AGAINST MAJORITARIANISM: DEMOCRATIC VALUES AND INSTITUTIONAL DESIGN

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INTRODUCTION

"*This is something tremendous, this is something unbelievable. We're talking above all of an idea of democracy that isn't only majority rule, an idea of democracy that is about minority rights and group rights and above all individual human rights.*"

– Kanan Makiya, remarks at a press conference in London before the second Iraq war discussing a post-war governance plan.[1]

"Hard-line Shiite politicians have been saying with growing vehemence that . . . American goals [such as a fair distribution of future oil revenues, lower barriers for Sunnis seeking government jobs, and a militia law that would demobilize armed groups such as Shiite militants] amount to an attempt to deprive them of the victory they won at the polls, and that instead of placating Sunni Arabs, a minority of about 20 percent in Iraq's population of 27 million, the United States should stand aside and 'allow the minority to lose.'"

– Sabrina Tavernise and John F. Burns[2]

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[1] GEORGE PACKER, THE ASSASSINS' GATE: AMERICA IN IRAQ 95 (2005); *see also* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 33 (2006) ("'Without the Sunni parties there will be no consensus government[,] . . . without consensus government there will be no unity, there will be no peace.'" (quoting Iraqi President Jalal Talabani)).

[2] Sabrina Tavernise & John F. Burns, *Promising Troops Where They Aren't Really Wanted*, N.Y. TIMES, Jan. 11, 2007, at A20.

Competing understandings of democracy vie for our attention and support. One understanding identifies democracy as the right of majorities to rule. This has the advantage of simplicity and gains further support from the frequent employment of majority-rule voting. Another understanding is more complex but far more adequate. It insists that political systems be organized on the basis of an abstract principle of political morality: political equality. It allows opportunities for majority rule voting and direct popular participation to play important roles in working democracies, but it asserts that legitimate democracies are those that respect minority rights and promote fair and inclusive deliberation.

Of course, we often disagree about the substance of particular rights claims, and the *objectively* difficult question of how best to organize our institutions – including judicial review – so as to realize a system of collective self-rule on the basis of fair and inclusive deliberation and political equality. Perhaps because of the complexities inherent in any account of democracy in today's world, there is much loose talk, and some impressive political theorizing, in favor of the simple idea of democratic politics as majority rule. I would like to argue here, however, that we should stop talking about "majoritarianism" as a plausible characterization of a political system that we would recommend.

I. THE "GAP" THESIS

Ronald Dworkin seems to me correct with respect to a fundamental point which is very often missed: the basic principle of democracy is *political equality*[3] and there is an important gap – an interpretive gap – between that principle and the more concrete rules and norms that structure decision making in particular institutional settings.

Importantly, majority rule is not a fundamental principle of either democracy or fairness, nor is it required by any basic principle of democracy or fairness. Rather, it is one among a variety of decision rules that may, but need not, advance the project of collective legitimate self-rule based on political equality.[4] Majority rule is a decision rule that has some nice properties, for example it is decisive when there are only two options, but its virtues, both practical and moral, are easily and frequently exaggerated.

An excellent discussion of this general terrain can be found in Charles Beitz's *Political Equality*.[5] Indeed, the core aim of that book is to insist on the gap between the basic principle of political equality and more concrete questions of institutional design, including the choice of voting rules and forms of representation (e.g., proportional representation vs. single-member, first-

[3] RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (forthcoming 2010) (Apr. 17, 2009 manuscript at 218-19, on file with the Boston University Law Review).

[4] *See id.* (manuscript at 242).

[5] *See* CHARLES R. BEITZ, POLITICAL EQUALITY: AN ESSAY IN DEMOCRATIC THEORY 55-67 (1989).

past-the-post systems).[6] Questions of democratic institutional design are rarely settled by reference to fundamental principles alone.[7] This is an example of what Dworkin might call objective indeterminacy.[8]

The debate over democracy, majority rule, and judicial review has often been conducted at too high a level of abstraction. The interesting issue is what constitutes the best overall system of collective self-government on the basis of political equality. Judicial review – designed one way or another – may or may not contribute to the improvement of legitimate self-rule. But judicial review is neither ruled out by first principles of political morality, nor is it required by first principles of political morality. Those principles need to be worked out and interpreted in particular practical settings as we take up the difficult issue of optimal institutional design. None of this is to criticize Dworkin, because I think he has it pretty much right at the level of basic principle.

