The Proceduralist Case for Judicial Review

by

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Thesis submitted in partial fulfillment of
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Master of Arts in the Department of
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ABSTRACT

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Abstract

This essay explores majority decisions to give up majority power from a proceduralist vantage point. In particular, it analyzes a majority's decision to institute judicial review as a method of final decision-making on questions of constitutional rights and contrasts that decision with the majority's election of a dictator. Both decisions involve a majority's voluntary transfer of power for certain matters in (practically) irreversible ways. Adopting the proceduralist viewpoint, the essay argues that these types of decisions—involving majoritarian renunciation of power—require a greater justification than decisions that do not alter future decision-procedures. That greater justification requires these types of decisions, decisions this essay terms "delegation decisions," to satisfy three legitimacy conditions. First, the majority can only legitimately give up power over issues that can be decided by procedures other than majority vote. Second, the procedural mechanism the majority gives power to must be a fair procedure. Finally, the procedural mechanism must also be appropriate for the decisions it is supposed to make.

The essay argues that majoritarian imposition of judicial review satisfies these three conditions. Majoritarian election of a dictator does not. First, the imposition of judicial review hands over only one set of issues to the constitutional court—bill of rights questions—that is capable of resolution by a nonmajoritarian procedure. Second,

judicial review as practiced by an ideal constitutional court is a fair procedure for rights questions because it exemplifies qualities such as anonymity and neutrality that are central to procedural fairness. Finally, a constitutional court is appropriate for deciding constitutional rights questions because its virtues—particularly its transparency, deliberative capacity, principled reasoning, and impartiality—are relevant for these questions and mitigate distortions in the decision-making process concerning rights. On the other hand, an elected despot makes decisions on questions that the majority cannot legitimately relinquish power over, fails to instantiate values of procedural fairness, and is inappropriate for any number of the infinite questions that it has authority to decide. The account I provide to justify majority-imposed judicial review and critique the majority-elected dictator relies on no procedure-independent standards. Proceduralists can thus resist the majority's election of a dictator without also having to resist its imposition of judicial review. And they need not abandon proceduralism in order to do so.

Dedication

For my beautiful wife, Angela.

Contents

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As with any academic achievement, this project could not have been accomplished without the help of many others. I am especially grateful to Professors Knight, Kirshner, and Blocher for their feedback and support over the past few years. Professor Knight first ignited my interest in political institutions, their origins, perpetuation, and limits. This interest blossomed into an obsession with judicial review as an institution. Professor Kirshner introduced me to the intricacies of the debate over proceduralism and to Waldron's multifaceted critiques of judicial review. These discussions were a catalyst for the future exploration of the role of proceduralist premises in a defense of judicial review. And Professor Blocher prompted me to attend to questions that legal scholars have frequently debated, from objections to process-based theories of judicial review to concerns about the scope and content of constitutional rights. This theoretical and practical reorientation to the law has been immensely valuable in shaping this project.

Countless other experiences and individuals have helped shape my thinking on this project. Participants in the Duke Law Student Scholarship Workshop, especially Professors Marin Levy and Taisu Zhang, offered both invaluable comments and penetrating objections. Other graduate and law students have also graciously listened to my ramblings on legitimacy, proceduralism, and judicial review. More than occasionally

they pushed me to develop my position more clearly. Finally, my family and especially my wife have put up with interminable research and writing, and not infrequently been forced to endure an excited discourse on democratic theory. I cannot thank them enough. Without the calming support, genuine interest, and unfailing encouragement of my wife, this project would never have been completed.

Introduction

In his *Notes on the State of Virginia*, Thomas Jefferson famously remarked: "An elective despotism was not the government we fought for."[1] He believed—and most democratic theorists after him still believe—that even a despot elected through fully democratic procedures is illegitimate. It is, in fact, one of the most strident critiques of democracy that it appears to allow for precisely this kind of troublesome transfer of power.[2] Against this background, the history of constitutional democracy is aptly viewed as an attempt to define the proper boundaries of majority decision-making.[3] And

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[1] Thomas Jefferson, *Notes on the State of Virginia* (Richmond, Va: J.W. Randolph, 1853), 195.

[2] Elaine Spitz, *Majority Rule* (Chatham, NJ: Chatham House Publishers, 1984), xi: "Because the moral acceptability of suicide of suicide is problematic, there was widespread conviction that something was wrong with a system [i.e. democracy] that apparently allowed for it." Others, like Henry McClosky, see in the "majority principle" a logical restriction on this kind of abdication:

> There can be nothing in the majority principle that requires that a majority should have the power to destroy it, for it is the very nature of a principle that it prohibits its own negation. Moreover, such power as a majority enjoys derives precisely from the majority principle, and when that principle ceases to prevail, the legitimate power of the majority must cease also. On logical grounds alone, then, it becomes apparent that a majority, deriving its sanction from the principle of majority rule, is limited by that principle to the extent, at least, that it cannot abrogate the rules which authorize the power it can properly exercise.

Henry McClosky, "The Fallacy of Absolute Majority Rule," *The Journal of Politics* 11 (1949): 643. Still others find not a logical restriction in this example, but an illustration of the necessity of outcome-based limitations on democratic results. Luigi Ferrajoli, for instance, claims that "[w]ithout substantive constraints on the substance of legitimate decisions, a democracy cannot—or, at least, it might not—last. It is always possible for the democratic process be revoked by means of the democratic process itself." Ferrajoli, "The Normative Paradigm of Constitutional Democracy," *Res Publica* 17 (2011): 357.

[3] As Elaine Spitz notes, the "attack" on majority rule became especially determined "after the democratic Weimar Republic in Germany enabled a constitutionally chosen ruler to establish a dictatorship." Spitz, *Majority Rule*, xi.

this debate has continuing ramifications for how we view the institution of judicial review today.[4] Two approaches to the value of democracy—instrumentalism and proceduralism—provide differing accounts of the appropriate limits on majority power.[5]

Democratic instrumentalists believe that democracy is valuable because "democratic procedures are the all-things-considered best means of implementing or ascertaining what justice requires."[6] On this account, democratic procedures are not valued primarily because they give everyone an equal say—though this may be important—but because they are more likely than other procedures of collective decision-making to get us to the right answers.[7] They are, in short, valued instrumentally. And because democratic procedures are valued instrumentally, we ought to assess the performance of democratic procedures according to a "result-

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[4] Pamela S. Karlan, "Foreword: Democracy and Disdain," *Harvard Law Review* 126 (2012): 12-13: "The Roberts Court's approach reflects a combination of institutional distrust—the Court is better at determining constitutional meaning—and substantive distrust—congressional power must be held in check. That perspective colors the Court's approach across an array of doctrinal areas, ranging from legal regulation of the political process itself to enforcement of constitutional rights."

[5] Laura Valentini, "Justice, Disagreement, and Democracy," *British Journal of Political Science* 43 (2013): 178. Christiano remarks on the importance of this question: "Philosophical discussions of democracy have been dominated by the question of the nature of the value that democracy is supposed to have." Thomas Christiano, "Debate: Estlund on Democratic Authority," *Journal of Political Philosophy* 17 (2009): 228.

[6] Valentini, "Justice, Disagreement, and Democracy," 181.

[7] See Thomas Christiano, "The Authority of Democracy," *Journal of Political Philosophy* 12 (2004): 266.

driven"[8] standard. As Dworkin argues, "[t]he best institutional structure is the one best calculated to produce the best answers to the essentially moral question" of what kind of government we ought to have.[9] Consequently, limits on majority power are appropriate when majorities reach outcomes that instrumentalists think defective in some important way—e.g., on grounds of justice, goodness, or the common weal.

On the other hand, democratic proceduralists see democracy as intrinsically valuable because it treats individuals fairly, and with respect. For proceduralists, the outcome or result of the decision-making procedure is either irrelevant or secondary to its legitimacy.[10] The most important facet of the decision is how the decision was reached; in the pure version of proceduralism, "[t]he results are made legitimate by being the results of the procedure."[11] Whatever the outcome, proceduralists anchor legitimacy in the process by which the decision was reached. And "[a]ccording to th[e] 'pure procedural' definition of democracy, an outcome is rightly characterized as democratic only when it is the result of a legitimate democratic process."[12] For the

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[8] Ronald Dworkin, *Freedom's Law: The Moral Reading of the Constitution* (Cambridge, Mass.: Harvard University Press, 1996), 34.

[9] *Id.*

[10] Christiano, "The Authority of Democracy," 266-267.

[11] Thomas Christiano, *The Rule of the Many: Fundamental Issues in Democratic Theory* (Boulder, CO: Westview Press, 1996), 35.

[12] Corey Brettschneider, "The Value Theory of Democracy," *Politics, Philosophy & Economics* 5 (2006): 259.

proceduralist then, limits on majority power are either always inappropriate (in the pure version) or only appropriate when defined procedurally (in the impure version).[13]

Despite this theoretical disagreement, both instrumentalists and proceduralists largely agree with Jefferson's sentiment that a democratically elected dictator is illegitimate.[14] And proceduralists often criticize the institution of judicial review along the same lines as the election of a dictator. Both decisions do, after all, share the same formal structure: they involve taking final decision-making power—for either some or all types of decisions—away from the majority. Though instrumentalists have the theoretical tools to resist the conclusion that judicial review is undemocratic to the same extent an elected despot is,[15] proceduralists appear to lack plausible ways to distinguish

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[13] Brettschneider notes that some proceduralists believe that rights can constrain majority power because, these theorists claim, the notion of legitimate majority power incorporates certain necessary "preconditions" (like near-universal suffrage) that would rule out, for example, disenfranchising a large proportion of the population. See Corey Brettschneider, *Democratic Rights* (Princeton: Princeton University Press, 2007), 12-13. I would classify these theorists as impure proceduralists because they recognize limits—though the limits are procedural—on what majorities can do. I see my project as another kind of this impure proceduralism, where there are limits on majority power that are procedurally defined.

[14] Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999), 255. Though, as Alex Kirshner helpfully reminded me, this agreement has always remained less than unanimous.

[15] The election of a dictator is a bad (i.e., unjust, unwise, etc.) decision and is, for that reason, not legitimate; judicial review, on the contrary, is good because it protects important substantive values and is therefore legitimate. Because instrumentalists value democracy as a means for protecting and promoting certain substantive rights, they are willing to endow courts with the power of judicial review to remedy any defects in the democratic machinery. This would be similar to Ronald Dworkin's view that there is no loss to democracy when a judge strikes down an undemocratic law. See Dworkin, *Freedom's Law: The Moral Reading of the Constitution*.

these two decisions—at least at first glance.[16] And some proceduralists welcome and exploit the formal similarity between these decisions. Jeremy Waldron, the quintessential democratic proceduralist, argues that "judicial review of legislation is inappropriate as a mode of final decisionmaking in a free and democratic society,"[17] and in the course of this argument explicitly draws on the analogy with an elected despot.[18] Though there have been multiple responses to Waldron's argument, some defending judicial review[19] and others continuing the assault,[20] neither side quibbles with Waldron's claim that procedural interests weigh strongly—almost uniformly—against judicial review. This essay is one of the first proceduralist cases for the legitimacy of judicial review.[21]

Both critiques—of authorized judicial review and elected dictatorship—seem hard to square with a proceduralist account of the value of democracy, an account that is

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[16] On the proceduralist account, so long as a fair procedure was followed in reaching any given decision, there is no justification for allowing an undemocratic cadre of experts to overturn that decision. See Jeremy Waldron, "The Core of the Case Against Judicial Review," *Yale Law Journal* 115 (2006): 1348.

[17] Waldron, "The Core of the Case Against Judicial Review," 1348.

[18] Waldron, *Law and Disagreement*, 255.

[19] See generally Richard H. Fallon, Jr., "The Core of an Uneasy Case for Judicial Review," *Harvard Law Review* 121 (2008).

[20] See generally Allan C. Hutchinson, "A 'Hard Core' Case Against Judicial Review," *Harvard Law Review Forum* 121 (2008).

[21] Yuval Eylon and Alon Harel provide a much different kind of proceduralist justification than the one I am offering here. They rely on the intrinsic value of a fair hearing that judicial review provides as the non-instrumental value that lends legitimacy to judicial review. Yuval Eylon and Alon Harel, "The Easy Core Case for Judicial Review," *Journal of Legal Analysis* 2 (2010).

formally unconcerned with the wisdom, rightness, or justness of the outcomes of democratic procedures.[22] In its most extreme version, the "pure proceduralist view of democracy would say that political outcomes would be just in virtue of having been generated by the inherently just democratic procedure, somehow inheriting the justice of that procedure."[23] Even impure proceduralists point to procedures as the legitimating component of democratic decision-making and are, too, formally unconcerned with outcomes. Though they reject the extreme version, Waldron and other proceduralists maintain that the two decisions—election of a dictator and institution of judicial review—stand or fall together. For these theorists, any proceduralist justification for judicial review will justify elected despotism and any proceduralist argument against elected despotism will similarly rule out judicial review.[24]

In this essay, I show how a proceduralist can allow for the democratic decision to choose judicial review and yet resist the democratic decision to elect a dictator. I show, in other words, how a proceduralist theory can account for the nearly unanimous belief

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[22] See Christiano, "The Authority of Democracy," 266.

[23] Christopher G. Griffin, "Debate: Democracy as a Non-Instrumentally Just Procedure," *Journal of Political Philosophy* 11 (2003): 116.

[24] To be sure, Waldron rejects the "pure proceduralist's nonchalance about the fate of individual rights under a system of majority-decision, for many of these rights are implicated in the democratic ideal." Jeremy Waldron, "Judicial Review and the Conditions of Democracy," *Journal of Political Philosophy* 6 (1998): 341. He rests his critique on "a rights-based objection" to judicial review. *Id.* But his rights-based objection is squarely procedural (if not purely so) because the rights we possess entitle us to the kind of political equality only realized, on Waldron's account, by majority rule.

that a democratically elected despot is illegitimate and still reject Waldron's argument that judicial review is illegitimate in the same way. I do so by illustrating the limits—on a proceduralist account—of a democracy's authority to choose, by means of majority vote, to vest ultimate and final decision-making power in a nonmajoritarian procedure. Reflection on these decisions reveals something importantly *procedural* about the democratic election of a dictator, or the democratic institution of judicial review, that a proceduralist ought to be concerned with. (And she should be concerned with these decisions in a way that she isn't concerned with decisions about the proper levels of taxation or access to healthcare.) After all, at t_1 (before the dictator was elected) the proceduralist justified the state's decisions by reference to the procedures followed, but at t_2 (after the dictator is elected) this method of justification is foreclosed.[25] By applying a set of procedural criteria to this decision, the proceduralist can make the case that electing a dictator is illegitimate without abandoning proceduralism. And, I will argue, these criteria can also justify the distinction between elected despotism and judicial review, condemning the former and vindicating the latter.

The task of this essay is therefore twofold: to show how an elected despot is procedurally illegitimate *and* to show how the institution of judicial review escapes this charge. The case presented here relies on no procedure-independent criteria when it

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[25] That is, she could not at t_2 explain to an ordinary citizen why he should follow a law or rule he disagrees with by referencing any of the normal procedural values indicative of fair procedures.

comes to assessing the decisions to elect a dictator or institute judicial review. It does, however, assume one fundamentally substantive axiom about human beings: each individual is born free and equal and, as such, is entitled to respect as a moral agent.[26] This commitment undergirds the desirability of democracy as the optimal political arrangement,[27] and serves to situate this essay in liberal democratic theory.[28] It is a

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[26] Valentini recognizes that "[c]ontemporary liberal theorists share a commitment to equal respect for persons, and believe that this commitment has important implications for the way society ought to be organized." Valentini, "Justice, Disagreement, and Democracy," 177. Though proceduralists are often criticized for smuggling substance into their theories, commitment to this kind of foundational axiom need not destroy all hopes of a proceduralist structure. Philosophers as diverse as John Rawls and Robert Nozick, Ronald Dworkin and Jeremy Waldron, have subscribed to this fundamental tenet of liberal democracy. Insofar as debates between instrumentalists and proceduralists take place in the modern liberal democratic camp, we can see that this substantive agreement does not settle much. The proceduralist (as well as the instrumentalist) can recognize this fundamental axiom as a reason for being committed to democracy, but need not, on the back side, place any limits on the substance or outcome of decisions made by these free and equal beings. More importantly, the function of the commitment to these core values is to identify democracy as the uniquely suitable form of government for creatures like us. It is a further question—one this essay seeks to answer—whether this commitment requires, allows, or forbids any restrictions on what free and equal beings can democratically decide. Waldron and other proceduralists think these values forbid further constraints. Dworkin and other instrumentalists think these values require further constraints. Others no doubt think these values at least sometimes allow constraints. The point here is simply that this commitment, though openly substantive, serves only to set the stage for the consequent conflict between proceduralists and instrumentalists. And it does not impair my argument to admit that proceduralism is built on a substantive commitment. Indeed, it is hard to know what else it could be built on.

[27] These basic commitments are as old as the justifications for democracy itself. Robert Audi traces these ideas through Kant and Locke, and refers to them as "democracy's two fundamental commitments. One commitment is to the freedom of citizens; the other is to their basic political equality." Robert P. Audi, "Moral Foundations of Liberal Democracy, Secular Reasons, and Liberal Neutrality toward the Good," *Notre Dame Journal of Law, Ethics & Public Policy* 19 (2005): 198. Corey Brettschneider's novel "value theory of democracy" invokes a different (but related) set of "three core values of democracy: equality of interests, political autonomy, and reciprocity." Brettschneider, "The Value Theory of Democracy," 261.

[28] Rejection of these values leaves open alternative methods to justify various political institutional arrangements. For example, pure instrumentalist Richard Arneson finds no support for democracy per se in so-called fundamental values: "Assigning political power to an hereditary aristocracy on the ground that the nobles deserve power by birth is wrong, but so too it is wrong to hold that each member of a modern society just by being born has a right to an equal say in political power and influence, to equal rights of political citizenship and democratic political institutions." Richard J. Arneson, "Democracy is not Intrinsically Just,"

starting point for settling the later disagreement between proceduralists and instrumentalists about the value of democracy, not a concession to the strength of the instrumentalist account. A plausible theory of democracy might argue that we all have a say in decision-making because we are free and equal, and still deny, perhaps even *because* we are all free and equal, that there are any substantive limits on what we can decide.[29] Or a theory might grant the antecedent but claim that that fact itself requires substantive limits on what we can decide. Without further argument, this commitment alone does not predetermine whether the instrumentalist or proceduralist account best explains the value of democracy. As Laura Valentini notes, "[i]n normative theorizing we have to start from somewhere, and there seems to be no place other than our most deeply held convictions."[30] The free and equal status of persons is one of these deeply held convictions that provides our starting point. And, though I do not argue its merits here, I adopt the proceduralist viewpoint of democracy throughout the remainder of the essay.[31]

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in *Justice and Democracy: Essays for Brian Barry*, ed. Keith Dowding, Robert E. Goodin, and Carole Pateman (Cambridge: Cambridge University Press, 2004), 41.

[29] This is indeed Waldron's task.

[30] Valentini, "Justice, Disagreement, and Democracy," 198.

[31] Though this core substantive commitment *might* rule out a pure procedural theory, it does by itself determine whether procedures or substance should legitimate political decision-making.

The essay proceeds in two stages. Part I creates an analytical framework for evaluating the kinds of decisions that cede final decision-making authority to a nonmajoritarian procedure. Before laying out this framework, however, Part I.A argues that there is an important and consequential—if hazy at the margins—distinction between substantive decisions that directly adjust benefits and burdens (e.g., a minimum wage law) and process-altering decisions that alter the procedures by which future decisions are made (e.g., the election of a dictator). The first of these decisions is not obviously open to direct critique by the proceduralist, assuming fair procedures were followed in making it. But the second, I argue, is squarely in the proceduralist's evaluative domain.

After drawing this distinction between substantive decisions and process-altering delegation decisions, I then argue in Part I.B that the legitimacy of the latter type of decision rests on it satisfying three conditions: (1) the type of issue that is delegated must be delegable to a nonmajoritarian procedure, (2) the new procedure must be a fair procedure, and (3) the new procedure must be an appropriate procedure for making decisions on the delegated issue. This third condition requires elaboration of the appropriateness link that is the bedrock on which the proceduralist critique of elective despotism relies. I refer to this appropriateness link as the "correspondence constraint" and spend the bulk of Part I.B fleshing it out. Finally, Part I.C responds to the objection

that these criteria are instrumental outcome values, and hence values that cannot be employed by a theory that calls itself procedural.

Next, in Part II, I show how judicial review can be legitimated when it satisfies the three conditions for process-altering decisions laid out in Part I. First, when strong judicial review[32] is exercised only on certain types of decisions—decisions about the scope and content of constitutional rights, for instance—it can satisfy the delegable issues condition. Second, so long as the court employs fair procedures in reaching its decision, it can satisfy the fairness condition. To develop the case for the procedural fairness of judicial review, I draw on two procedural values that are often thought important to majority decision-making—neutrality and anonymity—and show how they are satisfied by optimal arrangements of judicial review. Finally, I argue that procedural values that are intrinsic to the judicial decision-making process, such as transparency, deliberative capacity, principled reasoning, and impartiality, lead to the conclusion that judicial review is appropriate for constitutional rights questions.

