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Defending the Majoritarian Case Against Judicial Review

Honors Research Thesis

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Introduction

Jeremy Waldron, in *Law and Disagreement*, argues that judicial review by institutions such as the United States Supreme Court, where largely unaccountable judges have final say on important political issues, is incompatible with democracy. An essential premise to his argument is *majoritarianism*, which is the view that the citizen majority's view on any given political matter should be decisive in a democratic system. In this article, I will evaluate Waldron's arguments against judicial review in light of criticisms of his majoritarianism by Ronald Dworkin and others. I will argue that modified versions of Waldron's positions on both majoritarianism and judicial review can be successfully defended against those criticisms. The essay will proceed as follows.

First, I discuss what Waldron characterizes as the *circumstances of politics*, including *reasonable disagreement* and *a felt need for common action* with regard to important political issues. This problematic situation can be separated from Waldron's substantive conclusions in a manner that provides a common framework for thinking about the decisional problem brought about in politics.

Second, the *circumstances of politics* will be shown to require political institutions that are justifiable to all reasonable citizens. In this way, any legitimate political institution must be, in some sense, beyond reasonable disagreement.

Third, I will examine two prominent solutions to this problem: (1) Waldron's procedural solution arguing that only fair *procedures* can be free of reasonable disagreement and (2) Dworkin's substantive solution arguing that at least some considerations of *substantive* fairness are beyond reasonable disagreement.

Fourth, Dworkin's robust substantive solution will be shown to lack any independent criteria by which to judge better or worse outcomes, and for that reason is not justifiable to all reasonable citizens. Rejecting robust substantive solutions, I will argue that Waldron's majoritarianism as a procedural solution can be defended against Dworkin's objections that substantive political inequalities are present in a majoritarian system.

Fifth, I will consider the objection that Waldron's majoritarianism is subject to reasonable disagreement (1) in particular contexts and so is itself controversial as a principle, and (2) in the inclusion of undefended substance in majoritarianism. In response to the former, it will be argued that though the use of a majority decision-procedure in *specific* contexts is controversial, it is uncontroversial as a *general* principle in second-order contexts. In response to the latter, it will first be conceded that majoritarianism is indeed thinly substantive. The original distinction of procedure vs. substance will be shown as only helpful in relation to robust substantive views, such as Dworkin's solution. On the basis of a very thin substance that draws on Waldron's pre-existing defense, I will show that majoritarianism is an uncontroversial general principle, and so maintains its status as a legitimate decision-procedure. This thin substance will primarily be conditional upon the belief that all are entitled to basic rights, and that when combined with the permanent circumstances of politics, this assumption necessitates a fundamental right to participate, and thus orients all citizens as the proper source from which to derive opinions regarding important political decisions.

Finally, after having defended a modified majoritarianism as a legitimate political institution, I will analyze the compatibility of judicial review with that modified majoritarianism. I will first present what is ordinarily thought to be at stake in the debate over the legitimacy of judicial review. Then, I will demonstrate that American-style judicial review is a prototypical

instance of the judicial review that concerns theorists like Waldron. Third, I will argue that judicial review is incompatible with majoritarianism only in the instances where the majority is unable – by whatever means the majority deems appropriate – to reverse or alter the decisions of the Justices. Finally, I will show that the inclusion of thin substance into a modified version of Waldron's majoritarianism qualifies the case against judicial review only insofar as it is controversial that all citizens are entitled to basic rights.[1]

I. A Common Framework: Circumstances of Politics

In the arena of politics, there is nothing more certain than the presence of widespread disagreement on matters that are nevertheless of such importance as to require immediate or near-immediate coordinated action. Jeremy Waldron, in *Law and Disagreement*, refers to this problematic situation as the *circumstances of politics.*

A. Reasonable Disagreement

The first fundamental circumstance of politics is *disagreement* about important and substantial political issues. As John Rawls notes, this disagreement is "not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy."[2] Some of this disagreement can be ignored as unreasonable, as in the case of arguments put forth by "[ignorant] scoundrels (who care nothing for rights) or moral illiterates (who misunderstand their force and importance)."[3] However, the most prominent of political disagreements should be understood as *reasonable*. Here Waldron draws upon Rawls's discussion of the *burdens of judgment*. In short, given the vast and diverse experiences that have shaped individuals' moral and political views, in addition to the complexity involved in trying to critically evaluate or justify those views, it is *reasonable* that *some* individuals reach different conclusions.[4]

Note that the existence of multiple *reasonable* views does not entail some form of moral relativism, but since "such disagreements are, for practical political purposes, irresolvable," views may be *reasonable* without also being true in a morally objective sense.[5] Hence, in the case of opposing groups of individuals who differ strongly in their views about rights, even if one group is *in fact* correct in their view, both groups may be perfectly *reasonable* in the sense of the term used here.[6]

It is also important to note what is not being committed to here. First, it is an open question how much disagreement there is about any particular political issue or set of political

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[1] Note that the assumption that all citizens are entitled to basic rights is not as robustly substantive as it appears at first glance. As my paper will show, this commitment recognizes that citizens have varying views as to what counts as a basic or fundamental right. Instead, the assumption is only committed to the uncontroversial view that all citizens are entitled to some basic rights, whatever those rights may be. This view will become clearer as the paper progresses.

[2] John Rawls, "The Domain of the Political and Overlapping Consensus," 246.

[3] Jeremy Waldron, "The Core of the Case Against Judicial Review," 1346.

[4] John Rawls, *Political Liberalism*, 56-57.

[5] Waldron, "The Core of the Case Against Judicial Review," 1368.

[6] This is an important distinction from the ordinary usage of the term 'reasonable,' which often relates to the truth of the matter.

issues – e.g. political rights. Second, there is room to debate how much of political disagreement is indeed *reasonable*. Depending upon one's conclusions with regard to these moving parts, different political systems might be envisaged. In any case, it suffices that we agree that there is *reasonable disagreement*, and that it is especially rampant in politics.

B. A Felt Need for Common Action

The second fundamental circumstance of politics is *a felt need for a common course of action* where the alternative is no action at all – i.e. the *status quo*.[7] Even if everyone were to disagree about what the best or correct coordinated action should be with regard to some important issue, they all prefer that something reasonable should be done rather than nothing. This circumstance is intended to apply to all political issues that are regarded as important but have not yet been resolved.

In an uncontroversial instance of this circumstance, Waldron draws attention to the laws of rape. Beyond the general view of rape as morally wrong there are "aspects of the law of rape which are complex and controversial: for example, statutory rape, marital rape, homosexual rape, the bases (if any) on which consent is to be inferred, mistakes as to consent, etc."[8] No matter what individuals may think of these controversial issues, "[e]ach [will likely] prefer that these matters be settled even in a way that he opposes, if the alternative is no rape law at all."[9]

C. Interdependence of the Fundamental Circumstances of Politics

The two fundamental circumstances of politics should not be understood as independent, but *interdependent*. Neither condition would pose as significant a problem in the absence of the other condition. "Disagreement would not matter if there did not need to be a concerted course of action; and the need for a common course of action would not give rise to politics as we know it if there was not at least the potential for disagreement about what the concerted course of action should be."[10]

II. A Legitimate Solution: Beyond Reasonable Disagreement

Having established a common framework in the *circumstances of politics*, the next concern is how to meet the challenges posed by this problematic situation – i.e. how decisions are to be made where there is *reasonable disagreement* on important political issues and there is a *felt need for a common course of action* with regard to those sets of issues. The most basic criterion that must be satisfied in an institution is decisiveness in relation to whatever is in disagreement. However, many decision-procedures satisfy this requirement, from tossing a coin to authoritarian regimes.

What is needed is a decision-mechanism that legitimizes authority over the citizens that compose the community, and most importantly over the citizens that reasonably disagree with the final decision on the merits – recall that if all reasonable individuals already share the view that the community decides upon (so there is no reasonable disagreement), it is much easier to

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[7] Jeremy Waldron, *Law and* Disagreement, 102.
[8] Waldron, *Law and Disagreement*, 105.
[9] Waldron, *Law and Disagreement*, 105.
[10] Waldron, *Law and Disagreement*, 102-103.

convince them to act upon it. It is much like the scenario where two friends that support fundamentally opposed ideas agree to a coin-toss to resolve the disagreement. Though one of the friends is fated to disagree in one sense, his agreement to the coin-toss obliges him to accept the outcome. A political decision procedure is thus legitimate – as Waldron suggests – when it is "explicable and justifiable to all…[reasonable citizens] who have to live under [it]."[11] In short, we need an institution that is beyond reasonable disagreement, or at least whose legitimacy is beyond reasonable disagreement.

The most important criteria to be satisfied by any institution are principles of fairness, including qualities of respect and equality. Sufficient satisfaction of these principles will be required for any institution to be justified to all reasonable people, i.e., it is a condition on their submission to outcomes that they may not agree with.[12] Satisfaction of these principles will tend to make controversial any view that significantly restricts the number of views that are considered *reasonable,* and so requires that most views be considered as *reasonable*.[13] Pragmatics might also dictate the inclusion of most views as *reasonable*, but this is a secondary concern. To do otherwise would predictably violate qualities of respect and equality that I will assume derive from some view of objective human dignity or value that is possessed by all individuals, and to be found in any acceptable theory of a legitimate institution. It is unfathomable that reasonable citizens would be willing to accept an institution that does not treat them as equals and respect them at the most basic level of human dignity. It is then beyond *reasonable disagreement* that the best institution will maximize the principles of fairness – to the degree possible.

