



**JUDICIAL REVIEW AND ITS  
DISCONTENTS:  
IS JUDICIAL REVIEW DEMOCRATICALLY  
LEGITIMATE?**

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## Abstract.

Utgangsspørsmålet for dette verket er om prøvingsretten har et demokratisk problem. Jeg tar utgangspunkt i det norske systemet for prøvingsrett, og viser hvordan denne debatten leder til grunnleggende spørsmål om demokrati og konstitusjonalisme. Spenningen mellom demokrati og konstitusjonalisme kan ses som en spenning mellom konkurrerende legitimitetsprinsipper for utøvelse av makt. Hvor langt skal folket selv inkluderes i egen styring, og hvem setter betingelsene for den styringen? Dette, helt grunnleggende er spørsmålene prøvingsretten bringer opp. Jeg presenterer først et overblikk på prøvingsretten, og ser på systemene som finnes i Norge, USA, Canada og Storbritannia. Jeg tar også opp noen teoretiske distinksjoner rundt debatten om prøvingsrett. Et hovedskille går mellom *sterk* (Norge og USA) og *svak* (Canada og Storbritannia) prøvingsrett. Jeg diskuterer prøvingsretten og hva det betyr å stille spørsmål ved dette systemets demokratiske legitimitet. Jeg tar for meg tre teorier om demokrati fra Ronald Dworkin, og Jeremy Waldron, Allan C. Hutchinson og Jose Colón-Ríos. Jeg argumenterer for at Dworkin og Waldron begge er sårbare for innvendinger som vektlegger idéen om demokrati som selvstyre. Mens Hutchinson og Colón-Ríos, som mener at borgeres reelle deltagelse er essensielt for demokratisk legitimitet, representerer en idé om demokrati som er mer radikal enn både Dworkin og Waldron. Den siste delen bruker jeg på å utvikle spenningen mellom demokrati og konstitusjonalisme, og på hva det faktisk kan bety å åpne opp for større muligheter for borgeres politiske deltagelse på grunnlovsnivå.

I begin this work by asking if judicial review is democratic. I begin with the Norwegian system of judicial review, and show how this debate lead to foundational questions about democracy and judicial review. The tension between democracy and constitutionalism can be viewed as a tension between competing principles of legitimacy. To what degree should citizens be included in their own governance, and who makes the conditions for that governance? I first present an overview of judicial review, and use the systems in Norway, USA, Canada and The United Kingdom. I also deal with some theoretical distinctions in the debate about judicial review. A main division is between *strong* (Norway, USA) and *weak* (Canada, United Kingdom) judicial review. I discuss judicial review and what it means to question the democratic legitimacy of this system. I examine three different conceptions of democracy, due to Ronald Dworkin, Jeremy Waldron, Allan C. Hutchinson and Jose Colón-Ríos. I argue that both Dworkin and Waldron are both vulnerable to objections that are based

on the idea of democracy as self-government. The last part deals with exploring the tension between democracy and constitutionalism, and what it might actually mean to increase citizen's political participation at the constitutional level.

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# Chapter 1: Judicial Review.

For myself it would be most irksome to be ruled by bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture.<sup>1</sup>

This thesis is about the democratic legitimacy of judicial review. I begin with an introductory chapter. Here I present judicial review and its main characteristics, and also present the systems of judicial review found in Norway, the United States, Canada, and the United Kingdom. I argue that questions about the democratic legitimacy of judicial review raises questions about constitutionalism and democracy as well.

## 1.1 Judicial Review: The Shipping tax case.

In 2010, the Norwegian Supreme Court ruled a new system of tonnage tax legislation for owners of shipping companies unconstitutional. The system was enacted by the Norwegian parliament in 2007. Under the old system from 1996 shipping owners paid a set tax on the tonnage of their ships each year as opposed to paying on turnover. Under this system shipping companies were able to defer paying taxes on profits provided they did not pay out dividends. When the new system was implemented the government demanded that the companies pay the deferred tax from the last 10 years, a sum of approximately 21 billion NOK. Some shipping companies objected to this, claiming that this legislation violated the Norwegian constitution. Specifically, they argued that §97, which bans retroactive legislation (ex post facto laws)<sup>2</sup>, contradicted the legislature's demand that they pay in order to be included in the new tax system. After several rounds in the court system, the case was put to the Norwegian Supreme court in 2010, which found that the legislation was indeed unconstitutional. The result was that the owners did not have to pay the 21 billion NOK in

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<sup>1</sup> Judge Learned Hand cited in Zurn, "Deliberative Democracy and Constitutional Review", (2002): 467.

<sup>2</sup> Meaning that laws cannot retroactively change the legal consequences or status of actions that were committed before the law was enacted. In the case of criminal law this means that no one can be prosecuted for actions that were legal when it was committed, but was later made illegal. In the case of the shipping owners they argued that having to pay taxes retroactively violated this ban.

taxes they would have otherwise owed.<sup>3</sup> It was a close decision by the Norwegian Supreme Court, 6 justices believed it to be unconstitutional while 5 did not.

The 2007 tax law had been extensively debated in the Norwegian legislature (Stortinget). The Ministry of Justice and the Ministry of Finance had also given legal opinions about the law. The minority in the case noted that the evaluation of the constitutionality of the 2007 tax legislation was likely the most extensive done by a parliamentary committee on the constitutionality of a piece of legislation. This did not, however, persuade the majority.<sup>4</sup> Sturla Henriksen, director of the Norwegian shipping owner's association (Norsk Rederiforbund) said after the decision that: "Høyesterett har I dag bekreftet grunnlovens beskyttelse mot å gi lover med tilbakevirkende kraft. Det er en prinsipiell avgjørelse av stor betydning for rettsikkerheten til oss alle". In this way he emphasized the role of the supreme court as a protection from state overreach.

The shipping tax case is an example of *Judicial Review*. It gives the judiciary the authority to invalidate legislation that it rules to be in violation with the constitution. While judicial review has had long standing as constitutional custom in Norway it was officially included in the constitution after a substantial revision in 2014. §87 of the Norwegian constitution now states that: "I saker som reises for domstolene, har domstolene rett og plikt til å prøve om lover og andre beslutninger truffet av statens myndigheter strider mot Grunnloven".<sup>5</sup>

This highlight the fact that in systems of judicial review like those found in Norway and the U.S., it is a supreme court that has the final say in important political decisions about rights, and the interpretation of the constitution. This is, prima facie, opposed to the democratic ideal of self-government, in which political decisions ought to be made by the people themselves or their elected representatives. The counter-majoritarian difficulty points out that this institution runs counter to a central value and principle in contemporary democracies, namely popular self-government. Defences of judicial review have therefore often addressed the issue of judicial review by examining how we ought to understand democracy.

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<sup>3</sup> Kierulf, "Taking Judicial Review Seriously" (2014), 237-238, Kronen, "Plenumsdom i Høyesterett – skattlegging av rederier i strid med Grunnloven §97" (2010), accessed October 9, 2017, [https://lovdata.no/artikkel/plenumsdom\\_i\\_hoyesterett\\_skattlegging\\_av\\_rederier\\_i\\_strid\\_med\\_grunnloven\\_%C2%A7\\_97/335](https://lovdata.no/artikkel/plenumsdom_i_hoyesterett_skattlegging_av_rederier_i_strid_med_grunnloven_%C2%A7_97/335), Svalastog and Sættem, "Rederne slipper milliardskatt" (2010), accessed October 9, 2017: [www.nrk.no/okonomi/rederne-slipper-milliardskatt-1.6990356](http://www.nrk.no/okonomi/rederne-slipper-milliardskatt-1.6990356), Berge, "Rederne vant i Høyesterett", (2009), accessed October 9, 2017, [www.nettavisen.no/na24/2829603.html](http://www.nettavisen.no/na24/2829603.html).

<sup>4</sup> Kierulf, *Taking Judicial Review Seriously* (2014), 238-239.

<sup>5</sup> §89 Kongerikets Norges Grunnlov, accessed June 9, 2016, <https://lovdata.no/dokument/NL/lov/1814-05-17>.

## 1.2. What is Judicial Review?

Judicial review is a practice whereby courts are sometimes called upon to review a law or some other official act of government (e.g. the decision of an administrative agency such as a state or provincial labour relations board) to determine its constitutionality, or perhaps its reasonableness, rationality or its compatibility of fundamental principles of justice.<sup>6</sup>

There are many different systems of judicial review. But they are generally divided between a *European* and a *U.S.* model of judicial review. In addition, there is another distinction between *strong* and *weak judicial* review.

The distinction between U.S. and European model of judicial review divides among three main lines. In the U.S. model review takes place after legislation has taken force (*ex ante*), it is done in concrete cases, and these cases are brought before courts of general jurisdiction. Meaning that while there is a *Supreme Court* that decides on constitutional matters, the U.S. model does not have a separate *constitutional* court. In the European model, by contrast, review is often undertaken before a piece of legislation has taken force, i.e. before any particular case can arise, and it is undertaken by a constitutional court separate from the ordinary courts.<sup>7</sup> In addition, on the European model, legislatures have the positive power to decide laws, while a judiciary has the negative power to reject or nullify them. On this model rights ought to be excluded from being a subject of review. That is, what rights individual have should not be a matter the judiciary could decide upon. Neither should constitutions have lofty formulations about human rights.<sup>8</sup> In the words of the Austrian legal scholar Hans Kelsen:

Sometimes constitutions themselves may refer to principles, which invoke the ideals of equity, justice, liberty, equality, morality, etc., without in the least defining what is meant by these terms [...] But with respect to constitutional justice, these principles can play an extremely dangerous role. A court could interpret these constitutional provisions, which invite the legislator to honor the principles of justice, equity, equality [...] as positive requirements for the [material] content of laws.<sup>9</sup>

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<sup>6</sup> Waluchow, "Judicial Review" (2007), 258.

<sup>7</sup> Kierulf, *Taking Judicial Review Seriously* (2014), 95.

<sup>8</sup> *Ibid.*, 96.

<sup>9</sup> Kelsen cited in *Ibid.*, 97.



Many constitutions in European countries have not followed this last element, their constitutions also have a bill of rights. Nonetheless, this aspect of the European model expresses a desire to limit the role of the judiciary as a de facto creator of laws.<sup>10</sup>

A connected distinction, and the one that I will be primarily be concerned, is between *strong* and *weak* judicial review. This is identical to the distinction between the U.S. and European model, but the U.S. model has more in common with *strong* judicial review, while the European model will more easily map onto *weak* judicial review.