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[32] Walter Sinnott-Armstrong usefully describes the crucial difference between strong and weak judicial review: "In a system of strong judicial review, there are only three ways to overturn or undermine a court's interpretation of the constitution: (a) The court can reverse itself. (b) The court can change its interpretation through informal common law development. (c) The legislature (or legislatures) can amend the constitution. A system of weak judicial review allows these three responses plus a fourth: (d) The legislature can simply pass the law again 'notwithstanding' the constitutional clause or the court's interpretation of the constitutional clause." Walter Sinnott-Armstrong, "Weak and Strong Judicial Review," *Law and Philosophy* 22 (2003): 381. The United States is an example of the former; Canada of the latter. *Id*.

The claim that judicial review sits uncomfortably among the institutions of a free and democratic society is as old as the institutions themselves. It has been recently met by the emphatic assertion that judicial review is not only a suitable institution in a democratic society, but a necessary one as well. Though most countries have settled the formal question in favor of judicial review, the role and function of judges in these systems is an open question. And so too is the normative legitimacy of a regime that allows a small but important set of issues to be permanently removed from majoritarian procedures. These questions are of more than abstract and theoretical importance. Lives and liberties hang on our answer to them. This critical backdrop undergirds this essay's framework for squaring majority-imposed judicial review with a fundamental commitment to the fair procedures by which we collectively determine the terms of our social cooperation.[33]

[33] The reference to fair terms of social cooperation is to Rawl's conception of the subject of justice. See John Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971), 3-16.

I. An Analytical Framework for Delegation Legitimacy

In this Part, I first distinguish between two types of decisions that can be made by majority decision—assuming throughout the essay that majority decision is a fair procedure and that it is the default fair procedure in a democracy.[1] The first type of decision directly alters the substantive distribution of resources, while the second type of decision alters only the procedures used to make decisions on future issues. Next, in I.B I elaborate on three conditions for the legitimacy of delegation decisions.

Before engaging these questions, however, it is necessary to clarify the notion of legitimacy that this essay employs. I use legitimacy as a normative, as opposed to purely descriptive, term.[2] On the normative reading, "democratic legitimacy gives people a [defeasible[3]] reason to support or not to challenge democratic institutions and the

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[1] This is based on the notion that "when people in a society disagree about some decision (among two or more options) that has to be made in the name of them all, the fairest way to proceed is for them all to vote, for the votes to be counted, and for the option to be chosen which attracts the greatest number of supporters." Jeremy Waldron, "A Majority in the Lifeboat," *Boston University Law Review* 90 (2010): 1043. For the use of this kind of stipulation to clarify issues, see Corey Brettschneider, "Balancing Procedures and Outcomes Within Democratic Theory: Core Values and Judicial Review," *Political Studies* 53 (2005): 425 where he "posit[s] majority rule as a paradigmatic democratic procedure." See also Kenneth O. May, "A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision," *Econometrica* 20 (1952): 680.

[2] Fabienne Peter explains the other view: "In the descriptive sense, legitimacy prevails as long as people support (or at least do not challenge) existing structures of authority." Peter, "Democratic Legitimacy and Proceduralist Social Epistemology," *Politics, Philosophy & Economics* 6 (2007): 330 n. 3.

[3] Though Peter says that legitimate decisions create binding reasons, I prefer a formulation that creates a lesser, but still real, obligation on the part of participants. Only with a less than binding reason can an individual citizen still be morally entitled to engage in civil disobedience of a legitimate decision. I want to allow that this is possible. Estlund argues that the state creates defeasible obligations like this as well. See David M. Estlund, *Democratic Authority: A Philosophical Framework* (Princeton: Princeton University Press,

resulting decisions. If a democratic decision is legitimate, one ought to accept the decision and act accordingly . . . ."[4] Legitimacy, therefore, creates obligations for citizens. And this "normative concept of democratic legitimacy . . . is constituted by a set of conditions that the democratic decision-making must satisfy."[5] When the decision satisfies these conditions, it is legitimate, and creates obligations. If it fails these conditions the decision is illegitimate and does not demand adherence. I will say more about legitimacy when discussing the distinction between types of decisions in I.A and the criteria for legitimacy I propose in I.B, but this clarification should suffice for now. And Part I.C will show why this concept of legitimacy is still at its core procedural.

2008), ch. 7. Brettschneider makes a similar point: "[D]emocratic procedures create *pro tanto* duties to obey, albeit duties that can be overridden." Brettschneider, "Judicial Review and Democratic Authority: Absolute v. Balancing Conceptions," *Journal of Ethics and Social Philosophy* (2011): 7-8.

[4] Fabienne Peter, *Democratic Legitimacy* (New York: Routledge Press, 2009), 56. See also Richard H. Fallon, Jr., "The Core of an Uneasy Case for Judicial Review," *Harvard Law Review* 121 (2008): 1717: "Alternatively, legitimacy can function as a moral concept, measuring whether people ought to regard a political regime, institution, or decision as having an entitlement to respect that transcends the substantive correctness of an immediate object of dispute."

[5] Fabienne Peter, *Democratic Legitimacy*, 57.

A. On Process and Substance: The Significance of Process-Alteration

Any proceduralist account of democracy relies on (at least) the fairness of the procedures used in making decisions.[6] Without fair procedures, there can be no legitimate decisions for proceduralists.[7] And, while there might be questions on the margins, it is usually clear when a decision alters a decision-making procedure.[8] That is, "we are familiar with cases in which the use of decision-procedure A yields as an output the conclusion that, henceforth, procedure B, rather than A, should be used."[9] The decision to enact a minimum wage law, for example, does not change the way in which

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[6] See Alexander S. Kirshner, "Proceduralism and Popular Threats to Democracy," *Journal of Political Philosophy*, 18 (2010): 406.

[7] Note that this is what separates proceduralist theories from instrumentalist theories. Proceduralist theories *require* fair procedures. Pure proceduralists start and end there. Impure proceduralists add on additional components, some procedural some perhaps not so procedural. Instrumentalist theories, on the other hand, dispense with the *necessity* of fair procedures.

[8] Frederick Schauer points out utility of the distinction:

> There is a difference between the questions "Should there be national health care?" and "Should the question of national health care be decided by referendum, by representatives, or by bureaucrats?" And there is a difference between the question whether the United States should enforce trade barriers against Japanese imports and the question whether the minimum age for voting should be sixteen or eighteen or twenty-one. In each pairing, the former question is of substantive policy, but the latter is a procedural question (with undeniable substantive import) that asks how decisions about issues like trade policy or national health care should be made.

Frederick Schauer, "Judicial Review of the Devices of Democracy," *Columbia Law Review* 94 (1994): 1327.

[9] Jeremy Waldron, "A Right-Based Critique of Constitutional Rights," *Oxford Journal of Legal Studies* 13 (1993): 40.

future decisions, on minimum wage or other issues, are made.[10] But the decision to let a dictator make future decisions necessarily changes the procedure for future decisions. It is indisputable that the decisions by a dictator are procedurally different from—and on most accounts procedurally inferior to—decisions by a majority. And it seems to me that the prior decision to vest this decision-making authority in a dictator is also fundamentally different from a decision that does not directly impact future decision-making procedures. Indeed, this distinction is the foundation of process-based theories of judicial review.[11]

To be sure, the distinction here is predicated on a highly stylized view of democratic decision-making. Most actual decisions contain a blend of substantive and process-altering components, including decisions about education policy, campaign finance reform, immigration and citizenship, and the nature of judicial and executive nominations and appointments.[12] In practice, we would probably say that the distinction between substantive decisions and process-altering decisions is more like a spectrum

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[10] Of course, there is a way in which every decision has the potential to influence the number of people who vote, which can be said to be a different procedure than if a different number voted. This highly attenuated effect does not impact the core of my argument.

[11] In these theories, decisions that alter processes are the proper subject of judicial scrutiny and substantive decisions that (merely) regulate benefits and burdens are, in virtue of following from a set of proper procedures, constitutionally valid without regard to their substantive content. See, for example, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980).

[12] Joseph Blocher helpfully reminded me that these types of decisions—not the stylized decisions I have been considering—are more often the daily focus of legislative business.

than a dichotomous alternative. Yet these stylized abstractions enable us to analyze normative legitimacy without the complications that attend the analysis of complex legislative enactments. Often this kind of examination clarifies the principles we ought to use when analyzing the messy and chaotic institutions that we actually encounter. Thus, even though actual decisions are not always neatly subsumable under either the "substantive" or "process-altering" heading, the *conceptual* distinction is real and theoretically valuable. And, for the purposes of this essay, it is enough that the distinction is fruitful for ideal political theory, even if practical politics often blurs the line.

I call decisions that alter the process by which future decisions are made delegation decisions. I use the term "delegated" in a slightly technical way[13] to mean that ultimate and final decision-making authority is given, by means of a majority vote, to a nonmajoritarian procedure.[14] I intend to include by this term instances of complete

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[13] On my account, the *extent* of power or authority that is delegated is irrelevant. So long as final decision-making authority is given to a new procedure, delegation has occurred. But the extent of delegation *does* bear on condition one concerning "delegable issues." This aspect, among several others, is what sets my usage of the term "delegation" apart from its usage in the context of the American "nondelegation doctrine." Cass Sunstein summarizes the traditional view of the nondelegation doctrine well: "The unambiguous textual grant of lawmaking power to Congress might well be taken to mean that Congress, and no one else, has lawmaking authority; a delegation of 'legislative' power to anyone else might seem inconsistent with the constitutional plan. In addition, the conceptual background of the system of checks and balances seems to provide historical support for this view, suggesting, on Lockean grounds, that the original understanding would have condemned open-ended grants of power to the executive." Cass R. Sunstein, "Nondelegation Canons," *University of Chicago Law Review* 67 (2000): 319.

[14] Ross Carrick has created an interesting framework that incorporates an idea very similar to my notion of delegation. His theory is one of "institutional trusteeship" wherein powers are given to the institutional trustee to exercise consistently with the settlor's intent. And the institution then must fulfill its

delegation where, for instance, a majority votes to elect a dictator, as well as partial delegation where a majority vests ultimate authority for only one issue or matter in another, nonmajoritarian procedure. And I mean to exclude by this term instances where the majority retains authority to "undo" the delegation by another simple majority vote.[15] Though the distinction between delegation decisions and nondelegation substantive decisions may not always be clear, the decisions of concern here—about judicial review and tyranny—fall squarely on the delegation side.[16] So even though there

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fiduciary obligations to those who gave it such powers. These powers are broader than the powers given by a principal to her agent because "like with the common law trust, once the (political) property has been transferred to the trustee(-institution), and the terms have been set, the settlors (the political principals) cease to be able to control or exercise administrative discretion with respect to that competence (the delegated areas of public authority)." Ross Carrick, "The Procedural Democratic Legitimacy of Constitutional Courts," 7, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1986857> (accessed March 20, 2013).

[15] This is the case with most administrative agencies in the United States. Thus, because authority has not been delegated in my sense of the term, these agencies need no extra justification. Further, on this definition, institution of the filibuster in the Senate may not, despite the common perception, be a "delegation" that requires greater justification. See Sergio J. Campos and Gregory Koger, "The Majoritarian Senate," <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2176938> (accessed March 20, 2013).

[16] It might be objected that I too easily discount the possibility of slow-motion democratic suicides where a series of individually legitimate decisions eventually leads to an elected dictatorship. This might be thought to represent the real fear of elected despotism, such as what happened in the Wiemar Republic. This is a powerful objection, but its force would depend on what the individual decisions delegated. My initial and tentative response is to reject the possibility that there could ever be a sum of individually legitimate actions that would together constitute illegitimate delegation. In my estimation, there would probably be some decision in the chain that crossed the line of delegation legitimacy and ceded decisions not susceptible to delegation or ceded susceptible issues to the wrong kind of procedure. Even if there was not, the procedural mechanism itself (in this case the dictator/party) becomes inappropriate at some point in the line so that otherwise permissible delegation would likely no longer be legitimate. I think either of these two ways would still enable us to analyze distinct decisions and either approve or condemn them in isolation.

is some question on the margins, I echo Richard Arneson's insistence in another context that "the existence of a gray area does not threaten my use of the distinction."[17]

When majoritarian procedures are altered, even when they are altered by majoritarian means, the decision requires a greater justification than when majoritarian procedures are unaltered by a majority decision. In other words, delegation decisions require a sort of justification that ordinary substantive decisions do not. This follows from the proceduralist account of legitimacy. If majority decision is the default fair decision-making procedure in a democracy, then the decisions made by the majority that do not alter future processes need no further justification from the proceduralist. Substantive (as opposed to delegative) majority decisions are, because of their procedural fairness, per se legitimate. Recall that we defined a legitimate decision as one giving the citizen a defeasible obligation to adhere to the decision. The outcome of the decision is not relevant to the existence of the obligation.[18] The provenance of the decision is what gives it legitimacy. This is the case for normal, substantive majority decision-making. To see why, we only need to recall that proceduralists anchor legitimacy in the fairness of the process, and where concerns about the fairness of the

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[17] Richard J. Arneson, "Debate: Defending the Purely Instrumental Account of Democratic Legitimacy," *Journal of Political Philosophy* 11 (2003): 125.

[18] It may still, even on a proceduralist account, be relevant to the weight that should be afforded to the decision. The obligation is defeasible because it may well be, all factors considered, immoral for a given individual to follow the decision at all times.

process are absent—as the case would be for normal substantive decisions made by majority vote[19]—the authorizing process is sufficient.

But delegation decisions are different. The procedural provenance of the decision can no longer give a citizen the same kind of reason to follow the decision. It would be illogical to tell a citizen that she should follow decision D because it was produced by procedure P if D itself *just is* the rejection of P. The grounding of D, because it *necessarily* references P for the proceduralist, is undercut by the removal of P.[20] In this kind of delegation decision, "[t]he result is a tension between the procedure and the reasons that underlie it. Accordingly, if it is not to be self-defeating, majoritarianism should recognize some limits on . . . outcomes to ensure that its fundamental justification is not undermined."[21] The next section takes up these limits. They are required because no decision that undermines its own foundation can still base its legitimacy on that foundation. This does not mean that majority decision can never alter majority procedures. It simply means that something more is required to justify these delegation

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[19] This is true *ex hypothesi* for the proceduralist in a well-ordered democratic society.

[20] Suppose, as I will argue in the rest of the essay, that decision D—produced by procedure P—institutes procedure S for future decisions. So long as S meets the relevant criteria laid out below, there is still a procedural argument for legitimacy. But the point is that P is no longer sufficient (though it is necessary) for legitimating decision D.

[21] Corey Brettschneider, "The Value Theory of Democracy," *Politics, Philosophy & Economics* 5 (2006): 263. Brettschneider, of course, thinks these limits will need to be substantive limits on outcomes and not procedural limits on inputs. But the point remains.

decisions than is required to justify substantive decisions.[22] Delegation decisions cannot undermine their own foundation by eliding the very fairness on which their legitimacy relies.[23] I deal with the objection that this argument is no longer proceduralist in Part I.C, but first I turn to the additional procedural conditions that I argue are necessary for delegation legitimacy.

B. Legitimating Delegation

Process-altering decisions involve a delegation of decision-making authority to another decision-making procedure. Only decisions that involve delegation in my technical sense require the sort of heightened justification the prior section argued is required for process-altering decisions.[24] In this section I argue that the decision to

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[22] Brettschneider raises a similar point against what he calls "pure majoritarianism" in Brettschneider, "Balancing Procedures and Outcomes Within Democratic Theory: Core Values and Judicial Review," 430. A delegation decision that likely would be legitimate is when the majority votes to enfranchise all citizens from ages 18 to 20 in a society that previously allowed only those 21 and over to vote. This is a delegation decision (because it alters the future process for decision-making), but is not automatically illegitimate for that reason; it simply must meet the conditions for delegation legitimacy that substantive decisions do not.

[23] Though he presents an instrumental defense of judicial review, Richard Fallon recognizes that the delegative nature of the decision to institute judicial review may require greater justification and yet retain some of the legitimacy of the authorizing procedure:

> [T]he adoption of judicial review through relatively democratic processes at Time One may endow it with a continuing residue of democratic legitimacy at Time Two, even in cases involving reasonable disagreement about the appropriate specification of disputed rights. Recognizing once more that legitimacy is a matter of degree, I do not mean to claim that the entrenchment of judicial review is necessarily perfectly democratically legitimate at Time Two, just that democratic adoption at Time One may count for something.

Fallon, "The Core of an Uneasy Case for Judicial Review," 1727.

[24] That is, the only delegation we are concerned with here is where the majority chooses to vest ultimate and final decision-making authority—for some or all issues—in another procedure.

delegate authority is only legitimate if three conditions are met: (1) the issues that are handed over to another procedure can be decided using another procedure (i.e. they are not *uniquely* legitimated by majority decision), (2) the procedure to which they are handed over is a fair procedure, and (3) the new procedure is appropriate for decisions on the delegated issue. These conditions are individually necessary and jointly sufficient for delegation legitimacy.[25]

1. Condition One: Delegable Issues

The first condition means that delegation is only permissible if there is another procedure—besides majority vote—that is both fair and appropriate for deciding whatever questions will be delegated. This inquiry is aided by disaggregating the types of decisions that are customarily made by the state. To this end, I employ one plausible yet abstract distinction between types of issues; but my argument does not rely on the ultimate viability of this distinction. Strictly speaking, we can never be sure that condition one is satisfied until we determine that conditions two and three are satisfied for the particular decision. The distinction I propose here is a proxy for the latter questions and provides a preliminary answer to the requirement of condition one. It is also crucial to note that if majority decision is the only procedure that is both fair and

[25] Recall that majority decisions on substantive issues are legitimate without any extra conditions.

appropriate for every issue the state decides, then the first condition can never be satisfied.[26] And, if it cannot be satisfied, delegation is never legitimate. Judicial review and elected despotism would both then equally fail the test for legitimacy.

For the purposes of illustration, I draw on Ronald Dworkin's distinction between issues of policy and issues of principle. To reiterate, condition one can be analyzed and satisfied without recourse to the principle/policy distinction.[27] All that is necessary is that there is some procedure other than majority vote that satisfies both conditions two (the fairness condition) and three (the appropriateness condition) for the issue under consideration. The principle/policy distinction is merely a useful tool for discerning whether we are ever going to be able to find a procedure that will satisfy these other conditions.

For Dworkin, issues of policy concern the "collective strategies a government uses to secure the general interest," and issues of principle concern individual rights.[28]

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[26] This would probably be Waldron's response to an argument of the kind I employ here. See his "Judicial Review and the Conditions of Democracy," *Journal of Political Philosophy* 6 (1998): 341, where he implies that absolute majority rule is the only procedure that could be fair and appropriate in a democracy. But it need not be the response of proceduralists of other stripes. I provide reasons below to think the conditions I propose legitimate other procedures as fair and appropriate. As Annabelle Lever argues, "[t]he procedural case against judicial review, then, depends on an exaggerated sense of the importance of voting to the legitimation of power in a democratic society." Lever, "Democracy and Judicial Review: Are They Really Incompatible?" *Perspectives on Politics* 7 (2007): 810.

[27] Although this distinction is only illustrative, I think it both persuasive and defensible, though a fuller treatment would, of course, be required to show this. Because it only serves a proxy, I do not here undertake the defense of this particular distinction.

[28] Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986), 381.

Policy arguments are directed to questions about how a "decision advances or protects some collective goal of the community as a whole."[29] Arguments about principle rely on how a particular decision will respect or secure the rights of an individual or group.[30] Or, in the words of Stephen Guest, "principles describe rights, and policies describe goals."[31] When we are primarily concerned with the consequences of some decision, we are acting in the realm of policy. These decisions have the flair of utilitarian calculations about how "the public would benefit as a whole."[32] But when we are primarily concerned with the justness or rightness of a decision, we are in the realm of principle.[33] Even if this conceptual distinction cannot be steadfastly maintained in every instance, it can helpfully perform the illustrative purpose for which I employ it here.[34]

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[29] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978), 82.

[30] *Id.*

[31] Stephen Guest, *Ronald Dworkin: Third Edition* (Stanford: Stanford University Press, 2013), 90.

[32] Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), 73; *id*. at 78.

[33] Donald H. Regan, "Glosses on Dworkin: Rights, Principles, and Policies," *Michigan Law Review*, 76 (1978): 1235.

[34] As far as the distinction goes, it bears emphasizing that political philosophers who agree with Ronald Dworkin on little else have been adept at both employing the distinction in their own work and identifying its use in others'. See, e.g., Jeremy Waldron's impassioned critique of constitutional rights, "A Right-Based Critique of Constitutional Rights," where he continually employs the distinction: "We think moreover that the right to democracy is a right to participate on equal terms in social decisions on issues of high principle and that it is not to be confined to interstitial matters of social and economic policy" at 20; "[Citizens have fought for] the right to govern themselves, not just on mundane issues of policy, but also on high matters of principle" at 49; "[P]eople have paid tribute to the democratic aspiration to self-governance, without any sense at all that it should confine itself to the interstitial quibbles of policy that remain to be settled after some lawyerly elite have decided the main issues of principle" at 49.