At this point, however, there is debate as to how much we can suppose citizens to truly find agreement upon. Some argue that citizens are in agreement on certain fundamental values of political equality, while others argue that this is not the case.

III. Procedure or Substance?

A. Waldron's Procedural Solution

Waldron defends majoritarianism – the view that the citizen majority's view on any given political matter should be decisive in a democratic system – as the institution that maximizes the principles of fairness to the degree possible. He is open to the possibility that other decision procedures may result in substantively better or fairer *outcomes* than a system of majoritarianism. However, he argues that reasonable disagreement extends to all substantive conceptions of fair outcomes, and so accepts the confines of an "implausibly narrow understanding of equal respect." The only available reasons to justify a political decision procedure to all citizens are then *process-related reasons*: "reasons for insisting that some person make, or participate in making, a given decision that stand independently of considerations about

[11] Waldron, *Law and Disagreement*, 229.

[12] Gerald Gaus refers to these principles collectively as the "principle of political equality…[such] that no citizen's judgments are public recognized as superior to any other's." Gerald Gaus, "Public Justification and Democratic Adjudication," 19.

[13] David Estlund makes this important point, claiming "if we are willing to treat the positions of even decent citizens as beneath our respect [i.e. as unreasonable], it is far from clear that we meant what we said in adopting the liberal view that political legitimacy requires justifiability to each and every citizen." David Estlund, "Jeremy Waldron on *Law and Disagreement*," 115.

the appropriate outcome."[14] He goes so far as to suggest "majority-decision is the *only* decision-procedure consistent with equal respect in this necessarily impoverished sense" that excludes substantive fairness considerations that are subject to reasonable disagreement.[15]

Waldron defends majoritarianism on several fronts and, in line with the pertinent criteria, attempts to supply only process-related reasons for accepting majoritarianism. He defends majoritarianism as satisfying principles of fairness – namely equality and respect – subject to the exclusion of substantive fairness considerations.

First, Waldron rightly assumes that there is widespread consensus that all individuals have rights, but that there is reasonable disagreement as to the nature of those rights – contrary views are construed as *unreasonable*.[16] Since there is no access to an objective assessment of the nature of those rights, then no one individual or group is to be consulted to the exclusion of any others as an expert. Given that widespread disagreement about rights in the circumstances of politics are a permanent feature of our society, the result is a *fundamental right to participate* in all important political decisions that bear on the question of rights, what Waldron calls the "right of rights."[17] This does not preclude the inclusion of other rights as *fundamental*, but leaves the question as to what those rights are to the people.[18] In the context of disagreement about rights, submitting to the careful deliberation of right-bearers on equal terms – of whom the decision immediately affects – is appropriate and consistent with the respect associated with the belief that all do indeed have rights.[19]

With the "right of rights" as the defining characteristic of majoritarianism, the decision-procedure inherently expresses respect toward individuals as equally capable and responsible right-bearers – i.e. *equal political status*. Consensus that all should be attributed rights in the first place, Waldron argues, respects individuals as morally responsible agents, as rights "provide an individual with a protected choice on an issue which remains morally significant."[20] The moral significance is in part contained in the fact that the right-bearer may make the wrong choice – most importantly where other individuals are affected. An attribution of any right is then an act of faith that assumes a positive depiction of human beings as capable of careful contemplation on important issues, and – more importantly – responsible in their decision-making on salient issues that affect others. Thus, majoritarianism grants equal political status and respect by recognizing a fundamental right to participate that does not depend upon any controversial, substantive moral view.

Second, majoritarianism accords "equal potential decisiveness"[21] to the opinions and

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[14] Waldron, "The Core of the Case Against Judicial Review, 1372.
[15] Waldron, *Law and Disagreement,* 116 (emphasis added).
[16] Waldron, *Law and Disagreement*, 211.
[17] Waldron, *Law and Disagreement*, 232; Almost all decisions of a polity bear on rights in some capacity upon close examination. In any case, people will disagree on which issues do and do not implicate rights, and so almost all political issues will be brought into the fold as subject to the decision of all citizens on the basis of their right to participate.
[18] It may seem odd to leave it an open question of what rights are *fundamental*. However, this is because Waldron's assumption of disagreement in the circumstances of politics denies objective access to what constitutes fundamental rights. We can never be sure that the people are correct, but for the reasons I argue, subjecting the question to the people is the most appropriate manner to go about formulating what are thought to be fundamental rights.
[19] Waldron, *Law and Disagreement,* 222.
[20] Waldron, *Law and Disagreement,* 250.
[21] Waldron, *Law and Disagreement,* 114.

views of all citizens – i.e. *equal political impact*. Each citizen's vote counts for no more or less than the vote of another. This is because it is not beyond reasonable disagreement among citizens that one view should be privileged over another. Though equal political status itself might be interpreted as requiring equal political impact – as a recognition of their equal political status – the distinction is helpful because the former directs attention to the decision-makers and the latter to the beneficial features of the decision mechanism through which the decision-makers act – though both must be construed as highlighting aspects of the decision procedure.

Additionally, majoritarianism fares comparatively better than other procedures on solely fair procedural considerations. Let us consider two examples, a coin-toss and submitting to the will of an absolute sovereign. A coin-toss respects the political status of *some* individuals in the choice of possible outcomes – "we would not use the coin-toss to choose among options that nobody favours."[22] In fact, in the case where there are only two possible outcomes favored by the citizens, the coin-toss can be construed as respecting the political status of *all*. This is the case, because positive weight is given to the set of preferences that are in contestation. Additionally, decisive political impact is afforded to all citizens *only* in the event that *all* share the same view, because we would attribute to either possible outcome – i.e. heads or tails – the view that all citizens favor.[23] In submitting to the will of an absolute sovereign, only the views of the sovereign are considered, and they are absolute in their decisiveness.[24] In this way, there is only recognition of the political status and impact of one individual, namely the sovereign. Both decision procedures lack the level of procedural fairness that is implicit in a system of majoritarianism.

Note that a feature of the fundamental right to participate enshrined in Waldron's majoritarianism is that it confines the majority to decisions or procedures that are always subject to change by a future majority. Since it is defended as a more fair procedure than the alternatives, however, this feature is not to be regretted, but is instead beneficial.

B. Dworkin's Substantive Solution

Ronald Dworkin, in *Freedom's Law: The Moral Reading of the American Constitution*, argues that political institutions ought to be designed in a way that citizens are *substantively* treated "with equal concern and respect."[25] When institutions "provide and respect the…[substantive] conditions [of equality], then the verdicts of these institutions should be *accepted by everyone for that reason*."[26] Otherwise, they should not. In contrast to Waldron, Dworkin argues that not all conceptions of substantive equality and respect are subject to reasonable disagreement, or at least that we can design our institutions in uncontroversial ways that are conducive to securing substantive rights – e.g. a system of judicial review that is insulated from the public would conceivably be more conducive to better deliberation and protection of rights.[27]

Further, this view is not inherently against majoritarian decision procedures in all circumstances. To the contrary, Dworkin accepts that a minimal degree of citizen participation is

[22] Waldron, *Law and Disagreement,* 113.
[23] Waldron, *Law and Disagreement,* 113.
[24] Waldron, *Law and Disagreement,* 114.
[25] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, 17.
[26] Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, 17 (emphasis added).
[27] Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, 31.

a prerequisite for moral membership in a community, which is conducive to substantive political equality. Partly for this reason, he endorses *democracy* as the most preferable – and the only legitimate – type of government.[28]

Additionally, he embraces a *constitutional* form of democracy that entrenches abstract political rights – against majority rule – that can be agreed upon by all reasonable citizens as minimum conditions for the legitimacy of the government. Reasonable citizens "agree that the majority should not always be the final judge of when its own power should be limited to protect individual rights."[29]

This view is quite intuitive. If we can know that certain institutions are more likely to get matters right, then why choose another institution? Recall that we want to maximally satisfy the principles of fairness – i.e. equality and respect – and if we can substantively do so in a manner that is uncontroversial, as Dworkin supposes, then we should prefer his conception of a *constitutional democracy*.[30]

IV. Procedure over Substance

It bears mentioning that, at a general level, Dworkin and Waldron are not so fundamentally opposed. Both are interested in satisfying basic conditions of equality and respect. What separates them, fundamentally, is that Waldron limits himself to an "impoverished sense" of equal respect, given deep disagreement concerning more robust substantive equality and respect.[31] The question is whether or not Waldron's handicap is necessary. I want to argue that it is, and that Dworkin's non-majoritarian democracy implicitly conveys disrespect for citizens in a way that reasonable citizens would reject.

