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A 'HARD **CORE**' **CASE** AGAINST JUDICIAL **REVIEW**
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Responding to Richard H. **Fallon,** Jr., The **Core** of an **Uneasy Case** For Judicial **Review**, 121 HARV. L. REV. 1693 (2008).

In their exchange on judicial **review**, Jeremy Waldron and Richard **Fallon** join philosophical issue over whether it is a desirable or defensible institution in a democratic society. In his enthusiastic **case** against judicial **review**, Waldron insists that, although the 'outcome-related' arguments are inconclusive, the 'process-related' arguments are overwhelmingly on his side. He concludes that "rights-based judicial **review** is inappropriate for reasonably democratic societies whose main problem is not that their legislative institutions are dysfunctional but that their members disagree about rights." [FN1] In response, **Fallon** puts forward a tentative defense of judicial **review** on the basis that there are both outcome-related and process-related arguments to warrant a 'multiple veto-points' approach to retaining some form of judicial **review**. He insists that "it is reasonable to believe that a **constitutional** democracy with a well-designed system of judicial **review** would produce a morally better pattern of outcomes than a political democracy without judicial **review** ... under circumstances that plausibly exist." [FN2] In short, therefore, while Waldron finds that a balance of outcome-related and process-related arguments works to give the edge to the con side, **Fallon** holds that there still remains an **uneasy case** to be made pro judicial **review**.

In this short comment, I want to suggest a more 'hard **core' case** against judicial **review** in democratic societies. In particular, I want to challenge Waldron's assessment that the outcome-related arguments are inconclusive and **Fallon's** resistance to that fact. To do this, I will take a more strongly democratic approach and question Waldron (and **Fallon's**) views about there being available and reliable epistemological grounds for reaching correct decisions on rights disputes. Once this dubious assumption is abandoned or substantially relaxed, all outcome-related arguments are seen to be undergirded by process-related arguments which strongly support the con **case**. However, although I maintain that judicial **review** has no legitimacy in a democracy, I do think that **Fallon's** talk of 'multiple veto-points' is still valuable. While a multiplicity of deliberative institutions can play a useful role in a democratic polity, there is no reason at all why judicial **review**, as presently constituted, should be one of them. Accordingly, an unrelenting commitment to democracy offers a more 'hard **core**' and convincing **case** against judicial **review**.

I. DEMOCRACY AND PHILOSOPHY

Like other legal theorists, Waldron and **Fallon** seem to insist that there is some objective ground or moral facts-of-the-matter in regard to rights disputes. [FN3] In making their respective **cases**, Waldron and **Fallon** make a similar philosophical claim that, even if there is widespread disagreement about the precise definition and scope of rights, it is possible "to get at the truth about rights" [FN4] and that "acknowledgement of reasonable disagreement does not preclude reasoned judgments about what is right and wrong." [FN5] Because rights disputes are so fundamental in placing possible checks on the activities of legislatures, they maintain that it is "important that we get them right" [FN6] and that there is a "relatively, even if not perfectly, epistemically reliable way" to discover "moral truth[s]" and "right answer[s] ... to questions involving rights." [FN7] These are not merely claims about the legal indeterminacy around rights disputes, but about the existence of moral truths and the identity of rights as objective moral entities. As such, Waldron and Fallon's stances are foundational and metaethical claims of a grand epistemological kind. However, if their out-

come-related arguments are to have any purchase at all, Waldron and Fallon are obliged to rely on some such objectivist position. Without some relatively fixed benchmark, even if elusive and contested, against which to measure outcomes, there would be no way to compare the respective merits of different devices for resolving the outcomes of rights disputes. As foundational as these epistemological claims are to Waldron and Fallon's stances, they are highly controversial. This is especially the case in those societies in which its members are or would be committed to a strong mode of democracy. By this, I mean those societies that understand democracy as being not only a qualified mode of political governance, but also a thoroughgoing ideal by which they organize social life generally. In this sense, both Waldron and Fallon reveal themselves to be only half-hearted democrats. While Fallon is explicitly guarded in his commitment to democracy by treating democratic institutions as only one part of a complete political package, [FN8] Waldron rests much of his intervention on his supposedly unconditional embrace of "a culture of democracy, valuing responsible deliberation and political equality." [FN9]

Democracy, of course, comes in many shapes and sizes. Its central thrust comprises the preference for ordering power and authority in line with the views and requirements of a society's members. At its strongest, democracy is seen to be much more than a formal process for tallying people's preferences and distributing political power. Although strong democrats are concerned about the substantive quality of people's lives, they place more emphasis on enabling good lives than engaging in the detached search for some elusive Good Life. [FN10] Understood as a social as well as political way of life, it encompasses everything that affects the conditions of people's lives: people can tackle all those matters within a framework in which their active participation is the most important feature. All elite power -- be it the monied few, the judicial aristocracy, the political elite, the bureaucratic oligarchy, the corporate nabobs, or whoever -- is to be distrusted.