It seems to me that issues of policy—as the customary kind of decision made by the state—can only be decided by majority decision. Assuming this is right, though I won't argue the point further, issues of policy would not be delegable. But issues of principle seem to me to be susceptible to decisions by other procedures. One of the reasons to think issues of principle can be delegated is that some of the procedural values characteristically attributed to majority decision are not as obviously important in the context of rights. Take, for example, the principle that majority decision is fair, in part, because it treats everyone's vote equally; it takes each person's preference as given and assigns equal weight to it. But if Dworkin is correct that there are right answers to rights questions,[35] then this kind of equality may be misplaced.[36] We might not, for instance, think it appropriate to count all the slave-owners' preferences and all the enslaved persons' preferences and see who has more votes. We might think that other kinds of procedural values are more important when deciding rights questions. This could be part of the explanation for why we think it inappropriate to use majority vote

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[35] It is not only the instrumentalists who can be rights-objectivists. As Waldron puts it, "[o]ne can recognize the existence of disagreement on matters of rights and justice—one can even acknowledge that such disagreements are, for practical political purposes, irresolvable—without staking the meta-ethical claim that there is no fact of the matter about the issue the participants are disputing." Waldron, *Law and Disagreement* 244. Proceduralists can be—and often are—as well. See Waldron, "A Right-Based Critique of Constitutional Rights," 18-51.

[36] See generally Dworkin, *A Matter of Principle*.

to decide who should get thrown off the lifeboat or which groups of individuals should be drafted into the military first. But I am not here arguing that issues of principle such as these *cannot* be decided by majority vote. I am arguing for the considerably weaker claim that—whether they can ultimately be decided by majority vote or not—they can at least, as issues of principle, be appropriately decided by other decision procedures as well.

To this point, I have suggested that issues of policy are not delegable, whereas issues of principle are. If this is true, then a majority could not vote to hand over to an independent board of experts, say, all environmental issues if ultimate and final decision-making authority did not rest in the legislature.[37] This would violate the first condition because issues of policy are nondelegable. On the other hand, the legislature could legitimately hand over issues of principle to an independent panel of experts (e.g., the judiciary) without retaining ultimately and final decision-making authority. An elaboration and application of this latter claim may clarify a few points.[38]

Imagine a state, call it Bathens, that makes all decisions by majority vote through its legislature and has no other branches of government. One day the citizens gather in

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[37] It could, however, create "independent" agencies such as those in the United States because in that case Congress retains authority to overrule any decision made by an agency with a simply piece of ordinary legislation.

[38] Recall, however, that the distinction between principle and policy is illustrative only. The delegable issues condition does not depend on the utility of this distinction; even if the distinction ultimately fails, the delegable issues condition can function with any other suitable distinction between the types of decisions made in a democracy.

the assembly and decide, by majority vote, that there should be an independent judicial branch that will hear and decide all criminal trials and will have no other functions. The majority delegates (in my technical sense of the term) these issues to the judiciary. To satisfy the first condition—the delegable issues condition—this decision is only legitimate if guilt-or-innocence type decisions can be made using a decision-making procedure other than majority vote. If, as I briefly argued, issues of principle can be delegated to nonmajoritarian procedures, then so long as these criminal justice issues are issues of principle, this process-altering decision has satisfied the first condition (ultimately contingent, of course, on the actual existence of a procedure that is both fair and appropriate for deciding these issues). Though I won't argue it here, I think the question about the guilt or innocence of individuals is a prime example of an issue of principle. If so, the first condition can be satisfied when a majority creates a judiciary to hear criminal trials.

The principle/policy distinction serves as a useful device for thinking through condition one. It fleshes out the requirement of issues being delegable, but does not commit us to the ultimate veracity or possibility of a clear demarcation along the principle/policy line. And this brief illustration leaves many questions unanswered. For instance, the principle/policy distinction itself does not answer questions about who decides whether issue X is an issue of policy or an issue of principle. Nor does it say how we could even go about that taxonomical task. If condition one required that we answer

those questions, then this discussion would undoubtedly be incomplete. But condition one only means that there is some procedure other than majority decision that is both fair and appropriate for issues of type X. For some types of issues, there may not be any procedure other than majority vote that is fair and appropriate. These would not be delegable.[39] The principle/policy distinction is thus not an essential component of the framework that I here develop. It (merely) serves a useful illustrative role in explaining the function of condition one.

From this discussion, we can see one of the reasons to think that the democratic election of a dictator is illegitimate. If democracy is an inherently valuable form of government, then *replacing* democratic rule with a dictatorship delegates some issues that cannot be made by procedures other than majority decision, namely, all the issues there are. Within the total set of issues at least some are only capable of resolution by majority vote.[40] If this wasn't true, we would have neither procedural nor instrumental reasons to value democracy in the first place. And while this observation isn't, of course,

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[39] In other words, the delegable issues condition determines the proper *inputs* to the new procedure. Thus, even though this is in some sense a "substantive" determination, the distinction I draw on here is in principle no different from determining that citizen A's preference and citizen B's preferences should be fed into the decision procedure, as opposed to child C's preferences and foreigner D's preferences. The *choice* about where we draw that line is substantive to be sure (as it is for voting age and citizenship status), but I'm not here arguing about who decides or how we decide what is in each category. Those questions are irrelevant to delegation legitimacy. I'm arguing that, however we as a society flesh out these issues (and notice that to entrench a set of rights we have to settle these issues as a society), the delegable issues condition requires that only issues capable of resolution by another procedure be delegated.

[40] In the language of this section, this kind of delegation would involve delegating issues of policy to the dictator and we have suggested that issues of policy are nondelegable.

the complete argument against an elected dictatorship, it places one of the problems with an elected dictator in the context of a framework for delegation legitimacy.

2. Condition Two: The Fairness Factor

The second condition requires that the new procedure be fair. I bracket the discussion of what qualifies as a "fair" procedure in this Part (though I return to the concept in discussing judicial review below) and simply reiterate the fact that the fairness of the procedure is a necessary condition for its legitimacy. We could list coin flipping, choosing by majority vote, and drawing straws as three fairly uncontroversial examples of fair procedures. And, if Bathens's new judiciary followed procedures like those common in American criminal courts, it too, I should think, would qualify as a fair procedure for deciding whether or not an accused is guilty.

An objection to the necessity of procedural fairness might question why the *new* procedure that is employed for making decisions on the delegated issue must be fair if we are already assured that the original procedure that produced it was fair. Why not, in other words, allow a fair majority vote to delegate decisions to a procedure that may not be fair? We can think about the answer to this question by using the situation aboard a lifeboat where not all of us can remain. Waldron and Dworkin both agree that it would be inappropriate to use majority vote to decide whom we should require to leave the lifeboat in this situation. But Waldron argues that it is not at all inappropriate to use majority vote to decide which procedure, among all those up for a vote, to use for the

decision about whom to throw off.[41] We could use majority vote, in other words, to decide between drawing straws, picking lots, or other procedures for making the actual decision about who should go overboard. Importantly, however, Waldron recognizes that the choice of which procedure to use for deciding whom to throw off should be between procedures other than majority vote.[42] That is, we shouldn't be able to use majority vote among the procedures to pick majority vote as the procedure for deciding whom to throw off. It strikes me that this is a recognition that even the new procedures to which a majority delegates decision-making authority must be fair. There would be no reason for an individual to follow the majority's decision to institute an unfair procedure for deciding whom to throw off. She could rightly object to that. If majority vote would be unfair to decide the question directly, then using majority vote to pick majority vote as the method would likewise be unfair. The delegated procedure must therefore be fair in order for it to command adherence as the product of a legitimate decision.

And this is also one more strike against the elected dictator. Whatever qualifications we think are required of a fair decision-making procedure (some of which I explore in Part II below), the arbitrary will of an autocratic dictator—even a generally

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[41] Waldron, "A Majority in the Lifeboat," 1050-51.

[42] *Id.*

kind and benevolent one—is likely to fail this standard. As long as fair procedures remain an essential component of legitimacy, delegated procedures must also be fair.

3. Condition Three: The Correspondence Constraint

Condition three requires that the procedure satisfy the correspondence constraint, meaning that it is an *appropriate* procedure for the kind of decision delegated to it. The concept of the correspondence constraint arises from the recognition that there must be some kind of agreement or "fit" between the subject matter of the decision and the procedure employed to make it. This, I submit, is fundamentally different from requiring simply that the procedure be fair. Take, for example, a coin flip. We can all agree that flipping a coin is a fair decision-making procedure.[43] So too may be drawing straws, choosing by lottery, and many other types of procedures. But we would also all agree that using that coin flip to decide whether an accused murderer is guilty or not is

[43] Though there is some evidence to doubt even this elementary proposition. See Persi Diaconis, Susan Holmes, and Richard Montgomery, "Dynamical Bias in the Toin Coss," Society for Industrial and Applied Mathematics Review, 49 (2007): 211-235.

inappropriate.[44] As Adam Samaha puts it, "[f]lipping a coin to decide a case is among the most serious forms of judicial misconduct."[45]

I think this is more than a matter of mere semantics: we are not saying that flipping a coin is fair in the abstract but unfair when applied to the guilt-or-innocence question. What we are saying is that we care about something more than *just* whether the procedure we employ is fair. We also care that it is appropriate to the kind of decision being made, that it satisfy the correspondence constraint. The correspondence constraint gets at the intuition that an indisputably fair procedure may not be appropriate for some decisions in some contexts. Even Waldron recognizes this straightforward point in his defense of majority decision-making:

> Ronald Dworkin has convinced me, in conversation, that MD [majority decision] is not an *appropriate* principle to use in regard to first-order issues of justice. If we were in an overcrowded life-boat and somebody had to go overboard, it would not be *appropriate* to use MD to decide who that should be. MD is an *appropriate* principle, however, for choosing among general rules. If someone in the life-boat proposes that we should draw straws and someone else suggests that the oldest person should be

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[44] Wojciech Sadurski makes a similar point about inappropriateness: "By way of example, consider the issue of establishing the criminal guilt of a particular celebrity: Holding a national poll on his guilt or innocence with a verdict by majority of respondents seems like a particularly bad decision procedure in this case." Sadurski, "Legitimacy, Political Equality, and Majority Rule," *Ratio Juris* 21 (2008): 40. See also David M. Estlund, *Democratic Authority: A Philosophical Framework* (Princeton: Princeton University Press, 2008), 80, claiming that "a military conscription procedure in which the order of selection is determined by a popular majority vote would normally be deeply unjust."

[45] Adam M. Samaha, "Randomization in Adjudication," *William & Mary Law Review* 51 (2009): 1.

> required to leave the life-boat, then MD seems a fair basis for choosing among these rules.[46]

In other words, Waldron concedes that while majority vote is an indisputably fair procedure, there are certain kinds of decisions for which it should not be used.[47]

But I should be clear that nothing important hinges on this conceptual categorization. One can reject my insistence that appropriateness is a separate and distinct value from fairness and still agree that something like an appropriateness constraint is doing important work in the legitimation of procedures. The argument I present here is meant to show that we cannot call a procedure legitimate unless we are assured that there is a fit between the procedure and the context. Whether this means that we should vary our concept of fairness to account for appropriateness concerns or see appropriateness as a separate value is ultimately irrelevant. Nonetheless, I do think appropriateness is a distinct value and will continue to assume that it can be treated as such. But the rejection of this assumption does not undermine the argument that appropriateness is a real and important value, even if it is not conceptually distinguishable from the fairness analysis. An objection to my argument would have to show that we do not care about the kind of concerns I'm labeling "appropriateness"

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[46] Waldron, "The Core of the Case Against Judicial Review," 1406 n. 112 (emphases added).

[47] Note that this is a different claim than that I made in I.B.1 supra. There I argued that the recognition that majority vote would be inappropriate in the lifeboat supports the argument that issues of principle are not uniquely decidable by majority vote. Here, I argue the stronger claim that not only are some issues of principles not uniquely decidable by majority vote, but some issues of principle are not appropriately made by majority vote at all.

concerns; an objection that I'm simply mislabeling these concerns would not carry that burden.

Yet one might still object that the concept of appropriateness that condition three requires seems too vague to usefully employ. It is indeed impossible to give any straightforward definition in the abstract. Appropriateness simply means that the there is a fit between the procedure and the unique type of decisions that it makes. But while definitional certitude may be unattainable, two overarching principles help structure the unavoidably particularized inquiry that condition three requires. And though this kind of particularistic inquiry may seem like an impossibly difficult task, we make these kinds of moral distinctions all the time: we say that majority decision is appropriate for deciding where we should all go to dinner but inappropriate for deciding which one of us should be thrown off the lifeboat if we cannot all remain. We do this, in addition, without always being able to say just what it is that makes one procedure appropriate and the other not. There is, in this regard, something intuitive—and irreducibly so—about the concept of the correspondence constraint. And while we may not fully join Justice Stewart in proclaiming that we know it when we see it,[48] we are fairly adept at spotting an *inappropriate* procedure when we see one.[49]

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[48] Jacobellis v. Ohio 378 U.S. 184 (1964) (Stewart, J., concurring).

[49] I am indebted to Alex Kirshner for drawing my attention to the usefulness of this analogy.

Nonetheless, when determining whether a particular procedure is appropriate for a particular type of decision, several factors are key. First, the procedural values exemplified by the procedure should be relevant for the kind of decision being made. For example, one of the important procedural values respected by the coin flip is equal weighting of the alternatives. So if equal weight were important for the decision being made, then, *ceteris paribus*, a coin flip would be appropriate for making that decision. If, however, the type of decision was not one for which equal weight was a benefit—say, a decision by a group of disagreeable doctors about how to best treat a patient—then a coin flip would be inappropriate to use in making that decision. Note too that we would normally all agree that equal weighting in the medical context would miss something important about the nature of these types of decisions. Second, and this draws on the appropriateness of the Bathenian judiciary discussed below, if the type of issue is naturally prone to distortive influences, the procedure should eliminate the influence of extraneous factors—or at least cabin those factors as much as possible. One of the reasons a criminal trial, with its attendant procedural rules, is appropriate for deciding the guilt or innocence of the accused is that the procedure is designed to minimize the risk of irrelevant and arbitrary factors influencing the decision. (Removing these extraneous factors does not necessarily imply a purely instrumental reason for the appropriateness inquiry. We might want to remove extraneous factors from the

decision-making process in the lifeboat without thinking that that improves any kind of instrumental accuracy—if accuracy even has any meaning in the lifeboat situation.)[50]

The correspondence constraint thus requires choosing from the set of possible fair decision-making procedures one that is appropriate for the context. In short, decision-making procedures—even fair ones—are not fungible. This is the point David Estlund misses in his critique of the position he calls "fair proceduralism."[51] From his thin description of fairness—and the recognition that many procedures are "fair"—he concludes that "[f]air proceduralism, which would be satisfied by flipping a coin, is not a plausible account of the superiority of democratic principles and institutions over coin flips."[52] No reasonable account of democratic proceduralism should allow a coin flip to be substituted for majority vote on routine matters of legislation. But without something

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[50] Rawl's notion of the veil of ignorance works in a similar fashion for participants in the original position as the correspondence constraint does for decision-makers. The veil of ignorance removes factors that are "morally arbitrary" and should not play into the consideration of which principles of justice govern society. We remove these irrelevant factors so that the reasoning of the original position participants focuses on what matters for the decision they are making. In other words, we make the original position an *appropriate* procedure for choosing the principles of justice. Similarly, the second principle of the correspondence constraint requires that only factors relevant to the decision factor into the process. What is relevant and irrelevant will depend on the context. Just as one's social standing in society may be important for some moral decisions but irrelevant for choosing the principles of justice that should bind us, so too personal attachments are important for some decisions but are irrelevant for decisions about whom we as a group ought to force off the lifeboat. Commenting on this example, Waldron remarks: "I suspect Dworkin is right that a particular decision of this kind is likely to summon up all sorts of motives which, however compelling they are personally for each passenger, are not relevant from the perspective of the group." Waldron, "A Majority in the Lifeboat," 1053. The work that the second principle does is thus tantamount to sanctioning off the process in the manner of the veil of ignorance.

[51] Estlund, *Democratic Authority*, 83.

[52] *Id.*

like the correspondence constraint, proceduralism seems devastated by this critique. As Thomas Christiano notes, "[i]f . . . one thinks that one ought to make decisions democratically and not by lottery, that suggests that something other than procedural fairness is doing important work in the justification of democracy."[53] I contend that the appropriateness concerns identified by the correspondence constraint do this work.

In his insightful response to Estlund's argument, Christiano recognizes the importance of this link between the type of decision being made and the procedure employed to make it. Christiano sees this as part of the fairness analysis, that "what fairness demands or even recommends depends on the enterprise that is being regulated by fairness."[54] Eschewing any notion of essential fairness, he argues that Estlund's account creates too stringent a requirement for the fair proceduralist. Like Christiano, I think Estlund's critique of fair proceduralism fails to adequately take stock of the differences in the "enterprise that is being regulated." But I think Estlund is right that

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[53] Thomas Christiano, "Debate: Estlund on Democratic Authority," *Journal of Political Philosophy* 17 (2009): 230. Ben Saunders makes a similar point: "Critics of intrinsic fairness-based arguments for democracy have often suggested that, if the only justification of democratic procedures is simply that they are fair to all parties, then it would be equally justified to use a lottery to decide between courses of action. If this claim is correct, which I think it is, then it does not show that fairness plays no part in justifying democracy, but only that it alone is insufficient." Saunders, "Democracy, Political Equality, and Majority Rule," *Ethics* 121 (2010): 156.

[54] Christiano, "Debate: Estlund on Democratic Authority," 231. See also *id*. at 232, stating: "Fair contests, fair trials, fair procedures of hiring and firing involve very different criteria of relevance and the fairness is dependent on the nature of the tasks." He refers to this as "the constraint conception of fairness," but for reasons I adduce above, I think it best to provide a "constraint conception" that does not require our notion of fairness to vacillate with the context.

procedures such as a coin flip are still "unimpeachably fair procedures."[55] We should not, in other words, vary our concept of fairness (whatever that turns out to be) to match each individual context.[56] Instead, the correspondence constraint offers a way to validate our beliefs that some clearly fair procedures are simply inappropriate to use in some contexts. But to repeat, it is ultimately irrelevant whether we conclude that appropriateness is best viewed as a component of fairness or not. The point remains that we need to analyze appropriateness as either a constraint on fair procedures or a constraint on the notion of fairness itself.

Thus we might say that the guilt-or-innocence decision cannot be made on the basis of coin flipping—even though coin flipping is a fair procedure—because coin flipping does not satisfy the correspondence constraint in the context of a criminal trial. And it seems to me that the accused's grievance with condemnation by coin flip does not sound in fairness, but in appropriateness. "That is not the right kind of procedure to use for this question," we might imagine him saying.[57] The coin flip is, in other words,

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[55] Estlund, *Democratic Authority*, 84.

[56] For an instrumentalist argument that mirrors Christiano's proceduralist argument for variable fairness, see Fallon, "The Core of an Uneasy Case for Judicial Review," 1717: "It is almost too plain for argument that the fairness of procedures depends on the nature of the substantive ends that the procedures are designed to promote. . . . Outcome-based considerations make this allocation of power fair within the context of an otherwise largely democratic government."

[57] This is similar to complaints we would imagine from participants in Valentini's hypothetical: "Imagine a Catholic and an atheist being told that the legal permissibility of abortion will be decided by tossing a coin. Surely both could reasonably object to this proposal on the grounds that it fails to express respect for their status as rational agents. Respect for this status requires their reasons (in favour or against

an inappropriate procedure for deciding this particular issue of principle.[58] (Below I offer some tentative reasons to think this is so, but it is noteworthy that we customarily accept claims of this sort without the need for further specification.) And this failure would render the delegation decision illegitimate. Without the correspondence constraint, or something closely analogous, coin flipping to determine a verdict would seem to be procedurally unproblematic. At least a simple fair proceduralist would have to concede as much.

To more fully understand how the correspondence constraint operates as a robust limitation on permissible procedures, let's return to the state of Bathens. Recall that the Bathenian decision to create an independent judiciary seemed to satisfy the first condition—the delegable issue condition. It also satisfied the second condition so long as the judicial branch conducts trials using fair procedures. For it to satisfy the third condition, however, it must do more than just employ fair procedures. And it seems to me that the Bathenian judiciary can satisfy this requirement, too. For instance, the judiciary's hearing of testimony concerning the event, receipt of evidence relevant to its

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abortion) to be heard." Laura Valentini, "Justice, Disagreement, and Democracy," *British Journal of Political Science* 43 (2013): 195.

[58] Stated slightly differently, a coin flip to decide guilt or innocence would satisfy both condition one (the decision is on a delegable issue) and condition two (the procedure prescribed is fair), but still fail to satisfy condition three (the correspondence constraint is not fulfilled).

occurrence, and usage of similar techniques seems to be *appropriate* for deciding the question of whether an individual is guilty or innocent. If so, then it satisfies the correspondence constraint. And, crucially, it satisfies the correspondence constraint in the way that a coin flip (though a fair procedure) fails to.[59]

The two overarching principles I identified as guiding the correspondence constraint analysis can be illustrated in the reasons we reject majority vote as an appropriate procedure in the lifeboat situation. Dworkin outlines the problem in this situation:

> Suppose passengers are trapped in a lifeboat on the high seas that will sink unless one person—any person—jumps or is thrown overboard. How shall the group decide who is to be sacrificed? It seems perfectly fair to draw straws or in some other way to let fate decide. That gives each person the same chance of staying alive. Letting the group vote, however, seems a very bad idea because kinship, friendships, enmities, jealousies, and other forces that should not make a difference will then be decisive. [60]

Dworkin wants to use the lifeboat situation to argue that majority vote is not an intrinsically fair procedure, but what it really seems to illustrate is that majority vote is

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[59] In the context of a criminal trial, unlike for some other issues of principle, we all agree that the "enterprise that is being regulated" admits of right answers. We thus view as inappropriate procedures that ignore this salient fact. This is not always the case with issues of principle, and even when it is the case, we often disagree on what the conditions are for truth (i.e. in virtue of what is it true that John has a right to X). In the criminal trial, we agree not just that there are right answers, but on what makes an answer right or wrong.