A. Non-Majoritarian Institutions Subject to Disagreement

Non-majoritarian institutions contain unelected offices that carry political authority unobtainable by, and not directly responsive to, the majority of citizens, and so an individual or group other than the majority may be decisive with regard to important political issues. In an absolute monarchy, for example, one individual carries absolute political authority in matters that affect all citizens. If all reasonable citizens support a non-majoritarian institution, then the

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[28] Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, 24.
[29] Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, 16.
[30] Waldron's majoritarian argument was helpfully portrayed as extending equal political status and impact to citizens. However, recall that these features are only determinative if we do not have agreement on robust, substantive political issues or manners of deciding. For example, if we are in agreement that college-educated citizens make more wise decisions about important fundamental rights, then we do not want equal political impact. In fact, we want the college-educated citizens to have a disproportionate political impact. Equal political impact is not desirable in all scenarios.

It is hard to accept that any reasonable theory would reject equal political status as an important criterion in satisfying principles of fairness, if we accept that individuals have rights. In that case, citizens should at least be equally recognized as the appropriate group to decide on contentious matters, even if the impact of their vote is unequal. There is of course a worry of whether or not equal political status can be separated from equal political impact in this manner. I will show in my response to Dworkin's objections that it is indeed not possible, and that non-majoritarian institutions inherently lack equal political status.
[31] Waldron, *Law and Disagreement*, 116.

institution would be legitimate. Though we can easily conclude that an absolute monarchy is subject to reasonable disagreement, the same cannot be so quickly concluded with regard to all forms of non-majoritarian democracy.

In a non-majoritarian democracy, though the majority is not always decisive, care is taken to bring about conditions of fairness in the citizenry. This form of democracy could still include important participatory features, but at least in some cases, the majority would not be decisive. A constitution might entrench certain rights agreed upon in the abstract, though a limited group deemed competent – due to training or experience – might interpret the application of these rights. In such a system, equal political impact is absent, because such a system presupposes agreement that the opinion of some ought to have greater impact than others. This is unproblematic so long as this agreement is beyond reasonable disagreement, but I will show later that it is not. Additionally, there is a worry that a non-majoritarian democracy – though including prevalent participatory features – cannot maintain the equal political status of its citizens. I take it that this is a more basic condition of fairness that depicts citizens as equally capable in abilities – at least prior to training – to participate in collective decision-making in a morally responsible and significant manner.

Dworkin argues that majoritarian democracies do not uniquely establish the politically equal status of its citizens as capable to participate in collective decision-making in a morally responsible and significant manner. Rather, he argues, equality in political status can be present in a non-majoritarian democracy as well. In a non-majoritarian democracy, all citizens are eligible – in principle – to partake in an unelected office that carries political authority.[32] For this reason, differences in political authority need not be an expression of unequal political status, but rather – as Dworkin seems to suggest – a manifestation of citizens' pursuit of their own diverse interests.[33] When important decisions on substantive issues are made, there is nothing inherently disrespectful in considering – as determinative – the views of unelected citizens.

However, I think it is clear that disproportionately centering political authority on unelected offices effectually eliminates the possibility of attaining those positions for some even though everyone is *in principle* eligible. Take, for example, the position of U.S. Supreme Court Justices, who carry a disproportionate amount of political authority over citizens. A substantial number of citizens undoubtedly desire such a position, and it is reasonable to assume that a substantial number of citizens decide to pursue those positions early on. Inevitably, so long as the demand is higher than the supply, some will lose out. In fact, as certain offices acquire more political authority, we can expect that more citizens will desire those positions, and so more will disproportionately lack political authority that desired it in the first place. Hence, the situation is one where – though a large number desire to have a say on important issues – citizens are turned away as somehow inferior, or perhaps unlucky when compared to their competitors.

Since it is inevitable that unelected or appointed positions will not be available to all that desire them, the question arises of why those that acquired the positions of political authority should be heard over others. The answer must ultimately turn on some sort of *competence* of the unelected officials that allowed them to acquire positions over their competitors. That is, on substantive issues, unelected officials have somehow been determined to have a tendency to make *better* decisions than their competitors.

A couple of points should tell against Dworkin's view. First, in the case that two or more

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[32] This must be differentiated from majoritarian democracies, where unelected offices would never carry political authority over the citizens, since the majorities view is to always be decisive.

[33] Dworkin, *Freedom's Law: The Moral Reading of the American Constitution,* 28.

citizens are judged equally competent for an unelected position carrying political authority, the citizen given the unelected position can only be chosen arbitrarily. So when the citizen or citizens not chosen – that are equally competent – ask for a reason why they should listen to the position-holding citizen, there is no reason that can comfort them, since the reason of greater competence is unavailable. I take it that this worry applies to many important political positions, including that of the unelected justices of the Supreme Court.

Second – and more fundamentally – we have to consider the criteria used to judge the competence of applicants for unelected offices. Presumably, the individual judging applicants as more or less competent in important political issues must also be competent so as to be able to identify the varying levels of competence of the applicants. This presents a worry, because we seem not to have independent criteria by which to judge competence. To choose a judge that is competent in choosing a competent applicant, we need a further judge to choose the competent judge *ad infinitum*.[34] At some point we must reach a judge of applicants that was arbitrarily chosen, causing a similarly arbitrary effect on all the judges chosen afterwards. If this is the case, there is no substantive reason that we should have unelected positions, and so we should subject those positions to an election by the people.

Dworkin might claim that there are independent criteria upon which to judge competency. In fact, he suggests that existing constitutions enshrine such independent criteria, though he alludes to their creation as a "mysterious matter," where our maintaining their provisions is "out of a sense that stability cannot otherwise be had."[35] He writes that so long as "the public largely accepts [a particular reading of a constitution]…we have no reason to resist that reading and to strain for one that seems more congenial to a majoritarian philosophy."[36]

It is hard to understand the implications of this more practical view of Dworkin, primarily because it is out of line with his substantive requirements of political equality. Considerations of practicality and stability are secondary to that of a constitution's embodiment of political equality. The key concession in Dworkin's acceptance of a constitution seems to be *public acceptance* of a particular interpretation of a constitution. No citizen would accept a reading that conveyed inherent disrespect to themself. However, the public disagrees about important matters of political rights enshrined in constitutional documents, and there is no single interpretation accepted by the public. In the case that public consensus exists, then there would be no worry in subjecting the constitution to majoritarian change – i.e. a non-entrenched constitution.

In relation to Dworkin's argument that a non-majoritarian democracy can respect the equal political status of its citizens, it is clear that the unelected offices of such a democracy inherently enjoy unequal political status when more than one competent person desires an unelected office – which we can presume is the case in any office that holds political authority over others. A citizen applicant is given no reason that is not arbitrary as to why another should obtain an unelected political office over him, and more generally is not given any reason why another should have political authority over themself or others. A non-majoritarian democracy is inherently disrespectful to citizens as reasoners capable of reflecting on important political issues

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[34] This claim is limited if an uncontroversial standard exists at some level, but as I have mentioned and I note in the subsequent paragraphs, there are no identifiable independent criteria upon which to rely on. As I point out, even Dworkin, though perhaps unintentionally, only finds an independent measurable standard through public acceptance. Though, on closer examination, public acceptance actually works against his theory, as I shall demonstrate.

[35] Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, 34.

[36] Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, 35.

where there is no consensus on independent criteria of competent reasoning about rights, and so is subject to reasonable disagreement.

B. Majoritarianism Defense Against Objections

Conceding the provision of equal political status in a majoritarian democracy, Dworkin offers two main objections against Waldron's claim that majoritarianism provides equal potential decisiveness to citizens' opinions.

(i) Favored Representative

First, given the representative democracy that Waldron argues is necessitated by the current state of nations, Dworkin objects that an ordinary citizen's opinion on an issue carries substantially less decisional weight than any given legislative representative's view on that same issue.[37]

It is indisputable that a representative democracy necessarily favors the views of legislative representatives over their constituents. When important votes on substantive issues arise within a national legislature, the only votes that matter directly in that particular instance are those of the constituents' representatives.

Before responding, I think it is important to note that there is disagreement as to the proper role of a representative in the first place. In what is often referred to as the *delegate* model, a representative's proper role is simply to determine the expressed preferences of their constituents – i.e. the majority's preferences – and act upon them. Alternatively, the *trustee* model defines the proper role of a representative as acting upon what he or she – the elected official – believes to be the best course of action.[38] The latter model suggests that constituents vote for the individual rather than their alignment with their own preferences. Dworkin's objection assumes something like the *delegate* model, where the constituents vote for a representative to express their own preferences. If he meant the *trustee model*, then it would not be controversial that the representative's preferences are favored, because it is the will of the constituent that the representative act on his own preferences in that case.