It would be fruitful to recognize that actual democratic political systems are not sensibly described as "majoritarian," and then to move discussions of optimal institutional design to less abstract terrain.

II. WHY MAJORITARIANISM?

A. *Waldron's Argument for Majoritarianism*

Jeremy Waldron has advanced an argument for majority rule based on the principle of political equality. He has argued that "final decisions" about political questions – including individual rights and political processes themselves – should be made by majoritarian procedures.[9] Majoritarianism can be supported on a variety of grounds, but the simplest and apparently most morally basic defense is that when "equal" persons disagree about what the rules or policies should be, the fairest way of settling the disagreement is to give everyone an equal vote and the side that gets the most votes wins. Majoritarianism appears to respect our political and moral equality by submitting political questions to a procedure in which everyone has an equal

[6] *See id.* at x-xi.

[7] *See id.* at 138-40 ("[T]here is no general reason to reject a system of representation simply because it does not adhere to the proportionality principle.").

[8] Professor Dworkin rejects indeterminacy as the default position and would require a positive justification for a claim of indeterminacy rather than uncertainty, *see* DWORKIN, supra note 3 (manuscript at 58-63), but, in some cases, abstract questions of democratic institutional design may be objectively indeterminate. This is not to say that one cannot make a sound case for particular reforms when one combines these principles with greater information about particular contexts and historical patterns and pathologies.

[9] JEREMY WALDRON, LAW AND DISAGREEMENT 299 (1999). Democracy is founded on the premise of political equality: individuals equally hold rights, including an equal right to participate in making majority decisions. This right to participate, Waldron maintains, is the "right of rights." *Id.* at 232.

say; no one is regarded as more competent or worthy of having a greater say than anyone else. Majoritarianism instantiates one straightforward understanding of the principle of political equality: equal votes for equal people and the greatest number wins.[10]

Dworkin calls this – deflatingly – the "head-counting" principle, and argues that majority rule has no special claim to legitimacy.[11] It certainly lacks legitimacy if majorities oppress minorities and flaunt their rights. Even Waldron at his most majoritarian concedes that some rights are conditions of democratic legitimacy.[12] So the question remains: why should we regard majority rule as morally special? Why should a part of the people – even the larger part – decide for the whole? Why should majorities make decisions even about "the nature and limits of majority decision-making?"[13] Waldron has suggested an answer: politics is characterized by pervasive disagreement, so we disagree over every standard that might be invoked to qualify or limit majority decision, including the content and scope of those rights whose observance is essential to democratic legitimacy. As Waldron has said: "[i]t is disagreement all the way down, so far as constitutional choice is concerned."[14] Since a part will always decide for the whole, it is preferable that the ruling part should be the larger part.

Majorities, Waldron has said, should have the final say on political questions, including the question of the procedures by which we normally decide political issues. This is not because majority decisions are necessarily legitimate but because when political disagreements are at issue – including disagreements about the preconditions of legitimacy – there is no procedure preferable to majority rule as a matter of basic principle. Waldron does not rule out reliance on complex decision procedures and he favors space for deliberation, but the majority should be the ultimate "decider" when there is disagreement; and, presumably, complex procedures should not be deeply entrenched in a way that is hard for the majority to change.[15]

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[10] These paragraphs draw on a draft paper I coauthored with Christopher L. Karpowitz and Evan Oxman. *See generally* Stephen Macedo, Christopher L. Karpowitz & Evan Oxman, Two Conceptions of Democracy (Mar. 7, 2006) (unpublished manuscript, on file with the Boston University Law Review).

[11] DWORKIN, supra note 3 (manuscript at 242-43).

[12] WALDRON, *supra* note 9, at 283.

[13] *Id.* at 298.

[14] *Id.* at 295.