[60] Dworkin, *Freedom's Law: The Moral Reading of the Constitution*, 139.

inappropriate in this situation.[61] I argued that the concept of appropriateness is illuminated by two principles: (1) the procedure should instantiate values relevant to the decision being made and (2) the procedure should exclude distorting, arbitrary, or extraneous factors. Majority-decision's inappropriateness in the lifeboat results, at least in part, from the fact that it allows distorting factors—kinships, friendships, etc.—to improperly affect the result. We might also say that certain procedural values of majority vote, for instance positive responsiveness, are not relevant for deciding this type of question.[62] The principle requiring relevant attributes of the procedure fails in the same way that a coin flip among the group of doctors fails. Positive responsiveness to individual preferences is not useful or relevant for decisions in the lifeboat. It is affirmatively harmful in introducing factors that ought to be excluded. Similarly, the decision in the lifeboat is undoubtedly subject to the distorting influence of arbitrary factors. And majority vote does nothing to mitigate or cabin these concerns—it actually exacerbates them. As Risse concludes, "[i]n many cases (surely in many more cases than one might have thought given the ubiquity of majority rule), the considered judgment

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[61] Commenting on this example, Waldron remarks that "[m]ajority-decision . . . seems so obviously *inappropriate* for choosing who should go overboard." See Waldron, "A Majority in the Lifeboat," 1050 (emphasis added).

[62] Waldron argues that majority vote is an appropriate procedure for deciding the second-level dispute over which procedure to use to determine who gets thrown off the boat. *Id*. This is similar to my baseline assumption that delegation decisions (decisions that alter future procedures) must be made by the majority.

should be that majority rule is inappropriate."[63] And majority vote is inappropriate in the lifeboat in the same way that a coin flip is inappropriate for a criminal trial. But the Bathenian trial procedure can instantiate beneficial procedural values—such as impartiality—that are relevant for deciding guilt or innocence. It can also serve to exclude arbitrary factors—through tailored rules of evidence—that minimize distortions in the process. It would then be appropriate in a way that the coin flip is not.

In the end, it does not matter whether a strict line can be maintained between the procedural value that we call fairness and the procedural value that I refer to as "appropriateness." I think the distinction is useful if only for the fact that a separate appropriateness inquiry draws our attention to the unique facets of "the enterprise that is being regulated by fairness." Sometimes a myopic focus on fairness tends to obscure the contextual nature that this inquiry must take. One can, then, dispute my categorization of appropriateness as a value independent of fairness and still recognize its utility. So long as we require some fit between the decision-context and the procedure, this is sufficient.[64]

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[63] Mathias Risse, "On the Philosophy of Group Decision Methods I: The Nonobviousness of Majority Rule," *Philosophy Compass* 4 (2009): 799.

[64] Finally, it might be objected that my framework gives no guide for deciding what should happen when the conditions conflict. But the answer here is simple: there can be no conflict among the three conditions. Only fair procedures can be appropriate, and only fair and appropriate procedures can be the object of delegation.

C. Proceduralisms, Pure and Impure

In this section, I address the objection that the three legitimacy conditions (individually or in conjunction) comprise outcome-based standards that transform my account into an instrumentalist theory. I should note at the outset that I have no interest in defending one kind of *purely* procedural theory of democratic legitimacy. This kind of pure procedural theory (of democracy or of justice)[65] entails that there is no standard independent of the procedure by which we could judge outcomes. There is no such thing as right or just or good or wise that is independent of the procedure. The outcome simply is right or just or good or wise *because* it resulted from the procedure. A situation of fair gambles is supposed to be the paradigmatic pure procedural device: we cannot say that the distribution that results from a situation of fair gambles is right or just independently of the procedures.[66] Whatever results is just because it is the outcome of the procedure. I do not defend this theory because it seems to me to leave out important considerations of why we value fair procedures in the first place.[67]

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[65] Rawls, *A Theory of Justice*, 85-86.

[66] *Id.* at 86: "If a number of persons engage in a series of fair bets, the distribution of cash after the last bet is fair, or at least not unfair, whatever this distribution."

[67] I largely agree with the thrust of Brettschneider's project: "Contra pure proceduralists, however, I suggest that at times procedures can produce outcomes that undermine persons' autonomy and equal status. In such cases, the very democratic rationale for fair procedures has been undermined." Brettschneider, "Balancing Procedures and Outcomes Within Democratic Theory: Core Values and Judicial Review," 424. As Freeman puts it, "[n]o one would argue that the mere fact that a person makes a decision makes that decision right. The same holds true of group decisions, whether by simple or special majority rules. We have criteria for assessing the rightness of outcomes resulting from any actual political decision-

The rejection of pure proceduralism, however, is not a rejection of a fundamentally proceduralist account of legitimacy.[68] In other words, one can ground the legitimacy of decisions in the procedure that produced them, without making decisions "evaluable *solely* in terms of the procedure that brought them about."[69] The difference between this kind of impure proceduralism and an impure instrumentalism is that the former makes fair procedures a necessary condition for legitimacy (if not always sufficient), whereas the latter does not.[70] My account keeps procedures in the foreground. With Christiano, I contend that while "[p]ure proceduralism is completely

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making procedure, no matter how fair or appropriate that procedure may be." Samuel Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review," *Law & Philosophy* 9 (1991): 336.

[68] *See* Christopher G. Griffin, "Debate: Democracy as a Non-Instrumentally Just Procedure," *Journal of Political Philosophy* 11 (2003): 120 for a proceduralist account that is not purely procedural: "Since the democratic procedure distributes political power equally and thereby satisfies each person's interest in the public affirmation of basic social standing, democracy is an intrinsically just procedure. Note that the sense in which the democratic procedure is intrinsically just does not imply that its outcomes inevitably will be just. Hence, this argument does not suppose that democracy is a case of pure procedural justice."

[69] See Christiano, "The Authority of Democracy," 1 (emphasis added). Christiano is a good example of an impure proceduralist of the stripe I describe here. *Id*. at 25. David Estlund's account of epistemic proceduralism might also fall into this category. So too would Corey Brettscheider's "value theory of democracy," see his "Judicial Review and Democratic Authority: Absolute v. Balancing Conceptions," *Journal of Ethics and Social Philosophy* (2011): 8: "[O]n my view, to say that democratic procedures have intrinsic authority is to claim that they have authority even in the absence of the kind of results that they would ideally produce in a democracy."

[70] This would probably best describe Dworkin's view of democratic legitimacy. Procedures matter for him—he is not a pure instrumentalist—but when a court strikes down legislation in the name of democracy there is no loss to democracy so long as it reaches the right decision. This "no loss" position is only coherent if we reject the necessity of fair procedures for democratic legitimacy, at least unless an account like mine is correct.

false to the practice of democratic citizenship[,]. . . the democratic process has an intrinsic fairness."[71] Thus, although we may be able to say that majority decision can result in deeply unjust decisions according to our preferred principle of justice, our principle of legitimacy privileges procedures above all else.[72] And the limits that the framework I propose establishes are *procedural* limits on majority vote, not substantive ones.

Yet to even situate this framework in the impure proceduralist camp raises challenging questions of categorization. It is undeniably difficult to determine precisely the boundary between process values and outcome values. For our purposes a helpful starting point is to ask whether the value is a property of the process or of the outcome.[73] Some values can be both process values and outcome values, depending on the circumstance. We can, for instance, describe an outcome as fair, and we can describe a procedure as fair. On other hand, some values seem paradigmatically procedural, while others seem quintessentially outcome-oriented. For instance, we often look at values such as "decisiveness, anonymity, neutrality, and positive responsiveness"[74] as core

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[71] Christiano, "The Authority of Democracy," 4.

[72] See Waldron, "A Right-Based Critique of Constitutional Rights," 32.

[73] See Gerry Mackie, "The Values of Democratic Proceduralism," 8, <http://www.polisci.ucsd.edu/~gmackie/documents/DemocraticProceduralism.pdf> (accessed March 20, 2013), forthcoming *Irish Political Studies*, for a similar argument that stresses that several conditions are procedural where "[e]ach is a property of the procedure."

[74] *Id.*

procedural values, and likewise look at values such as justness, goodness, or rightness as central outcome values.[75]

But there are some values that we ascribe to procedures—such as the property "reliable"—that are still ultimately outcome values. We would call a procedure reliable, and thus ascribe the property *to the procedure* and yet we only think reliability is an important value if we think the procedure is reliably producing some desirable result. This would be an instrumental valuation of the property "reliable" that we ascribe to the procedure. So while we might think that property-specification is a starting point, we cannot also end there. We must answer the concern that appropriateness works like reliability. It is a property of the procedure, to be sure, but it might only be valuable instrumentally (as reliability is). Here Joshua Cohen's categorization helps: "a procedural value," he argues, "is a value used for the assessment of procedures without regard to the results of those procedures."[76] And Christiano's complementary definition: "Let's say that a moral standard guiding the choice of policies is *substantive* if a policy's degree of conformity to the standard is constitutively independent of the decision-

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[75] See Brettschneider, "Balancing Procedures and Outcomes Within Democratic Theory: Core Values and Judicial Review," 427.

[76] Joshua Cohen, "Pluralism and Proceduralism," *Chicago-Kent Law Review* 69 (1994): 606.

making procedure that produced the policy."[77] It is crucial, therefore, to determine whether the value is ascribable because of the results (as reliability is) or because of the intrinsic functioning of the procedure (as I argue appropriateness is).

To further answer the instrumentalist challenge, an important clarification about the analytical framework developed above is in order. The three conditions outlined in the previous sections are all necessary conditions for legitimating any delegation decision. But note that condition one applies to the proper subject matter of the delegation decision, while conditions two and three apply to the content of this delegation decision. Symbolically, the state makes delegation decision D by means of procedure P_1 where decision D is that procedure P_n should henceforth be used in place of procedure P_1 for some or all future decisions. The three criteria are conditions for the legitimacy of D, *not* for the legitimacy of P_1 or P_n.[78] On my definition of legitimacy, the term applies only to decisions made by the state. But though only decision D is subject to scrutiny, condition one analyzes *what* issue or issues D is giving to another procedure and conditions two and three analyze *how* D is doing so. The latter task requires specifying how exactly P_n functions.

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[77] A.J. Julius, "Book Review: David Estlund, *Democratic Authority*," *Philosophical Review* 119 (2010): 256.

[78] Recall, moreover, that P_1 is majority vote and I have stipulated for purposes of this essay that majority vote is the default decision-making procedure that must be used to legitimate all other decisions.

The worry here is that what conditions two and three are really analyzing is the outcome of decision D and not just the process by which D was produced. And the proceduralist was supposed to be unconcerned with outcomes. There is a difference, however, between a substantive outcome and a procedural outcome. I argued earlier that delegation decisions must satisfy more than the minimal legitimacy criterion (i.e., being produced by majority vote) because by changing future decision procedures they potentially undermine their own justification. This is the same reason the proceduralist can analyze the "outcome" of a delegation decision without becoming an instrumentalist. She may not be able to claim the mantle of pure proceduralism, but she does not become an instrumentalist by analyzing procedural outcomes alone. And it is crucially important that the only outcome that my account of delegation legitimacy allows inquiry into is an outcome that is itself a procedure (and no more). Thus, it is not inconsistent with the reasons that proceduralism is commonly invoked in the first place—namely, that intractable disagreement on what counts as a good decision renders all instrumental accounts pragmatically useless.[79] My account proposes no method to

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[79] This is not to say, of course, that there will *always* be greater agreement on what procedures to use. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 98: ``[W]hen sincere and good persons differ, we are prone to think they must accept some procedure to decide their differences, some procedure they both agree to be reliable or fair. [But] this disagreement may extend all the way up the ladder of procedures.'' It is nonetheless true that we often abide by decisions we disagree with if it can be shown that they were the product of a fair (and appropriate) procedure. See, e.g., Cohen, "Pluralism and Proceduralism," 617. And if the disagreement ever becomes as deep as Nozick makes it out to be, then we would have to conclude that, at least in that situation, a common undertaking on the issue is simply no longer possible.

discover whether a substantive outcome is correct, whether some procedure leads to good results, whether it produces the most just society, betters its citizens, or promotes the common good; nor do I employ any other instrumental criteria. The conditions of delegation legitimacy are thus still properly viewed as procedural criteria for democratic decision-making.[80]

And we can observe how they operate as procedural restraints: condition one draws a line around the kinds of issues that a majority can delegate. At first blush, this might be thought of as a paradigmatic instrumentalist limit, similar to the direct argument that instrumentalists make for restricting majority vote by a set of substantive individual rights. But condition one is different insofar as it works from the premise that procedures legitimate outcomes. If decision A cannot be legitimated by procedure S, then a procedural theory ought to say that A cannot be made by using S. Thus, for example, if an issue of policy cannot be legitimated by any other procedure than majority vote, then a procedural theory ought to say that issues of policy are nondelegable. This—and no more—is what condition one does. It is a procedural threshold question. The fact that we need to determine the relevant characteristics of the decision being made does not change the analysis. The inputs to a procedure are a

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[80] Brettschneider remarks on this distinguishing characteristic: "'[P]roceduralists' emphasize the intrinsic value of democratic procedures, for instance, on the grounds that they are fair." Brettschneider, "Balancing Procedures and Outcomes Within Democratic Theory: Core Values and Judicial Review," 423.

relevant part of the procedure. To use an example from Gerry Mackie's excellent treatment of the concept:

> To manufacture gunpowder, take saltpeter, charcoal, sulfur, and other inputs, and process them in proper quantity, sequence, and conditions. The materials exist prior to the procedure, but they become inputs to the procedure, which further must handle them properly, for example mixing the inputs in the proper proportion. Both the materials *as inputs*, and their right *handling*, are not independent of the manufacturing procedure.[81]

This is the extent of condition one. Delegable issues are *inputs* that are not independent of the decision-making procedure. And the right *handling* of these inputs is governed by conditions two and three.

Rather than look at the threshold question concerning the possibility of legitimation, condition two looks to the actual fairness of the proposed new procedure. Fairness, though it can be a value ascribed to an outcome, is used here as a procedural value. And the fairness of the procedure is not instrumentally valuable to any particular outcome. It is intrinsically valuable. Thus, only if the new procedure is a fair procedure can the delegation decision be legitimate. And while condition one determines the proper ingredients for the procedure—that only delegable issues are fed into it—condition two sets up the first of two restrictions on the new procedure itself.

Condition three, the correspondence constraint, works similarly. We ascribe the property "appropriate"—the value recognized when the correspondence constraint is

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[81] Mackie, "The Values of Democratic Proceduralism," 10.

satisfied—to the procedure. When analyzing appropriateness we are singularly unconcerned with the consequent decision made using the new procedure. We aren't, therefore, focused on any instrumental benefits that appropriateness provides, but on the fit between the type of issue (i.e. the inputs) and the procedure. It does not, however, have anything to say about the outputs of the procedure. Thus, even though conditions two and three look to the "result" of the delegation decision itself, they examine only the procedural values exemplified by the procedural outcome.

There is, then, no good reason to think that a proceduralist cannot subscribe to the three conditions outlined above. Only delegable issues can be legitimated using procedures other than majority vote and nondelegable issues are thus properly ruled out. But once we have decided that a delegable issue is the proper input, the function of the new procedure is important. It must be both fair and appropriate. Like fairness, appropriateness is another procedural value that is required before we can call any decision-making procedure legitimate. None of these conditions hinge on controversial judgments about what procedure promotes the common interest or best serves the common good, or best shows respect for citizens, or maximizes their opportunities for self-fulfillment. In short, the account here is fundamentally procedural. It is *about* procedures all the way down, even if this requires analyzing procedural outcomes.

Once we have seen how each condition remains procedural, we can assess more closely how the principle of legitimacy that these three conditions encompass is itself

essentially procedural. First, however, it is useful to distinguish the principle of legitimacy for a simple fair proceduralist:

> Simple Proceduralist Principle of Legitimacy: *Decision A is legitimate if and only if A is the outcome of a fair and appropriate procedure.*

The use of a fair and appropriate procedure is both necessary and sufficient to legitimate decision A. This is the classic proceduralist position that falls prey to the objection of tyranny imposed by the fair and appropriate procedure of majority vote. It has no resources to critique that kind of decision. I have tried to show how a fundamentally proceduralist account can incorporate this concern in a non-question begging way. My account proposes a significant rider to the simple proceduralist principle:

> Qualified Proceduralist Principle of Legitimacy: *Decision A is legitimate only if A is the outcome of a fair and appropriate procedure. If A is not a delegation decision, then it is legitimate. But if A involves delegation to procedure Z, then Z must be a fair and appropriate procedure.*

Notice that "being produced by a fair and appropriate procedure" remains a *necessary* condition for A's legitimacy—whether it is a delegation decision or not. But if A is a delegation decision, then the new procedure Z must be a fair and appropriate procedure as well. Returning once more to the lifeboat example, we can see how the qualified principle works. When we are all in the lifeboat and must decide who should leave, we have a number of possible procedures to use. Consider Waldron's explication:

> Suppose there is disagreement in the lifeboat about the appropriate principle to use for determining who should go overboard. Dworkin says that (α) choice by lot is the "obvious" solution. But other principles might be suggested. One possibility is (β) a principle that examines the health of each passenger and considers jettisoning those who are unlikely to

> survive anyway. Suppose the passengers disagree strongly as to the merits of (α) and (β). The issue needs to be decided, but how? It does not seem silly or oppressive or inappropriate to have a debate followed by a vote concerning these alternative principles. The fact that it is silly or unfair to use a majoritarian procedure to choose a victim doesn't show that it would be silly and unfair to use it to choose a method for selecting a victim. Majority-decision, which seems so obviously inappropriate for choosing who should go overboard, does not seem so obviously inappropriate for choosing which principle to use to determine who goes overboard.[82]

Running this through the qualified proceduralist principle, we see that the decision about which procedure to use for deciding who should leave the lifeboat is a delegation decision, and consequently needs to be made by a fair and appropriate procedure and in turn prescribe a fair and appropriate procedure. The decision is made using majority vote, and majority vote is fair and appropriate for deciding which procedure to use. So long as one of the new selected procedures is both fair and appropriate for deciding whom to throw off, the delegation decision is legitimate and thereby binds the participants. It is crucial to emphasize that majority vote is not one of the procedures that the participants are choosing from when they prescribe either (α) or (β) or another procedure. We already decided that majority vote is *not* fair or appropriate for making the decision about whom to throw off, even if it is fair and appropriate for picking which procedure to use to decide that question. Thus, the qualified proceduralist principle of legitimacy does not require complex and controversial judgments about the

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[82] Waldron, "A Majority in the Lifeboat," 1050.

justice of decisions. *Procedures* are what make a decision legitimate and *procedures* are therefore the source of obligations for citizens.

II. The Legitimacy of the Decision to Institute Judicial Review

In this Part, I apply the analytical framework developed in Part I to the Bathenian decision to institute strong judicial review.[1] Importantly, this analysis does not necessarily legitimate judicial review in modern democracies where judicial review has been adopted through means other than majority vote.[2] What it shows is that *if* a majority chooses to institute judicial review,[3] and in this way delegate final decision-making authority for a subset of issues to the judiciary, *then* the proceduralist need have no worries about its legitimacy. I first discuss in II.A the Bathenian decision to institute judicial review and then in Part II.B apply the three legitimacy conditions to judicial review.

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[1] There are, of course, many purported instrumental justifications of judicial review. E.g. Richard H. Fallon, Jr., "The Core of an Uneasy Case for Judicial Review," *Harvard Law Review* 121 (2008). These instrumental accounts would answer some of the concerns that Waldron expresses in his arguments against the institution, but would not be acceptable accounts for the proceduralist (whom I try to appeal to here). And they often rely on contested and controversial claims about the competence of judges. For this reason, Lever persuasively argues that "[i]t is unwise and undesirable . . . to rest the case for judicial review on substantive judgements [sic] about the relative rights-protecting virtues and vices of judges and legislators." Lever, "Democracy and Judicial Review: Are They Really Incompatible?" *Perspectives on Politics* 7 (2007): 806. Agreement with this sentiment is part of the impetus for this essay.

[2] This kind of hypothetical justification can be helpful in showing how a particular practice is justified even if it does not adequately explain how it came about. Nozick makes this same point about state-of-nature explanations of the political realm. See Nozick, *Anarchy, State, and Utopia*, 9.

[3] Judicial need not be a power that judges presume by themselves, as in the American case. By now, it is a familiar axiom of political philosophy that "[i]n exercising their constituent power at the level of constitutional choice, free and equal persons could choose judicial review as one of the constitutional mechanisms for protecting their equal basic rights." Samuel Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review," *Law & Philosophy* 9 (1991): 327.

A. The Bathenian Embrace of Strong Judicial Review

Returning to the Bathenian democracy, let's imagine that the Bathenians gather in the assembly one day and determine that their delegation of criminal trials to the independent judiciary was a success. That decision, Part I suggested, was legitimate. Now the Bathenian assembly decides to delegate judicial review to a constitutional court. Let's suppose that the majority gives the independent judiciary broad powers of judicial review, what's often called "strong judicial review."[4] The judiciary has the power, that is, to nullify legislation passed by the Bathenian assembly through majority vote.