In regard to the Waldron-Fallon debate, this distrust extends to those philosophers, sages, or experts who claim that there are some set of objective values or truths to which a democratic society must conform or by which it can be disciplined. This strong version of democracy accepts that there is no one set of rights entitlements or practical realization of them that will always be morally superior. Rather, it is for people to determine for themselves what is best for them. In contrast, Fallon is sanguine about the possibility that reasonable disagreement about moral truths or the content of rights can be resolved in a relatively reliable theoretical way. [FN11] Even though Waldron concedes that such disagreements might be "for practical political purposes, irresolvable," [FN12] there is simply no basis in a strong democracy to be held hostage to the possibility, however remote, that such truths exist or that experts, like judges and jurists, might have some special access to them. Moral authority is a quality to be earned in democratic exchange, not bestowed from elsewhere; there is no independent or superior standard of moral legitimacy than that derived from the processes and procedures by which laws and legal decisions are made. In particular, there is no supra-democratic method that can be invoked or appealed to that will have greater moral authority than the society's own routine engagements through its democratic infrastructure and according to its prevailing social ethos. There are no conversation-ending or truth-fixing arguments about moral claims other than those that gain acceptance in engaged debate and open inquiry. [FN13]

For strong democrats, therefore, moral progress or agreement is not to be found by abandoning the political or social sphere. There is simply no need to posit the existence of objective moral facts. Moral backing or justification is not about bringing extant values into abstract line with elusive moral truths, but is itself a social practice that has or requires no external authority to its own democratic development. There are no facts-of-the-matter which are independent of argument and debate within democracy; the grounds of political morality are inside, not outside or regulative of that debate. As such, there is no metaphysical authority that can claim priority over a democratic community of good-willed participants coming together and deciding what is the most useful thing to do in difficult circumstances: "There's no God, no reality, no nothing that takes precedence over the consensus of a free people ... there's no court of appeal higher than a demo-

cratic consensus." [FN14] Consequently, in allowing for the epistemological possibility that 'getting it right' is somehow a separate process from a democratic society's own efforts to act justly and fairly, Waldron and Fallon are betraying the democratic spirit of inquiry, debate, and action.

By refusing to compromise their non-foundational and pragmatic convictions, strong democrats resist the claim that there are epistemologically-reliable ways to discover 'moral truths' about rights. Indeed, locating knowledge and truth within a communal set of practices and engagements, they evince an implacable opposition to epistemological methodology generally. In this sense, therefore, the strong democrat does not fall foul of Waldron's charge of "moral relativism" or Fallon's caution about "rights-skeptic[s]." [FN15] Because strong democrats eschew all claims to abstract or disengaged truth, they do not hold a relativistic account of truth -- all views on all topics are as good or valid as any other -- by insisting that the best moral values are those which pass muster under the prevailing democratic procedures and protocols of justification. Strong democrats can make and enthusiastically promote normative arguments; they simply cannot defend them as somehow eternal or transcendental. Moreover, for much the same reasons, strong democrats do not adopt a skeptical approach to rights; they simply maintain that there are no epistemological or political bases for rights that are above or outside the existing democratic practices that give rise to them. Political and moral rights exist and are justified to the extent that a vibrant democracy holds faith with them.

Accordingly, the reliance by Waldron and Fallon on the existence of moral truths is both a necessary feature of their arguments and an unconvincing one. If there are no relatively epistemologically-reliable means for ascertaining what rights are or how they apply, any argument about the outcome-related reasons for supporting judicial review founders. It makes no sense to talk about "a morally better pattern of outcomes" [FN16] or "[w]rong answers" [FN17] as separate from the democratic processes which gave rise to them. The lack of any neutral, reliable, or uncontested epistemic procedure by which to resolve disagreements means that there is no way to compare the effectiveness of different institutions in terms of their capacity for determining better or worse outcomes. Indeed, without such a method, the only way to compare and contrast different institutions for resolving rights disputes is by their process-related qualities and strengths. As both Waldron and **Fallon** tend to agree, this makes the **case** against judicial **review** even stronger. [FN18]

II. POLITICS AND PROCESSES

In advocating a 'hard **core' case** against judicial **review** in a democracy, I obviously take Waldron's side of the argument. However, although the major thrust of **Fallon's** careful, if modest **case** for judicial **review** is not persuasive, he does draw neglected attention to a very important issue in societies which are committed to a largely democratic system of governance. While there is no compelling argument as to why democracies should rely on judicial review, it does not follow that all power and authority should be left in the hands of omnipotent legislatures; there is absolutely no warrant to frame the debate as a zero-sum choice between legislatures and courts, as presently constituted. In short, there is a strong and 'easy' case to be made for the creation of "multiple [possible] veto points" [FN19] in ensuring the fulfilment of important democratic ambitions about the protection of people's rights and political entitlements.