[15] *See id.* at 289-312; Mark Tushnet, *Against Judicial Review* 2-3 (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 09-20, 2009), *available at* http://ssrn.com/abstract=1368857 (arguing that "mechanisms of displacement must be relatively easy" so that the people can "replac[e] the legislators who made choices of which [they] disapprove); *see also* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 96-100 (2000) (discussing the importance of ensuring non permanent majority factions, especially in a system without judicial review).

It seems paradoxical to allow the majority to decide on the limits of majority rule. However, majoritarians respond to this apparent paradox by pointing out that every alternative method of decision will have the same liabilities as majority decision – persisting disagreement, and some making decisions that bind all – as well as the additional problem of privileging the "voices and votes of a few" over a greater number.[16] Majority rule at least allows "a voice and a vote in final decision-procedure to every citizen of the society," and when numbers rule, the equality of each person is, at least in one aspect, preserved.[17]

Nevertheless, as Dworkin says, if all decision procedures are controversial, saying the choice should be settled by majoritarian procedure simply begs the question: *why*?[18] Waldron's response seems to be that the choice of any ultimate settlement procedure is going to beg the question in its own favor, so *why not* majority rule? Waldron's argument seems to boil down to the contention that we should prefer majority rule to minority rule in conditions in which we disagree about everything else and know only that one side has numbers on its side.

B. *Majoritarianism and Judicial Review*

Waldron has pursued the argument at a high level of abstraction, and his examples are scarce. In reality, societies engaged in constitutional design often manage to secure super-majority support for constitutions containing minority rights guarantees and independent judiciaries charged with enforcing them. These and other limitations on majority rule have become ubiquitous features of democratic constitutions.

Of course, some disagree with particular rights guarantees and American-style judicial review. But what is the character of this disagreement, and is it reasonable? Sometimes objections to minority rights claims are palpably unreasonable, even when asserted by a majority of the people or the people's representatives. This becomes clearer when we shift the discussion away from abstract conceptions of disagreeing "majorities" and "minorities" to more concrete examples. For instance, it seems unreasonable for a majority of Americans or their representatives to deny indigent persons accused of crimes the right to publicly funded counsel or to deny adult homosexuals the liberty to have consensual sex in the privacy of their homes. I agree with Dworkin that it is a gain for democracy when a court that is empowered by a popular constitution with the power of review insists upon protecting the equal rights of accused persons or homosexuals. I am not moved by the observation that some people disagree with the proposition that those rights should be secured: what reasons do they have?

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[16] WALDRON, *supra* note 9, at 299.

[17] *Id.* As with utilitarianism, there is another aggregative standard for decision: everyone counts for one, nobody counts for more than one. BEITZ, *supra* note 5, at 55-67.

[18] *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 18, 68-70 (1996).

Waldron has other cards up his sleeve. He observes that there may be a gain to democracy in one respect insofar as we agree that a right essential to legitimacy has been unfairly denied by legislatures. But there is also a loss to democracy insofar as "unelected and unaccountable" judges have invalidated a duly enacted law.[19]

This critique is flawed. First, federal judges are not "unaccountable." Rather than being accountable at the polls, judicial accountability takes a different form. Judges are accountable for the quality of the decisions they reach and the reasoning and evidence that backs their decisions. Those decisions and opinions are subject to intense scrutiny and debate. Courts are not alone in this regard: democratic societies routinely and increasingly design institutions that operate on the basis of multiple forms of accountability.[20] Elections are one form of direct accountability, but as an accountability mechanism, elections are deeply flawed in a variety of ways. Requiring judges to give reasons in public and subjecting those reasons to intense scrutiny is another, albeit indirect, form of democratic accountability.

Second, judges' decisions are not final. True, judges' decisions can be very difficult to reverse, and this is certainly true of the U.S. Supreme Court. But unpopular Supreme Court decisions eventually are reversed, and in the meantime their force can be limited.[21] Waldron, Tushnet, and others may be right that other countries have done a better job than the U.S. of organizing the interactions among courts and legislatures.[22] Nonetheless, I do not argue that the U.S. Constitution is perfect, nor does Dworkin.