But what exactly does the Bathenian majority delegate? It cannot simply be the power to second guess all legislative decisions by the Bathenian assembly or this delegation would be no different than the election of a dictator (though in the form of a collective and not unitary dictator).[5] By instituting judicial review, the Bathenian assembly wants to ensure that some set of rights gets enshrined as legally enforceable rights against the majority. The reasons for the Bathenian assembly to desire this

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[4] *See supra* note 32.

[5] There may be a worry that as authority has a tendency to expand, there is no effective way for the majority to circumscribe the powers of the constitutional court. Perhaps the court will usurp more and greater power in the name of fulfilling its judicial role. Though that is a possibility that cannot be ignored, the four procedural values I endorse below should mitigate this risk. Transparency, in particular, seems a plausible check on judicial overreach. Of course, without a culture of constitutionalism, *any* branch or department of government with sufficient power can in the end run roughshod over fundamental liberties. The fact that the judiciary has neither sword nor purse is also another reason to think that effective checks can be maintained.

particular institutional mechanism are irrelevant, or at least secondary.[6] Though the assembly could certainly have valued rights without feeling bound to entrench these in a legally enforceable Bill of Rights,[7] they could also entrench the rights if their choice of institutional mechanism—the independent judiciary exercising judicial review—satisfies the three conditions of delegation legitimacy. Before making this argument, I want to flesh out the limited nature of the Bathenian delegation in more detail. The limited nature of the delegation is important both to assuage the worry that a new system of government—"judicial aristocracy"[8]—lurks whenever judicial review appears and to lay the foundation for the delegability of these important but narrow issues.

The delegation by the Bathenian assembly is notably circumscribed in a number of ways. As Aileen Kavanagh points out:

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[6] I offer some thoughts below, but it could also be for reasons Freeman adduces: "By a bill of rights they, in effect, agree to take certain items off the legislative agenda. In so doing they publicly recognize and acknowledge that maintaining the sovereignty and independence of each is a condition of their cooperation, and partially define the ends of legislative change." Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review," 352.

[7] Waldron is persuasive on the point that there is no necessary connection between a commitment to rights and the institution of judicial review. See Waldron, "A Right-Based Critique of Constitutional Rights."

[8] The phrase is Waldron's from *Law and Disagreement*, 248. Aileen Kavanagh shows its error: "[U]nlike, say, democracy, monarchy or aristocracy, judicial review in the form we are considering here, is not a complete theory of political authority. It is a decision-making procedure designed to deal with a limited range of issues. As such, judicial review should not be posed as an alternative to democratic government, but rather (if at all) as one element within that government." Kavanagh, "Participation and Judicial Review: A Reply to Jeremy Waldron," *Law and Philosophy* 22 (2003): 454.

> [I]n political systems which possess American-style judicial review, most political decisions, including important policy-making issues, are left to the democratic process, accountable to the citizen-body. Nor is it even the case that all matters related to constitutional rights are allocated to the courts under judicial review. Much of the detailed regulation of rights is carried out by the legislature in the course of their policy-making decisions, not all of which will be in response to judicial decisions. So, we are considering a small and special class of political decisions, of which only some are assigned to the courts.[9]

The delegation is limited in two important respects. Only issues of principle (not all political issues) are delegated *and* only those issues of principle that concern the rights enshrined in the Bill of Rights are delegated (not all issues of principle nor all regulations of issues of principle). And even these rights are still regulated by the Bathenian assembly in some ways. The Bathenians may choose not to delegate all rights issues because they think other important issues of principle are properly a matter of legislative prerogative alone—perhaps even because they are persuaded by some of Waldron's arguments against judicial review. But they have collectively decided that there are at least some rights that they think ought to be capable of vindication before a neutral, independent, and impartial tribunal. And this decision, *so long as it is legitimate*, is not open to further criticism from the proceduralist.

It would be a mistake, however, to leave unanswered two of Waldron's arguments about the democratic decision to create judicial review. First, he sketches two main reasons for why majorities *should not* make this delegation: (1) it is incoherent, and

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[9] *Id.* at 454.

(2) it is disrespectful. Next, he argues that if majorities do—even after full consideration and deliberation—choose to make this delegation, it is nonetheless *undemocratic*. In this section, I respond to the argument that a majority *should not* make this delegation and outline Waldron's argument against the decision's claim to be "democratic." But I leave the answer to this latter challenge to the conditions for legitimacy in Part II.B *infra*.

The prudential objections Waldron raises rely on the unique circumstances of entrenched constitutional rights. He argues at length that it makes no sense to see the entrenchment of rights as a kind of pre-commitment by the people.[10] It is not, in short, the same as Ulysses tying himself to the mast. The difference lies in the kind of action that must be taken by others at t_2 to uphold the self-imposed limits instituted at t_1. When the sailors refuse to unbind Ulysses as they sail past the sirens, they are upholding his initial choice to be bound later. But the analogy doesn't hold for society at large. Judicial review isn't primarily or exclusively exercised to invalidate statutes when the people have moments similar to Ulysses' weakened state. Waldron makes this point that it is not only when legislatures have a "weakness of will" that rights disagreements arise. We often disagree in calm and rational moments about what it is we bound ourselves to in the first place and in what ways we should continue to be bound. The failure to

[10] Waldron makes this argument in a number of places, including *Law and Disagreement*, ch. 12.

understand this distinction, says Waldron, makes defenses of judicial review that rely on the pre-commitment theory incoherent.

But even when they aren't incoherent, Waldron thinks that the desire to entrench rights is inconsistent with the reasons we ascribe rights to individuals in the first place.[11] We see people as right-bearers in part because we believe that they can take a broader view about what it means to live in society together; they can respect the rights others have when making decisions about what they should do. To then turn around and claim that we need judicial review because the majority will wantonly disregard the rights of the minority creates an uneasy tension. As he puts it, "if the typical upshot of an agent's exercise of a right vested in him were moral havoc or a reckless or malicious assault on the interest of others, we should quickly rethink the basis of the original rights-attribution."[12] We can't, it appears to Waldron, value individuals as rights-bearers with the capacity for morally responsible action and at the same time demand judicial review to save us from the moral irresponsibility of these same actors.

I won't dwell long on these objections. The first objection can be answered by simply discarding the pre-commitment rationale. Judicial review could be valued by the citizenry for reasons other than the desire to later bind itself. I suggest some reasons below, though the precise rationale is irrelevant for the purposes of legitimacy. As for

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[11] Waldron also advances this claim a number of times, including in *Law and Disagreement*, ch. 10.

[12] Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999), 222.

the charge of disrespect, there are a number of responses. First, constitutions often play a constitutive role in creating a society and when this constituting happens, "it may be an open question for those drafting or being asked to assent to a constitution whether or with whom to join in a proposed project of collective self-government. Under these circumstances, it may not be unreasonable to seek entrenchment of assurances without which a proposed collective venture would appear unattractive or even unacceptable."[13] In other words, disrespect may not be inherent in entrenchment. We simply may be unsure who else will be welcomed in to our collective venture at a later date and therefore set up assurances to protect against those with divergent interests. Second, we don't have to believe that people are fundamentally evil to think they are capable of committing injustice: "there is no inconsistency in saying that people have the capacity to decide well and sometimes decide badly. In designing institutions, we should put both of these facts into the equation."[14] In any event, these are objections that might plague instrumental justifications for judicial review. As Lever recognizes, "the procedural case for judicial review does not impugn the motivations, values, or abilities of democratic citizens, or the legislators who are supposed to represent them."[15]

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[13] Fallon, "The Core of an Uneasy Case for Judicial Review," 1724.

[14] Kavanagh, "Participation and Judicial Review: A Reply to Jeremy Waldron," 476.

[15] Lever, "Democracy and Judicial Review: Are They Really Incompatible?," 808.

These are Waldron's arguments for why a majority should not adopt judicial review. Besides the brief responses above, we can imagine less insidious or irrational reasons for why citizens might decide to hand over Bill of Rights questions to the judiciary—even in the face of (or perhaps *because* of) what Valentini calls "thick disagreement" about justice[16] and what Waldron calls "the circumstances of politics."[17] As long as there is sufficient uncertainty among the population about what will be called "rights" and who will be in the majority, giving certain questions to an independent panel with certain valuable institutional characteristics seems reasonable.[18] Participants

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[16] Thick disagreement is disagreement about both what realizes justice in a particular application and what it would mean to call a decision just. Thin disagreement is simply disagreement on how to realize justice in a particular application, where we all agree on what it would mean for something to qualify as just. As Valentini formally defines it: "Thick Disagreement about Justice (TD): Citizens advance conflicting claims about justice and disagree about the truth conditions of those claims." Laura Valentini, "Justice, Disagreement, and Democracy," *British Journal of Political Science* 43 (2013): 183.

[17] Waldron, *Law and Disagreement*, 102.

[18] Horacio Spector provides a helpful description:

> [R]ational people, under reasonable conditions, would prefer for autonomy-based reasons a liberal constitution to a populist one. . . . In effect at the constitutional phase individuals would compare the degree of individual autonomy they would enjoy under an unconstrained majoritarian democracy and under a constitutional democracy. Even granting that they would lose autonomy as a result of the application of constitutional constraints, they might predict a net gain of autonomy by getting an insurance against potential autonomy violations resulting from the application of majority rule. Rational individuals might then think that establishing constitutional limitations and entrusting a constitutional court with their application are, on balance, the best institutional arrangement to maximize liberty during the constitutional phase."

Spector, "Judicial Review, Rights, and Democracy," *Law and Philosophy* 22 (2003): 327. Freeman also describes the situation well: "[I]n the absence of widespread public agreement on these fundamental requirements of democracy, there is no assurance that majority rule will not be used, as it so often has, to subvert the public interest in justice and to deprive classes of individuals of the conditions of democratic equality. It is in these circumstances that there is a place for judicial review." Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review," 355.

in Rawl's original position would likely choose an institutional set-up precisely like this.[19] Horatio Spector ably makes the case for the reasonableness of the decision to institute judicial review:

> There are reasons for setting up an independent, detached institution that is competent to ascertain the compatibility of laws with constitutional rights. . . . Cases concerning constitutional rights often present various competing claims flowing from diverse and usually incommensurable values that are difficult to assess and ponder. Despite the faithful efforts of representatives to bring out and articulate those claims, the legislative majority may be so attached to the views of their constituents that it becomes incapable of mimicking the viewpoints of other groups and individuals. In contrast, the adversarial judicial process can provide a good setting for a battle of impersonal arguments.[20]

The characteristic qualities of a constitutional court often make it an ideal forum for dispute resolution on issues of rights. Uncertainty could be reason enough to motivate the decision to delegate questions to this body.[21] Perhaps, that is, others will not

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[19] See John Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971), 228-234, where he discusses constitutional constraints implied by, or at least consistent with, the two principle of justice. I think we could also say that the original position (or at least the veil of ignorance) could be a device for seeing how rational individuals would choose judicial review directly even without agreement on the two principles of justice first.

[20] Spector, "Judicial Review, Rights, and Democracy," 303.

[21] See Fallon, "The Core of an Uneasy Case for Judicial Review," 1726-1727: "[D]ecisionmakers at Time One might reasonably entrench judicial review of legislation alleged to threaten the constitutive norms of political democracy, not because they believe their society to be pathological at Time One, but to establish a bulwark against pathologies that might develop in the future. Surely a society can take precautions against the possibility of future legislative pathologies without thereby betraying itself as pathological already." See also Mark Tushnet, "Forms of Judicial Review as Expressions of Constitutional Patriotism," *Law and*

recognize what I think is a fundamental right to health care; or perhaps what I recognize as the right to free expression will not be viewed as robustly by the majority. Worse yet, perhaps my views on what rights we have will be a minority view throughout the course of my participation in political life.

Of course, the argument from uncertainty only goes through assuming certain institutional characteristics of the constitutional court and facts about the relative standing of the citizen in society. But it seems to me that a veil-of-ignorance-type device could show the reasonableness of judicial review without implying that an individual who endorses the practice thinks poorly of her fellow citizens. An average Bathenian citizen could, in other words, vote for judicial review without either holding negative views of the citizenry or seeing her decision as a sort of communal self-restraint. She simply sees it as a wise decision in the face of deep uncertainty on important questions that affect all areas of her life.

But I should be clear that Waldron's prescriptive arguments about what a majority ought to do cannot defeat my argument here about the legitimacy of the delegation decision to create judicial review. I may be wrong about the reasons why a majority would elect to institute judicial review. Waldron's prescriptive arguments,

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Philosophy 22 (2003): 354, for a description of the reasons for the widespread democratic adoption of judicial review.

though, are in principle no different than arguments that the majority should not raise the minimum wage or cut funding for education. There may be good and bad pragmatic, moral, and prudential reasons for the majority's decision. These are the kinds of reasons that Waldron has adduced so far against judicial review. But the majority can legitimately make the "wrong" decision—one that is unwise, impractical, or inefficient—on minimum wage, education funding, or even on judicial review. And the proceduralist account of legitimacy provides no fodder to the critic of these decisions. So long as they are procedurally legitimate, their foolishness is no reason to discard them.

Waldron's deeper argument against judicial review—that it is undemocratic—is not nearly as fleshed out as his prior two critiques. For the most part, Waldron simply restates the problem this essay seeks to answer: if a majority can elect a dictator and we still see that decision as undemocratic, then we cannot just assume that when a majority chooses judicial review it is automatically democratic.[22] But this is less an argument against the democratic character of judicial review than a challenge to the proponent of judicial review to carry her burden of showing its legitimacy. This, I think, the proponent of judicial review can do full well. And in doing so she can reveal what it is about the election of a dictator that defeats its claim to democratic legitimacy.

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[22] See Waldron, *Law and Disagreement*, 255.

But Waldron is right that proponents of judicial review cannot simply point out that a majority voted for the institution and then rest her case. For this kind of facile rejoinder would legitimate the democratic suicide that we are worried about avoiding. Majority vote may give us reasons for allowing an elected dictator, but an elected dictator remains a dictator. As Waldron says, "my arguments entail that if the people want a regime of constitutional rights, then that is what they should have: democracy requires that."[23] "But," Waldron continues, "we must not confuse the *reason for carrying out a proposal* with the *character of the proposal* itself. If the people wanted to experiment with dictatorship, principles of democracy might give us a reason to allow them to do so. But it would not follow that dictatorship is democratic."[24] I think Waldron is right on this score: *merely* because a democratic majority makes some decision does not allow us to conclude that the decision is democratic.

But there is a danger that once Waldron draws this distinction between "the reason for carrying out a proposal" and "the character of the proposal itself," he opens himself up to difficult challenges from the instrumentalist. After all, the instrumentalist evaluates democratic decision-making based on the "character of the proposal" that the majority adopts, not on the "reason for carrying out a proposal." In other words, Waldron's distinction is what the instrumentalist has been at pains to show the whole

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[23] Waldron, "A Right-Based Critique of Constitutional Rights." 46.

[24] *Id.* (emphases added).

time: majority decisions to undermine fundamental rights, oppress minority interests, silence opposition, or even elect a dictator are problematic precisely because they make society *less democratic*. That Waldron could accept this possibility but nonetheless hold that the majority's vote was a conclusive "reason for carrying out" the decision is odd. This is where I think failure to attend to the differences between substantive decisions and process-altering decisions is important. The proceduralist can critique the latter without having to explain how or why we could have *conclusive* reasons to let a democracy commit suicide.

Yet Waldron has a response.[25] He invites us to think of the question of constitutional design made by a group of individuals contemplating how to structure their social life together.[26] They can choose whatever form of government they want: monarchy, oligarchy, democracy, or some admixture. We aren't bound, Waldron points out, to say that just because the people came together and voted for governmental system X that that system is therefore a democracy. And he's right—that assertion would be absurd. But the question about whether some institutional change to society once we have a democratic form of government makes the society more or less

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[25] He argues that "concerns about the democratic or non-democratic character of a political procedure do not evaporate when the procedure in question is being used to address an issue about the nature of democracy." Waldron, "Judicial Review and the Conditions of Democracy," *Journal of Political Philosophy* 6 (1998): 345.

[26] Waldron, *Law and Disagreement*, 255-56.

democratic is a different kind of question.[27] Indeed, the proceduralist account would be nonsense if we had to analyze every decision to see whether it made society more or less democratic before we called it legitimate. I don't take Waldron to mean that all decisions that make society less democratic are illegitimate.[28] But he does, nonetheless, assert that judicial review is illegitimate (not *just* undemocratic). The argument that it is illegitimate, however, seems to draw Waldron back to the notion that it is undemocratic. Without this false equivalence, he has no independent arguments for its illegitimacy.

In this essay, I do not explicitly attempt to defend the democratic credentials of judicial review. Countless others have ably undertaken that task.[29] What the three

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[27] My framework attempts to implement the proposal Waldron claims will distinguish democratic from undemocratic characters: "The distinction between a democratic method of constitutional choice and the democratic character of the constitution that is clearest when we can point to a founding moment in the life of a political society (a moment of constitutional choice) and distinguish between the decision-procedures used at that moment and the decision-procedures which, at that moment, it was decided to employ in all subsequent political decision-making." *Id.* at 256.

[28] Though he does get remarkably close to arguing this in *Law and Disagreement*, at 264: "[T]o the extent that they invest the judiciary with an overriding power of judgement as to how something as basic as equal protection is to be understood, allowing that judgement to override the judgement of the people or their representatives *on this very issue*, it is undeniable that (in terms of the Aristotelian taxonomy) they have set up what would traditionally be described as a non-democratic arrangement." To me, it seems strange to think that Aristotle would classify not just regimes but also the individual decisions they make. This again seems to be the kind of case-by-case inquiry that proceduralists think it necessary to avoid.

[29] Though he later couches it in terms of pre-commitment, Freeman offers a strong defense of the democratic credentials of judicial review:

> {Judicial review] is among the procedural devices that free and equal sovereign persons might rationally agree to and impose, in light of their general knowledge of social conditions, as a constraint upon majority legislative processes, to protect the equal basic rights that constitute democratic sovereignty. Judicial review limits the extent of the exercise of equal rights of political participation through ordinary legislative procedures. Its purpose is to enforce the substantive constraints on legislation that have been taken off the legislative itinerary. Since it invokes a non-legislative means to do this, it may well be

conditions of delegation legitimacy attempt to show is that the decision to institute judicial review is *legitimate* in a democracy in the way that the majority decision to institute a dictator is not. My framework leaves substantive questions about the degree of "democratic" and "undemocratic" outcomes to the side.[30] I contend that we have procedural reasons to resist the election of a dictator. We don't just have to accept the decision and then argue that it is undemocratic despite its unquestioned authority. And, in contrast, we can't just call judicial review undemocratic and believe that that proves its illegitimacy.

This illustrates a deeper problem with Waldron's claim about democratic and undemocratic outcomes. For, under the typical proceduralist regime, "there is nothing intrinsically democratic about the outcomes of such decisions aside from the fact that they were produced by democratic procedures."[31] We cannot, that is, simply claim that

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> a constitutional measure of last resort. But this does not imply that it is undemocratic. For it is not a limitation upon equal sovereignty, but upon ordinary legislative power in the interest of protecting the equal rights of democratic sovereignty.

Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review," 353.

[30] Brettschneider recognizes that this categorization rests on outcome analysis. See Brettschneider, "Balancing Procedures and Outcomes Within Democratic Theory: Core Values and Judicial Review," *Political Studies* 53 (2005): 438.

[31] Brettschneider, "Balancing Procedures and Outcomes Within Democratic Theory: Core Values and Judicial Review," 424; see also Brettschneider, "The Value Theory of Democracy," *Politics, Philosophy & Economics* 5 (2006): 259: "According to this 'pure procedural' definition of democracy, an outcome is rightly characterized as democratic only when it is the result of a legitimate democratic process."

an elected dictator (or judicial review) is "undemocratic" without either abandoning proceduralism or finding some fault in the procedures that authorized these decisions. The instrumentalist chooses the former route, and this essay chooses the latter. It is unclear where Waldron stands.

B. The Procedural Merits of Judicial Review

We have seen that the Bathenian decision to create judicial review is not a blanket cessation of plenary power to the judiciary.[32] Rather, it is a circumscribed delegation decision that must satisfy three conditions in order to be legitimate.[33] In this section, I argue that Bathenian judicial review satisfies the three legitimacy conditions when the practice is suitably specified.[34] To be sure, the values I ascribe to judicial

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[32] For this reason, to speak of "judicial aristocracy" as alternative form of government to democracy is simply disingenuous.

[33] And, moreover, while the Bathenians could have good reasons to delegate this power to the judiciary, nothing in my account requires them to have good reasons to do so—just as nothing in the procedural account more broadly requires majorities to make decisions for good reasons.