In a system of strong judicial review, the courts have the authority to not apply a piece of legislation in a particular case, or to modify the legislation so as to conform with the constitution. In addition, a system of strong judicial review gives courts the authority to rule in such a way that the legislation, while formally still in effect, is no longer enforced or have normative force (dead letter).<sup>11</sup>

In a system of weak judicial review, on the other hand, courts may evaluate a piece of legislation for its conformity with a constitution, but does not allow the courts the authority to render the legislation unenforceable, even when the court rules the legislation to be in contradiction with the constitution. A stronger, but still *weak*, system of judicial review may allow courts the authority to render legislation unenforceable, but also grants legislatures the authority to override the courts decision.<sup>12</sup>

Weak judicial review is also typically undertaken by a separate constitutional court, while strong review is done by the ordinary judiciary. Supreme court cases of review generally start in lower courts and can end up in the supreme court through a series of appeals. This was the case for the Tax legislation case in the Norwegian judiciary.

### **1.3. The case of Norway.**

The Norwegian constitution dates back to 1814. After the U.S., Norway has the second oldest constitution in the world that is still in effect.<sup>13</sup> The Norwegian constitution can only be amended by the legislature. Amendments have to be put forth by one legislature and voted on by the next after an election. The vote requires a 2/3 supermajority. The Norwegian Supreme

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<sup>10</sup> Ibid., 97.

<sup>11</sup> Waldron, "The Core of the Case Against Judicial Review" (2006), 1354.

<sup>12</sup> Ibid, 1346, Kierulf, *Taking Judicial Review Seriously*, 97 and Tushnet, "Alternative Forms of Judicial Review" (2006), 2786.

<sup>13</sup> Smith, *Høyesterett og Folkestyret* (1993), foreword.

Court consists of 20 justices, the head of the Supreme Court has the title of Chief Justice. They are appointed by the government. Ordinarily, cases are heard by five of the justices, but some cases are heard in Grand Chamber by eleven justices or by all 20 justices. Cases of judicial review are always heard in either Grand Chamber or by all justices in cases of particular importance. Justices also sit in the Appeals selection committee which decides what appeals ought to be heard in the supreme court.<sup>14</sup> There is no separate constitutional court in the Norwegian legal system. Review cases take place after legislation has taken effect and are put before the court in concrete cases.

The practice of judicial review has a long history in Norway, though it was not officially a part of the constitution until 2014. The earliest known case in which the Norwegian Supreme Court discuss its authority and competence to review legislation is from 1866.<sup>15</sup> In a case between naval officer Captain Lieutenant Wedel-Jarlsberg and the state, Chief Justice Peder Carl Lasson said of the issue of judicial review:

What has the Supreme Court to do, when presented at the same time with the constitution and a private statute? It has then, as far as I know constitutional law, been generally agreed that as one cannot place it upon the courts to uphold both these laws at once, they must necessarily give preference to the Constitution [...]<sup>16</sup>

Meaning, of course, that in cases before the court where ordinary laws passed by the legislature conflicted with constitutional law, the latter takes precedence.

The Norwegian system of judicial review strongly resembles the U.S. model. In practice, however, the Norwegian practice of judicial review has been less politically controversial than in the U.S.<sup>17</sup> Norway is the second oldest system of judicial review. But despite its long history in Norway, the practice of judicial review has not been uncontroversial. In the 1960s historian Jens Arup Seip famously described judicial review as a reaction to the growth of parliamentarism towards the end of the 19<sup>th</sup> century.

Et studium vil vise at prøvingsretten ble laget for å anvendes I det politiske spill. I sin tilblivelse og i sine første virkninger var den politisk reaksjonær og klart antiparlamentarisk av karakter. Den var en

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<sup>14</sup> “Høyesterett”, domstol.no, last modified august 14, 2017, <http://www.domstol.no/no/Om-domstolene/De-adminnelige-domstolene/Hoyesterett/>, and Kierulf, *Taking Judicial Review Seriously* (2014), 153.

<sup>15</sup> Deliberations from the Norwegian Supreme Court was not made public until 1863, Kierulf, *Taking Judicial Review Seriously* (2014), 171.

<sup>16</sup> Chief Justice Lasson cited in Kierulf, *Taking Judicial Review Seriously*, (2014)172.

<sup>17</sup> Smith, *Høyesterett og Folkestyret* (1993), 32.

kjepp med vilje kastet inn i demokratiets hjul, en siste handling, bak stortingets rygg, av den detroniserte embetsstand.<sup>18</sup>

While Seip's interpretation of the of judicial review in Norway and its history as purely political, stemming from a reaction against the growth of parliamentarism is likely not correct, as judicial review arose as supreme court practice at an earlier stage, concerns about judicial review and its legitimacy as a part of the basic framework of a democratic society have remained.<sup>19</sup> Both in concrete political debates in Norway and in the larger philosophical and political debate about judicial review.

#### **1.4. Strong Judicial Review; the United States.**

The United States is *the* example of strong judicial review. Both in institutional design and in judicial and political practice. The U.S. supreme court consists of eight Associate Justices and one Chief Justice. Justices are nominated by the President and require the consent of the Senate in order to be appointed. As is the case in Norway, the only way for the legislature to set aside Supreme Court decisions on the constitutionality of legislation is to amend the constitution. In the U.S. this requires a vote of two-thirds in each house of Congress<sup>20</sup>, and then ratified by three-fourths of the states (either by state legislatures or conventions within the states). Alternatively, a special national convention can be called, though this has never occurred.<sup>21</sup> As is the case in Norway there is no separate constitutional court, and the supreme court deals with cases after they have already been put before lower courts and been appealed.

The United States was the first nation to institute a system of judicial review. With the case of *Marbury v. Madison* in 1803, Chief Justice John Marshall established the authority of the Supreme Court to invalidate laws that conflicted with the constitution.<sup>22</sup> The most significant feature of the decision in terms of judicial review was that the Supreme Court established its authority to review legislation in terms of its constitutionality.<sup>23</sup> What the scope of this authority ought to be, and how it related to the constitutional interpretations of other branches of government were controversial issues for decades after. Over time, however, judicial review in the U.S. came to be a system in which a single institution had final say in the

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<sup>18</sup> Seip quoted in *Ibid.*, 13.

<sup>19</sup> *Ibid.*, 13, see also Slagstad, *Retters Ironi* (2001).

<sup>20</sup> The U.S. legislature consists of two separate houses. The house of representatives and the Senate.

<sup>21</sup> Breyer, *America's Supreme Court* (2011), 223.

<sup>22</sup> *Ibid.*, 12.

<sup>23</sup> *Ibid.*, 13-19, The Constitution of the United States, section 4, article V, available at: [http://www.senate.gov/civics/constitution\\_item/constitution.htm#a5](http://www.senate.gov/civics/constitution_item/constitution.htm#a5).

interpretation of the constitution.<sup>24</sup> And, furthermore, that legislation found to be unconstitutional by the supreme court will not be applied, it becomes a *dead letter*.

### **1.5. Examples of Weak Judicial Review: Canada and the United Kingdom.**

As in the U.S. system Canada's Supreme Court consists of one Chief Justice, and eight other Justices. They are appointed by the federal government as vacancies occur. Supreme Court Justices are eligible to serve until retirement at age 75. The Canadian system is also one where cases must first be heard in the lower courts and appealed up to the level of the supreme court. In addition, the Canadian Charter of Rights and Freedoms, enacted in 1982, also entrenches fundamental rights as higher law, it cannot be repealed by an ordinary legislative majority and the courts are empowered to undertake judicial review of legislation.<sup>25</sup> But unlike both the systems of judicial review in Norway and the U.S. the Canadian Supreme Court does not have the final say in constitutional matters. The Supreme Court may rule a piece of legislation unconstitutional, and this will invalidate the legislation, but this is not the final say in the matter. The Canadian Charter includes section 33, which states that governments (federal and provincial) can invoke a "notwithstanding" clause. Such a "notwithstanding" clause enables legislatures in Canada to override a ruling from the supreme court about the constitutionality of legislation for a period of five years, subject to renewal.<sup>26</sup>

One point of the notwithstanding clause was to give the Canadian Supreme Court a role in constitutional interpretation without making that Court's judgements completely authoritative in the short run. A legislature that disagreed with the court's interpretation could reenact the legislation found invalid, protecting against a subsequent challenge by invoking section 33.<sup>27</sup>

According to Mark Tushnet, by including section 33, Canada invented weak-form judicial review.<sup>28</sup> The possibility for legislatures to invoke a "notwithstanding" clause is a clear departure from the U.S. model of judicial review.<sup>29</sup> The possibility for legislative override of the court's constitutional interpretations with an ordinary majority is significant, even though in practice it is rarely used.

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<sup>24</sup> Tushnet, "Alternative Forms of Judicial Review" (2003), 2783.

<sup>25</sup> Gardbaum, "The New Commonwealth Model of Constitutionalism" (2001), 721, 723.

<sup>26</sup> *Ibid.*, 722.

<sup>27</sup> Tushnet, "Alternative Forms of Judicial Review", 2785.

<sup>28</sup> *Ibid.*, 2785.

<sup>29</sup> Gardbaum, "The New Commonwealth Model of Constitutionalism", 722.

For its part the U.K. has long been an example of a system of parliamentary or legislative supremacy, as opposed to the U.S. system of judicial supremacy. With the implementation of the Human Rights Act of 1998, this changed, but only to a certain extent.<sup>30</sup>

The act incorporated the European Convention of Human Rights into British law. And the British Human Rights Act gives courts the authority to review and evaluate legislation in terms of its compatibility with the rights and freedoms in the European Convention of Human Rights as incorporated into British law. But the result of such a review is not that the law is struck down or rendered invalid, instead the court can issue a “declaration of incompatibility”. Section 4 (6) of the British Human rights acts states that such a declaration “[...] does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and [...] is not binding on the parties to the proceedings in which it is made”.<sup>31</sup> Meaning that even though the court finds a piece of legislation to be in conflict with the Human Rights Act this does not affect the validity of the legislation. The U.K. system is a clearer example of weak judicial review, but the issue is by no means clear-cut.<sup>32</sup>

#### **1.6. Comparing Strong and Weak judicial review.**

The United States is the classical example of strong judicial review, and Canada a classical example of weak judicial review. Despite its classical status, however, Canada is quite similar to the U.S. system, and the clause that allows for legislative override has very rarely been used.<sup>33</sup> The U.K. is a clearer example of weak judicial review, as legislation that the courts find to be in conflict with the European Convention of Human Rights, as incorporated into British law, continues to be in effect and be valid.<sup>34</sup>

Norway is very similar to the U.S. model in terms of institutional design, and is an example of a system of strong judicial review. But it ought to be noted that the way judicial review has been practiced in Norway is quite different from what has been the case in the United States. Norwegian courts, including the supreme court, have for significant periods of time been quite deferential to other branches of government, particularly the legislature and their interpretation of the constitutionality of legislation.<sup>35</sup>

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<sup>30</sup> Ibid, 732.

<sup>31</sup> Human Rights Act, 1998, c. 42, § 4(2), (6), cited in Waldron *Core of the Case Against Judicial Review* (2006), 1355.