C. *Indeterminacy, Uncertainty, and Judicial Deference*

Sometimes it seems that Waldron wants to advance a more modest argument, focusing on the range of cases where differing legislative factions disagree reasonably. In those instances, he seems to be saying, the courts should respect the disagreement and not settle it.

Valuable observations on this score can be found in the early chapters of *Justice for Hedgehogs*. Obviously, moral questions concerning rights arise which strike us as *uncertain*: for example, when is a one-day waiting period an

[19] WALDRON, *supra* note 9, at 286-87.

[20] *See* John Ferejohn, *Accountability and Authority: Toward a Theory of Political Accountability*, *in* DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 131, 131-53 (Adam Przeworski et al. eds., 1999) (arguing that "[e]lectoral punishment . . . is a fairly blunt instrument," and that accountability through greater transparency can be much more effective).

[21] For example, Congress can enact legislation that limits the decision's impact and lower courts can narrowly interpret the holding or call the Supreme Court's reasoning dicta.

[22] *See* discussion *infra* notes 45, 46 and accompanying text (discussing how limited judicial review in countries such as the United Kingdom and New Zealand has resulted in a higher caliber of debate and discussion within the political branches). Similarly, Dworkin does not argue that the United States's institutional design is optimal.

unfair burden on the choice of a woman to have an abortion? And other questions may be *objectively indeterminate* on the basis of abstract principles alone.[23] But if these are the sorts of cases that Waldron is trying to single out as inappropriate for judicial resolution, then the stark and simple case for majoritarianism – which I believe Waldron has distilled better than anyone – sweeps far too broadly. We need to specify which questions concerning rights are objectively uncertain and which are indeterminate.

Waldron mentions abortion as an example of a policy area where the U.S. Supreme Court should have exercised greater deference.[24] What we need to know is exactly what is indeterminate or uncertain about the claimed abortion right and why a woman should not have the right to reflect on that indeterminacy or uncertainty and choose for herself. Waldron presumably means that important aspects of the abortion question are matters of reasonable disagreement even when we factor in the liberty interests of women; on the other side, after all, are the interests of the unborn. Perhaps so, but the case needs to be laid out in some detail to show that there really is a stalemate here with powerful reasons on both sides and no sufficiently clear stronger case. The bare fact of disagreement, without more in terms of supporting reasons, often deserves little or no weight. Somewhere there will be a crank, zealot, or nut who disagrees with the most sensible and well-justified of policies.

Obviously, I am not insisting that Jeremy Waldron pronounce on every controversy. But our judgment about the reasonableness of his urging that the federal courts stay out of the abortion issue (if he does urge that) will depend in significant part on our assessment of the substantive merits of the contending positions in this controversy. We need to address the issue at retail. It is hard to see how we will get anywhere on the basis of talking about "disagreement" in the abstract.

III. AGAINST "MAJORITARIANISM"

Waldron's defense of majority rule is the best available, and it is unsuccessful. Indeed, it is half-hearted, as Waldron favors complex constitutional arrangements designed to protect minority rights and promote equitable representation and fair deliberation.[25] His model of well-working legislative politics has many of the same admirable features as Dworkin's

[23] *See supra* notes 7-8 and accompanying text.

[24] Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1366-67 (2006) (citing both abortion and affirmative action as examples of rights-based disagreements that "define major choices that any modern society must face").

[25] *See id.* at 1361-62 ("I assume that the [democratic] institutions, procedures, and practices of legislation are kept under constant review from this perspective, so that if there are perceived inequities of representation that derogate seriously from the ideal of political equality, it is understood among all the members of the society that this is an appropriate criticism to make and that, if need be, the legislature and the electoral system should be changed to remedy it.").

partnership democracy. Waldron sensibly questions the legitimacy of unicameral legislative systems, and other systems that do not adequately insure minority representation and inclusive deliberation.[26] But note that bicameral systems are not majoritarian, but rather are super-majority systems. His more recent criticisms of judicial review as practiced in the United States do not depend entirely upon majoritarian premises, but also rely on the more pragmatic assertion that, in practice, courts and judges do not improve, but rather frequently degrade, deliberation in legislative and other political settings.[27] Waldron and other critics of American-style judicial review would do well to simply stop talking about majoritarianism, which in real world discussions of democratic institutions serves more to distract than to illumine.