Because 'moral worth' in strong democracies is established (but not determined or fixed) through the accepted and agreed-upon standards for justifying knowledge, it will be crucial to ascertain and examine the terms and conditions under which such social agreements are reached and enforced. Being experimental and open as well as suspicious of any general claims to truth-validating methods, democracy is sensitive to the inevitable presence of power and its disruptive and self-serving potential. Existing values and settled interests have no democratic valence on their own. While critics and activists must work with the justificatory tools of their society, they are not condemned to work within its past decisions or remain beholden to its present orientations: The past consensus is only a starting point and the present accord is only a temporary respite from continuing debate and engagement. As such, extant democratic arrangements must themselves not only allow, but also facilitate critical engagement. Justificatory standards endure only as long as they retain the

confidence and support of the community as the best and most useful benchmarks available; they thrive and wither in the good faith debate between intelligent interlocutors about what counts as 'working best.'

As such, legal theorists' attention must shift towards the critical elaboration of those process-related conditions which make legal enactments and decisions more or less democratic. It will then become more apparent that outcomes and processes are not separate or separable as Waldron and Fallon assume, but are intimately connected through their democratic status: Democratically-passed laws are legitimate not because of their elusive and slippery conformity with elusive 'moral truths,' but because they satisfy process-related democratic criteria. In a strong democracy, it is a point of principle and practice that ends and means are integrated as closely as practically possible: The status and legitimacy of the initiating procedures is the benchmark against which both the legal system and any particular enactment's legitimacy can be measured. The greater the extent and quality of participation in the legislative and adjudicative process, the greater the legitimacy of their substantive pronouncements.

In fulfilling this critical responsibility, democratic institutions and instincts can assist by ensuring that people are emancipated as far as practicable from bondage of all kinds (i.e., economic, social, cultural, and, especially in this context, intellectual oppression) and that participation is as wide and unconstrained as possible. The task is most definitely not to purge intellectual inquiry and debate of its politicalness as a reliance on judicial review recommends. Instead, mindful that power can also be constitutive and enabling as well as restrictive and distorting, a democratic approach can meet power's challenge by organizing democratic arrangements so as not only to maximize people's life-choices and lifestyles, but also to provide a set of communal resources through which the bases for these choices and styles can be debated and criticized. This might entail a commitment to devolve and diffuse power as much as practicably possible by fostering 'multiple-veto points.'

In line with this commitment, strong democrats will look to extend and proliferate the opportunities for participation in micro-communities rather than to narrow and accrete decision-making power to small and centralized elites in the name of expertise and truth. This institutional transformation involves two important initiatives in regard to existing arrangements. First, it will be important to reinvigorate democratically those bodies and organs (e.g., parliaments, legislatures, state agencies, etc.) which presently claim to be the decisive seat of democratic government. Rather than function as remote entities that have tenuous claims to democratic legitimacy through occasional elections, they might begin to be less entrenched and more responsive in their designs, deliberations, and decisions; local government would replace federal government at the heart of democratic involvement. For instance, 'congress' might begin to approximate more closely to its original meaning as 'a gathering of people.' Representation and participation could be less structured and more popular in action and ambition. [FN20]

Secondly, it will be important to ensure that, if there is to be a second-look agency that contributes to protecting citizens' rights and checking the constitutional merits of legislative enactments, such institutions will themselves be more representative and accountable to popular views. Of course, judicial review does not meet such a standard; appointed (and even elected) judges tend to operate in the same calcified and elitist ways as the legislatures that they are supposed to check. Accordingly, it will be necessary to engage citizens directly in more imaginative and participatory ways in such deliberative bodies, including special tenure protections, non-legal personnel, and the like. Moreover, as part of such a shift, it might be possible, in Jeffersonian fashion, to develop practices whereby every decade all fundamental laws and institutional arrangements could lapse and periodic assemblies could be convened so that each generation had the "right to choose for itself the form of government it believes most promotive of its own happiness." [FN21] In this way, citizens might claim the constitution and its 'amendment-by-review' as their own and take responsibility for the deep structure of their political society.