<sup>32</sup> See Gardbaum “The New Commonwealth Model of Constitutionalism” (2001) for more on the U.K system and its relationship to, among others, the Canadian system.

<sup>33</sup> This fact leads Jeremy Waldron to regard the Canadian system as strong judicial review, somewhat weakened by the possibility of legislatures invoking the “notwithstanding” clause.

<sup>34</sup> Ibid., 733.

<sup>35</sup> Kierulf, *Taking Judicial Review Seriously* (2014), 157 – 158.

To be sure, differences between nation-states, in institutional design, the authority granted to different branches of government, as well as how systems of judicial review have actually been practised, are important in evaluating and comparing different systems of judicial review. And both the distinction between a European and a U.S. model of judicial review, as well as the distinction between strong and weak judicial review, are theoretical distinctions that to a lesser or greater extent will map on to actual implementations of judicial review.

For now, I will take a step back from concrete examples and examine in more detail the reasons that systems of strong judicial review give rise to doubts about its democratic legitimacy. Arguments that focus on the democratic illegitimacy of judicial review are mainly targeted at systems of strong judicial review. The classical formulation of the problem is due to Alexander Bickel, and what he called the counter-majoritarian difficulty.

### **1.7. The Counter-Majoritarian Difficulty with judicial review.**

In a system of strong judicial review, then, courts are empowered to overrule legislation or decisions made by the state on the grounds that they violate the constitution. And these decisions are the final word on the issue. This is not the case for weak judicial review where the courts may only review legislations or decisions. The reason for this has to do with the potential democratic worry with allowing a small set of judges overrule elected representatives of the people. If the review process does not allow the judiciary to have the authority to render inactive legislation which it rules to be unconstitutional, then potential worries concerned with the democratic legitimacy of judicial review are not so pressing.

There is, *prima facie*, a tension in a system of judicial review in a democracy. If we assume that democracy is essentially rule by current majorities in a society, and that this majority rule is expressed in the decisions of the elected representatives of a people, then how can it be democratically legitimate to allow a small number of unelected judges to overrule the decisions of the representatives of the people? Zurn formulates the problem thusly:

Since representative forms of democracy must involve the legislative enactment and executive enforcement of the will of the people, and since the will of the people is expressed in the majoritarian decisions of their elected representatives any governmental agency that overrules the outcomes of legislative practices appears not only undemocratic, but fundamentally anti-democratic.<sup>36</sup>

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<sup>36</sup> Zurn, “Deliberative Democracy and Constitutional Review” (2002), 468

To be sure, there are issues concerning how a society's elected representatives can be said to actually enforce 'the will of the people', whatever we take that to actually mean. But in principle at least, the justification for relegating decisions to elected representatives is squarely democratic in the sense that the representatives are electorally responsible. Something judges, for the most part, are not. Seip's opinion about judicial review is an example of this line of reasoning.

An influential way of replying to the counter-majoritarian worry has been to say that there ought to be limits on what a majority of voters or legislators can enact. What these limits are taken to be varies depending on who is attempting to impose them. But most often this is framed in a language of rights. That is, the argument is concerned with what individual rights should be protected in a society. The assumption is that individuals have certain rights that no majority can be justified in violating. For instance, we would tend to say that it is not legitimate for democracies to limit access to voting for certain minorities, regardless of what the majority in that society might believe. Seen in this light a system of judicial review becomes a matter of securing some basic individual rights, and hence individual citizens, from unjust state action. Proceeding from this premise, it is possible that rather than being a bug in the system, judicial review is in fact a feature. That is, the limits placed upon majoritarian decisions by a system of judicial review is not a democratic problem, rather it is part of a larger system that helps preserve democratic legitimacy. Or, at least, make sure that minorities can participate in political decisions and processes on the same terms as the majority. While there will be disagreement concerning what exactly the limits of majoritarian decisions ought to be, that there are such limits, on this view, is a good thing, and judicial review is a good way of defining those limits and upholding them.

Another but related defence of judicial review is to point to the constitution that judicial review is there to protect as the true will of the people. While ordinary electoral politics is relegated to political representatives who are accountable to their voters at regular intervals, the constitution provides the basic framework and rights that 'the people' enacted as its most basic principles. On this view, when the judiciary overrules a legislature, it is in fact upholding the most basic political convictions of the demos.

So, while the counter-majoritarian difficulty is certainly a challenge to defenders of judicial review it is by no means a settled issue. It is important to note that the counter-majoritarian

difficulty itself relies on an assumption about how democracy ought to be understood. It expresses a normative ideal for democratic legitimacy, namely that policy decisions made by a government *ought* to have the support of a majority of voters. This view of democracy holds that “[...] at its core, democracy denotes a certain type of political process: majoritarian self-legislation as expressed through electorally accountable representative bodies”.<sup>37</sup>

Which means it may be possible to avoid the counter-majoritarian difficulty by providing a different conception of democracy. In addition to the counter-majoritarian difficulty, there is related, but different concern about judicial review. Namely that it entails rule by a judicial elite.

### **1.8. The Charge of judicial paternalism.**

The counter-majoritarian difficulty is a general worry about the legitimacy of judicial authority overriding legislative authority in political matters. Underlying it is a specific ideal of democracy as majority rule. Christopher F. Zurn highlights another, connected, but different, aspect of scepticism towards a system of strong judicial review. What he calls the charge of judicial paternalism. While the counter-majoritarian difficulty relies on a majoritarian view of democratic legitimacy the notion underlying the charge of paternalism is a somewhat more abstract idea. Namely that democracy implies self-rule, autonomy and self-government. Zurn presents the issue like this:

The issue is not the impact of one’s vote on the outcome – in large collectivities like modern nation-states individual’s electoral impact may well be miniscule – but, rather, the degree to which the decision-making processes accord individuals the capacity to understand themselves as collective authors of the law that each is subject to.<sup>38</sup>

The charge of judicial paternalism centres on the notion that leaving important constitutional matters in the hands of a small group of elite judges may weaken citizen’s political autonomy.

Although Dworkin is a defender of judicial review, in *Freedom’s Law* he articulates a version of this scepticism. He defends what he calls the moral reading of the U.S. Constitution.<sup>39</sup> He sees the constitution as expressing abstract moral principles, and the moral reading is a

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<sup>37</sup> Ibid, 471.

<sup>38</sup> Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (2009), 5.

<sup>39</sup> Dworkin speaks specifically about the U.S. constitution, but I believe his points are valid for constitutionalism in general. Though there will be differences depending on the constitution in question.



strategy for interpreting the constitution. “Lawyers and judges, in their day-to-day work, instinctively treat the constitution as expressing abstract moral requirements that can only be applied to concrete cases through fresh moral judgements”.<sup>40</sup> The moral reading is not the exclusive purview of a judicial elite however. “[It] proposes that we all – judges, lawyers, citizens – interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice”.<sup>41</sup> This means that in interpreting the constitution, everyone, judges included, must ultimately make use of their own judgement. The moral reading is, according to Dworkin, obvious and deeply embedded in constitutional review.<sup>42</sup> And yet it is an interpretive strategy almost no constitutional expert, nor judge, will endorse. The reason for this is that to admit to the moral reading in contemporary U.S. legal and political debate would be to erase the distinction between law and morality, and simply leave law as the preferred morality of a given judge. According to Dworkin:

It [the moral reading] seems grotesquely to constrict the moral sovereignty of the people themselves – to take out of their hands, and remit to a professional elite, exactly the great and defining issues of political morality that the people have the right and the responsibility to decide for themselves.<sup>43</sup>

Dworkin’s further argument is that this worry about judges are not warranted. But it is not difficult to understand why many legal professionals, constitutional scholars and politicians would be reluctant to publicly endorse something like the moral reading. Whether or not the moral reading is the correct view of constitutional interpretation does also matter for the democratic legitimacy of judicial review.

### **1.9. Constitutionalism, Democracy and Judicial Review.**

That the counter-majoritarian difficulty is also relevant for constitutionalism ought not really to be a surprise. After all, a system of judicial review is the enforcer of limits set forth in a constitution. And if the difficulty applies to the enforcer, it also applies to the rulebook, that is, the constitution. Put another way: if we accept that democracy means majority support of legislation, and that we because of this, find a system of judicial review to be in some way democratically suspect because it goes against a majority decision, then this suspicion will also extend to the constitution itself. Prima facie then, the counter-majoritarian difficulty is not simply a challenge to judicial review, it is a challenge to constitutionalism as such. After

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<sup>40</sup> Dworkin, *Freedom’s Law* (1997), 3.

<sup>41</sup> *Ibid*, 2.

<sup>42</sup> *Ibid*, 4.

<sup>43</sup> *Ibid*.

all, why should a constitution enacted hundreds of years ago be used to overrule current majorities from enacting their will?

So, from beginning with worries concerned with judicial review we are led to deeper worries about constitutionalism. This is not to say the worries cannot be calmed. But rather that what is needed for both defenders and opponents of judicial review is a more full-fledged theory of constitutional democracy. Such theories will necessarily be normative rather than descriptive. While they certainly cannot ignore the structure of the countries we call democratic, their *raison d'être* is to develop a theory of democracy that evaluates disparate 'democratic' values and their justifications in order to suggest principles and values upon which the structure of a democracy ought to be based.

### 1.10. What is Democracy?

Democracy means government by the people. But what does that mean? No explicit definition of democracy is settled among political theorists or in the dictionary. On the contrary it is a matter of deep controversy what democracy really is.<sup>44</sup>

Formulations like 'government by the people' or 'popular sovereignty' hints that a central feature of democracy is that the people rule themselves. Even if they do not do so directly, the foundation and source of political power is ultimately the people themselves. If this is the case, any political institution that is to exercise power or decide political matters must in some way be able to justify their legitimacy by tracing the sanctioning of their use of power back to 'the people themselves'.

There are a great many nations which are termed democracies, and they differ a great deal. Democracy is not a question of either-or, but rather a matter of degrees. This can also make it easier to incorporate another feature in political discourse: we often speak of democratic *values*. Oftentimes things like freedom, equality, rule of law and freedom of speech are cited as examples of values that democracies should uphold. Again, these values and their correct interpretation are of course subject to disagreement. This disagreement is, of course, not only political but also philosophical. And the different theorists of democracy I am discussing in this paper are all providing *normative* theories of democracy. They are importantly not attempting to describe or explain how societies we say are democratic are organised.

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<sup>44</sup> Ibid, 15.

Normative democratic theory: “[...] Aims to provide an account of when and why democracy is morally desirable *as well as moral principles for guiding the design of democratic institutions*”.<sup>45</sup> I am not going to pick up the former issue, but focus on the latter. The focus then will be on what values and principles the differing theories of democracy perceive as being the most important. And thus, what values and principles we should base the organisation of a democratic society on.