It is unclear what people mean when they describe a political system as "majoritarian." Actual democratic polities (and non-public associations) employ majority rule in particular phases of decision-making. But majority rule is merely a voting rule, employed in particular settings. It has strengths and weaknesses. It is decisive when there are only two options, but when there are more than two options, there can be cycling of preferences such that there will be no majority winner.[28] So E.E. Schattschneider once said that the people are a sovereign who can answer only one question: A or B?[29] "Majority rule" cannot get us to the point at which majority decision-making is possible; it cannot be all there is to democracy. When to employ it is generally as much a matter of pragmatic as principled considerations: how is it liable to work over time in the context in question, are their alternative voting rules that would be fairer to all concerned, and perhaps more useful in other ways?

Mass elections for legislatures or executives in constitutional democracies often empower governments that represent only pluralities of the public, rather than majorities. In these real world systems, moreover, the choices that voters face are typically highly constrained: a limited number of parties, perhaps only two, compete for our support. Moreover, the office of modern citizen is not

[26] *Id.* at 1361 & n.47.

[27] *Id.* at 1369-95 (arguing that because neither majoritarian nor non-majoritarian processes clearly produce better outcomes, majoritarian processes should be preferred because they are *procedurally* superior); Jeremy Waldron, *Compared to What? Judicial Activism and the New Zealand Parliament*, 2005 N.Z. L.J. 441, 442-45.

[28] Add a third alternative and the possibility of intransitive preferences and the familiar Arrow-type cycling problems (varying the order in which several pair-wise alternatives come up for a vote) make it impossible to say that any particular results are preferred by a majority.

[29] *See* E.E. SCHATTSCHNEIDER, PARTY GOVERNMENT 52 (1942) ("The people are a sovereign whose vocabulary is limited to two words, 'Yes' and 'No.'"); *see also* E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 56-59, 137-38 (Harcourt Brace Jovanovich Coll. Publishers 1980) (1975) [hereinafter SCHATTSCHNEIDER, SEMISOVEREIGN] (describing how the two-party system "organize[s] the electorate by reducing their alternatives to the extreme limit of simplification").

such as to elicit a high level of responsibility. It is no insult to observe, with Schumpeter,[30] that being one citizen among millions is like being a member of an enormously large committee – the incentive to do one's homework before meetings is weak. Mass popular elections surely do – as they ought – matter greatly in modern representative systems, and legislative deliberation is often highly admirable, well-informed, conscientious, and dignified. But there is no insult or affront – either to the voters or to the democratic principle of political equality – if, in designing and adopting popular constitutions, additional mechanisms are adopted to further improve the quality of collective deliberation: expert administrative agencies, politically arm's-length commissions, and courts with the power of review. Political institutions such as these are crucial features of modern democratic systems. They are accountable not on the basis of elections but often based on demanding expectations that reasons will be given in public and subjected to intense scrutiny.[31]

IV. MAJORITY RULE VOTING: A DECISION RULE NOT A POLITICAL SYSTEM

We should dispense with the word "majoritarian" as a shorthand description for democracy, and instead consider when majority rule voting makes sense and when it does not within fair, inclusive, and deliberative systems of collective self-rule. Majority voting is one of many possible decision procedures that are consistent with the underlying principle of political equality; other decision rules are also consistent with political equality and may be fairer and more inclusive. When it comes to elections for councils or legislative bodies, proportional representation and "multi-winner" rules can help insure that minorities get their fair share of power. Preferential voting can allow for more fine-grained expression of preferences. In some settings, consensus rather than majority rule is a reasonable aim of deliberation.[32] Different procedures yield different accounts of what "the people" prefer, but no one procedure is clearly superior on the basis of fundamental normative principles, nor on the axioms of social choice theory.[33] Perhaps most importantly, supermajority voting rules in which minority interests gain special

[30] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 261 (2d ed. 1947); *see also* SCHATTSCHNEIDER, SEMISOVEREIGN, *supra* note 29, at 135-36.