[34] A brief clarification between *justifications* for judicial review (of which this essay seeks to add) and *theories* of judicial review (of which this essay has nothing much to say) may be useful here. A justification for judicial review can be either be ad hoc or it can be theoretically motivated. An ad hoc justification would argue directly that judicial review is legitimate—either for instrumental or procedural (or both) reasons. My argument here, however, was theoretically motivated by the framework for delegation legitimacy that I advanced. What both justifications have in common is that they set aside questions about what judges ought to do when they decide particular cases. The justifications seek to show that the institution *simpliciter* is legitimate. And although this has some implications for how judges decide cases, the restraints it imposes are minimal. Theories of judicial review take up the task of specifying what judges should do in particular cases. I have set aside this aspect of judicial review. My justification of judicial review is compatible with a wide variety of theories of judicial review: both originalism and living constitutionalism, process-based theories and Dworkin's "moral reading of the Constitution." Nothing in particular about interpretation is entailed by my proceduralist justification for judicial review. It is for this reason that I have said little about process-based theories of judicial review in particular or theories of constitutional interpretation in general. (Thus, for example, "the Constitution's openly substantive

review may seem to legitimate the practice only in utopian circumstances. But one of the purposes of illustrating how a legitimate institution would function perfectly is to allow us to compare it with actual institutions. It is beyond the scope of this essay to explore how much congruence there must be between actual institutions and the ideal Bathenian judiciary for the former to be legitimate. Still, the functioning of Bathen's constitutional court is a helpful normative tool, even if actual institutions do not always approximate this ideal.

1. Condition One: Are "Bill of Rights" Questions Delegable?

The delegable issues condition means that it is only legitimate for the majority to delegate issues that are susceptible to decisions by nonmajoritarian procedures. In other words, there must be another procedure that is both fair and appropriate for determining answers to the questions delegated. It follows from my definition of delegable issues that we can never be fully sure that the first condition is satisfied until we have determined that the new procedure satisfies conditions two and three. Yet the principle/policy distinction can give us evidence that we are on the right track. In Part I, I employed this distinction to show how a judiciary deciding criminal trials could satisfy

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commitments" are no problem for my procedural justification for judicial review. See Laurence H. Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories," *Yale Law Journal* 89 (1980): 1065.) These theories are an undoubtedly important component of a comprehensive discussion of judicial review, but specifying the particular conception that is most reasonable is not necessary to legitimate the practice. It is enough that there is substantial breadth in which the Bathenian judges can choose their course.

this condition. Here, I return to that distinction to show why it would be permissible for the majority to delegate all questions of constitutional rights to an independent judiciary.

It seems to me that calling matters of constitutional rights "issues of principle" is fairly uncontroversial. If one accepts the distinction between issues of principle and issues of policy, there is no large leap to the conclusion that constitutional rights questions are questions of principle. But they are not simply equivalent to issues of principle; they are a (comparatively small) subset of issues of principle. A brief overview of the types of right questions confronting the state is useful to show the narrow and limited scope of Bathenian delegation. I previously noted the doubly limited nature of the delegation in passing; here I more specifically outline the kind of rights that get delegated—and how *these* rights are delegable under condition one. The suggestion in Part I that issues of principle are generally delegable ought to justify the even narrower and limited nature of Bathenian delegation.[35] Recall, however, that the policy/principle distinction is just a proxy for the analysis that takes shape fully in the analysis of

[35] That is, if issues of type X are generally delegable, then issue A, which is a subset of issues of type X, is even more clearly delegable, at least so long as issue A is not itself on the fringes of what qualifies X for delegability.

conditions two and three. Here is it simply important that there is a discernible limit on what the delegated issues actually are.[36]

Though we often use the word "right" indiscriminately in the context of issues of principle, three types of rights questions are important in political decision-making: moral rights, legal rights, and constitutional rights.[37] A right-based theory often works from the premise that individual rights are the foundation of a normative account of social and political justice.[38] But the rights at the foundation are moral rights and the move from foundational moral rights to particular legal rights (and from legal rights to particular constitutional rights) is neither necessary nor inevitable. As I suggested above, it would be reasonable for a society to embrace fundamental moral rights and yet reject the notion of (a specific set of) legally enforceable rights.[39] And even conceding that moral rights must have legal protection, there is no necessary connection with legal

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[36] This limit is a common assumption shared with Waldron and can in practice be maintained by checks and balances. If there was no discernible limit, then judicial review would always devolve into dictatorship.

[37] Questions such as what constitutes an individual right, what those rights do (e.g. trump other considerations), how they are grounded, which are basic and are derivative, are beyond the scope of this essay. Waldron notes the diversity of views here: "Different theories will identify different individual rights—to freedom, independence, dignity, etc.—as having fundamental and abiding importance, and they will regard a sense of that importance as a general basis for normativity within the theory." Waldron, "A Right-Based Critique of Constitutional Rights," 23. Openness to this kind of disagreement is one of the key features of proceduralism.

[38] *Id*.

[39] I might have a moral right that you keep a promise you made to me, but there is nothing in the nature of the moral right that requires I also have a legal right to your performance of the promise.

rights: "There may be all sorts of ways in which [moral right] X may be secured legally for [citizen] P, without her having a legal *right* to it."[40] Thus, just because there are some issues of principle (e.g. moral rights) that a society might wish to protect, it is not necessary that the majority delegate decisions on these rights to an independent tribunal or provide citizens with tools to vindicate these rights themselves.

A society might, however, choose to create a set of definable legal rights that can be individually vindicated. A legal right is usually understood "to indicate the existence of an articulated legal rule or principle entitling P to X."[41] If P is entitled to X, then P does not need a majority to determine that she is entitled to X. Another procedure might just as well—or even better—secure P's entitlement to X. Though there is nothing ineluctable about the move from moral rights to legal rights, the majority could properly conclude that nonmajoritarian procedures could more fairly or appropriately arbitrate disputes about legal rights. Nonetheless, these legal rights need not take the form of entrenched constitutional rights. Very likely only some legal rights will be enshrined in the Bathenian Bill of Rights.

The distinction between legal rights *simplicter* and constitutionally entrenched legal rights is often the result of important social and moral considerations. There are some legal rights that we want individuals to possess against the arbitrary whim of

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[40] *Id.* at 24.

[41] *Id.*

official discretion, but not against the collective force of majority opinion. For example, I may have a legal right to information about what the government is doing on certain matters. If so, individual officials cannot legally deny me that right. And I can use legal procedure to enforce this right. But the majority may well decide tomorrow that this right to information (or to a certain class of information) and its accompanying legal regime are too costly to maintain. A simple majority can abolish my claim-right to provision of information—at least so long as this claim-right remains a mere legal, and not yet constitutional, right.

However, "[w]hen a principle is entrenched in a constitutional document, the claim-right (to liberty or provision) that it lays down is compounded with an immunity against legislative change."[42] Thus a constitutional right is not only a claim-right to liberty or provision (as all ordinary legal rights are); it is the further right to disable the majority from abolishing the claim-right. Thus we can now say what the Bathenian majority delegates to the constitutional court: authority to decide all constitutional rights disputes, where constitutional rights are defined as legal claim-rights to liberty or provision that also carry along with them the right to disable the assembly from altering or abolishing the right. I have addressed the reasons *why* the Bathenians might do this for certain rights in Part II.A *supra*, but the important point here is the dual nature of a

[42] *Id.* at 27.

constitutional right. There is bound to be a very limited number of rights, and a concomitantly limited sphere of operation, for the constitutional court of Bathens. An unfounded fear that the judiciary might slowly accrete unchecked power to itself through liberal interpretation is no more an argument against the institution than the fact that militaries may at any time stage a coup d'état is a definitive argument against standing armies.[43]

In this section, I have turned Waldron's argument against constitutional rights on its head.[44] He argues that the leap from moral rights to legal rights to constitutional rights is not a necessary leap for those committed to moral rights. They could get off the train before the introduction of legal rights or before the introduction of constitutional rights and still be properly called "right-based" theorists. I have not quibbled with this argument, but merely used Waldron's taxonomy to show that the move from moral to legal to constitutional rights mitigates the concern with Bathenian delegation. The Bathenians are not asking the judiciary to decide all questions about moral rights or legal rights. They are only ceding authority for one small subset of rights: constitutional rights. And while Waldron is right that this evolution was not necessary, he has done nothing to show that, regardless of the procedures employed by the constitutional court, it is illegitimate. Thus, the Bathenian decision to create and define constitutional rights,

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[43] See also *supra* note 5.

[44] Waldron, "A Right-Based Critique of Constitutional Rights," 23ff.

and then delegate these issues to the judiciary, is not defeated by condition one.[45] So long as the judiciary satisfies conditions two and three in the procedures it employs, condition one will be conclusively satisfied.

2. Condition Two: Is Judicial Review Fair?

The fairness condition requires that the new procedure to which the delegable issues are delegated be a fair one. This might be satisfied, for instance, if the judiciary used a coin flip to decide its cases. But a more robust and realistic account of judicial review will help show not only how it can be fair, but also pave the way for a showing that it is also appropriate (i.e., that it satisfies the condition imposed by the correspondence constraint). I do so by drawing on two values of majority vote—neutrality and anonymity—that are thought central to its fairness and show how they can be exemplified by judicial review.[46]

Before giving this argument, however, I should clarify the role of this argument in my defense of judicial review. In this section, I need only show that judicial review is a *fair* procedure for deciding an outcome on a question of constitutional rights. This, we

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[45] Recall that while condition one cannot be conclusively satisfied until conditions two and three are, it can end the inquiry if the delegated issues are per se nondelegable for some reason.

[46] I take issue here with Fallon's conflation of the fairness of procedures and the justness of outcomes: "The fairness of procedures depends crucially on the ends that they seek to accomplish. If judicial review promotes morally better outcomes than would exclusive legislative definitions of disputed rights, then reliance on judicial review is not unfair, nor does it, as Waldron maintains, necessarily lack 'legitimacy.'" Fallon, "The Core of an Uneasy Case for Judicial Review," 1699.

have seen, is a rather low threshold. Multiple, competing procedures are fair (e.g. lottery, coin flip, etc.) and fairness alone is too a thin a concept to rest democratic legitimacy on. Yet fairness is still necessary for legitimacy. Rather than simply make a thin argument from intuition that judicial review satisfies our considered notion of fairness, I make the stronger claim that it exemplifies (several of) the values of procedural fairness that majority vote does. If this stronger claim fails, the argument that judicial review is still "fair" in the way that a coin flip or lottery draw is fair would suffice to satisfy condition two.

Four procedural values are commonly thought to provide the core of the case for the procedural fairness of majority vote: (1) decisiveness, (2) anonymity, (3) neutrality, and (4) positive responsiveness.[47] Decisiveness refers to the ability of the procedure to pick a determinate outcome. Anonymity means that the procedure produces the same outcome if two participants trade preferences—the procedure is blind to *who* holds which preference. Neutrality is the reverse: if the preferences trade places the outcome is the same—the procedure does not favor one outcome over any other. Finally, positive responsiveness means that the if two outcomes are tied and one person changes in favor of A while the rest of the voters' preferences remain unchanged, A will be chosen. May's theorem has shown that majority vote uniquely satisfies these four criteria in a choice

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[47] See Kenneth O. May, "A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision," *Econometrica* 20 (1952).

over two alternatives.[48] But Bathenian judicial review can, I argue, exemplify traits of both neutrality and anonymity that are central components of procedural fairness.[49]

There are two ways to characterize neutrality as a procedural value. What we might call thin, or formal, neutrality merely mandates that the procedure itself evince no bias toward one or another outcome. Christopher Peters offers an illustration of how formal this concept of thin neutrality is: "Suppose the rule in the applicable jurisdiction is that verdicts in civil cases must be unanimous. This procedure—a form of minority rule, as it gives disproportionate power to a small number of holdouts—also is 'neutral as between the contested outcomes' in the sense that it does not incorporate some inherent preference for one verdict over the other."[50] But this thin concept is not what we value when we value the fact that a procedure is neutral among outcomes.[51] Imagine, for example, a democracy that required unanimous decisions to enact legislation. We would not normally, at least given widespread and ineradicable disagreement on the good, call

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[48] Peter sums of the force of May's work: "Kenneth O. May shows that majority rule is the only social decision rule that satisfies four minimal axioms. The work that these axioms do is to specify *a fair democratic procedure*." Peter, "Democratic Legitimacy and Proceduralist Social Epistemology," *Politics, Philosophy & Economics* 6 (2007): 333 (emphasis added).

[49] I leave out decisiveness and positive responsiveness not because I think judicial review cannot account for them, but because I think they are weaker intrinsic fairness values than the other two.

[50] Christopher J. Peters, *A Matter of Dispute* (New York: Oxford University Press, 2011), 124-25.

[51] Though it could be a response to the assertion that super-majoritarian procedures should be used on constitutional courts for right-based questions.

that state a model of procedural fairness; this thin concept would justify minority rule as much as majority vote.

What we really value is thick neutrality. For a decision procedure to exhibit thick neutrality, the procedure must treat participants' views equally in some relevant respect. This equality will demand different things in different contexts.[52] It may require equal weight (in, say, the voting context), equal voice (in, say, a dispute resolution setting), or equal chance[53] (in, say, the lottery draw). The particular kind of equality that is necessary for thick neutrality requires attention to the context of the decision. Majority decision in the voting context is thickly neutral in this sense because it gives "each individual's view the greatest weight possible in this process compatible with an equal weight for the views of each of the others."[54] And in the United States, "[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of

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[52] This doesn't necessarily mean our notion of fairness varies; it could simply indicate that one aspect of fairness is sensitive to the context. And sensitivity to the context here seems more blunt than for the appropriateness that we think central to justify the use of a procedure in a given context. But to reiterate, even if we include appropriateness in a variable account of fairness, my account still can still succeed with the necessary changes.

[53] An equal chance is importantly different from an equal weight. If I live in Texas and you in live in Ohio, my vote may have as much *weight* as yours (it still gets counted once), but the *chance* that my vote will impact the presidential election is just about as close to zero as it gets.

[54] Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999), 137.

our representative government."[55] This is what thick neutrality requires in the voting context.

But in the dispute-resolution context—where judicial review is situated—mere equal voting power would likely not be neutral among outcomes in the thick sense. For it would miss a crucial characteristic of the sphere: some arguments or claims are simply better than others. It does not matter how "better" is fleshed out; even a narrow reading of better to mean "more coherent" will suffice.[56] Sometimes there are just bad arguments, arguments we ourselves would recognize as bad even if we made them, for person A's claim prevailing over person B's. And to be neutral in the thick sense does not require that the two positions be weighted equally (not to mention that equal weight would, of course, mean we'd end in a tie every time). Thick neutrality requires that each side have an equal voice before the arbitrator. This is precisely what Bathenian judicial review does. It is thickly neutral because each side is afforded an equal voice—not just through the formality of equal argument time, but also through an equal opportunity to persuade the Bathenian judges. The procedure is thickly neutral so long as the judges declare the winner to be the one with the "better" argument *ex post* and have not made

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[55] Moore v. Ogilvie, 394 U.S. 814, 819 (1969).

[56] Note that if we understand "better" to mean "more coherent" then we can go so far as to say that some arguments or claims are inherently better than others. This may take away some of the fears that reintroducing terms like "better" push us back into the territory that proceduralism was designed to help us avoid.

up their minds *ex ante*.[57] Though it might be hard to imagine judges in the real world doing this perfectly, it is not an impossible ideal.

Unpersuaded, Waldron argues that in the context of judicial review "there is room for doubt about the condition of neutrality which [majority decision] presupposes."[58] He points out that a presumption of constitutionality used to guide constitutional interpretation in the U.S. Supreme Court and that some states require a super-majority for their supreme courts' exercise of judicial review.[59] These may or may not be good devices. Some in the populace would surely laud such rules for respecting the proper boundaries of the democratic sphere. Others would fear that such rules would be too tolerant of rights-violations. Fortunately, we need not settle this dispute. It is enough that the Bathenians have set up judicial review with a simple majority requirement. Though these kinds of rules show that judicial review can exist without satisfying the demands of neutrality, the Bathenians could quite rightly consider it a key component of the procedural fairness of the process: both those claiming a rights-

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[57] Deciding the "winner" *ex post* does not require the judge to approach every new case from scratch. Judges have jurisprudential proclivities and strong opinions on different matters of rights. They need not pretend they don't. What they must *not* do for neutrality, however, is decide before the case which side ought to win. For example, a judge's position that a petition for a writ of habeas corpus should never be granted is an example of the impermissible *ex ante* determination that violates thick neutrality. But skepticism about these types of claims is not necessarily problematic.

[58] Jeremy Waldron, "Five to Four: Why do Bare Majorities Rule on Courts," 21, < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195768> (accessed March 20, 2013).

[59] *Id.*

violation and those denying one would have an equal shot at persuading the court they are right. Waldron may well have "show[n] that there is room for doubt about the condition of neutrality which MD presupposes" in the judicial context.[60] But this doubt is about the prudence or feasibility of simple majority vote on the court, *not* about its fairness. If neutrality is the institutional set-up chosen by the Bathenians, we have reasons to think the judiciary's procedures can be defended as fair along these lines. Neutrality is a key component of procedural fairness that majority decision exemplifies and its instantiation in judicial review helps, I have argued, show how it is a fair procedure as well.

The second important procedural value that's central to fairness—and that judicial review exemplifies—is anonymity. A decision procedure "is anonymous if and only if no difference is made in the collective ordering if the identity of the owner of the preference ranking is changed."[61] Or, to take it out of the purely political arena, we could say that the procedure is anonymous if the outcome remains the same when the litigants change sides. Notice that neutrality and anonymity both get at the same concern: we don't want decisions made for irrelevant reasons, whether in the context of voting or deciding disputes (or, we might add, in the context of deciding whom to throw off the

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[60] *Id.*

[61] David M. Estlund, *Democratic Authority: A Philosophical Framework* (Princeton: Princeton University Press, 2008): 78.

lifeboat).[62] But they get at that concern differently. Neutrality requires that no outputs be favored; anonymity that no inputs be. In the context of judicial review, this means not only that judges must decide cases *ex post*—relying on the merits of the arguments—instead of *ex ante* (the neutrality factor), but also that nothing about who the particular litigants are influences their decision (the anonymity factor). We could test the anonymity of the judicial procedure by determining whether the outcome would change if the litigants reversed their roles. So long as the outcome would remain the same, judicial review is an anonymous procedure. That this may be a far cry from the behavior of actual courts does not defeat it as an ideal component of judicial fairness.

I have argued that judicial review as a procedure for constitutional rights questions can exemplify both the kind of neutrality and the kind of anonymity that we think crucial to procedural fairness. But there is also another aspect to judicial review that deserves mention. In nearly all the multi-member constitutional courts in the world, decisions are made on the basis of simple majority vote.[63] I have briefly mentioned several ways in which this majority vote adds to our recognition of the fairness of judicial review, but it is beyond the scope of this essay to deal with how this internal

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[62] Rawl's veil of ignorance also screens these irrelevant concerns.

[63] And not just multi-member courts: "All sorts of collective decisions are taken by majority, even if not always by a simple majority: The laws passed by parliaments, the verdicts laid down by courts, the election of a new pope by the conclave of cardinals, the regulations adopted by clubs and associations, as well as the decisions between friends as to which film to see together." Sadurski, "Legitimacy, Political Equality, and Majority Rule" *Ratio Juris* 21 (2008): 39.

mechanism might further affect the analysis.[64] It should be sufficient to say that it does nothing to *undermine* the case for the procedural fairness of judicial review.[65] To the extent it matters (from a procedural perspective) that the judges use majority vote, it only helps the case for judicial review's legitimacy.[66]

Judicial review is thus a fair procedure for deciding constitutional rights questions. The procedure is more than just the final vote that the judges make on the case. It involves argument, persuasion, deliberation, compromise, and other aspects of collective decision-making characteristic of a "forum of principle."[67] That judicial review is both anonymous and thickly neutral provide compelling reasons to think it is fair. Yet it is possible that a procedure could possess these two attributes and still be an all-things-considered *unfair* procedure; so too could another procedure lack one or both of these attributes and still be an all-things-considered *fair* procedure. The argument here

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[64] It's not entirely clear why this particular procedure needs any justification. As Waldron himself says: "[I]t seems plausible that a procedure such as voting will be necessary in any institution consisting of more than one person that attempts to settle disagreements about what the community's policy ought to be or what principles the community should adhere to." Waldron, *Law and Disagreement*, 26. I think this is exactly right.

[65] There is also a common argument that judicial review is often "majoritarian" in the sense that it tracks the views of the majority fairly accurately. E.g. Barry Friedman, *The Will of the People* (New York: Farrar, Straus and Giroux, 2009). That, however, is a separate argument that I do not make.

[66] Some argue that it does nothing either way: "[T]he problem of judicial majoritarianism is simply reducible to the original debate about judicial review." Guha Krishnamurthi et. al., "An Elementary Defense of Judicial Majoritarianism," *Texas Law Review See Also* 88 (2009): 33. And Waldron himself thinks that it deserves more attention. Jeremy Waldron, "Five to Four: Why do Bare Majorities Rule on Courts?" But he agrees that the "failure to explain why courts use majoritarian decision-making would not undermine judicial review." *Id.* at 8.

[67] Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), 33.

does not, in other words, prove in any strict sense that judicial review is fair. What it does do is give us more than just intuitive reasons to think that the practice is fair. Beyond this, however, our intuitions that it is fair are powerfully convincing.[68]

We just do, in other words, accept that judicial review is a fair decision-making procedure in a well-ordered democracy. And this itself is strong circumstantial evidence for its fairness. After all, the best case the proceduralist can give for her account of democracy is that it most persuasively answers the concern of the citizen who is forced to submit to a decision she disagrees with: the decision was made on the basis of a fair procedure. So too the procedural proponents of judicial review answer the disaffected litigant in the same way. Waldron marvels over this aspect of judicial review: "It is remarkable that people put up with this—for example that supporters of Vice-President Gore were willing to accept the bare majority decision in *Bush v. Gore*."[69] And yet, Waldron's puzzlement notwithstanding, it seems that our considered judgments do reveal judicial review to be a fair decision-making procedure for constitutional rights questions.