### 1.11. What is Constitutionalism?

As is the case for democracy there is no settled agreement on what constitutionalism actually entails nor how it is best conceived. But following the counter-majoritarian difficulty and its majoritarian premise, I take as my starting point that constitutionalism implies certain limits on majoritarian decisions.

‘Democracy’ appears to mean something like this: Popular political self-government – the people of a country deciding for themselves the contents (especially, one would think, the most fateful and fundamental contents) of the laws that organize and regulate their political association.

‘Constitutionalism’ appears to mean something like this: The containment of popular political decision-making by a basic law, the Constitution [...].<sup>46</sup>

Put in this way the very notion of a constitutional democracy seems paradoxical. The limits on ‘democracy’ in this formulation is the idea of a ‘basic law’. In *Deliberative Democracy and the Institution of Judicial Review*, Christopher F. Zurn identifies four central pillars of constitutionalism: “the rule of law, a distinction between higher (entrenched) law and ordinary law, the establishment and arrangement of the institutions of government, and, the provision of individual rights”.<sup>47</sup> Beginning with the rule of law, it means that governmental actions are subject to laws.

It requires, in some form or another, that state actions be controlled by legal rules, or at least rulelike legal norms and standards rather than by the indiscriminate and unpredictable decisions of state officials operating in the absence of control by any pre-existing legal standards.<sup>48</sup>

The main reasons for advocating a rule of law in this sense is to provide a predictable framework within which members of a society can act and plan, being able to know what

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<sup>45</sup> Christiano, (2015), “Democracy”.

<sup>46</sup> Michelman, *Brennan and Democracy* (2005), 6.

<sup>47</sup> Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (2009), 84.

<sup>48</sup> *Ibid.*, 86.

actions are permitted by the law and which are not. At the level of constitutional law, we are dealing with the basic framework of political and legal institutions: the scope of their power, and the relationship between them.

The distinction between 'higher' and 'ordinary' law is exemplified by the special requirements for amending the Norwegian constitution. The degree to which higher law ought to be entrenched and harder to change than ordinary law is no settled matter, but the idea that constitutional law set forth a basic framework that ordinary law functions within, is connected both with the arrangement of governmental institutions and the notion of individual rights. In terms of the former, a constitution defines what the basic political institutions of a society are and what powers they have and do not have. One of the major reasons for structuring political institutions in a constitution is to help ensure that they are *good* political institutions.

Constitutionalism, in explicitly allocating various types of political authority to different offices and diversely organised formal and informal political institutions, seeks to prevent predictable abuses of power: for instance, tyranny, oppression, official self-dealing, other forms of corruption, abuse of the powerless, repressive or discriminatory distributions of the benefits of government, and so on.<sup>49</sup>

A constitution, then, does not only set the basic rules and limits for the political institutions, but ideally does this in a way that prevents unwanted, yet foreseeable, abuses of their power. This is closely connected with the final element of constitutionalism that Zurn highlights: individual rights. I have so far not discussed either judicial review, nor constitutionalism explicitly in terms of rights. Even though discussions concerning both are often framed in terms of rights. The basic idea is that a constitution can entrench certain important rights. A basic subdivision of these rights are *political* rights, that is, rights that secure a guarantee of equal political participation, and individual rights, meaning rights that protect an individual's sphere of self-determination from interference from others.<sup>50</sup>

This is not meant to be an exhaustive or complete account of constitutionalism. Rather, it is meant as a starting point from which to examine full-fledged theories of constitutional democracy. And in particular how they respond to the counter-majoritarian difficulty, both for judicial review and constitutionalism itself. Ronald Dworkin has attempted to defuse the counter-majoritarian difficulty.

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<sup>49</sup> Ibid., 97.

<sup>50</sup> Ibid., 101.

In the following I am going to examine two different conceptions of democracy in more detail. One due to Ronald Dworkin (in chapter two), and the other due to Jeremy Waldron (in chapter three). The former argues for judicial review, while the latter argues against. Despite their different conceptions, I argue that both ultimately are problematic. Dworkin because he does not sufficiently include citizen's participation in what he calls his partnership conception of democracy. Waldron, for his part, attempts to base his conception of democracy by marking the right to participation in government as *the* democratic right. However, I believe that Waldron's account ultimately suffers because he does not want to go far enough in the direction of democracy. Chapter four is dedicated to a further discussion of the conceptions of democracy from Dworkin and Waldron. In particular I examine the legitimacy conditions for Waldron's account. I will then present a suggestion from Hutchinson that he calls strong democracy as an approach that can make good on democracy and avoid the trouble Waldron gets into. Recommending an approach he calls *strong democracy*, Hutchinson suggests a democratic conception that would require significant changes in contemporary democracies, if they were followed. Finally, in chapter five, I argue that argument against strong judicial review, that are based on an understanding of democracy as participation in government, and that furthermore ties principles of legitimacy to citizen's participation in government, will tend to imply a scepticism also towards an entrenched constitution that requires a supermajority to revise or amend.

## Chapter 2: Ronald Dworkin; The Partnership Conception of Democracy.

Ronald Dworkin (1931-2013) was a legal scholar and philosopher who wrote extensively on political philosophy and law. He was concerned with the nature of judicial interpretation, particularly constitutional interpretation, and was also a defender of strong judicial review. The latest development of his political philosophy can be found in *Justice for Hedgehogs* from 2011. Here he advances what he calls the partnership conception of democracy as an alternative to a majoritarian conception. This partnership conception is part of a larger thesis that Dworkin advances in *Justice for Hedgehogs*, the unity of values.

In the following I will first examine central features of the unity of value thesis, and show how Dworkin's partnership conception fits into this larger framework. I believe it is useful, in order, to understand Dworkin's notion of democracy to place it within his theory on both ethics and morality, especially since he himself sees all of this as different parts of the larger field of value. I will then move on to the particulars of Dworkin's conception and develop these by looking at an earlier book, *Freedom's Law*, from 1996, where he argues that the collective actions of a democratic society, ought to be understood as a special kind of collective action. While the discussion in *Freedom's Law* is undertaken in somewhat different terms and ways, the similarities to the conception presented in *Justice for Hedgehogs* is striking. Lastly I will deal with Dworkin's view of judicial review. I take this rather circuitous route to judicial review because Dworkin is advocating for a definition of democracy that, if successful, would take the sting out of the charge that judicial review is anti-democratic. I will argue that Dworkin's defence is not necessarily strong enough to argue for a system of strong judicial review. But that it nonetheless provide an interesting perspective that will also inform and challenge Jeremy Waldron's attack on judicial review in the next chapter.

### 2.1. The Unity of Value.

Value is one big thing. The truth about living well and being good and what is wonderful is not only coherent but mutually supporting: what we think about any one of these must stand up, eventually to any argument we find compelling about the rest. I try to illustrate the unity of at least ethical and moral

values: I describe a theory of what living well is like and what, if we want to live well, we must do for, and not do to, other people.<sup>51</sup>

The unity of value is a big thing indeed. In addition to the ethical and moral fields, Dworkin also sees political morality as part of the larger field of value. The position is an explicit rejection of value pluralism. It says that, despite appearances to the contrary, different values do not conflict with each other.

For instance, freedom and equality are often thought to conflict. My freedom to do what I want is constrained by a government that prohibits, for example, the buying of votes. On this view, while such prohibitions may well be justified by demands of equality, it nonetheless requires us to balance different and conflicting values. The unity of value thesis holds that, properly understood, freedom and equality does not conflict. Rather than having to balance the demands of freedom against the demands of equality, these values will demand the same things. Provided we understand them correctly. In order to do this, Dworkin relies on an account of interpretation wherein any value concept ought to be interpreted in such a way that it supports and cohere other values. Together these different values form a mutually supportive network. For Dworkin, it is part of our ethical obligations to take up the challenge of constructing such a framework. Whether we succeed will be a matter of degrees, but the only thing that can support our moral values are, at the end of the day, other moral values. In line with unity of value thesis, this also applies to the ethical and political realm. In Dworkin's words this thesis is: "[...] the hedgehog's faith that all true values form an interlocking network, that each of our convictions about what is good or right or beautiful plays some role in supporting our convictions in each of those domains of value".<sup>52</sup>

## **2.2. The impossibility of external scepticism.**

Dworkin believes that coherence is an essential criterion for evaluating our value judgements. But he does not endorse a coherence theory of truth for value judgements. That is, a value judgement is not made true by virtue of coherence. Dworkin insists on the idea that moral convictions are *truth-seeking*.<sup>53</sup>

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<sup>51</sup> Dworkin, *Justice for Hedgehogs* (2011), 1. Dworkin uses the term "ethics" about individuals, it concerns what we ought to want to be and do in our lives. And he uses "morality" about how we ought to treat other people. When we make an ethical judgement, we judge our own or other's conception the good life, and when we make moral judgements we judge how we ought to treat others.

<sup>52</sup> *Ibid.*, 120.

<sup>53</sup> *Ibid.*, 99.

*That* there are truths about value is an obvious, inescapable fact. When people have decisions to make, the question of what decision they should make is inescapable, and it can be answered only by noticing reasons for acting one way or another; it can be answered only in that way because that is what the question, just as a matter of what it means, inescapably calls for.<sup>54</sup>

The claim that there are truths about values, *and* that this is an “obvious” and “inescapable” fact is rather surprising considering the impressive amount of energy that has been exerted by philosophers and others in the pursuit of answering this question. As far back as Socrates’ quarrel with the sophists about the nature of truth. But certainly, in later philosophy with non-cognitivist theories in meta-ethics. The emotivism of A. J. Ayer and C. L. Stevenson, and then the quasi-realism of Simon Blackburn, and Allan Gibbard’s norm-expressivism, were all part of a project that explicitly rejected that value judgements, or more specifically, statements about value, could be either true or false.

Non-cognitivist theories are an example of what Dworkin labels *external scepticism*. This is distinguished from *internal scepticism* in that the former raises questions *about* morality as such, while the latter raises questions *of* morality. The distinction is in philosophy known as first-order vs. second-order judgements or beliefs. For instance: my belief that punching Nazis in the face is wrong, permissible, or right, is a first-order moral judgement. My further belief that any judgement as to the wrongness or rightness of punching Nazis in the face is neither true or false is a second-order belief. First-order beliefs pose questions *of* morality, whereas second-order beliefs pose questions *about* morality.

Dworkin rejects external scepticism wholesale. He argues that any answer we give to a question of morality or ethics are answers *of* morality and ethics, not about them. “Philosophy can neither impeach nor validate any value judgement while standing wholly outside that judgement’s domain”.<sup>55</sup> For Dworkin there is no distinct meta-ethical field of philosophy, the question of whether there are moral truths is itself a substantive moral issue, not a meta-ethical one.<sup>56</sup> Dworkin’s project is to advance an ambitious version of a substantive moral theory that covers not only ethics and morality, but also politics. His starting point is the concept of dignity.