[31] For example, administrative agencies are subject to robust due process requirements codified in administrative law including publication of proposed rules, opportunities for public comment, and judicial review of agency decisions. *See* Administrative Procedure Act, 5 U.S.C. §§ 553(b)-(c), 702 (2006).

[32] *See* JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 31-33 (1983).

[33] *See* Mathias Risse, *Arguing for Majority Rule*, 12 J. POL. PHIL. 41, 43-48, 57-62 (2004) (critiquing arguments for majority rule and describing various alternate voting procedures); *see also* BEITZ, *supra* note 5, at 58-67 (arguing that simple majority rule does not completely satisfy social choice theory).

protection are often preferable: we *all* might prefer these systems given the possibility of finding ourselves in the minority.

Part of the apparent appeal of majority rule is its fairness (everyone counts for one), but in the real world, where we know there can be persistent majorities and minorities, insisting that democratic principles favor majority rule seems to me wrong as well as imprudent. If majority factions develop, whether through clusterings of voters or linkages across issues, the minority may *never* get its way via majority rule, and its fundamental interests – and basic human rights – may be ignored.[34]

Finally, majority rule is flawed in a way that other "aggregative" conceptions often are. Like utilitarianism, majoritarianism looks at social decisions as aggregation problems in which everyone counts for one and nobody counts for more than one. Majority rule says that the loss for the few is justified by the fact that the winners are greater in number. But why should the minority accept this way of looking at it? Perhaps under a system of "minorities rule" in which all groups have their turns to rule in shifting and unstable governing coalitions, the (distributive) fairness criterion is satisfied since theoretically, everyone gets a fair turn to be in the majority. In actual politics, there can be consistent losers – "discrete and insular minorities"[35] – who are entitled to the protections afforded by basic rights. Fairness requires that institutions should speak to the vulnerable perspective of minorities and not simply lump them in with everyone else. Fairness requires that we look at the justifiability of a political system *distributively* and not merely *aggregatively*, as Jeremy Waldron himself has argued with great eloquence.[36]

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[34] *See* BEITZ, *supra* note 5, at 90 ("[F]air procedures ought not to allow the more or less permanent exclusion of an entrenched minority from effective participation in politics."). As Douglas Rae has argued, if our collective choice about decision rules is guided by the aim of assuring each person that the system maximizes the chances of getting what he wants and not getting what he does not want, majority rule wins out only under extremely restrictive conditions – strictly pair-wise alternatives, strictly individualistic preferences (no factions or coalitions), no linkages across decisions, no accounting for intensity of preferences, no asymmetry of gains and losses (no preference for avoiding bads over achieving goods). *See* Douglas W. Rae, *Decision-Rules and Individual Values in Constitutional Choice*, 63 AM. POL. SCI. REV. 40, 40-63 (1969) (discussing the difficulties that permanent minority factions pose to majority rule). If we depart from these conditions (by allowing for the existence of factions, by including non-individualistic preferences, etc.), majority rule loses its appeal. *See id.*

[35] United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1937); JOHN HART ELY, DEMOCRACY AND DISTRUST, 152-53 (1980) (arguing that the real issue is not that the minorities are "discrete and insular," rather that status is the result of an underlying prejudice that is harmful to a democratic system). Note here that the objection to a simple aggregation approach refers to the underlying strategy of justification.

[36] Waldron argues this point in his terrific review of John Rawls's *Collected Papers*. *See generally* Jeremy Waldron, *The Plight of the Poor in the Midst of Plenty*, LONDON REV. BOOKS, July 15, 1999, at 3-6 (reviewing JOHN RAWLS, COLLECTED PAPERS (Samuel Freeman ed., 1999)). For another account, see, for example, BEITZ, *supra* note 5, at 23 ("[T]he terms

The idea that majoritarianism is the moral core of democracy does not hold up to critical scrutiny. *Majoritarianism is not a uniquely authoritative or legitimate decision rule in conditions of disagreement among political equals*. It has the virtue of simplicity, and it is decisive when there are two options. However, majoritarianism as an *ideology* is a simplistic and morally unattractive solution to the problem of collective self-rule amidst the great diversity and disagreement of modern mass societies. It is not a promising way of taking seriously the principle of fair treatment that we should also want our politics to represent. As Dworkin says, it should not be fetishized, as it too often is.[37]