In response, Waldron claims, "[w]e accept that for practical reasons not everyone can participate directly," and thus a representative legislature is necessitated.[39] Key to this response is that *the people* agree to a representative form of democracy. "If people thought significant experience was being slighted, or significant opinion overlooked, in the process of legislation, then it…[is] perfectly appropriate on this model for them to complain and to do something about it."[40]Again, he does not make the distinction that Dworkin suggests, but rather – and I think rightly – implicitly sets the contentious issue aside. Whether we accept the *trustee* or the *delegate* model is something that can be determined by the constituents themselves. In fact, individual localities may predominantly subscribe to one or another model. It is up to the people to decide

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[37] Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, 27.
[38] Suzanne Dovi, "Political Representation," *Stanford Encyclopedia of Philosophy (2011).*
[39] Waldron, *Law and Disagreement*, 54.
[40] Waldron, *Law and Disagreement*, 66; Note that such a response would be unavailable to Dworkin, because he endorses authority placed in unelected, lifetime-appointed offices.

how best to be represented.[41]

In response to Dworkin's objection, then, final political authority rests in the people, and a representative – including all his votes on political matters – is only in his position, because the people (of a particular constituency) chose him. In a majoritarian system – where the majority's view is decisive – a constituent need only to garner support from fellow constituents, and if enough of them agreed on a particular view – i.e. a majority – they could either vote for a representative that holds their view or pursue some other existing mechanism in their system.[42] Additionally, if they felt direct democracy was more appropriate for their society, they need only have a majority that agree with them in a majoritarian system to make that change. At a basic level, citizens retain equal potential decisiveness in a majoritarian democracy. The people decide not only on their representatives, but also on the system wherein their representatives act. They control both, and can at anytime work to change what they find unacceptable.

(ii) Political Inequalities of Wealth

In his second objection, Dworkin argues that majoritarianism – in and of itself – does not address the more gross political inequalities due to inequalities of wealth. Inequalities of wealth amplify the impact of the small minority of the population that constitute the wealthiest citizens of modern democracies through a greater ability to convince others of their opinions – e.g. saturating the media with one-sided views on an issue.[43]

First, Waldron might argue that inequalities of wealth do not have the effect Dworkin claims. Recall that if we agree that all citizens should have rights – which we do – then we also believe that citizens are capable of deliberating on important political issues that affect others.[44] Even where a correlation supports the notion that money can buy support on an issue, respect for citizens as capable and responsible deliberators requires that this conclusion not be drawn.

Second – and in relation to the first point – majoritarianism does not prescribe a fixed institution, where existing problems are somehow set in stone. It is a mode of operation for society, within which right-bearers will address important issues such as gross inequalities of wealth and their impact on political decisions. In fact, majoritarianism is neutral as to outcomes, and that is a benefit of the system. Even in our own society, campaign finance reform – to address inequalities of political impact – has been pushed in a majoritarian manner, though

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[41] I recognize that there is likely a mixed view among citizens as to which model should predominate, and in what circumstances. This is perfectly consistent with what I am claiming; it is up to the constituents to choose their representative, and if they do not act in the manner they wish, they can choose a different representative in the next election or follow whatever mechanisms exist within their own democratic system.

[42] Remember that Waldron is envisaging a majoritarian system, which is different from the American-style democracy in that the majority's view is decisive. This important point must be considered in all his responses. However, even in the American-style democracy, there are informal mechanisms that a majority may pursue; I am not suggesting that informal mechanisms be the only mechanisms. To get an idea of these mechanisms, Larry Kramer suggests "political-legal" mechanisms that have been historically used, including petitions, public meetings, exerting control over local governmental institutions, and even legitimate mobbing. Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, 24-29.

[43] Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, 27.

[44] *See* "Section III: A. Waldron's Procedural Solution."

qualified by a very small group of judges in *Citizens United v. Federal Elections Commission*.[45] In a majoritarian system, such elitist control over the majority would not be possible, though again it would allow for delegated authority in an elected, representative body. Though majoritarianism does not necessarily resolve the effects Dworkin claims are caused by inequalities of wealth, neither does it require those same inequalities. Instead, it provides a mechanism to resolve social inequalities.

Third, it is important to understand that there is not unanimous agreement on how to resolve the issue of the disproportionate political impact of the wealthy. As *Citizens United* makes evident – applied to campaign financing – we have to at least consider the balance of other rights important to equal political impact when addressing the issue – e.g. freedom of speech in *Citizens United*. To put it more directly, there is a general consensus that a democracy should not allow disproportionate political impact of the wealthy, but there is *reasonable disagreement* as to how to address the issue and balance it with other important rights.[46] Majority decision is a way to rectify this reasonable disagreement.

C. What Can Majoritarianism Guarantee?

Not much. Majoritarianism can only guarantee *procedural* equality embodied in a fundamental right to participate, what Waldron calls the "right of rights." Independently, it cannot establish the kind of *substantive* equality that Dworkin is clearly suggesting should be required of a democracy. However, as we have seen, Dworkin's constitutional democracy also cannot independently establish *substantive* equality in a way that would be free of reasonable disagreement, and so it is illegitimate. In this way, majoritarianism is *fair*, because it does not privilege the views of any citizens where there is reasonable disagreement on the matter, but instead counts each citizen's view on a matter equally with all others with the majority view being decisive.

V. Majoritarianism as Controversial

Setting aside disagreement over substance, the question now arises whether Waldron's procedure is itself uncontroversial. Is majoritarianism subject to reasonable disagreement?

A. Majority in a Lifeboat: A Controversial Case

Dworkin, in *Justice for Hedgehogs*, argues "that the majoritarian decision principle is not…a general principle of fairness independent of context – that is, an 'intrinsically' fair

[45] *Citizens United v. Federal Election Commission* 130 S.Ct. 876 (2010); The use of this case here is not to say the Supreme Court was correct or incorrect in its decision. The point is to show that the disproportionate political impact of the wealthy is an acknowledged political issue and there are citizens making steps to restrict effects of wealth in politics. Additionally, this example shows – in respect to campaigns – how the issue is not so simple as simply blocking excessive contributions, because there are other rights that need to be considered – e.g. freedom of speech.

[46] This is an important point about abstract rights generally. In one sense, some might plausibly argue that most people can roughly agree upon a list of rights that they find important to democracy – the Bill of Rights is a testament to this. However, each individual's conception of what those rights entail can vary tremendously, including the balance of all the rights taken together.

process."[47] To support this conclusion, he presents an example: "[w]hen a lifeboat is overcrowded and one passenger must be thrown over else all will die, it would not be fair to hold a vote so that the least popular among them would be drowned. It would be fairer to draw lots."[48]

If Waldron's majoritarianism is controversial as an intrinsically fair procedure in at least one case – which the lifeboat example is meant to show – then the decision procedure itself must be called into question as subject to reasonable disagreement. If there is reasonable disagreement, it does not seem that majoritarianism has the original appeal of a procedure that all would be willing to accept, despite the fact that they may not agree with the outcomes produced.

In response, Waldron makes a critical distinction between "majority-decision-as-to-principles" and "majority-decision-as-to-particulars,"[49] with the latter always appropriately subject to the former. In relation to the lifeboat example, the latter may not be a real option – likely repugnant to the passengers – but the former would be used to decide among decision procedures to decide who is to be thrown overboard. In short, a majority decision is not appropriate in all "*first-order issues of justice*…[but it is] for choosing among general rules."[50] Further, this just is what democratic legislatures are empowered to do – making general rules that are to apply to all citizens.[51] It seems, then, that there is not reasonable disagreement about majoritarianism as a principle, but only in particular contexts.

However, Dworkin points out, it seems that even in making general rules or legislation, the use of the majoritarian principle is controversial in cases where the majority determines the rights of disliked minorities.[52] Instead, Dworkin insists that we should design the institution so as to protect citizens from the "tyranny of the majority." Stephen Macedo, in "Against Majoritarianism: Democratic Values and Institutional Design," argues on the basis of a similar worry that "[f]airness requires that institutions should speak to the vulnerable perspective of minorities and not simply lump them in with everyone else."[53]

In defense, Waldron first clarifies what is meant by "tyranny of the majority," defining it as a case "in which people care little for minority or individual rights other than their own."[54] Important to this definition is the realization that "[p]eople…do not necessarily have the rights they think they have," and so a minority group is not under tyranny simply in virtue of their opinion of their rights not prevailing within the community.[55] Rather, minority groups are under tyranny when their interests are not taken into account by the rest of the community in their formulation of an opinion on a matter.

In response to Macedo's more general worry that minority groups should be given special attention, he supplies his own solution that "supermajority voting rules in which minority interests gain special protection are often preferable."[56] Macedo suggests "we *all* might prefer these systems given the possibility of finding ourselves in the minority."[57] However, isn't the

[47] Ronald Dworkin, "Response," 1085-1086.
[48] Ronald Dworkin, *Justice for Hedgehogs*, 387.
[49] Jeremy Waldron, "A Majority in the Lifeboat," 1051.
[50] Waldron, "The Core of the Case Against Judicial Review," Footnote 112 (emphasis added).
[51] Waldron, "A Majority in the Lifeboat," 1050.
[52] Dworkin, *Justice for Hedgehogs*, 387.
[53] Stephen Macedo, "Against Majoritarianism: Democratic Values and Institutional Design," 1038.
[54] Waldron, "The Core of the Case Against Judicial Review," 1346.
[55] Waldron, "The Core of the Case Against Judicial Review," 1346.
[56] Macedo, "Against Majoritarianism: Democratic Values and Institutional Design," 1037-1038.
[57] Macedo, "Against Majoritarianism: Democratic Values and Institutional Design," 1038.

more reasonable view simply to treat minority groups with respect and take their views into consideration when deliberating on important political issues that affect them? An appeal to the golden rule would provide for a more congenial environment. In the case that a previous majority-member citizen does find himself in the minority on a particular issue, he can find comfort in the expectation of careful consideration of his own views by the new majority.