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[68] For instance, it is reported that in the United Kingdom, 71 percent of the population supported instituting strong judicial review when this option was being considered. See Waldron, "A Right-Based Critique of Constitutional Rights," 46. This would be hard to square with a belief that the procedure was unfair.

[69] Waldron, "Five to Four: Why do Bare Majorities Rule on Courts?," 23 n. 40.

3. Condition Three: Is a Binding Decision by Judges Appropriate for Constitutional Questions?

A binding decision by the judiciary can, I argue, be appropriate for constitutional questions. The previous section argued that judicial review is a fair procedure to decide questions of constitutional rights. It is fair, in short, both because it exemplifies several of the values on which we base our belief in the fairness of (ordinary) majority vote and because it satisfies our considered judgments about what a fair procedure should do.

Beyond the fact that it satisfies baseline values associated with fairness, we also have reasons to think that judicial review is *appropriate* for deciding the outcome of disputes about constitutional rights. And these reasons need not be instrumental reasons predicated on the notion that judges are more likely to get to the "right" answer than legislatures. "Rather," as Aileen Kavanagh argues, "they are based on general institutional considerations about the way in which legislatures make decisions in comparison to judges, the factors which influence their decision and the ways in which individuals can bring their claims in either forum."[70] Even if we can't agree on what an instrumental assessment for good or bad outcomes would look like, we can often agree on factors that should not to play into considerations of rights questions. This is part of the explanation for the institutional superiority of the constitutional court. For example,

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[70] Kavanagh, "Participation and Judicial Review: A Reply to Jeremy Waldron," 466. To be fair, Kavanagh calls these reasons "instrumental" reasons, but they do not seem to me to be necessarily so. I hope to show in the rest of this section why they need not be instrumental values only.

Kavanagh continues, "[t]he familiar argument that judges should make decisions about rights because they are an independent body and thus relatively insulated from direct political pressure is a common example of this type of argument."[71] Insularity and independence can be instrumentally valuable if they increase the probability of desirable outcomes, but the identification of unique institutional values associated with judicial review need not necessarily take an instrumental path.[72]

In this section I argue that four important procedural values identify judicial review as an appropriate procedure for deciding constitutional rights questions: transparency, deliberative capacity, principle reasoning, and impartiality.[73] Though these values may also be helpful instrumentally, in leading judges to the "right" answer, any instrumental value they possess—or lack—is irrelevant for my argument.[74] In other words, these are attributes we value regardless of the outcome. I will examine each

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[71] *Id.* at 467.

[72] Fallon takes this approach: "[Judges' professionally ingrained instincts and processes of judgment are likely to differ from those of legislators and to be better adapted to reflecting such imperfect wisdom about the content of rights as our legal tradition embodies." Fallon, "The Core of an Uneasy Case for Judicial Review," 1709.

[73] Cf. Krishnamurthi et. al., "An Elementary Defense of Judicial Majoritarianism," 34: "[T]here are significant differences between courts and legislatures that ensconce the justice-seeking role of the courts—courts are independent, comprised of rights-focused experts, et cetera."

[74] Spector also expresses the view that this process is valuable because it "allows the direct participation of the right holder in the deliberation, and warrants that the response, *be it favorable or unfavorable*, wil be founded on reasons, reather than sustained by power." Spector, "Judicial Review, Rights, and Democracy," 292.

characteristic in turn and then offer some thoughts on why these characteristics are appropriate for constitutional rights questions.

First, transparency is an important value for government decision-making in general, and regardless of the ultimate outcome. The Bathenian constitutional court exemplifies this attribute through, *inter alia*, its published opinion writing process. Rather than simply declare that the petitioners have won, the constitutional court gives reasons for its decisions. There is a complicated literature about what it is courts do (as a descriptive matter) and ought to do (as a normative matter) in giving reasons for their decisions, but the fact that they give reasons at all is important. And so too is the fact that the reasons they give are expected to be intelligible in the unique cultural and moral setting of Bathenian society. Note, too, that this is important whatever the court decides. The transparency is, other words, intrinsically valuable. Justice Clarence Thomas, describing the way he and his clerks write opinions, expressed this view of the intrinsic value of transparency:

> The editing we do is for clarity and simplicity without losing meaning, and without adding things. You don't see a lot of double entendres, you don't see word play and cuteness. We're not there to win a literary award. *We're there to write opinions that some busy person or somebody at their kitchen table can read and say, 'I don't agree with a word he said, but I understand what he said.'*"[75]

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[75] Quoted in Conor Friedersdorf, "Why Clarence Thomas Uses Simple Words in His Opinions," *The Atlantic,* February 20, 2013, <http://www.theatlantic.com/politics/archive/2013/02/why-clarence-thomas-uses-simple-words-in-his-opinions/273326/> (accessed March 12, 2013) (emphasis added).

There is great benefit to the public reason-giving that is characteristic of constitutional courts, and this value extends beyond reasons or results that we agree with.

The transparency of decisions about constitutional rights also produces several salutary byproducts—though it is not only instrumental to the achievement of these byproducts: it opens up political discourse;[76] enables the relevant legal and political communities to push back on the court's assumptions or bring the decision's unforeseen implications to the court's attention;[77] and the transparency serves as a check—however modest it may be—on the ability of judges to decide on the basis of arbitrary or irrelevant reasons.[78] "The court's role here," recognizes Rawls, "is part of the publicity of reason and is an aspect of the wide, or educative, role of public reason."[79] The constitutional court's transparent reason-giving plays an important role in a democratic

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[76] This happened, for instance, in the build up to and aftermath of both *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012) and *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

[77] The opinions require the judges not just to reach principled decisions in the case before them, but also to be able to defend the principle or tests that they employ in similar cases that may come before them. Tushnet reiterates this important function in the course of describing the role of public opinion in the courts. "Some holding views to which the court ought to be exposed," argues Tushet, "will not always know that they should be blasting the court with their opinions." Importantly for my argument, however, he continues, "[o]nce a decision has been reached, the advocate becomes a critic: 'You, the court, thought that you were responding appropriately to the full range of rights- and relevant interest-baed arguments, but here's an important argument you overlooked or undervalued." Tushnet, "Forms of Judicial Review as Expressions of Constitutional Patriotism," 364-65.

[78] See Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology," *Journal of Legal Education* 36 (1986): 518-62, describing the felt objectivity of the law and the constraints it imposes on judges.

[79] John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), 236.

society. It shapes and is shaped by public opinion. Indeed, Annabelle Lever argues that public opinion at least partially constrains the court and in turn "foster[s] the demands for accountability, on the one hand, and the desire to publicize the rightness or appropriateness of one's judgements and actions, on the other."[80] These byproducts of the transparency function of the court add to the legitimacy of its exercise of judicial review.

Second, deliberative capacity is a key component of the Bathenian judicial review process. Deliberation takes place in two phases for the Bathenian judiciary. The first is through interactions between the litigants and the judges and the second is through interactions among the judges (or, as seems more likely, between the judges and their clerks). The first deliberative component takes place when litigants submit written arguments and present an oral defense of their arguments. As well as serving the transparency function, this opportunity also requires judges to test the strength of arguments presented to them. The second deliberative component takes place after these judge-litigant interactions and occurs when judges confer with one another or with their own staff. Both kinds of deliberation are also—like transparency—intrinsically valuable. Whether a judge ultimately votes for the petitioner or for the respondent, the fact that she deliberated about the decision is a non-instrumental value of the procedure. Recall

[80] Lever, "Democracy and Judicial Review: Are They Really Incompatible?," 812.

that in describing the fairness of the Bathenian judiciary, we required the judges to decide questions *ex post*, after listening to the competing claims. Once we have this notion, we can see how deliberation is an important value. The deliberation gives us hope that judges are not making decisions on rights questions by using flawed or faulty logic, or worse, by using irrelevant or arbitrary criteria of better and worse arguments.

Waldron feels compelled to show that legislatures are as good as or better deliberators than the judiciary, which is itself an attestation to the value of deliberation. But even if legislatures are in fact as good as courts at deliberation, the argument that deliberative capacity is an important procedural value for courts still goes through. Nothing in my argument requires that courts be better than legislatures or that they uniquely possess the attribute of deliberative capacity. So long as they do possess it, courts are that much more appropriate fora for constitutional rights questions.[81] And though Waldron views this as an instrumental value, I think it also another value that we regard as important whatever the outcome. A deliberated-upon conclusion to a rights question is better, for just that reason, than a conclusion to a rights question that is not deliberated upon—at least where there is pervasive disagreement about the answer

[81] Waldron does not doubt that they do possess it: "For there is surely no doubt that the Supreme Court is a deliberative body, and that it does not cease to be so when its members disagree with one another, even though their disagreement means that, at the end of their deliberation, the matter before them has to be determined by a vote." Waldron, "Five to Four: Why do Bare Majorities Rule on Courts?," 30.

to that question. The robust literature on deliberative democracy underscores this point.[82]

The third institutional value of judicial review, principled reasoning, builds on the foundation of transparency and deliberative capacity. Not only does the Bathenian constitutional court write opinions after deliberation, it also gives the *kinds* of reasons that judges ought to give when deciding rights questions: principled reasons. They are, in short, the kinds of reasons we commonly think are appropriate for theorizing about political morality.[83] As Waldron recognizes, "[i]t is often thought that the great advantage of judicial decisionmaking on issues of individual rights is the explicit reasoning and reason-giving associated with it."[84] This doesn't mean that judges should formalistically deduce their conclusions from their premises (as if they could), but that they will rely, as much as possible, on principled reasoning. This includes treating like

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[82] See Amy Guttman and Dennis Thompson, *Why Deliberative Democracy?* (Princeton, NJ: Princeton University Press, 2004). In fact, the kind of deliberation that Knight and Johnson argue might form the basis of democratic legitimacy is remarkably similar to the kind of deliberative capacity I have been ascribing to the constitutional court: "We view deliberation as an idealized process consisting of fair procedures within which political actors engage in reasoned argument for the purpose of resolving political conflict." See Jack Knight and James Johnson, "Aggregation and Deliberation: On the Possibility of Democratic Legitimacy," *Political Theory* 22 (1994): 285. Spector expands on a similar point: "[D]eliberative democrats often fail to realize that the judicial process may be well structured to conduct a reflexive process of public deliberation. Alexander Bickel advanced the view that judicial review can complement the deliberative and argumentatie functions of the Congress when fundamental values are involved." Spector, "Judicial Review, Rights, and Democracy," 319.

[83] This assumes, of course, a cognitivist view of ethics—a view that Waldron himself rejects. But it is fair to say that everyday beliefs and speech about ethics takes for granted a cognitivist view. This is what Mackie seeks to dissuade us from with his "error theory."

[84] Jeremy Waldron, "The Core of the Case Against Judicial Review," *Yale Law Journal* 115 (2006): 1382.

situations alike and following conclusions whether the conclusions mesh with one's own preferred outcome. And it requires similar types of consistency that are indicative of reasoned and logical argumentation more generally. This may, perhaps, be the upshot of the independence of the judicial branch insofar as detachment from pragmatic political concerns enables better reasoning about rights.[85]

Rawls, for example, argues that "in a constitutional regime with judicial review, public reason is the reason of its supreme court."[86] Public reason refers to the notion that judges give reasons that are different in kind from the reasons given by ordinary voters for what they do in the ballot box or that undergird legislator's decisions to vote one way or another on a pending bill. There may, of course, be disagreement about what kinds of reasons are appropriate for deciding rights questions—is utilitarian reasoning permitted? Is Kantian reasoning?[87] But even if the complete set of permissible reasons is sometimes unclear, there are often reasons that we recognize should not play a role in

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[85] Christopher L. Eisgruber, for instance, remarks that "[c]ommentators generally accept that 'principled decision-making' is the judiciary's strong suit. It is something we demand from judges even outside the context of judicial review: we want them to render impartial, principled judgments when interpreting statutes, applying the common law, or presiding over trials (including the trials of defendants accused of infamous and horrible crimes)." Eisgruber, "Constitutional Self-Government and Judicial Review: A Reply to Five Critics," *University of San Francisco Law Review* 37 (2002): 145.

[86] Rawls, *Political Liberalism*, 231.

[87] In Rawl's articulation, judges cannot "invoke their own personal morality, nor the ideals and virtues of morality generally. . . . Equally, they cannot invoke their other people's religious or philosophical views." *Id.* at 236. This is a part of Rawl's larger project of cleansing the public sphere from controversial comprehensive doctrines, and though we might disagree with him about the relevant reasons the judges apply, we can agree that there are some reasons that legislators, for instance, rely on that we think inappropriate for constitutional judges to rely on.

rights adjudication. It shouldn't matter, for instance, what race, ethnicity, religion, or political party the petitioner belongs to. Nor should it matter that the judge would be better off financially if the respondents won the case.

But this is only half the account of principled decision-making; Herbert Wechsler famously detailed the other component:

> [T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?[88]

Partial, parochial, and arbitrary reasons are incompatible with the obligations of principled decision-making. So too are insufficiently neutral or general reasons. Judicial opinions ought, above all else, to be grounded in principle.[89] In other words, "in a case the resolution of which depends upon taking into account countervailing considerations, principled judgment requires that the decisionmaker formulate a general criterion that

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[88] Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73 (1959): 15.

[89] *Id*. at 19: "A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved. When no sufficient reasons of this kind can be assigned for overturning value choices of the other branches of the Government or of a state, those choices must, of course, survive."

shall serve as a principle of decision in cases of its type."[90] Adhering to these generally applicable reasons is what makes the institution principled. From this explication, we can see that "[p]rincipled legal judgment is not so much a matter of content as it is of form."[91] Principled reasoning is thus a *procedural* value of the Bathenian court. It has intrinsic value regardless of the outcome.

Waldron sees this an outcome-based value and attempts to show that the kind of reasoning the U.S. Supreme Court employs is deficient as far as principled decision-making goes. To the first point, it seems to me that principled decision-making is intrinsically valuable in a forum deciding rights questions. We can assess and critique the reasons given independently of the outcome reached. And, in fact, we may even critique the reasoning when we find the result favorable (as no doubt Waldron would say about *Roe v. Wade*).[92] This suggests that principled reasoning is an intrinsic procedural value we think relevant for rights questions.

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[90] M. P. Golding, "Principled Decision-Making and the Supreme Court," *Columbia Law Review* 63 (1963): 50.

[91] *Id.* at 42-43.

[92] Waldron, "The Core of the Case Against Judicial Review," 1383: "In the Supreme Court's fifty-page opinion in Roe v. Wade, for example, there are but a couple of paragraphs dealing with the moral importance of reproductive rights in relation to privacy, and the few paragraphs addressed to the other moral issue at stake—the rights-status of the fetus—are mostly taken up with showing the diversity of opinions on the issue. Read those paragraphs: The result may be appealing, but the 'reasoning' is thread-bare."

As to the second point, Waldron argues that not only is it false that judges alone give reasons for their decisions (legislators do too, he says), but false also that judges give better reasons than legislators.[93] There are two points in response to this objection. First, the argument here is about the *institutional* capacity of the constitutional court. If some actual courts fail to give good reasons for their decisions, this does not mean that courts are not better suited institutionally to do so. Courts have an institutional practice of reason-giving, and a particular kind of principled reason-giving, that legislatures do not.[94] They have the institutional resources for deliberation about issues of principle that legislatures do not. Because some debates in the British legislature happen to be more robust than some deliberations in the United States Supreme Court is no response to the

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[93] *Id.* at 1382-86.

[94] To be sure, Waldron would even disagree with this characterization because he sees legal reasoning as unduly and inappropriately fixated on precedents and theories of interpretation that bear little on the important issues in dispute. See Waldron, *Law and Disagreement*, 251. As he continues in another article:

> It is sometimes liberating to be able to discuss issues like abortion directly, on the principles that ought to be engaged, rather than having to scramble around constructing those principles out of the scraps of some sacred text, in a tendentious exercise of constitutional calligraphy. Think of how much more wisely capital punishment has been discussed (and disposed of) in countries where the debate has not had to center around the moral reading of the phrase "cruel and unusual punishment," but could focus instead on broader aims of penal policy and on dangers more morally pressing than "unusualness," such as the execution of the innocent. It is simply a myth that the public requires a moral debate to be, first, an interpretive debate before it can be conducted with any dignity or sophistication.

Waldron, "Judicial Review and the Conditions of Democracy," *Journal of Political Philosophy* 6 (1998): 339.

arguments about institutional design and capacity.[95] The Bathenian constitutional court takes seriously its role as the "institutional exemplar" of public reason.[96]

Additionally, it seems to me that Waldron overstates the case against the U.S. Supreme Court's capacity for principled decision-making and, even if he doesn't, this point does not defeat the argument that courts are better institutionally designed to take rights questions seriously. Legislatures have varying constituencies that demand mollification and, even if the populace is on the whole sensitive to the rights of others, the incentive structure in the legislature often stifles the principled reasoning that is characteristic of courts. Consider the Supreme Court's reasoning as it struck down Texas's flag-burning prohibition in *Johnson v. Texas*:

> The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. . . . And, precisely because it is our flag that is involved, one's response to the flag burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.[97]

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[95] Waldron's arguments about the abortion discussion in Britain therefore do not support the larger point he wants to make. See Waldron, "The Core of the Case against Judicial Review," 1349-50.

[96] Rawls, *Political Liberalism*, 235.

[97] Texas v. Johnson, 491 U.S. 397, 419-20 (1989). This example—and many more that could be adduced—ought to at least blunt Waldron's uncharitable characterization of First Amendment jurisprudence in the United States: "For example, First Amendment doctrine in America is concerned to the

This, it seems to me, is an example of principled decision-making that pays particular attention to exactly what the disagreement over rights concerned. By squarely addressing the important considerations, the Court provided a model of the intrinsic virtue of principled reasoning.

Finally, impartiality is perhaps the key procedural virtue realized by Bathenian judicial review.[98] It both leads to and enables principled decision-making. We can say that "an impartial procedure . . . is one in which factors extrinsic to the merits of a dispute have no tendency to favor one side of the dispute over another."[99] Impartiality is similar to, and includes, the ideas of neutrality and anonymity that I drew upon to show the fairness of judicial review; it might, in fact be thought of as the conjunction of neutrality and anonymity. Those qualities are also ingredients of the appropriateness of judicial review for questions of constitutional rights. Impartiality in the Bathenian

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point of scholasticism with the question of whether some problematic form of behavior that the State has an interest in regulating is to be regarded as 'speech' or not. ('Is pornography speech?' 'Is burning a flag speech?' 'Is topless dancing speech?' 'Is racial abuse speech?' and so on.)" Waldron, "A Right-Based Critique of Constitutional Rights," 26. But, contrary to Waldron's assertion that "this is not the way to argue about rights," the question the Court is asking when it categorizes certain behavior as speech is not just an esoteric exegetical or interpretive question. *Id.* It is question of political morality that the Court has to answer by analyzing the purpose and vision of the First Amendment's protection of the right to speak. And that, I submit, is precisely the way to argue about issues of principles.

[98] For a great introduction to the limits of arguments from impartiality, see Adrian Vermeule, "Contra Nemo Iudex in Sua Causa: The Limits of Impartiality," *Yale Law Journal* 122 (2012), especially at 420: "A well-rounded analysis should see the impartiality of decisionmakers as one institutional good among others, to be pursued, or not, as a larger calculus of institutional optimization suggests."

[99] Peters, *A Matter of Dispute*, 125.

constitutional court means that the judges will decide cases based on the strength of the arguments and claims presented to the court and not on irrelevant factors.[100] Impartiality does not describe the process of decision-making—that is where principled reasoning comes in; rather, it describes the institutional preconditions necessary for that rationally principled posture.

Though some scholars see impartiality as an epistemic (and so instrumental) virtue of judicial review, it need not be seen as only valuable in this instrumental sense. To see why, consider one instrumentalist's argument for judicial review's institutional capacity for impartiality:

> In most modern constitutional regimes, high court judges are not elected and hence are not vicariously attached to the immediate interests—personal or political—of members of their political community. Moreover . . . judges are obliged by the protocols of adjudication to attend to comparatively general and comparatively durable principles—principles that apply to a variety of different circumstances. . . . Judges are constrained to abide by principles that, by their temporal, geographic, or substantive reach, sprawl across areas of disinterest and interest on the judges' part. Were they otherwise inclined to choose principles that cut narrowly in favor of things they care about today, they would have to

[100] The arguments could be "strong" based on precedential, policy, or other types of reasons, but that is not relevant for my point here about impartiality. No matter what ideas are properly included in a plausible theory of constitutional interpretation, impartiality means that only ideas internal to this theory can be relied on by the judge. She cannot, for instance, rely on the fact that the government against whom the petitioner is seeking redress happens to be controlled by the same political party to which she belongs. Reliance on this fact—in making her opinion or stating the reasons for it—would make her no longer impartial.

> appreciate that those same principles could work powerfully against them tomorrow.[101]

This is a persuasive argument about the way courts are institutionally designed for impartial reason-giving. And it seems to me that we can value this aspect of the procedure without having to conclude that it is *only* valuable if judges are more likely to get to the right answers about rights questions as a result. In the face of widespread disagreement about rights, it is valuable per se to have a judiciary that decides the matter based on what's relevant to the determination of rights questions. Impartiality helps remove the irrelevance.[102] If this is all it did, I think we should still find it valuable.

