic, most especially since Dworkin after all concedes that decisions emanating from the legislature that respect the democratic conditions should be accepted.

Institutional Competence

Ely argues that the act of judicial review is one of perspective rather than expertise, because after all many legislators are lawyers themselves. 31 He submits that that the role of judges should be confined to that of referee deciding technical and procedural rather than controversial and substantive questions of democracy, that is, whether the political market is operating

under equality. Posner adds to this in saying that the experience judges have in the court room is not sufficient to make them specialists in the fields of human activity which they regulate to justify their powers of judicial review. 2 He asserts that the Supreme Court is in reality timid because they are yet to abolish capital punishment or decree homosexual marriage.

The plausibility of this bold assertion is marred by the failure of Posner to account for periods in American history when other democratic institutions have called for judicial restraint, for example, President Nixon and Senator Jacksons' campaign for a statutory amendment of the Court's decision in *Swann v Charlotte-Mecklenburg Board of Education*³⁴ which gave federal courts powers to use busing orders as a remedy for segregation. 5 Pre-commitment Waldron argues that this argument may be justified in the case of the drinker who chooses to hand the car keys to a friend to avoid causing damage under intoxication.

The situation is, however, different in democracy because society is in disagreement about what rights people should have, and which rights should take priority over others. 6 He argues that the act of pre-commitment would be simply be a triumph of one view over another, rather than based on any pre-emptive rationality. I disagree with Dworkin for the simple reason that some normative rights are less contentious, such as the right to life and free speech, and these can be bound by democratic self-restraint. None of these arguments, in my opinion, can offer arguments to rebut my presumption of the necessity of judicial protection of fundamental rights in a democracy.