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<sup>54</sup> Ibid., 24.

<sup>55</sup> Ibid., 37.

<sup>56</sup> Ibid., 67.



### 2.3. Dignity and its two principles.

Dworkin's strategy for illuminating and arguing for the unity of value thesis is to identify basic principles of ethics, and then show how these can be used to provide a substantive account moral theory that can encompass ethics, morality and political morality.

Dworkin grounds his conception of ethics and morality in the concept of dignity. He defines dignity by advancing two basic and abstract principles: *self-respect* and *authenticity*. These two principles are fundamental for living well.<sup>57</sup> *Self-respect* means that: "Each person must take his own life seriously: he must accept that it is a matter of importance that his life be a successful performance rather than a wasted opportunity".<sup>58</sup> Formulated a little differently, this principle require that we recognize the objective importance of our own lives.

*Authenticity* demands that: "Each person has a special, personal responsibility for identifying what counts as success in his own life; he has a personal responsibility to create that life through a coherent narrative or style that he himself endorses".<sup>59</sup>

Formulated in this way the principles apply to the ethical realm, that is, they are principles of personal morality. Throughout *Justice for Hedgehogs* Dworkin develops and reformulates the two principles in the domain of ethics, morality, and politics. In the political domain, Dworkin's formulation of the two principles of dignity is this:

1) "[Government] must show equal concern for the fate of every person over whom it claims dominion".<sup>60</sup>

2) "[Government] must respect fully the responsibility and right of each person to decide for himself how to make something valuable of his life".<sup>61</sup>

Dworkin does not see the different formulations or domains as hierarchical, nor is one more fundamental than any other. Rather, in line with the unity of value thesis, they are all different domains within the larger field of value.

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<sup>57</sup> Ibid., 203.

<sup>58</sup> Ibid., 203.

<sup>59</sup> Ibid., 204.

<sup>60</sup> Ibid., 2.

<sup>61</sup> Ibid.

#### 2.4. Collective action: statistical and communal.

Dworkin sees political morality, the obligations we have by virtue of our membership of a political community, as derived from the moral obligations we create to other people through special acts like promising something. Politics is a distinct field because here we are not simply engaging with what we as individuals owe each other, but what we all owe each other as part of a distinct political entity. That is, the duties we collectively owe to each other because we are part of the same political community. For Dworkin: “Political obligation [...] marks the transition from the personal to the political, because citizens acquit their political obligations in part through a separate, artificial collective entity”.<sup>62</sup>

In *Freedom’s Law*, Dworkin answers the question of what this entity is by pointing to a particular form of collective action, namely, what he terms *communal* collective action. This is distinguished from *statistical* collective action. He defines statistical collective action as being a function of the individual actions of the group’s members. We can use the stock market as an example: certain stocks will have a higher or lower price depending on the individual actions of many different traders. But when we speak of what the stock market does it is not necessary to talk about a distinct *agent* that made these decisions. Any such talk can easily be replaced by speaking of the actions of individuals instead.

Communal collective action, on the other hand, is distinguished by a kind of agency where the action cannot simply be reduced to the individual actions. Dworkin uses the examples of an orchestra or football team embodying this kind of communal collective action. For a football team to play well they must play *as* a team. The players of a football team aim to contribute to the performance of the team, and take part in a collective responsibility for the team’s performance.<sup>63</sup> Communal collective action means that the members of a group see themselves as acting together in a special form of agency. “It is a matter of individuals acting together in a way that merges their separate actions into a further, unified, act that is together *theirs*”.<sup>64</sup>

Membership in this communal sense is what Dworkin calls *moral membership*. There are certain conditions that, when they apply, will enable us to count an individual as a genuine member of a political community, capable of acting communally. Dworkin separates the conditions of moral membership into two: structural and relational. Structural conditions apply to the community as a whole and will include historical, cultural, and even

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<sup>62</sup> Ibid., 327.

<sup>63</sup> Dworkin, *Freedom’s Law*, 20.

<sup>64</sup> Ibid., 20.

psychological facts about that community that makes it reasonable to consider it appropriate to count its members as *moral members*.<sup>65</sup> For instance: “The political community [...] must have been established by a historical process that has produced generally recognized and stable territorial boundaries”.<sup>66</sup> Further conditions can attach to a shared culture, and political history. In short, structural conditions are those that would pick out a legitimate nation state (Whatever we take legitimate to mean in this context).

Relational conditions are most important for my purposes here because they describe how individual members ought to be treated by the community for moral membership to apply. Dworkin says that: “A political community cannot count anyone as a moral member unless it gives that person a *part* in any collective decision, a *stake* in it, and *independence* from it”.<sup>67</sup> That we have a part in the collective decisions of our democracies for Dworkin means that we have an opportunity to make a difference in the decisions of our community and, importantly, that differences in the political power of different individuals “[...] must not be structurally fixed or limited in ways that reflect assumptions about his worth or talent or ability, or the soundness of his own convictions or tastes”.<sup>68</sup> That we have a stake in our community means that it expresses “[...] some bona fide conception of equal concern for the interests of all members [...]”.<sup>69</sup> Which is to say that a community that shows insufficient concern for the consequences for some members compared to others, will not meet the conditions for moral membership. Per Dworkin, this point explains another significant intuition many share about a democracy: “[...] that a society in which the majority shows contempt for the needs and prospects of some minority is illegitimate as well as unjust”.<sup>70</sup>

That we have independence from our community means *moral* independence to form and hold our own opinions, values, and views on what it means to lead a good life. Many issues of justice and law in a democracy must be decided collectively, and in those arguments some will inevitably lose. But on Dworkin’s view, a very important condition is that the majority does not lay claim to dictate an individual’s conception of the right life to lead. “Someone who believes in his own responsibility for the central values of his life cannot yield that

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<sup>65</sup> Ibid., 23.

<sup>66</sup> Ibid., 24.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid., 25.

<sup>70</sup> Ibid..

responsibility to a group, even if he has an equal vote in its deliberations”.<sup>71</sup> This is the outline of what genuine membership of a political community entails in *Freedom’s Law*.

In *Freedom’s Law*, the conditions for moral membership are not seen by Dworkin in connection to the larger unity of value thesis. But there are striking similarities in the conditions for moral membership and the two principles of dignity. Equal respect and concern are at work in both. The most important feature of this kind of membership for my purposes here is that it allows Dworkin to explain political legitimacy.

A government has legitimacy over a political community in the case where it respects certain conditions. Where the conditions of moral membership are one step in this direction, the two principles of dignity can express a very similar point, but in a different, and perhaps, more refined way: “Governments [...] can be legitimate if their laws and policies can nevertheless reasonably be interpreted as recognizing that the fate of each citizen is of equal importance and that each has a responsibility to create his own life”.<sup>72</sup>

## **2.5. Rights.**

Recall that the principles of dignity I described earlier was first found in the ethical field. In moving to the political realm these principles are still important, but they must be (re)interpreted in terms of what distinguishes the political field, namely what obligations we all have to each other when we act in, and as, the artificial collective agent that Dworkin believes a legitimate political community is. This part also sheds light on Dworkin’s conception of rights.<sup>73</sup> Where we in the ethical or moral realm more easily speak of obligations, the shift to speaking in terms of rights makes more sense in the realm of political philosophy.

When we come to political morality [...] rights plainly provide a better focus than duties or obligations, because their location is more precise: individuals have political rights, and some of those rights, at least, are matched only by collective duties of the community as a whole rather than of particular individuals.<sup>74</sup>

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<sup>71</sup> Ibid., 26.

<sup>72</sup> Dworkin, *Justice for Hedgehogs* (2011), 322.

<sup>73</sup> Ibid., 327-328.

<sup>74</sup> Ibid., 329.

Obligations and duties provide constraints on what would otherwise be a reasonable decision. Capturing the same idea in the political sphere, Dworkin suggests we ought to view rights as “[...] trumps over otherwise adequate justifications for political action”.<sup>75</sup>

For instance, prohibiting certain kinds of political speech or indefinitely detaining people suspected of terrorist sympathies may be thought to make the society safer. But safety is not, on this view, a reason for enacting these policies as they would violate the political rights of its citizens.

Conceiving of rights in this way means that the question of what rights we have, is also the question of what individual interests are so important that they trump almost all other considerations? The answer to this can be found in Dworkin’s partnership conception of democracy.

## **2.6. Partnership vs Majoritarian conception of democracy.**

Dworkin distinguishes between two different conceptions of democracy. The *partnership* conception and the *majoritarian* conception. In *Justice for Hedgehogs* he defines the majoritarian conception like this: “The majoritarian conception holds that people govern themselves when the largest number of them, rather than some smaller group within them, holds fundamental political power”.<sup>76</sup> Political institutions must be designed with this in mind for them to be democratically legitimate. Representative government, for instance, might be necessary in a complicated modern society, but features like regular and fair elections are meant to ensure that political decisions will be those that a majority prefers. This is what grants legislation its legitimacy.

Dworkin's preferred option is the partnership conception: “[...] it holds that self-government means government not by the majority of people exercising authority over everyone but by the people as a whole acting as partners”.<sup>77</sup> My previous discussion of communal collective action and moral membership give pretty solid hints as to what Dworkin means by this conception. But while the content is similar there is a twist.

The unity of value thesis Dworkin is working with in *Justice for Hedgehogs* means that rather than being grounded in the qualifications for collective communal action, the partnership conception is grounded in the two principles of dignity. In terms of these, a political

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<sup>75</sup> Ibid., 329.

<sup>76</sup> Ibid., 383.

<sup>77</sup> Ibid., 384.

community act as a partnership when they accept that they must act with equal respect and concern for all partners. Or in somewhat different terms: “If each accepts a standing obligation not only to obey the community's law but try to make that law consistent with his good-faith understanding of what every citizen's dignity requires”.<sup>78</sup> This does not, however, require unanimity on what dignity requires, that is, what policies ought to be enacted. There will be disagreement over issues, but provided the members of a political community uphold the conditions of legitimacy they can form a partnership nonetheless. This obligation can be said to obtain when the fundamental conditions of legitimacy are respected. For Dworkin:

A political community has no moral power to create and enforce obligations against its members unless it treats them with equal concern and respect; unless, that is, its policies treat their fates as equally important and respect their individual responsibilities for their own lives. That principle of legitimacy is the most abstract source of political rights.<sup>79</sup>

In other words: Government must respect the two principles of dignity, for each and every person in the political community, in order to be a legitimate source of political obligations. The further question of what particular rights we have can be developed by examining what these abstract formulations actually require on different questions. “We fix and defend particular rights by asking, in much more detail what equal concern and respect require”.<sup>80</sup>

I will now turn to Dworkin’s further development of the partnership conception and how our concepts of equality of political power and liberty can be interpreted in a way that makes sense of some of the dilemmas and paradoxes the majoritarian conception finds itself in.