V. JUDICIAL REVIEW AS A DEMOCRATIC OPTION

Judicial review should also not be fetishized in our accounts of constitutional democracy, and the critics of American-style "strong" judicial review are right to complain that many celebrate the Supreme Court's role without adequately considering the possible costs and drawbacks. It is much to Dworkin's credit that he defends judicial review without fetishizing it. As he says, "Nothing guarantees in advance that judicial review either will or will not make a majoritarian community more legitimate and democratic."[38] He denies that the Supreme Court is, in principle, at odds with democracy, and argues that its contribution, on balance, depends upon how it has actually behaved.[39] Assessing the Court's contributions to democracy cannot, therefore, be settled at the level of principle, but requires careful attention to history and institutional analysis.

The history is a mixed bag, and it is difficult to assess the impact of federal court decisions on the political activities, energies, and capacities of other institutions and actors in democratic politics. Some charge that the availability of litigation strategies has sapped and wasted the political energies and resources of those seeking social change. Gerald Rosenberg and others have argued that federal court decisions make no discernible difference with respect to desired outcomes.[40] The courts are generally impotent to effect social change but they frequently spur political backlash.[41]

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of democratic participation are fair when they are reasonably acceptable from each citizen's point of view.").

[37] DWORKIN, *supra* note 3 (manuscript at 246).

[38] *Id.* (manuscript at 250).

[39] *Id.* (manuscript at 249-51).

[40] *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 353-54 (2d ed. 2008).

[41] *See id.* at 415-19 ("[T]hose who rely on the courts absent significant public and political support will fail to achieve meaningful social change, and may set their cause back."); Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 71, 85 (1994) (arguing that "a transformation in American race relations was . . . a virtual inevitability" and that judicial action through *Brown* "catalyz[ed] southern

These charges of impotence and backlash are hard to assess, resting as they do on suppositions about counterfactual history (i.e., what would have happened had alternative strategies been pursued). The best empirical work on these matters – by Michael McCann, Thomas Keck, and others – points to ways in which those advocating for social change can be energized by court decisions even if their opponents are also energized.[42] While the litigation strategies pursued by those seeking equal rights for gays and lesbians have enjoyed mixed success,[43] for example, it is very hard to imagine that the repeal of sodomy laws nationwide would have occurred without the Supreme Court.[44] Furthermore, who would have foretold twenty-five years ago that gay marriage would be a realized fact in some states and the District of Columbia and a matter of widespread debate and ferment in so many others? One must allow that the strategy that has been pursued, which has prominently included litigation, has in many ways been phenomenally successful.

Those who defend judicial review without fetishizing it are open to the idea that there may be ways of organizing the interactions among courts and legislatures that do a better job than the American model. "Weaker" forms of judicial review facilitate the reconsideration of legislation deemed to infringe on minority rights without invalidating it. Arguably, as Mark Tushnet, Waldron, and others have posited, "weak" judicial review may be a better way of improving legislative deliberation and the caliber of political argument democratic politics as a whole.[45] Waldron is especially impressed by the caliber of debate in the British Parliament and speculates that this may be due

resistance to racial change"). *See generally* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007) (arguing that backlash is a normal part of "democratic constitutionalism" because it permits the people to have an interpretive voice in constitutional law).

[42] *See* MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 58-65 (1994); Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC'Y REV. 151 *passim* (2009) [hereinafter Keck, *Beyond Backlash*] (observing how same-sex marriage law suits resulted in a backlash against gay rights, but also laid the groundwork for future successful litigation); *cf.* Thomas M. Keck, *Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?*, 101 AM. POL. SCI. REV. 321, 322-23 (2007) (examining how often and under what circumstances "partisan elites regularly attempt to use the Court to promote their own policy preferences and political fortunes").

[43] *See* Keck, *Beyond Backlash*, *supra* note 42, at 172.

[44] *See* Lawrence v. Texas, 539 U.S. 558, 578-79 (2003) (holding a Texas sodomy law to be a violation of substantive due process).