III. CONCLUSION

Ironically, at the very time that the theoretical basis for judicial review is coming under serious and sustained challenge, there has been a huge expansion in the introduction and use of judicial review around the world. [FN22] Nevertheless, this should not discourage democrats, but should galvanize them to redouble their efforts at revealing the flawed and fragile theoretical foundations on which the case for judicial review presently rests. Even its supporters, like Fallon and Dworkin, recognise that the case for judicial review is not as obvious or as easy as is often assumed. While Waldron has made a powerful case as to why judicial review and democracy do not fit well together, I have suggested that the case against judicial review can be made even stronger. In a society that takes democracy seriously, there is no privileged place for judicial pro-consuls or their scholarly cohorts -- citizens can govern best when they govern themselves.

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[FN1]. Jeremy Waldron, The **Core** of the **Case** Against Judicial **Review**, 115 YALE L.J. 1346, 1406 (2006).

[FN2]. Richard **Fallon,** The **Core** of an **Uneasy Case** For Judicial **Review**, 121 HARV. L. REV. 1693, 1715 (2008).

[FN3]. See, e.g., RONALD DWORKIN, IS DEMOCACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE 46 (2006) ("[T]here is objective truth to be had in the realms of ethics and morality.").

[FN4]. Waldron, supra note 1, at 1375.

[FN5]. Fallon, supra note 2, at 1703.

[FN6]. Waldron, supra note 1, at 1373.

[FN7]. Fallon, supra note 2, at 1703.

[FN8]. Id. at 1725.

[FN9]. Waldron, supra note 1, at 1361. See generally JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

[FN10]. See, e.g., BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 118 (20th anniversary ed.2003); ALLAN C. HUTCHINSON, THE COMPANIES WE KEEP: CORPORATE GOVERNANCE FOR A DEMOCRATIC SOCIETY 59-81 (2005).

[FN11]. Fallon, supra note 2, at 1368.

[FN12]. Waldron, supra note 1, at 1368.

[FN13]. RICHARD RORTY, CONSEQUENCES OF PRAGMATISM, at xxvi (1982). For further developments of this insight, see also RICHARD RORTY, TAKE CARE OF FREEDOM AND TRUTH WILL TAKE CARE OF ITSELF: INTERVIEWS WITH RICHARD RORTY (Eduardo Mendieta ed., 2006) and ROBERTO MANGABEIRA UNGER, THE SELF AWAKENED: PRAGMATISM UNBOUND (2007).

[FN14]. Scott Stossel, The Next Left: A Conversation with Richard Rorty, ATLANTIC UNBOUND, Apr. 23, 1998, http:// www.theatlantic.com/unbound/bookauth/ba980423.htm (quoting Rorty); see also JOHN

DEWEY, EXPERIENCE AND NATURE 407-08 (2d ed. 1958); HILARY PUTNAM, THE COLLAPSE OF THE FACT/VALUE DICHOTOMY 94-95 (2002); RICHARD RORTY, PHILOSOPHY AND SOCIAL HOPE 266 (1999); ROBERT B. WESTBROOK, DEMOCRATIC HOPE: PRAGMATISM AND THE POLITICS OF TRUTH 142-54 (2005).

[FN15]. **Fallon,** supra note 2, at 1703.

[FN16]. Id. at 1715.

[FN17]. Waldron, supra note 1, at 1373.

[FN18]. It is worth noting that **Fallon** does argue, in contrast to Waldron, that, while judicial **review** may lack democratic legitimacy, it may be considered to be legitimate on other process-related grounds. See **Fallon,** supra note 2, at 1718, 1725.

[FN19]. Id. at 1705.

[FN20]. For an effort to rethink the agenda of democratic deliberation and to redesign American institutions, see MICHAEL C. DORF & CHARLES F. SABEL, A **Constitution** of Democratic Experimentalism, 98 COLUM. L. REV. 267 (1998).

[FN21]. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in WRITINGS 1395, 1402 (Merrill D. Peterson ed., 1984). Mark Tushnet has been developing a rich and provocative body of work on how best to develop non-judicial forums for constitutional decision-making. See, e.g., MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Mark Tushnet, Non-Judicial Review, 40 HARV. J. ON LEGIS. 453 (2003). See also K.D. Ewing, A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary, 38 ALTA. L. REV. 708 (2000); Allan C. Hutchinson, Judges and Politics: An Essay from Canada, 24 LEGAL STUD. 275 (2004).

[FN22]. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 1, 169-70 (2004).

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