## **2.7. Equality of political power.**

Democracy demands an equality of political power. But what does this mean in practice? What does the demand for equal political power for all citizens actually amount to? Dworkin distinguishes three possible interpretations of political power: as influence, impact, and attitude. Equality of influence, according to Dworkin, means that all citizens have an equal chance that his or her preferred policies will be enacted. “Each of them has as great a chance as any other adult citizen that the opinions he brings to the political process will in the end

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<sup>78</sup> Ibid., 384.

<sup>79</sup> Ibid. 330

<sup>80</sup> Ibid., 330.

become law or state policy”.<sup>81</sup> Impact, on the other hand, disregards the resources different citizens have to influence others. A citizen's political impact is a matter of whether or not the opinion he or she forms is given equal weight in the final decision. “A person's influence includes his power to persuade or induce others to his side, his impact is limited to what he can achieve through his own opinion without regard to what others believe”.<sup>82</sup>

In terms of influence, leaders of political groups, as well as rich individuals, or even just people who are very persuasive, will be able to convince many more that their positions are the correct ones. Dworkin admits that some of these inequalities may be problematic, like the greater political influence afforded to wealthy citizens, but he argues in *Freedom's Law* that in these cases it is not the inequality itself, but rather the source of the inequality that is problematic.<sup>83</sup> For most cases, however, Dworkin believes that inequalities of influence are a feature of democracy that we cannot get rid of. Equality of influence would only really be possible in a dictatorship where the influence of ordinary citizens would be the same: non-existent.

But as equality of impact the case is no better, according to Dworkin. Democracies do not, and cannot, decide all matters by referendum. The majoritarian conception accepts representative democracy as a necessary compromise. According to Dworkin, however, it makes no sense why we should care about equality of impact. This is because the likelihood that my one vote will make any difference *at all*, in either a concrete political decision or in who gets elected to parliament, is vanishingly small, even in a country as small as Norway. “People in a large community whose political impact is actually or close to equal have no more power over their own governance, just as individuals, than they would if priests took political decisions by reading entrails”.<sup>84</sup> Dworkin's basic idea here is that any concrete attempt to find a metric of power, a way of measuring the difference each individual citizen can make, will fail because of the myriad of actual differences in political power.

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<sup>81</sup> Ibid., 388.

<sup>82</sup> Ibid.

<sup>83</sup> Dworkin, *Freedom's Law*, 27. According to Dworkin, wealth ought not make a difference in political influence because it is unfairly and unequally distributed. While this approach might work for elected or appointed representatives, there are many things that increase political influence that are not fairly and equally distributed. Charisma, persuasive ability, and fame, to mention just a few. Dworkin does not provide a case for why wealth is especially problematic. This is a minor feature, but may have consequences for Dworkin's support for limits on financial contributions to political candidates. In *Justice for Hedgehogs*, he limits himself to saying it is regrettable because “We regret some people's special influence because it is grounded in wealth, which we think should make no difference in politics” (*Justice for Hedgehogs*, 389).

<sup>84</sup> Dworkin, *Justice for Hedgehogs* (2011), 390

So, according to Dworkin, our political power understood as equality of influence does not make sense. And our political power understood as equality of impact is so small as to not merit attention. Then why bother with political equality at all? Dworkin's answer is, of course, the third interpretation, that of attitude. Here the equality we ought to be concerned with is that of the status of citizens, rather than their ability to make any real difference in political decisions as individuals. For Dworkin, political equality ought to mean this: "that no citizens have less impact than any other *because of reasons that compromise his dignity*".<sup>85</sup> Eschewing any attempt at what he calls a mathematical conception of political equality, Dworkin sees the value of political equality in signalling the equal concern and respect for the members of a political community.

If any citizen is assigned less electoral impact than others, either because he is denied a vote or they are given extra votes, or because electoral arrangements place him in a district with more people but no more representatives, or for any other reason, then the difference signals a lesser political standing for him, unless it can be justified in some way that negates that signal.<sup>86</sup>

On this view, any policy that denies the vote to certain groups, either based on gender, wealth, education or any other justification, will most likely be illegitimate. But many inequalities will be perfectly allowable. Dworkin uses the United States and its problematic history of racial injustice as a reason that policies increase the chances of black representatives would be allowable, provided whites are not outright denied the vote. But even in this case it ought to be noted that the reason whites cannot be denied the vote is not because it would reduce their political power, but because of the symbolism of such a denial. Conceivably on this view, it is perfectly allowable to deny certain groups the vote, provided we find some appropriate way of countermanding the symbolism of such a denial. Though I will grant Dworkin that it is exceedingly hard to imagine what might countermand such a signal, given the emphasis in actual democracies on the right to vote and its importance. At any rate, Dworkin believes that the partnership conception can make better sense of the principle of equality of political power, than the majoritarian conception.

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<sup>85</sup> Ibid., 388.

<sup>86</sup> Ibid., 391.



## 2.8. Liberty, positive and negative.

Dworkin takes the same approach to the concept of liberty. A classic concept of liberty is John Stuart Mills definition of liberty as the freedom to do what one wants.<sup>87</sup> On this view any government will necessarily limit our liberty. Any law or regulation whatsoever will infringe liberty: Meaning that while it may be necessary to prohibit murder we are nonetheless compromising on an important value. That the liberty or freedom of a community is eroded when a constitution hinders or restricts the range of decisions available to the majority, is perhaps most easily understood in terms of Isaiah Berlin's distinction between *negative* and *positive* liberty. In the classical text "Two conceptions of Liberty", Berlin defines negative liberty as the answer to the question: "What is the area within which the subject – a person or group of persons – is or should be left to do or be what he is able to do or be, without interference by other persons". While positive freedom is the answer to the question: "What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that".<sup>88</sup> For Berlin, these two conceptions of liberty were bound to clash. Defining negative liberty as being able to do what you want without interference from others, will necessarily conflict with any law. On this view, even though we have very good and valid reasons for prohibiting murder, we are nonetheless infringing on the (negative) liberty of the citizens.

Dworkin cannot accept this on pain of abandoning the unity of value thesis. So while he employs the distinction between positive and negative liberty, he seeks to provide an interpretation of the terms that make them cohere rather than conflict. On Dworkin's understanding the distinction between positive and negative liberty corresponds to two questions: "How can coercive government by a group larger than a single person be self-government for everyone?", and "If coercive government is legitimate at all, then how can we carve out some area of decision and activity that government has no right to regulate?".<sup>89</sup>

According to Dworkin, the answers to these two questions are theories of liberty because the second principle of dignity states that responsibility for our own lives are only compatible with governance by others when certain conditions are met. The answer to the first question is that everyone be allowed to participate, in the right way, in issues that concern them. The answer to the second question is that the political community cannot collectively decide issues that personal responsibility demands the individual decide for himself.

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<sup>87</sup> Ibid., 345.

<sup>88</sup> Berlin, "Two concepts of Liberty" (1969), 122.

<sup>89</sup> Dworkin, *Justice for Hedgehogs* (2011), 365.

Dworkin says that:

A theory of positive liberty stipulates what it means for people to participate in the right way. It offers, that is, a conception of self-government. A theory of negative liberty describes which choices must be exempt from collective decisions if personal responsibility is to be preserved.<sup>90</sup>

In this way, Dworkin argues for the compatibility rather than the conflict of positive and negative liberty. The partnership conception explains positive liberty by interpreting the notion of self-government. Pointing to the basic conditions of legitimacy that must be in place so that a political community can properly be regarded as a partnership. Meaning things like universal adult suffrage, reasonably fair and free elections, as well as free speech, to mention a few. Negative liberty, on the other hand denotes those issues that cannot be subject to collective decisions, on pain of weakening the legitimacy of the democracy as a whole. These two conceptions of liberty are not in conflict, rather they are both necessary for democracy. Participation “in the right way” is very important here because these are conditions for the legitimate exercise of citizen’s influence on their government.

## **2.9. The Partnership Conception and Representative, Constitutional Democracy.**

As presented by Dworkin, the majoritarian conception allows for representative democracy as a necessary evil. While we ideally would want rule by direct democracy, in a modern and complicated democracy this is not feasible. So, we implement protections like free speech, and fair elections, which are meant to ensure that we can be reasonably certain that the decisions made will be in line with the wishes of the majority. For Dworkin, the case is a different one. He believes that representative government is justified by a different metric. The test he proposes is that any differences in political impact must meet two conditions:

(1) The first is that the difference “[...] must not signal or presuppose that some people are born to rule others”.<sup>91</sup>

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<sup>90</sup> Ibid., 365

<sup>91</sup> Ibid., 392.

According to Dworkin: “There must be no aristocracy of birth, which includes an aristocracy of gender, caste, race, or ethnicity, and there must be no aristocracy of wealth or talent”.<sup>92</sup>

The second condition is tied to the conditions of legitimacy in a more substantive way:

(2) Constitutional designs can create differences in impact, so long as they plausibly increase the overall legitimacy of the political community.<sup>93</sup>

Given the larger framework that Dworkin is working with, constitutional arrangements and political institutions that provide a better protection of individual rights than their alternatives, entail no problem of democratic legitimacy. This is ultimately because legitimacy refers back to the substantive demands of the partnership conception. And provided these are fulfilled, there is no lack of democratic legitimacy. So how would Dworkin make sense of the legitimacy of representative democracy, according to these two conditions? In his words, the first condition is:

“[...] automatically satisfied, however, by any constitutional arrangement that lower the political impact of all citizens across the board; there can be no suspicion of indignity to any person or group when an important decision is left to an elected parliament, rather than offered to the people at large in a referendum. If that decision counts as a partial disenfranchisement, it disenfranchises all unelected groups and persons equally”.<sup>94</sup>

Representative democracy is then not a challenge to democratic legitimacy on the partnership conception. At least not according to the first condition. What about the second condition? If it is true, as Dworkin argues that rule by legislature is better than rule by popular vote or town meeting in protecting rights, then the second condition is also met.

This does lead to somewhat of a challenge, however. How are we to evaluate the latter claim? Dworkin admits of no easy answers to this: “Reasonable people and politicians will disagree about which such structures improve the chance that the community will show equal respect and concern for all and each. But that is the test the partnership conception offers, not the cruder mathematics of majority rule”.<sup>95</sup>

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<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid., 393.

<sup>95</sup> Ibid., 394.

## 2.10. Judicial Review and The Partnership Conception of Democracy.

I am going to present what I believe are Dworkin's main arguments for judicial review. In *Justice for Hedgehogs*, the explicit defence for judicial review is somewhat limited. For the most part his defence of judicial review can be said to lie in defusing the counter-majoritarian difficulty. The partnership conception is a theory of democracy that, if accepted, will make anti-majoritarian features of our democracies less prima facie worrisome. What matters is the twofold condition that they disenfranchise equally, that is privilege no aristocracy; and second that those institutions are likely to make the right decisions. For the case of judicial review, the first condition is satisfied so long as no one is barred from the judiciary on the basis of birth, wealth or talent. So that is likely to be satisfied in many countries.