In fact, instituting barriers such as supermajority voting rules breeds an environment of distrust for the future actions of the majority. It forces the minority to find solace in an institution rather than the community, and will tend to decrease the need for meaningful dialogue with the majority, which is important to any political environment – i.e. the minority need not meaningfully discuss issues where it knows that the other side only has a majority. It will make tyranny of the *supermajority* – if it were to occur – much worse than if it were of the *majority*, because the supermajority would have a much weaker relationship with the minority than would occur in a majoritarian institution. Additionally, if a supermajority were to institute political changes in a supermajoritarian institution that did not take the minority's interests into consideration – and thus making it tyrannical – the obstacles to change would be insurmountably more difficult for the minority group than if in a majoritarian institution. If a citizen were to ask the government why a *supermajority* voting rule is in place, the government must say: "we don't trust our citizens to treat minorities with respect, including you." If a citizen were to ask the same question to a government with a *majority* voting rule, the government must say: "we value your opinion equally with all citizens, and your opinion has maximum potential decisiveness consistent with that equality."

I think Waldron must concede that tyranny of the majority is a possibility. But he should also note that this is not unique to majoritarian institutions. Oppression by the ruling group is a possibility in all political institutions. This is the case even in Dworkin's non-majoritarain democracy that includes checks on the majority through, e.g., judicial review. Working within Waldron's definition of tyranny, it is certainly possible – and perhaps to be expected – that, for example, Justices on the Supreme Court will not always take into consideration the interests of minority groups.[58] The same possibility holds true for any political institution. Also, experience in a diverse contemporary society suggests that actual instances of tyranny of the majority are quite rare, perhaps for the reasons I've suggested above – namely that it incentivizes the majority to treat the minority well due to uncertainty in future political membership.[59] In the first place, this partially alleviates such worries. Secondly, it adds empirical support to the view that citizens are capable and responsible deliberators on important political issues, which Waldron has previously argued is an essential depiction of citizens if we believe they are deserving of rights.[60] Recall, however, that majoritarianism must be free of reasonable disagreement if it is to be acceptable, and so simply alleviating worries does not eliminate the principle as controversial.

In his newest formulation of his argument, "The Core of the Case Against Judicial

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[58] In "Section VI: Judicial Review," I describe the focus on judicial review as misguided. Instead, it is the absence of a majority's ability to overturn decisions made through the power of judicial review. I only mention this to qualify my example of oppression by a ruling group. In this example, and since a supermajority has the final say in American-style government (I discuss this in Section VI), the oppression is in reality by the supermajority that acquiesces to the decisions of the Court. In either case, the possibility of tyranny remains, and as I've alluded to earlier, one might worry that tyranny of the supermajority is indeed worse than tyranny of the majority.

[59] Waldron, "The Core of the Case Against Judicial Review," 1401.

[60] *See* "Section III. A. Waldron's Procedural Solution."

Review," Waldron restricts his case to those societies that already have a commitment to robust minority rights. As Waldron puts it, the applicable societies "believe that minorities are entitled to a degree of support, recognition, and insulation that is not necessarily guaranteed by their numbers or by their political weight."[61] This assumption – going beyond the commitment to a mere "right of rights" – seems to be a concession that majoritarianism is controversial as a general principle, because it places as a necessary condition what was originally supposed to be a matter of faith in the majority. However, I believe that Waldron's most recent concession is unnecessary in defending his original formulation as uncontroversial.

In attributing rights to citizens, Waldron has shown that we must also be depicting citizens as capable and responsible deliberators on important political issues that affect others. If we did not think that citizens could decide responsibly – and allow for cases where they might be wrong – then we should not make such great efforts to protect rights in the first place. What is the value in protecting citizens' rights if we can always expect that they will simply abuse them to cause harm to others? Oppression is a possibility no matter who has political authority. We must simply accept the possibility of tyranny of the majority if we value rights.

In order to draw out this intuition, I think it is important to understand what we mean in talking about rights. A right grants a protected choice on a matter as illustrated earlier in the defense of Waldron's majoritarianism. For example, imagine a right to freedom of speech gives a right-bearer the ability to speak in a public place in any manner he wishes – to the extent that it does not conflict with others' rights.[62] The right-bearer may give a speech with malevolent intentions that offends a particular group. Alternatively, the right-bearer may give a speech with benevolent intentions that promotes a minimum level of welfare, beneath which the right-bearer proposes the community should provide support. If the citizen indeed bears a right to freedom of speech – and supposing the two above cases do not conflict with any other rights – then the right-bearer may engage in either scenario. We cannot guarantee that the right-bearer will choose to engage in the benevolent-intentioned speech, even though we would prefer it. In fact, we cannot guarantee that the right-bearer will make any use of his right. In relation to rights more generally, if we truly attribute a right to citizens, no result – good or bad – can be guaranteed.

In discussing rights in this manner, Waldron's intuitive idea becomes clearer. Accepting that there is widespread disagreement about rights – what they are and the extent of their protections – it seems particularly odd for an individual or group to claim that all citizens indeed have rights, but that the individual or group will decide what those rights are. How can we know that this particular individual or group will tend to reach more correct decisions than a majority where there is no procedure-independent measurement? There is the possibility of tyranny in either case. However, majoritarianism is more consistent with the assumptions that followed our attribution of rights in the first place – namely that *all* citizens are capable and responsible reasoners about rights. To question this assumption is to question whether all citizens should have rights, which Waldron's original formulation rightly counts on our not questioning.

B. Folding Substance Back Into Procedure

[61] Waldron, "The Core of the Case Against Judicial Review," 1364.

[62] Note that this analysis applies to negative rights as well, which can be formulated positively. For example, a right to be protected from unreasonable searches and seizures might conversely be formulated as a right to privacy in the home. It makes no difference that we cannot perfectly formulate a negative right positively, as it is simply a result of the disagreement and confusion that these abstract rights represent.

Though I agree with Waldron's view that majoritarianism is a fair procedure, there is the worry that he is building substantive claims into his concept of fairness that could be subject to reasonable disagreement – "folding substance back into procedure."[63] Recall that the appeal of Waldron's view was that it did not appeal to substantive claims, which he has convinced us are all subject to reasonable disagreement, and so unable to ground a legitimate decision-mechanism. In a review of *Law and Disagreement*, David Estlund argues that Waldron's majoritarianism cannot be defended as fair on the basis of purely procedural considerations and instead requires a substantive justification.

First, Estlund argues that Waldron's majoritarianism lacks what he refers to as *full anonymity* or insensitivity to the personal features of those involved in the pertinent decision procedure.[64] A majority decision procedure *is* sensitive to personal features of the individuals – namely their preferences for a particular outcome. A coin toss, he argues, is an example of a decision procedure that does have full anonymity, in that the chances of one outcome or the other remains constant independent of any individuals' preferences for one or the other outcome. According to Estlund, *full anonymity* is necessary to a procedure's claim to fairness on procedural considerations alone.[65]

Estlund does not argue that the lack of full anonymity necessitates overall unfairness – i.e. substantive unfairness. For example, there might be *substantive* reasons to think that a majority of citizens are more likely than a coin toss to choose the correct decision in resolution of any particular political issue. Waldron, however, does not argue on the basis of substantively fair outcomes, because of deep-seated disagreement about what counts as such. Since a majority decision-procedure is not *fully anonymous*, and because any *substantive* reasons for endorsing majority decision are subject to reasonable disagreement under Waldron's theory, then majoritarianism is unavailable to Waldron both on *purely procedural* and *substantive grounds*.

Even if Waldron's majoritarianism could hold up on substantive grounds of fairness, Estlund argues that they do not provide a basis to prefer majority decision to other possible decision procedures. Estlund defines the principle to defend: "giving each person the greatest possible chance of being decisive compatible with everyone's having an equal chance."[66] Without a defense of this evidently substantive principle, a coin toss might be just as good as a majority decision on substantive grounds. Again, given that Waldron defines substantive fairness considerations as outside the purview of available defenses of a decision-procedure, Estlund suggests that Waldron's majoritarianism seems fated as insufficiently unmotivated.

Estlund's critique of Waldron's majoritarianism suggests an important point with regard to choosing a decision procedure based on fair procedural considerations. Though a coin toss is more procedurally fair than majoritarianism, we would expect reasonable citizens to reject a coin toss as a legitimate decision procedure for salient political issues, and even Waldron agrees on this point. He comments, in regard to coin tossing, "[n]o one would think *that* an appropriate

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[63] Waldron, *Law and Disagreement,* 116.
[64] David Estlund, *Democratic Authority: A Philosophical Framework,* 80.
[65] This claim at first appears to be contrary to Estlund's view, stating "[w]e should not say that procedures…are not fair simply because they are not fully anonymous[;]...procedures can mix fairness and other principles, remaining fair." However, this claim must be interpreted as defining "other principles" as substantive in nature. To support this, Estlund goes on, "[a]nything less than full anonymity imports nonprocedural…values." Estlund, *Democratic Authority: A Philosophical Framework,* 81.
[66] Estlund, "Jeremy Waldron on *Law and Disagreement,*"120.

basis for determining which propositions should be accorded authority as sources of law."[67] Estlund suggests similarly that there is nothing especially helpful about considering only procedural fairness. Instead, we need a decision procedure with at least some element of *substantive fairness*. Of course, Estlund also recognizes the disagreement that is the focus of Waldron's work, and does not suggest an account that puts forth full-fledged conceptions of the good. Rather, he finds that we ought to select a decision procedure that tends "to get things right from the standpoint of justice or common good *whatever the best conception of those might be*."[68] This introduction of substance, Estlund argues, should be *uncontroversial*.