[45] *See* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 151-57 (comparing the British and American models and illustrating a higher caliber of constitutional debate in the British system).

to the absence of strong judicial review in Britain.[46] Who knows? If it is true it is likely due to a lot of things.

It seems to me that the issue of ideal design is difficult. Neither Dworkin nor I argue that the American model is ideal. For example, in *Justice for Hedgehogs*, Dworkin suggests term limits for Supreme Court Justices.[47] The American Constitution is now extremely old – some might call it "antique" – and though it certainly has been durable, it would be very surprising indeed if nothing could be learned from 220-plus years of subsequent constitutional experience!

The challenge is to be fair in our assessments of particular institutions, while also realistically assaying the opportunity costs of mobilizing for constitutional reform when political energies are scarce, and doing all of this on the basis of a defensible account of the values of democracy. Dworkin adopts a sensibly pragmatic attitude toward institutional design. He insists that we should take an interpretive posture toward the institutions that we have, making them the best they can be, while also considering how they might be reformed.[48]

Dworkin does not argue for an abstract "right to judicial review," as some have done,[49] though citizens do of course have a right to judicial review within the constitutional system of the United States. The relevant individual right at a more abstract level would presumably be a right to a fair hearing before being convicted of a crime or otherwise disadvantaged by a determination of law. It is worth noting that from a democratic standpoint, judicial review of legislation – or some other reasonable form of hearing for individuals – does provide a particular and valuable form of participation to individuals. In court – or some other appropriate setting in which individuals can have their complaints fairly assessed on the merits and in a way that is insulated from partisan political pressures – the state and dissenting individuals appear as equals, and the state must justify itself to particular dissenting parties, responding to the merits of their claims. As Dworkin observed long ago: it is wonderfully democratic that the state and dissenting individuals or groups appear in court as equals (at least formally), there to argue for and against the contention that the law offends individual rights or some other constitutional

[46] WALDRON, *supra* note 9, at 289-94 (discussing how "limited review" may have improved the quality of political dialogue on issues such as abortion and gay rights in the United Kingdom and New Zealand); *see also* TUSHNET, *supra* note 45 at 157 ("[T]he performance of legislators and executive officials [in systems with weak judicial review] in interpreting the constitution is not . . . dramatically different from the performance of judges.").

[47] DWORKIN, supra note 3 (manuscript at 251).

[48] *See id.* (manuscript at 219-20) ("We do better when we recognize that the familiar concepts of political virtue are interpretive concepts.").

[49] *See* Yuval Eylon & Alon Harel, *A Right to Judicial Review*, 92 VA. L. REV. 991, 997-99 (2006) (arguing that judicial review protects a moral right to a hearing rather than merely a legal "watch-dog" right).

principle.[50] In considering the democratic merits of judicial review, or other forms of individualized hearings for individuals who believe their rights have been unjustifiably infringed, it is worth recognizing that courts furnish intrinsically valuable participatory forums.[51]

CONCLUSION

Judicial review of legislation is a permissible option when considering the difficult question of optimal institutional design in modern democracies: it offends no basic principle of democratic political morality. According some power to judges (and other political officials) insulated from some partisan political pressures may help political communities better achieve their democratic aspirations. Deliberation on hard questions of institutional design is not advanced by wrongly identifying democracy with majority rule.

[50] DWORKIN, TAKING RIGHTS SERIOUSLY 216-17 (1977) (arguing that our judicial system provides democratic opportunities for "the development and testing of the law through experimentation by citizens and through the adversarial process").

[51] For two good discussions responding to Waldron, which I found helpful in writing this paper, see Annabelle Lever, *Is Judicial Review Undemocratic?*, PUB. L., Summer 2007, at 280, which argues that Waldron has underestimated "the extent to which democratic forms of politics can be judicial," and Annabelle Lever, *Democracy and Judicial Review: Are They Really Incompatible?*, 7 PERSP. ON POL. 805 (2009), which illustrates a democratic justification for judicial review. For a good discussion of the philosophical and constitutional underpinnings of judicial review and its implications on democracy and equality, see RONALD DWORKIN, A MATTER OF PRINCIPLE 33-71 (1985).