This is essentially the same as his treatment of representative government. The legitimacy conditions for political institutions that transfer power from the many to the few, are justified if (1) they do not signal any kind of aristocracy of birth, wealth or talent. And (2) they must also plausibly be more likely to protect the rights of individuals than their alternative. Legitimacy understood in this manner is a matter of degrees, not either/or. The value of universal suffrage for Dworkin is in its value as a signal that all members of the society are treated with equal concern and respect. As representative government does not assume any aristocracy or hierarchy of birth, wealth or talent, it does not violate the first requirement. And since it is at least plausible that representative government is better at protecting individual rights than rule by referendum or town hall, there is no defect in the democratic legitimacy of representative government.

Dworkin makes the same basic case for judicial review. First, it does not signal any kind of aristocracy of birth, wealth or talent. This is because while judicial review may be a disenfranchisement of ordinary citizens, in that power is transferred from the legislature to the judiciary, it is not a *selective* disenfranchisement. It disenfranchises us all equally. For the United States, Dworkin answers the second question by saying that overall judicial review has led to better than decisions. While expressing disappointment in some recent supreme court decisions, he nonetheless: “[...] [B]elieve that the overall balance of its historical impact remains positive. Everything now turns on the character of future Supreme Court nominations. We must keep our fingers crossed”.<sup>96</sup>

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<sup>96</sup> Ibid., 399.

As a counterfactual defence of judicial review, this is very hard to evaluate. As Dworkin, himself admits, questions about rights are usually quite difficult and complex. I will discuss some arguments for why the judiciary might be more likely to get things right in the section about Waldron, but for now I want to leave such empirical matters to the side. Instead I will examine the main arguments Dworkin levels in defence of the democratic legitimacy of judicial review

I propose to call the first argument from *equal disenfranchisement*. Judicial review entails no aristocracy of birth, wealth or talent, and therefore pose no prima facie democratic legitimacy problems. Especially considering that there are other anti-majoritarian features of our democracy we are not, for the most part, similarly concerned with. The executive branch, the administration, and the bureaucracy all entail a transfer of power from citizens or their elected representatives to institutions. And a representative democracy itself transfers power from citizens to their political representatives. If we argue that these transfers of power are legitimate in the case of the executive, but not in the case of judicial review, there is an inconsistency that must be addressed. Put another way: if we understand democratic legitimacy as majority rule, there are many features of contemporary democracies that are democratically problematic. Even if this is a matter of degrees, it would seem like you need a further argument as to why we need to worry so much about judicial review, but not, for instance, the executive branch.

The next argument, I call *the partnership argument*. This is an implicit argument in that the partnership conception of democracy provides an alternative basis for democracy than that expressed in the counter-majoritarian difficulty. The partnership conception could potentially defuse the counter-majoritarian difficulty. To the extent that the partnership conception can show how and why a system of judicial review is no threat to the democratic character of a society, while preserving our most important democratic principles and values, it is a potentially powerful argument against the counter-majoritarian difficulty. Dworkin's conception of democracy as those institutions that best respect and uphold the principles of dignity, does not attach democratic legitimacy to participation.

A third argument is connected with the partnership argument, but it brings Dworkin's entire unity of value thesis into the picture. I call this *the dignity argument*. Dworkin's theory is built from the two principles of dignity. Ultimately the demand for a recognition of both responsibility and self-respect in the ethical, moral, and political domains is deeply

connected. This does not seem like a very strong argument, but it can, I believe be enhanced when viewed in direct relation to Dworkin's two principles of dignity. His conception is that human dignity fundamentally means recognizing the objective importance of your own life and, by extension into the moral domain, the objective importance of the lives of others. Furthermore, independence says we ought to consider it our responsibility to develop our own comprehensive ethical, moral and political conceptions. If we grant the collective the authority to overrule our own conceptions, then we jeopardize not only our sense of responsibility and independence, but our self-respect.

Viewed in this light, judicial review is put in a stronger position than simply as the protector of a given set of rights. On this view, the entrenchment and judicial protection of rights does not only guard our political rights. They can also enhance our moral, ethical, and political lives overall. Because rights are of the same kind as moral obligations to ourselves and others, judicial review can be seen as a valuable enhancer of the features of the human condition that are necessary to uphold values like the equal worth of human beings. This argument does not say that judicial review is the only way to do this. But it can say that it is good way to do this, and one that does not, appearances to the contrary, pose a problem to our democratic commitments. Much of the force of this argument stems from, in my opinion, its considerations of broader democratic values and considerations that move well beyond an identification of democracy with simple majority rule.

This formulation of the argument is my own and not one that Dworkin fleshes out in precisely these terms. But I believe it is a reasonable argument to draw out from his writings. It draws from his insistence that counter-majoritarian features of a democracy can be more democratically legitimate provided they reach decisions that respect the two principles. As an addendum to this, Dworkin's larger unity of value thesis says that there is a clear connection between our political, ethical, and moral lives. Which frankly seems like a obvious point to make. But Dworkin is hopeful that the unity of value thesis also gives us good reasons for being optimistic about improving and resolving our political disagreements. According to Dworkin, we are constructing a coherent conception of all values, all formed from the basic recognition of human dignity. One that challenges us personally, collectively, and communally.

The next argument I want to discuss is what I call *the Lifeboat* argument. When speaking about the majority vote as a way of making collective decisions, Dworkin makes the case that a majority vote is not intrinsically fair.

When a lifeboat is overcrowded and one passenger must go overboard to save the rest, majority vote would seem close to the worst method of choosing the victim. Personal attachments and antagonisms would play a role they should not play, and so a lottery would be much superior. Those attachments and antagonisms spoil politics as well, but on a much larger scale, and this makes the idea that majority vote is intrinsically or automatically fair in that context seem at least dubious”.<sup>97</sup>

There are two parts to this quote. The first is an argument against the intrinsic or automatic fairness of majority decisions. The second is an argument that the same, or at least similar, personal considerations that makes majority vote an unfair way of determining who gets thrown overboard are equally unfair when we make political decisions. The first claim, I believe, is not very controversial, nor as strong as Dworkin would like. The second is interesting, and I will address this question through a comment by Jeremy Waldron.

In “A Majority in the Lifeboat” Jeremy Waldron attempts a reconstruction as to what the lifeboat example can be taken to show (ranked from strongest to weakest):

1. It is silly to think that majority-decision is intrinsically fair or intrinsically valuable.
2. It is not the case that majority-decision is ever intrinsically fair or intrinsically valuable.
3. Majority-decision is not intrinsically fair or intrinsically valuable in all circumstances.
4. Majority-decision is not intrinsically fair or intrinsically valuable in circumstances just like the lifeboat example.<sup>98</sup>

Waldron then puts forth the conclusion that he believes Dworkin wants to reach:

5. A definition that ties the term firmly to majority-decision is an unhelpful misconception of democracy.<sup>99</sup>

Of the four reconstructions, it is really only (1) and (2) that would get Dworkin to his desired conclusion. Waldron says it is not clear how the lifeboat example could help to establish (1) or (2). It might show is something like (3) or (4), but these cannot support (5).

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<sup>97</sup> Ibid., 348.

<sup>98</sup> Waldron, “A Majority in the Lifeboat” (2010), 1048-1049.

<sup>99</sup> Ibid., 1049.

[...] [W]hat the lifeboat example might illustrate: It offers us an instance of a strange sort of case in which any enthusiasm we might have for majority decision might need to be qualified (for certain odds kinds of case). That's conclusion (4) above. But that won't get us to (5); it doesn't establish the inappropriateness of majoritarianism in general, let alone the "silliness" of associating it with democracy.<sup>100</sup>

I agree that the lifeboat example does not really show what Dworkin would need it to, if what he is looking for is a knock-down argument against defining democracy as rule by majority decision. But it is not clear why he should need this. Regardless, I do believe the lifeboat example convincingly makes the case that a majority decision is not intrinsically fair. But neither do I believe that to be a very controversial question.

The more interesting question to me here is the degree to which electoral politics can be spoiled by "personal attachments and antagonisms". Assuming that we can understand "politics" here as *electoral* politics, then the accusation is that its participants are too easily led from honest deliberation and voting because of "personal attachments and antagonisms". This signals a rather deep scepticism about electoral politics. Which is not to say that he is wrong. There are many good reasons to be sceptical about the behavior of legislatures and the politicians that inhabit them. Worries over democracy as mob rule, subject only to selfishness, political infighting, and other "attachments and antagonisms" are quite common. The basis for these are diverse, but for Dworkin it seems clear that he believes elected legislatures are more likely to fall prey to the personal attachments and antagonisms that spoil politics. And that supreme court judges are more resistant to these spoilers. Zurn describes Dworkin's position like this:

Because the legitimacy conditions concern individual rights and fundamental principles, they should be handled by an independent judiciary that has the requisite competences and lacks the distorting pressures of power blocs and private interests. [...] Dworkin believes that legislatures cannot fill this role, as their debates are rarely of high quality with respect to fundamental moral principles, their decisions are often substantially influenced by power blocs, and they usually aim at compromises that undermine the deontic quality of principles.<sup>101</sup>

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<sup>100</sup> Ibid., 1054.

<sup>101</sup> Zurn, *Deliberative Democracy and Institutions of Judicial Review* (2009), 117.



The last argument I call the argument from *public debate*. In *Freedom's Law*, Dworkin says that when an issue becomes a subject for the supreme court it serves to enhance the public debate more than if it would have been a case just for the legislature.<sup>102</sup> It enhances it in a way that pays more attention to the questions of political morality.

When an issue is seen as constitutional [...], and as one that will ultimately be resolved by courts applying general constitutional principles, the quality of public argument is often improved, because the argument concentrates on the start on questions of political morality. Legislators often feel compelled to argue for the constitutionality and not just the popularity of measures they support, and Presidents or governors who veto a law cite constitutional arguments to justify their decisions.<sup>103</sup>

That political debates have been enhanced by being made a constitutional issue is difficult to answer. But I think this point ought not be underestimated. A wider look on the kind of debates and deliberations that occur in connection with democratic institutions may show that they are more worthwhile, and democratic even in a majoritarian sense. But even if this is the case with judicial review, it is important to remember that we really are talking about strong judicial review. That is, the same kind of constitutional debate could conceivably be achieved, even if the judiciary only could make advisory decisions in review of legislation. Or it could be done through a legislature. Meaning that this may be an argument for constitutional review. But in order for it to be an argument for strong judicial review, or even judicial review as such. Dworkin needs a further argument to the effect that there is a special judicial competence in evaluating such issues. The challenge might be even more challenging to Dworkin because he himself is explicit about the fact that the interpretations undertaken by judges, legislators and ordinary citizens are of the same kind. In *Freedom's Law*, he described this as the *moral reading of the constitution*.