First, I want to address Estlund's narrow conception of procedural fairness, which I will argue leads to a bizarre and unacceptable conception of what is ordinarily meant by procedural fairness. Estlund claims that a coin toss has the feature of full anonymity. However, that is not quite correct. Thomas Christiano points out that in a coin toss, "the set of alternatives is set in advance…[and so] the outcome is still dependent on the preferences of the...contending parties."[69] The result, Christiano claims, is that "the procedurally fairest way to decide [in any scenario] is to set up a lottery over all possible alternatives."[70] He rightly claims that this is a "perverse" characterization of procedural fairness. I think Christiano is accurate in his claim, but I want to push his suggestion a little further.

Though Christiano suggests that a random decision-mechanism is the only fair procedure that can be conceived of as having full anonymity, I will show that decision-mechanisms that resolve an issue coherently must *necessarily* incorporate substance. Imagine, for example, two friends discussing what they should do for the day. Both of the friends disagree fundamentally on what the best thing to do would be, such that doing what one of the friends prefers would preclude engagement in the other friend's preferred activity. They both agree to use a decision-mechanism that is procedurally fair, and so they first choose to flip a coin. As we learned from Christiano, however, the possible outcomes of a coin toss are dependent on the preferences of the two individuals, and so they instead choose to submit their decision to a randomization machine. This machine will select from every possible activity for the day as a possible choice. By restricting the set of outcomes to *activities* that can be done *on that day,* however, the randomization machine gives positive weight to the question of which activities could be engaged in on that day – i.e. it lacks full anonymity. In this way, it is still sensitive to the two friends' preferences that the decision-mechanism decide on an *activity* and one that can be done *on that day*. The two friends then consult another randomization that does not have this restriction – it will provide an answer to any matter of disagreement – but because it is unrestricted in possible outcomes, there will be no necessary connection between the original disagreement to be resolved and the response received. The result is an incoherent decision-mechanism. For coherence, a decision-mechanism *must* be sensitive to the context of the decision, and thus at least thinly substantive.

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[67] Waldron, *Law and Disagreement*, 89 (original emphasis added).
[68] Estlund, "Jeremy Waldron on *Law and Disagreement*," 122 (original emphasis added); Waldron appears to recognize this point in "The Core of the Case Against Judicial Review," from Aileen Kavanagh, who suggests a similarly modest instrumental view. However, it is hard to say that his discussion of "outcome-related reasons" is sincere, since the indeterminacy that resulted from his comparison of judicial review and majoritarianism is compatible with his view of substantive disagreement. Waldron, "The Core of the Case Against Judicial Review," 1373-1374.
[69] Thomas Christiano, "Debate: Estlund on Democratic Authority," 231.
[70] Christiano, "Debate: Estlund on Democratic Authority," 231.

In our preoccupation with obtaining a procedure with full anonymity, we have been led away from the original point, which was to decide the activity for the day. We might have been okay with a decision-mechanism that is random in the way that Christiano originally suggested. However, pushing Estlund's view of pure proceduralism to its limits leads to an even stronger perversity in his characterization of a fair procedure. Any procedure that truly has the feature of full anonymity would seem bizarre in its incoherence as a means of resolving any disagreement.

The appeal of fair procedure does not rest in some unattainable concept of full anonymity, but rather – as Christiano suggests – in its capacity "to exclude factors that are not supposed to make a difference."[71] These irrelevant factors are "determined by the nature of the task involved."[72] For example, we intuitively think it fair to exclude the influence of physical strength in determining the guilt or innocence of a citizen through regulated court procedures aimed at getting the truth of the matter as opposed to a fighting match between the defendant and the accuser. In a wrestling match, however, we think just the opposite. The point is that substance is brought into any procedure, and only an incoherent procedure would lack substance. Of course, Estlund's point stands: any desirable procedure must bring in substance, and show that it is uncontroversial. But we have learned an additional important point: *a procedure need only be uncontroversial in the particular context that it is used*. In relation to majoritarianism, additional support is provided to the view that the principle need not be uncontroversial in all circumstances as Dworkin suggested in the lifeboat example, but only in the particular context of legislation.

C. A Simple Matter of How Much Disagreement

If Waldron were to concede that majoritarianism is thinly substantive, must he accept that majoritarianism immediately is subject to reasonable disagreement?[73] Recall that the original requirement for legitimacy of a political institution is justification to all reasonable citizens. It was at this point that Waldron made the distinction between substantive and procedural fairness, with the former being always subject to reasonable disagreement. This distinction was helpful in defending against more robust substantive solutions, such as Dworkin's solution. However, placing reasonable disagreement into a simple dichotomy allowed Estlund to corner Waldron's

[71] Christiano, "Debate: Estlund on Democratic Authority," 231.
[72] Christiano, "Debate: Estlund on Democratic Authority," 232.
[73] At times, Waldron appears to concede majoritarianism is controversial, such that he allows its inclusion within the purview of reasonable disagreement.[73] As he puts it, "[i]t looks as though it is disagreement all the way down."[73] His subsidiary argument relies instead on pragmatic considerations for the adoption of majoritarianism.

In a situation where there is disagreement as to which political procedure to endorse in making important political decisions, citizens must first decide on a temporary procedure to use in order to decide on a more permanent one. Waldron suggests, in this case, that majoritarianism is preferable on pragmatic grounds, because (1) it is "an ordinary and familiar procedure," and (2) "*we need a procedure* on this occasion."[73] In considering this argument, more sense can be made – in his newest formulation of the argument – of his use of the assumption of an existing democratic institution as a fundamental premise.[73] With such an assumption, a majority-decision would likely constitute "an ordinary and familiar procedure,"[73] above and beyond any other candidates for a decision-procedure in the aforementioned situation.

This argument does not give the robust consensus that we are looking for in a legitimate decision-procedure. For this reason, I will be attempting to defend majoritarianism as uncontroversial.

majoritarianism. As we have learned, the distinction between substantive and procedural fairness is a false dichotomy, because a coherent fair procedure necessarily includes a thin substance in its exclusion of irrelevant factors.

Closer examination of Waldron's majoritarian principle in the proper context of politics provides several uncontroversial, substantive reasons for its adoption. Recall that Estlund defined the principle to defend as "giving each person the greatest possible chance of being decisive compatible with everyone's having an equal chance."[74] Two substantive claims must then be defended: (1) that citizens are the appropriate source from which to derive opinions or preferences and (2) the appeal to citizens' opinions or preferences should be equal. In a sense, what follows is mostly a reiteration of Waldron's previous points. However, given the strength of Estlund's objection, I think it appropriate to highlight exactly what supports Waldron's substantive claims.

With regard to the first point, each citizen's opinions or preferences are considered for two independent reasons, one negative and the other positive. Negatively, in the ordering of a legitimate political institution, it is unclear where opinions might derive from if not from the citizens. That we should, e.g., adhere to a coin-toss is itself an opinion that must come from some source. Note that we've already set aside what Estlund identifies as the purely procedural option as incoherent. In fact, I cannot think of any coherent political system that does not include the opinions of at least *some* citizens – whether it be one, many, or all. I suppose that a group of people could decide to follow a god of sorts, but upon whose word is this idea introduced? I have belabored this point because of the emptied concept of procedure introduced by Estlund, in light of the requirement of full anonymity. It seems clear that the opinions of at least *some* citizens will always be relevant.

A positive reason to consider each citizen's opinion or preferences is our consensus that all have rights, which assumes that citizens are capable and responsible thinkers on important political issues that affect others. This results in a degree of trust or faith that we should listen to other citizens, while setting aside appeals to whether or not they are right. Importantly, this positive reason is conditional on our agreement that citizens should have rights, but I think it is evident that we have consensus on this substantive view. In this way, majoritarianism is interested in an outcome favorable to the maintenance of citizens' rights. For example, imagine a scenario where citizens are debating between two options, *A* and *B*, and all citizens support one or the other option. No citizen has knowledge of the other citizens' views. They can either take a majority vote or consult a randomization machine. This randomization machine restricts the outcomes in a particular political decision to all of the possible options, which include *A*, *B*, *C*, and *D*.[75] Though it is uncertain which options will result in better or worse outcomes, the view that all have rights requires the consistent *belief* that the citizens have reasonable views about the options – including *C* and *D* – and their effect on other citizens in their ultimate support for *A* or *B*. To choose the randomization machine would then be an act of disrespect to the citizens as deliberators capable of reflecting on important political issues. It is in this manner that majoritarianism respects citizens as right-bearers in a way demanded by the trust that accompanies the attribution of rights. Recall that in the original defense of Waldron's view, we characterized this feature as providing equal political *status*.

Second, citizens are heard equally due to our impoverished epistemic state of equality,

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[74] Estlund, "Jeremy Waldron on *Law and Disagreement,*" 120.