From my treatment of these institutional values, it is clear that there is not an easy and obvious separation between the value of impartiality and the value of principled reasoning. Nor is there a clear separation of principled reasoning or impartiality from transparency and deliberative capacity. The values inhere in the judicial process of Bathen's constitutional court and it is not necessary that we be able to isolate which value is at work when. But we can sketch an outline of how the values interact and remain, in concept at least, distinct values. Impartiality and transparency

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[101] Lawrence G. Sager, *Justice In Plainclothes: A Theory Of American Constitutional Practice* (New Haven, CT: Yale University Press, 2004), 199.

[102] As Kavanagh argues: "The importance of interests protected by human rights combined with the risk of bias, self-onterest or myopia make a case for removing rights from majoritarian mechanisms, and submitting some of those decisions to an independent view body. Since the court upholding an entrenched Bill of Rights has no interests of its own to further, and is relatively unnacountable to the various political interestes in society, it can provide an importail forum in which the issues can be decided in lihgt of consittutional principles." Kavanagh, "Participation and Judicial Review: A Reply to Jeremy Waldron," 476.

are components of the institutional design of the court. Impartiality cordons off an arena for the court to work that is free from the concerns confronting the legislature. Its benefits accrue to judges in much the same way that benefits from the veil of ignorance accrue to participants in the original position. Transparency ensures that the democracy has not been abdicated to a judicial aristocracy; it allows an external check on the institution's narrowly delegated role.

Moving from form to content, the design-feature of impartiality leads to a generative and iterative deliberative process. Robust deliberation is made possible by the intellectual space that impartiality provides. Deliberative space enables concern not just for reasons, but for the kinds of reasons indicative of a principled decision-making body. In this way, the values interact and synergistically reinforce one another.[103] Transparency demands that there be principled reasoning, a kind of reason-giving which is made possible by impartiality and supported by the court's deliberative capacity.

We can see some measure of distinction in the values as we view the judicial process temporally. First, judges are selected and insulated from electoral concerns

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[103] Waldron helpfully lays this out: "Judges don't just 'come up with' a view on the matter before them and vote in its favor. They are trained in the law. As experts, they hear hours of oral arguments back and forth and they read volumes of written submissions and precedent cases. They deliberate thoughtfully both among themselves and each in the solitude of his or her own chambers. They (or their clerks) write elaborate essays to spell out their reasons for adopting one or other view." Waldron, "Five to Four: Why do Bare Majorities Rule on Courts?," 15.

when delegated constitutional rights issues. This creates (or at least promotes) impartiality. Next, a case comes before the court and the petitioners and respondents raise arguments that the court questions. These public and (later) behind-the-scene discussions illustrate the court's robust deliberative capacity. After this, the court begins to craft an opinion detailing the reasons that the petitioner should prevail over the respondent. This is where the court employs principled reasoning to reach its decision. Finally, after the deliberative and reasoning components are complete, the court publishes its opinion to make it available to society at large. This illustrates transparency. The four values no doubt blend in practice—and rightly so. And, importantly, these attributes are valuable without concern for the instrumental success of the constitutional court. These are intrinsically valuable features of a procedure for rights questions.

But even after laying out these four values, and how they are exemplified by judicial review, we still may wonder what this has to do with judicial review's appropriateness for deciding constitutional rights questions. How, in other words, does possession of these values enable judicial review to fulfill the correspondence constraint? The connection here, I contend, is that rights questions are particularly suited to procedures exemplifying these four attributes. It is not simply that we value transparency, deliberative capacity, principled reasoning, and impartiality as attributes of decision-making procedures in general (we may in some circumstances and may not

in others). It is that we value these four characteristics when dealing with rights questions in particular. And we value these characteristics for more than their supposed ability to help us get to some desirable outcome.

Recall Dworkin's discussion of the lifeboat situation and the problems with majority vote in that context—"kinship, friendships, enmities, jealousies, and other forces that should not make a difference will then be decisive."[104] The problem was not that these kinds of distractions and irrelevancies impeded the passengers from producing the "right outcome"—whatever that could be—but that it distorted the decision-making process in a way that was inappropriate for rights questions. The four values I have outlined perform the same function. We do not appreciate them because they increase the instrumental probability of good results. We think they are important regardless of whether the outcomes are just or unjust (in our opinion). When the judiciary possesses these four values, we have reasons to accept that the decision-making process is one that ought to be respected, regardless of our particular view of the resulting decision. Much in the same way that the collective opinion of the majority (as expressed in legislation) commands our respect in spite of disagreement, so to do Bathenian judicial decisions.

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[104] Ronald Dworkin, *Freedom's Law: The Moral Reading of the Constitution* (Cambridge, Mass.: Harvard University Press, 1996), 139.

Adjudicating rights is a notoriously difficult task and no interpretation of a legal document entrenching rights is likely to be obvious or agreed upon. But distortions with interpretation, not just of the words themselves, but of the ideas they stand for, can be mitigated by the procedural values exemplified by the Bathenian judiciary. And to harp on the same point again, mitigating distortions is not equivalent to improving instrumental accuracy. The four values I have attributed to the Bathenian judiciary are important intrinsic values for a decision procedure that makes decisions on constitutional rights questions.[105]

It might be helpful at this point to take a step back and locate the argument of this section in the context of the broader whole. Without this situating, one might be tempted to object that these four values cannot conclusively establish the legitimacy of judicial review. That may be true. They may not *alone* sustain the conclusion that judicial review is a procedurally unproblematic institution. But I have not chosen the direct—and ad hoc—route of arguing that judicial review is legitimate because it instantiates these procedural values that are important for deciding rights questions. Rather, I have set this defense within a broader analytical framework for delegation legitimacy. The framework requires that delegation decisions, like the decision to institute judicial review, satisfy three conditions before they can be deemed legitimate. The argument in

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[105] Scholars have also argued that judicial review is intrinsically valuable insofar as it is necessary to secure the basic political right to a raise a grievance. See Yuval Eylon and Alon Harel, "The Easy Core Case for Judicial Review," *Journal of Legal Analysis* 2 (2010).

this section about the procedural values of judicial review is designed to show that judicial review is an appropriate procedure for deciding rights questions. But one can disagree with my characterization of these values and still maintain that condition three is satisfied by judicial review. Or one can accept my broader analytical framework and reject the conclusion that judicial review satisfies it.

I have tried to do more in this essay than (merely) claim that judicial review has some desirable procedural values that should lead us to think it legitimate. I have tried to show that our theoretical tools for procedural legitimacy ought to lead us to conclude that judicial review is legitimate. The argument in this section is only part of the more holistic project that seeks to legitimate delegation decisions in general and the decision to institute judicial review in particular. The framework stands independent of any particular arguments about discrete delegation decisions. And the argument here that judicial review satisfies these conditions is by no means the only plausible way to establish that they are in fact satisfied. There may be a different analysis of fairness than I employed. Or perhaps a better description of the procedural values that tend to show the appropriateness of judicial review. Neither of these alternatives undermines my framework or conclusion. My central goal has been to show that the proceduralist need not be worried about the majoritarian imposition of judicial review. And as long as judicial review is a fair and appropriate procedure for deciding questions of constitutional rights, that goal has been fulfilled.

Conclusion

Though critics have been contending for decades that "[t]he American ideal of democracy lives in constant tension with the American ideal of judicial review in the service of individual liberties,"[1] this essay has argued that the majority decision to institute strong judicial review can be legitimated by a proceduralist account. I have made this case by proposing a framework with which to analyze majority decisions to delegate final decision-making authority more broadly. This framework rests on the premise that "the purpose of legitimacy inquiries is to determine whether citizens have a moral reason to accede to political decisions with which they substantively disagree."[2] The qualified proceduralist principle of legitimacy that I employed was an attempt to instantiate this moral ideal. It required that delegation decisions be authorized by a fair and appropriate procedure and in turn authorize a fair and appropriate procedure. On this account, we have no moral reason to accede to the political decision that elects a dictator. The dictatorship procedure is both unfair and inappropriate for deciding the limitless swath of issues over which an unchecked dictator has authority. It is thus illegitimate, even though it was authorized by a fair and appropriate procedure (i.e., majority vote).

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[1] Robert H. Bork, "Judicial Review and Democracy," *Society* (1986), 5.

[2] Fallon, "The Core of an Uneasy Case for Judicial Review," 1719.

But when judges on a constitutional court have been authorized to exercise strong judicial review, we have reasons to think this delegation is legitimate. Consistent with the qualified proceduralist principle, the decision to create the constitutional court was made by a fair and appropriate procedure (i.e. majority vote); and, since this creation was a delegation decision, we also had to be assured that the procedure employed by the court for its delegated issues is fair and appropriate. I have argued that it is.

Citizens in jurisdictions where courts are authorized to exercise the powers of strong judicial review have reasons to accept decisions they disagree with. Here Richard Wollheim's paradox of democracy is mirrored in a paradox of judicial review. In a democracy, I might affirm both that A is my preferred outcome (and the one I think most just) and affirm also that B ought to be the outcome because it received the most votes in the assembly.[3] In the same vein, I might affirm both that a win for the petitioner is my preferred outcome (and the one I think most just) and affirm also that a win for the respondent ought to be the outcome because it received the most votes on the constitutional court. "Anyone," says Waldron, "whose theory of authority gives the

[3] Valentini also grapples with this issue: "Despite its intuitive appeal, the intrinsic account [of democracy] faces significant difficulties when it comes to reconciling the claim that democracy is a requirement of justice with the observation that democracy may undermine one's preferred account of what justice requires. How can justice demand something that may hinder it?" Valentini, "Justice, Disagreement, and Democracy," 181. And then she provides an answer: "Democracy is what equal respect (procedurally) requires when there is thick reasonable disagreement about what equal respect (substantively) requires." *Id.* at 193. Once we allow theories of authority and legitimacy to become unmoored from theories of justice, our only remaining haven is procedures.

Supreme Court power to make decisions must—as much as any democrat—face up to the paradox that the option he thinks just may sometimes not be the option which, according to his theory of authority, should be followed."[4] But the paradox dissolves once we separate the issue of good outcomes from the issue of fair procedures. Or as Waldron puts it "[a]nother way of saying this is that a normative political theory needs to include more than just a basis for justifying certain decisions on their merits. It needs to be more than, say, a theory of justice or a theory of the general good. It also has to address the normative issue of the legitimacy of the decision-procedures that are used to make political decisions in the face of disagreement."[5] The qualified proceduralist principle of legitimacy that I proposed does just that. And because judicial review satisfies that standard, the majority's decision to institute the practice is legitimate. It is morally binding in a way that the election of a tyrant never could be. As Aileen Kavanagh concludes, "[r]ather than disempowering ordinary citizens on matters of high moral and political importance, as Waldron suggests, judicial review can be a way of empowering citizens to assert, publicise and ultimately enforce their rights in the public forum."[6] The majoritarian imposition of judicial review need not worry the proceduralist in the same way that an elected despot should.

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[4] Waldron, *Law and Disagreement*, 247.

[5] Waldron, "The Core of the Case against Judicial Review," 1406 n. 65.

[6] Kavanagh, "Participation and Judicial Review: A Reply to Jeremy Waldron," 484.

References

Arneson, Richard J. "Debate: Defending the Purely Instrumental Account of Democratic Legitimacy." *Journal of Political Philosophy* 11 (2003): 122-32.

Arneson, Richard J. "Democracy is not Intrinsically Just." *In Justice and Democracy: Essays for Brian Barry*, edited by Keith Dowding, Robert E. Goodin, and Carole Pateman, 40-58. Cambridge: Cambridge University Press, 2004.

Audi, Robert P. "Moral Foundations of Liberal Democracy, Secular Reasons, and Liberal Neutrality toward the Good." *Notre Dame Journal of Law, Ethics & Public Policy* 19 (2005): 197-218.

Bork, Robert H. "Judicial Review and Democracy," Society (1986): 5-8.

Brettschneider, Corey. "Balancing Procedures and Outcomes Within Democratic Theory: Core Values and Judicial Review." *Political Studies* 53 (2005): 423-41.

Brettschneider, Corey. *Democratic Rights*. Princeton: Princeton University Press, 2007.

Brettschneider, Corey. "Judicial Review and Democratic Authority: Absolute v. Balancing Conceptions." *Journal of Ethics and Social Philosophy* (2011): 1-9.

Brettschneider, Corey. "The Value Theory of Democracy." *Politics, Philosophy & Economics* 5 (2006): 259-78.

Campos, Sergio J. and Gregory Koger. "The Majoritarian Senate." <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2176938> (accessed March 20, 2013).

Carrick, Ross. "The Procedural Democratic Legitimacy of Constitutional Courts." <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1986857> (accessed March 20, 2013).

Christiano, Thomas. "Debate: Estlund on Democratic Authority." *Journal of Political Philosophy* 17 (2009): 228-240.

Christiano, Thomas. "The Authority of Democracy." *Journal of Political Philosophy* 12 (2004): 1-25.

Christiano, Thomas. *The Rule of the Many: Fundamental Issues in Democratic Theory*. Boulder, CO: Westview Press, 1996.

Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

Cohen, Joshua. "Pluralism and Proceduralism." *Chicago-Kent Law Review* 69 (1994): 589-618.

Diaconis, Persi, Susan Holmes, and Richard Montgomery. "Dynamical Bias in the Toin Coss." *Society for Industrial and Applied Mathematics Review*, 49 (2007): 211-235.

Dworkin, Ronald. *A Matter of Principle*. Cambridge, Mass.: Harvard University Press, 1985.

Dworkin, Ronald. *Freedom's Law: The Moral Reading of the Constitution*. Cambridge, Mass.: Harvard University Press, 1996.

Dworkin, Ronald. *Law's Empire*. Cambridge, Mass.: Harvard University Press, 1986.

Dworkin, Ronald. *Taking Rights Seriously*. Cambridge, Mass.: Harvard University Press, 1978.

Eisgruber, Christopher L. "Constitutional Self-Government and Judicial Review: A Reply to Five Critics." *University of San Francisco Law Review* 37 (2002): 115-190.

Ely, John Hart. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, Mass.: Harvard University Press, 1980.

Eylon, Yuval and Alon Harel. "The Easy Core Case for Judicial Review." *Journal of Legal Analysis* 2 (2010): 227-56.

Estlund, David M. *Democratic Authority: A Philosophical Framework*. Princeton: Princeton University Press, 2008.

Fallon, Jr., Richard H. "The Core of an Uneasy Case for Judicial Review." *Harvard Law Review* 121 (2008): 1693-1736.

Ferrajoli, Luigi. "The Normative Paradigm of Constitutional Democracy." *Res Publica* 17 (2011): 355-67.

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

Friedersdorf, Conor. "Why Clarence Thomas Uses Simple Words in His Opinions." The Atlantic (February 20, 2013),

<http://www.theatlantic.com/politics/archive/2013/02/why-clarence-thomas-uses-simple-words-in-his-opinions/273326/> (accessed March 12, 2013).

Friedman, Barry. *The Will of the People*. New York: Farrar, Straus and Giroux, 2009.

Golding, M.P. "Principled Decision-Making and the Supreme Court." *Columbia Law Review* 63 (1963): 35-58.

Griffin, Christopher G. "Debate: Democracy as a Non-Instrumentally Just Procedure." *Journal of Political Philosophy* 11 (2003): 111-121.

Guest, Stephen. *Ronald Dworkin: Third Edition.* Stanford: Stanford University Press, 2013.

Guttman, Amy and Dennis Thompson. *Why Deliberative Democracy?* Princeton, NJ: Princeton University Press, 2004.

Hutchinson, Allan C. "A 'Hard Core' Case Against Judicial Review." *Harvard Law Review Forum* 121 (2008): 57-64.

Jacobellis v. Ohio 378 U.S. 184 (1964).

Jefferson, Thomas. *Notes on the State of Virginia.* Richmond, Va: J.W. Randolph, 1853.

Julius, A.J. "Book Review: David Estlund, Democratic Authority." *Philosophical Review* 119 (2010): 256-58.

Karlan, Pamela S. "Foreword: Democracy and Disdain." *Harvard Law Review* 126 (2012): 1-71.

Kavanagh, Aileen. "Participation and Judicial Review: A Reply to Jeremy Waldron." *Law & Philosophy* 22 (2003): 451-86.

Kennedy, Duncan. "Freedom and Constraint in Adjudication: A Critical Phenomenology." *Journal of Legal Education* 36 (1986): 518-62.

Kirshner, Alexander S. "Proceduralism and Popular Threats to Democracy." *Journal of Political Philosophy*, 18 (2010): 405-24.

Knight, Jack and James Johnson. "Aggregation and Deliberation: On the Possibility of Democratic Legitimacy." *Political Theory* 22 (1994): 277-96.

Krishnamurthi, Guha et. al. "An Elementary Defense of Judicial Majoritarianism." *Texas Law Review See Also* 88 (2009): 33-38.

Lever, Annabelle. "Democracy and Judicial Review: Are They Really Incompatible?" *Perspectives on Politics* 7 (2007): 805-22.

Mackie, Gerry. "The Values of Democratic Proceduralism." <http://www.polisci.ucsd.edu/~gmackie/documents/DemocraticProceduralism.pdf> (accessed March 20, 2013), forthcoming *Irish Political Studies.*

May, Kenneth O. "A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision." *Econometrica* 20 (1952): 680-84.

McClosky, Henry. "The Fallacy of Absolute Majority Rule." *The Journal of Politics* 11 (1949): 637-54.

Moore v. Ogilvie, 394 U.S. 814 (1969).

National Federation of Independent Businesses v. Sebelius, 132 S. Ct. 2566 (2012).

Nozick, Robert. *Anarchy, State, and Utopia*. New York: Basic Books, 1974.

Peters, Christopher J. *A Matter of Dispute*. New York: Oxford University Press, 2011.

Peter, Fabienne. *Democratic Legitimacy*. New York: Routledge Press, 2009.

Peter, Fabienne. "Democratic Legitimacy and Proceduralist Social Epistemology." *Politics, Philosophy & Economics* 6 (2007): 329-53.

Rawls, John. *A Theory of Justice*. Cambridge, Mass: Harvard University Press, 1971.

Rawls, John. *Political Liberalism*. New York: Columbia University Press, 2005.

Regan, Donald H. "Glosses on Dworkin: Rights, Principles, and Policies." *Michigan Law Review*, 76 (1978): 1213-64.

Risse, Mathias. "On the Philosophy of Group Decision Methods I: The Nonobviousness of Majority Rule." *Philosophy Compass* 4 (2009): 793-802.

Sadurski, Wojciech. "Legitimacy, Political Equality, and Majority Rule." *Ratio Juris* 21 (2008): 39-65.

Sager, Lawrence G. *Justice In Plainclothes: A Theory Of American Constitutional Practice*. New Haven, CT: Yale University Press, 2004.

Samaha, Adam H. "Randomization in Adjudication." *William & Mary Law Review* 51 (2009): 1-85.

Saunders, Ben. "Democracy, Political Equality, and Majority Rule." *Ethics* 121 (2010): 148-77.

Schauer, Frederick. "Judicial Review of the Devices of Democracy." *Columbia Law Review* 94 (1994): 1326-47.

Sinnott-Armstrong, Walter. "Weak and Strong Judicial Review." *Law and Philosophy* 22 (2003): 381-92.

Spector, Horacio. "Judicial Review, Rights, and Democracy." *Law & Philosophy* 22 (2003): 285-334.

Spitz, Elaine. *Majority Rule*. Chatham, NJ: Chatham House Publishers, 1984.

Sunstein, Cass R. "Nondelegation Canons." *University of Chicago Law Review* 67 (2000): 315-43.

Texas v. Johnson, 491 U.S. 397 (1989).

Tribe, Laurence H. "The Puzzling Persistence of Process-Based Constitutional Theories." *Yale Law Journal* 89 (1980): 1063-80.

Tushnet, Mark. "Forms of Judicial Review as Expressions of Constitutional Patriotism." *Law & Philosophy* 22 (2003): 353-79.

Valentini, Laura. "Justice, Disagreement, and Democracy." *British Journal of Political Science* 43 (2013): 177-99.

Vermeule, Adrian. "Contra Nemo Iudex in Sua Causa: The Limits of Impartiality." *Yale Law Journal* 122 (2012): 384-420.

Waldron, Jeremy. "A Majority in the Lifeboat." *Boston University Law Review* 90 (2010): 1043-57.

Waldron, Jeremy. "A Right-Based Critique of Constitutional Rights." *Oxford Journal of Legal Studies* 13 (1993): 18-51.

Waldron, Jeremy. "Five to Four: Why do Bare Majorities Rule on Courts." < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195768> (accessed March 20, 2013).

Waldron, Jeremy. "Judicial Review and the Conditions of Democracy." *Journal of Political Philosophy* 6 (1998): 335-55.

Waldron, Jeremy. *Law and Disagreement*. New York: Oxford University Press, 1999.

Waldron, Jeremy. "The Core of the Case Against Judicial Review." *Yale Law Journal* 115 (2006): 1346-1406.

Waldron, Jeremy. *The Dignity of Legislation*. Cambridge: Cambridge University Press, 1999.

Wechsler, Herbert. "Toward Neutral Principles of Constitutional Law." *Harvard Law Review* 73 (1959): 1-35.