[75] Note that this randomization machine is not of the purely procedural sort, but more akin to a coherent type of randomization machine discussed in the previous section.

which provides no reason to favor one reasonable citizen over another. Dworkin may believe the best institution is a *constitutional democracy.* Another may believe that it is a coin-toss, or even a randomization machine. However, because we cannot know which view is better or worse due to widespread disagreement as part of the circumstances of politics, we cannot privilege those that favor a coin-toss over those that favor a randomization machine. From this impoverished epistemic state, we can derive a thin commitment to equal decisiveness, but not anything more robust. In fact, this state of equality is – to a degree – regretful. Consider how desirable it would be to have even limited answers to the great questions of rights. But majoritarianism alleviates the concern that an outcome might favor one individual's views over another. Again, this feature can be seen in the original defense of Waldron's view of equal political *impact*.

In arguing for a modified version of Waldron's approach, I have not fully ignored his original argument. Instead – setting aside the additional negative justification – it becomes clear that Waldron has already provided a substantive justification. The distinction between purely procedural and substantive justifications only became helpful, because majoritarianism calls for what we ordinarily think of in terms of simple procedures. As Stephen Macedo notes, "majority rule is merely a voting rule."[76] In fact, it is this intuitive appeal of majoritarianism as a simple procedure that makes Waldron's view so appealing.

More robust substantive views, such as Dworkin's constitutional democracy, call for a much more complicated scheme that includes a set of predetermined issues entrenched in a constitution. *Prima facie*, it seemed quite different in kind to a simpler majority-rule type view. Estlund reminded us of the original standards of legitimacy that we sought out, and that was whether or not a view was controversial. In returning to this original understanding – and thus setting aside the procedure vs. substance distinction – a version of Waldron's view appears to meet the standard for legitimacy.

Therefore, close examination of Waldron's argument reveals a substantive justification for the endorsement of the majoritarian principle, but it is indeed very thin, and rests on uncontroversial propositions. Majoritarianism prevents further substance from getting in, except as it is put through the decision-procedure itself. That is, in an established majoritarian democracy, the input of substance requires a majority-consensus.

Section VI: Judicial Review

As Dworkin aptly points out, "the [issue of the] validity of the majoritarian premise…is…at the heart of the long constitutional argument [about judicial review]."[77] Judicial review may not be necessitated in a robust, outcome-based conception of democracy, but the strong case against judicial review *prima facie* hinges on the validity of majoritarianism. In response, a modified version of Waldron's majoritarianism has been defended as a legitimate decision procedure. The worry is whether this thinly substantive version of Waldron's majoritarianism undermines the argument against judicial review. To address this worry, I will first define exactly what is meant by judicial review and briefly describe how American-style judicial review exemplifies the type of institution that Waldron argues against. Then, I will analyze whether the thinly substantive version of majoritarianism is compatible with judicial

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[76] Macedo, "Against Majoritarianism: Democratic Values and Institutional Design," 1038; The context of this quote is originally a criticism suggesting that a political system cannot be based on majoritarianism, which I address in "Section IV: Judicial Review."

[77] Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, 18.

review. I will show that the modified version of majoritarianism is incompatible with judicial review when decisions are beyond the reach of the majority to reverse or alter its decisions. This conclusion is conditional upon the uncontroversial claim that all citizens have rights – though we may dispute what those rights are – and it is only by attacking this claim that Waldron's arguments against judicial review may be undermined.

A. What is Judicial Review?

In "The Core of the Case Against Judicial Review," Waldron carefully defines the object of what is ordinarily contested in arguments for or against judicial review. The focus is on *strong judicial review* of "primary legislation enacted by the elected legislature of a polity."[78] It is a system where largely unaccountable "courts have the authority to decline to apply a statute in a particular case or to modify the effect of a statute to make its application conform with individual rights."[79] This contrasts with weaker forms of judicial review that lack the kind of authority in a system of strong judicial review. In a system of *weak judicial review*, "courts may scrutinize legislation for its conformity to individual rights but they may not decline to apply it," i.e., a judge puts forth an opinion for the legislature to consider, if it has not already.[80]

Further, the judicial review at issue is practiced *a posteriori,* i.e. after the legislative enactment of statutes rather than as part of the legislative process before their enactment. Finally, the focus is on *rights-oriented judicial review* of constitutionally entrenched rights, such as the Bill of Rights of the U.S. Constitution.[81] Rights are *entrenched* where the majority may never alter or amend them. Waldron notes that "many of the challenges to rights-oriented judicial review can be posed to other forms of constitutional review as well."[82] For purposes of clarity, we will focus our case on *rights-oriented strong judicial review*.

B. American-Style Judicial Review

Though Waldron's setup is designed to abstract the issue away from any particular system in an effort to make a more general and inclusive argument, the current judicial review performed in the U.S. Supreme Court is an obvious candidate system for what Waldron has in mind. For that reason, I will be adopting the U.S. Supreme Court in my analysis, and any reference to the U.S. Supreme Court and its functioning should be understood as a reference to the form of judicial review described above. Before reaching the question of the compatibility of judicial review with majoritarianism, I think it is helpful to understand how American-style judicial review is prototypical of the style of judicial review we are imagining, and so I've included a brief overview of American-style judicial review's functioning.

The highest court to hear cases in the U.S. is the Supreme Court.[83] The most numerous

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[78] Waldron, "The Core of the Case Against Judicial Review," 1354.
[79] Waldron, "The Core of the Case Against Judicial Review," 1354.
[80] Waldron, "The Core of the Case Against Judicial Review," 1355.
[81] Waldron, "The Core of the Case Against Judicial Review," 1358.
[82] Waldron, "The Core of the Case Against Judicial Review," 1358.
[83] I am setting aside issues of state courts, where the state's own court of last resort is the final interpreter of their own state constitutions. However, arguments against the U.S. Supreme Court might be applicable to state court systems – with regard to its compatibility with state resident majorities – where their functioning resembles that of the Supreme Court.

set of the cases heard by the U.S. Supreme Court consists in appealed lower court cases, where Justices choose from about eight thousand appealed cases every year, and make final decisions through written opinions for less than one hundred of them.[84] In this manner, Justices have a great deal of discretion in choosing the issues they wish to address.[85] Upon hearing a case that involves a legislative statute, they have the option of upholding the statute, striking it down in violation of the Constitution, altering the statute's meaning, or relatedly finding it inapplicable. They are relatively unconstrained in this regard, because the three primary legal methodologies utilized – plain meaning, framer's intent, and precedent – can often be used to argue either side of a case, and thus are unlikely to uniquely justify a particular decision.[86] Justices thus can and do often utilize these methods in a way that conforms to their own preferences.[87]

Justices are largely unaccountable to the people. They are "nominated and confirmed by elected officials," but serve life terms.[88] When the Court interprets a legislative statute contrary to its intended meaning, Congress can pass a new statute that clarifies its meaning – i.e. effectually overturning the Court's ruling.[89] Additionally, "Congress can hold judicial salaries constant, impeach justices, change the size of the Court, and make 'exceptions' to the Court's appellate jurisdiction."[90] However, once a constitutional interpretation is affirmed in a decision, it is much more difficult to alter the effect. Congress or the states may pass a constitutional amendment, but this requires a supermajority.[91] Non-compliance with a decision is possible and does occur, but we should question why the people should have to resort to this.[92]

Considering these possible maneuvers to obviate decisions of the Court should appear troublesome in and of itself, because it suggests that we do not have any real control over the Court. Instead, we must resort to secondary measures to reverse or change decisions. In any case, the issue of the precise degree of unaccountability of the Justices is irrelevant for our analysis.

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[84] Lee Epstein and Thomas Walker, *Constitutional Law for a Changing America: Institutional Powers and Constraints*, 12.
[85] Of course, they may be forced to address an issue, because of inconsistent lower court rulings. These cases often pertain to important political issues as well. Epstein and Walker, *Constitutional Law for a Changing America: Institutional Powers and Constraints*, 18.
[86] Jeffrey Segal and Harold Spaeth, *The Supreme Court and The Attitudinal Model Revisited*, 111; As one example, they argue "legitimate precedents exist on both sides of controversies."
[87] I am not here addressing the degree to which this is the case, but merely recognizing that it may occur. For a prominent book that discusses the influence of Justices' preferences in decision-making, *see* Segal and Spaeth, *The Supreme Court and The Attitudinal Model Revisited*.
[88] Waldron, "The Core of the Case Against Judicial Review," 1394.
[89] Epstein and Walker, *Constitutional Law for a Changing America: Institutional Powers and Constraints*, 115.
[90] Epstein and Walker, *Constitutional Law for a Changing America: Institutional Powers and Constraints*, 116.
[91] "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress;" U.S. Constitution Article 5.
[92] Larry Kramer suggests that non-compliance was the traditional solution to resist judicial supremacy through "political-legal" mechanisms, which made the public more aware of the people's sentiments. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review,* 24-29.

For our purposes, all that matters is that the Court's interpretation of the Constitution requires supermajorities to reverse through an amendment, and removal of a Justice from the Court ultimately requires the same.[93]

C. Is Judicial Review Compatible with Majoritarianism?

Waldron's argument that judicial review is incompatible with majoritarianism focuses on the Supreme Court's use of judicial review itself, but his focus is misplaced. It may be regrettable that the appointments of Justices are one-step removed from the people, but we can at least find it somewhat agreeable that it is *our* representatives that are doing the choosing – i.e. the President and the Senate.[94] Under a majoritarian system, we of course retain the power to make the choice directly, if we found it more agreeable to our democratic sentiments. What is most troubling is that reversal of constitutional interpretations – and thus whether or not legislation is constitutional – requires a supermajority.

First, it is important to make a distinction between the legitimacy of a government, and legitimacy of the decisions made by the government. As we have already discussed, the only legitimate government is one that is beyond reasonable disagreement. The legitimacy of the decisions made by the government depends on the legitimacy of the government itself. So long as the institution is beyond reasonable disagreement, then the decisions made within that institution are legitimate. In the case of a majoritarian democracy, it has already been shown that the institution itself is legitimate. Decisions made within that an institutional structure in which majority rule exerts ultimate control are thus legitimate as well.

In this distinction, the reasons for rejecting a system of strong judicial review become quite evident. There may be strong support for the institution of judicial review, and a supermajority may even reasonably support the institution. However, as part of our majoritarian form of government, strong judicial review is certainly not beyond reasonable disagreement. The people must retain the ability at all times – by majority vote – to decide the important political issues that are effectually taken out of their hands by the Court.

D. Qualifying the Case Against Judicial Review

Recall that our modified version of majoritarianism is thinly substance, and so we must be careful to consider whether this alters or qualifies our case against judicial review. Also, recall that the modified version of majoritarianism endorses the uncontroversial assumption that all are entitled to basic rights, and that when combined with the permanent circumstances of politics, this assumption necessitates a fundamental right to participate.

Sharing the view that all citizens retain the "right of rights," John Hart Ely, in *Democracy and Distrust*, argues for a form of American-style judicial review that he concludes respects citizens' right to participate, and thus would be compatible with our form of majoritarianism. Much like Waldron, Ely makes a distinction between procedure – embodied in political participation of citizens – and substance – embodied in outcome-related values. Legitimate

[93] "The Senate shall have the sole Power to try all Impeachments…And no Person shall be convicted without the Concurrence of two thirds of the members present. Judgment in Cases of Impeachment shall not extend further than to removal from Office." U.S. Constitution Article 1 Section 2.

[94] "[The President] shall nominate, and, by and with the Advice and Consent of the Senate, shall appoint…Judges of the supreme Court" U.S. Constitution Article 2 Section 2.

judicial review, he argues, is concerned with the former in a "representation-reinforcing approach," in contrast to the latter, which presumes that "judges are better reflectors of conventional values."[95] In other words, it is not an affront to citizens as reasoners capable of reflecting on important political issues when judges are acting to clear "the channels of political change" that promote participation by citizens.[96] Unelected judges, as "comparative outsiders in our governmental system," are uniquely suited to "objectively…assess" whether political procedures are being properly followed.[97]

Two responses should tell against Ely's representation-reinforcing view of judicial review. First, as the analysis of Waldron's view has already demonstrated, the distinction between procedure and substance is a false dichotomy. Unlike Waldron's dichotomy however, Ely includes a much more robust substance in his conception of procedure. Instead of requiring that the majority be decisive in matters of procedure, Ely's procedural view elevates the judgment of a few – i.e. the unelected judges – over all citizens in determining whether the majority takes the minority's interests into account. Similar to Dworkin's robust substantive view, the decision to elevate the judgment of some over all is a similarly controversial view, and thus illegitimate as a non-majoritarian institution. Second – and in relation to the first point – there is no uncontroversial justification in supposing "the moral capacities respected in the idea of rights are only capacities to think substantively, as opposed to capacities to think reflectively about procedures."[98] Instead, respect requires the belief that citizens' moral capacities extend to all matters of disagreement, including Ely's characterization of political procedure.

Additionally, we must also recognize that allowing substance into majoritarianism qualifies our case. As previously mentioned, the modified version of majoritarianism endorses the assumption that all are entitled to basic rights, and that when combined with the permanent circumstances of politics, this assumption necessitates a fundamental right to participate. If this is not the case, then our majoritarian argument fails, and the case against judicial review falls through. I take it that this is an uncontroversial claim, and so only thinly substantive. Thus, the modified version of majoritarianism undermines Waldron's original argument against judicial review only insofar as the aforementioned crucial assumption does not hold.

Having argued that majoritarianism is incompatible with American-style judicial review, we must recognize that forms of weak judicial review are still possible. For example, the majority may delegate judicial representatives on their behalf to perform judicial review, just as we do with congressional representatives. In this sense, there would be no incompatibility if the Supreme Court were composed of majority-elected members that served limited terms and could be recalled upon a majority vote. Any desire for greater insulation from the people conveys only distrust, and much greater problems will arise in a community formed on such a bond.

Stephen Macedo points out that "majority rule is merely a voting rule, employed in particular settings," and cannot be the basis of a whole political system.[99] He is partially correct in this assertion. It is a voting rule, but this should be viewed as a benefit to the construction of a political system. Where there is widespread disagreement about important political issues, it provides a neutral framework to address these issues – in contrast to any non-majoritarian institution that will, for example, entrench certain rights that require a supermajority to change.

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[95] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, 102.
[96] Ely, *Democracy and Distrust: A Theory of Judicial Review*, 103.
[97] Ely, *Democracy and Distrust: A Theory of Judicial Review*, 103.
[98] Waldron, *Law and Disagreement*, 295.
[99] Macedo, "Against Majoritarianism: Democratic Values and Institutional Design," 1038.

For this reason, majoritarian democracies will look different from one country to another. The people may decide to have a directly elected court that engages in judicial review, or they may have judges appointed by a president that do not have the ability to strike down legislation. Many different systems can be imagined. Most important, however, is that in all of these systems, the majority retains the ultimate power to change whatever they see fit. All the different arrangements of the political system would initially be set up by a majority decision, and it is by this same method that they may be altered or removed. The people then are able to take a more active role in setting up their government. It is a much more malleable system in this regard.

The immediate worry would be the stability of a system that is always subject to change, as opposed to more firmly established non-majoritarian systems. But two considerations speak against giving that worry too much weight. First, it is not clear why there should be an established political system where the majority of us feels there is a need for change. For example, a contemporary society might feel that a five hundred person legislature is antiquated due to the exponential growth of their population, and so double the size of the legislature. If the size began to be viewed as harmful to meaningful deliberation, the majority could contract the legislature. Second, that it is our immediate concern that a political system be stable can be reflected in our careful deliberation on the matter. If we are concerned with stability, it is likely that others are as well, and it is only a majority that we must convince of the same.

Conclusion

We started out with an abstracted version of Waldron's *circumstances of politics*, which framed the problem of politics as how to achieve coordinated action in the midst of large-scale disagreement. The remedy was to find a procedure that is beyond reasonable disagreement of citizens in order to obligate them to the outcomes of the procedure, whatever they happen to be.

In response, two plausible solutions were presented, Waldron's procedural solution and Dworkin's substantive solution. It was demonstrated that Dworkin's robust substance lacked any independent criteria by which to measure, and in fact relied on a false consensus embodied in existing constitutions. Waldron's majoritarianism, free of robust substance, lacked Dworkin's substantive problem, and was defended against objections that majoritarianism lacks substantive equalities.

After endorsing Waldron's procedural solution, majoritarianism was tested against the original requirement that a legitimate procedure is beyond reasonable disagreement. It was first established that, though subject to reasonable disagreement in specific contexts, majoritarianism is uncontroversial as a general principle. However, Estlund presented a forceful argument that revealed undefended substance in Waldron's majoritarian solution. In accepting the existence of substance in any coherent fair procedure, the procedure vs. substance distinction was set aside as only helpful in distinguishing Waldron's view from much more robust substantive views such as Dworkin's constitutional democracy.

Closer analysis revealed that Waldron's majoritarianism, though thinly substantive, was indeed defensible more or less on Waldron's own terms. The essential, substantive premise that majoritarianism rests on is the view that all are deserving of rights, which carries with it a trust of others as careful deliberators, and thus the proper sources of opinions about important political issues. Those that fear a "tyranny of the majority" might question their willingness to attribute rights as belonging to all. However, if we acknowledge the widespread disagreement about important political issues, illegitimate rule or despotism is the only alternative to majoritarian

democracy.

After establishing the legitimacy of majoritarian democracy, the question of the compatibility of judicial review with majoritarianism then became a simple question of whether or not the use of judicial review is subject to majoritarian scrutiny. So long as any particular instance of judicial review can be reversed or altered by the majority, then it is compatible. If not, then it is not compatible. In the instance of American-style judicial review, which is the prototypical example used by Waldron and others, the requirement of supermajorities to reverse decisions by amendment is beyond the majority's control, and thus incompatible with majoritarianism.

Given the injection of substance into our modified version of Waldron's majoritarianism, the case against strong judicial review requires qualification. It was shown that Ely's attempt to defend strong judicial review within democracy was too robustly substantive, because it required the controversial belief that the opinion of unelected judges in matters of procedure is substantively better than the people themselves. Most importantly, our case against strong judicial review is conditional upon the belief that it is beyond reasonable disagreement that all citizens are entitled to the enjoyment of basic rights, whatever those rights happen to be.