Most contemporary constitutions declare individual rights against the government in very broad and abstract language [...]. The moral reading proposes that we all - judges, lawyers, citizens - interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice.<sup>104</sup>

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<sup>102</sup> Dworkin, *Freedom's Law* (1997), 345.

<sup>103</sup> *Ibid.*, Dworkin cites the debate in the U.S. concerned with abortion and the *Roe v. Wade* decision as an example of this.

<sup>104</sup> *Ibid.*, 2.

Given that the moral reasoning that judges are engaged in is of the same kind we all engage with from time to time, then it is hard to see what argument could establish the special competency needed. Christopher Zurn asks somewhat leadingly:

Is it really true that only judges have the requisite competence to detect and interpret basic moral principles that underlie the conditions we set on our collective political arrangements, and that this competence should be grounds for allowing them to not only set the basic terms and limits of subsequent debate but also decide the issue for a significant period of time?<sup>105</sup>

Zurn suggests that a reason for this rather uncomfortable fact is that Dworkin operates with two different political processes in mind. One is a principled moral debate about the fundamental character and value of democracy, the other is concerned with the attempt of different individuals and groups to improve their lives.<sup>106</sup> And this, as well, bases itself on a sceptical view of ordinary electoral politics.

*I will have more to say about this scepticism about electoral politics, and the optimism about the judiciary.*

For now, I will say that Dworkin's conception of democracy captures a rather interesting notion, namely that democratic legitimacy is a substantive demand on the outcomes that a political community produce. A society is democratic if it respects the two principles of dignity. This conception rejects a view of democratic legitimacy that attaches it to a procedural ideal of participation. I turn now to Jeremy Waldron's arguments against judicial review, and his conception of democracy. One that is expressly formed with the plurality of values in mind, rather than the unity of them.

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<sup>105</sup> Zurn, *Deliberative Democracy and Institutions of Judicial Review* (2009), 120.

<sup>106</sup> *Ibid.*, 120-121.

## Chapter 3: Jeremy Waldron; the Right to Participation.

Much of Jeremy Waldron's work on political philosophy is dedicated to vindicating "the dignity of legislation", and to present a "rosy" picture of the work of legislatures. His reason for doing this is to counter what he perceives as a widespread tendency in a great deal of political philosophy to adopt a very cynical view about legislatures, the politicians that work there, and the citizens that elect them. According to Waldron, this cynical view of electoral politics is often contrasted with an idealized picture of what goes on in judiciary when they are deciding issues of rights.

His article "The Core of the Case Against Judicial Review" has been widely read and cited, and is an attempt to base a criticism of judicial review on rights. For Waldron, the fundamental democratic right is that of the right to participation. The degree to which democratic institutions are designed with popular participation in mind, the greater their degree of democratic legitimacy, according to Waldron. He begins his argument with the fact of disagreement, and the need to make collective decisions. This is what he calls the circumstances of politics. Waldron's conception of democracy is geared toward the importance of democracy as self-government. This means that he is sceptical towards any institution that compromises this ideal. He rejects the democratic legitimacy of strong judicial review. In *Freedom's Law* he seems to be recommending a democratic principle of legitimacy that would imply that constitutionalism is also democratically illegitimate institution. But he seems hesitant to actually go so far. And in the later "The Core of the Case Against Judicial Review" one of his assumptions about the societies in question is that they can have constitutional protections of rights. In other words: He does not go as far as his argument might recommend he does.

Waldron is an opponent of strong judicial review, and his best argument against judicial review is founded upon some assumptions about both the legislative and judicial institutions, and a political community's general commitment to individual and minority rights. I will begin with examining Waldron's views on democracy and constitutionalism in general before presenting his argument against judicial review. I am also going to examine an interpretation of Waldron's argument due to Christopher F. Zurn which takes the former to be committed to a quite radical scepticism towards constitutionalism as such, as well as judicial review. I will

argue that while there is grounds for this interpretation in Waldron, there is also a clear opening for an interpretation that is decidedly less ambitious. And I believe that Waldron's later article "The Core of the Case Against Judicial Review" makes this interpretation more reasonable. Lastly in this chapter I will deal with a worry about the extent to which Waldron's attempted "rehabilitation" of legislatures may go too far in rosy view, and a more general worry that is implicit in much of the defence of judicial review: the desire to guard against a tyranny of the majority.

### **3.1. The circumstances of politics.**

In *Law and Disagreement* Waldron presents what he calls the circumstances of politics. They are meant to describe the basic conditions of political decisions. Waldron's circumstances of politics are twofold:

- 1) The felt need of the members of a political community to collectively decide many issues. There are certain goals or goods that can only be achieved through such collective decisions.<sup>107</sup>
- 2) The persistence of deep and consistent disagreement on fundamental political issues.<sup>108</sup>

Waldron illustrates the first condition with what is known as *partial coordination problems* used in game-theory to show the structure, and difficulty in acting together. Partial coordination problems are problems where both parties have their own preferred option, but most of all they prefer to settle on a common option. An example: Tom and Jerry have to decide where to go for a date. Tom prefers the football match; Jerry prefers the opera. But most of all they both prefer to go out together, rather than attend their preferred option alone. According to Waldron, this illustrates an important point about legislation in the circumstances of politics. For instance, while we all may agree that rape ought to be prohibited, the particularities of the law, like what is to count as consent, are subject to very real disagreements in our political communities. But laws against rape need to take a stand on such controversial particularities. And in such cases, it is preferable that we enact a conception, rather than limit ourselves to uncontroversial cases, even if the view enacted is one that some will disagree with. In the words of Waldron:

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<sup>107</sup> Waldron, *Law and Disagreement* (1999), 102.

<sup>108</sup> *Ibid.*, 103.

Reasonable people differ on matters like these. Yet each may have an interest – of the sort represented in a PC [Partial Coordination problem] – in sharing with others in society a common scheme of rape law that deals unequivocally with these matters, a scheme which sets a specific age of consent, which states whether mistakes have to be reasonable in order to be exculpatory, and so on. Each may prefer that these matters be settled even in a way that he opposes, if the alternative is no rape law at all (with everyone who has a view enforcing it as best he can), or a law confined only to those cases where it is uncontroversial in the community that a wrong has been committed.<sup>109</sup>

The first condition of politics then is the need to settle on a common course of action. The second condition states that we must reach such a settlement amidst disagreement. Thus, the need to reach a decision that counts for all of us stands in tension with the fact that we disagree about what to do. This tension is heightened when we speak of constitutionalism and judicial review. It is one thing that we disagree about what our laws say about vagrancy and begging, quite another if we disagree about our basic political framework. That we live in pluralistic and liberal societies that, generally, see great value in respecting such disagreement simply adds to this tension. Waldron is clear that we ought to expect disagreement about fundamental ethical, moral, and political issues and principles. And further, that we ought not view such disagreement as a result of a failure of intelligence or powers of reasoning, nor as a result of bad-faith or selfish motivations.

To contrast with Dworkin, he too sees disagreement as something that we must accept in a democracy. His principle of independence means that our comprehensive conception of the good life, questions of religion, giving to charity, and a myriad other issues, must be left for each individual to decide. Also in the case of rights, his emphasis on the need for interpreting abstract concepts and values means that there is room for disagreement, at least about the correct interpretation. But for Dworkin, there is an end to this room for disagreement. At the foundations of his theory is the idea that our values in different domains will lead to a unified and correct interpretation of contested values. Dworkin stipulates not only that there is a correct view of justice (which Waldron may very well agree with), but also that this is a view we will share if we all proceed in the correct manner of interpretation (i.e. proceeding from the two principles of dignity). I believe Waldron's reply to Rawls' position is apt also here: "But the *need* for a common view does not make the act of disagreement evaporate. Instead it means that our common basis for action in matters of justice has to be forged in the heat of our disagreements, not predicated on the assumption of a cool consensus that exists only as an ideal".<sup>110</sup>

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<sup>109</sup> Ibid., 105.

<sup>110</sup> Ibid., 106.

Furthermore, Waldron says that legislation we generally believe to have made our society more just; women's suffrage and liberation, abolition of child labour, the dismantling of segregation, and more, were all fought for and, at least partially, secured in the circumstances of politics. And this took place in the midst of serious disagreement: "What is more, each of these legislative achievements claims authority and respect as law *in* the circumstances of politics, including the circumstance of disagreement as to whether it is even a step in the right direction".<sup>111</sup>

For Waldron, the fact of disagreement in our political community about basic principles and values ought not to be explained away, but taken as a challenge we must face. Dworkin called the view that the majority ought to prevail in every case a crude statistical view of democracy.<sup>112</sup> To this Waldron responds that:

What seems like the majoritarian obsession with statistics is [...] the tribute that politics pays to the reality that social problems and opportunities confront us in our millions, not in the twos and threes that moral philosophers are comfortable with. And what seems like its impersonality is a commitment to equality – a determination that when we, who need to settle on a single course of action, disagree about what to do, there is no reasonable basis for *us* in designing our decision-procedures to accord greater weight to one side than to the other in the disagreement.<sup>113</sup>

### **3.2. Waldron's theory of democracy.**

In the words of Christopher Zurn: "Waldron argues for majoritarian aggregation of equally weighted votes as the most justifiable democratic process".<sup>114</sup> But, interestingly, Waldron argues that what is aggregated are not simply selfish desires or prepolitical interests, but our good-faith opinions about what is the best course of action. The fundamental reason for this is that Waldron identifies the ascription of rights, and by extension, citizen's right to participate in their own governance as the basic democratic principle.

The identification of someone as a right-bearer expresses a measure of confidence in that person's moral capacities – in particular his capacity to think responsibly about the moral relation between his interests and the interests of others. The possession of this capacity – a sense of justice, if you like – is the primary basis of democratic competence. Our conviction that ordinary men and women have what it takes to participate responsibly in the government of their society is, in fact, the same conviction as

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<sup>111</sup> Ibid.

<sup>112</sup> Ibid., 117.

<sup>113</sup> Ibid., 117.

<sup>114</sup> Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (2009), 142.

that on which the attribution of rights is based.<sup>115</sup>

Waldron believes that if we regard each other as the bearers of rights, we must also recognize our mutual capacity for thinking about rights. The one entails the other. From this Waldron draws the implication that our capacity for thinking responsibly about rights also means that what we ought to participate in deciding what rights we have. Waldron draws the fundamental democratic right from the idea of self-governance. A democracy is collective self-government, and as such the basic democratic right becomes, for Waldron, the right to participation. “Democracy requires that when there is disagreement in a society about which a common decision is needed, every man and woman in the society has the right to participate on equal terms in the resolution of that disagreement”.<sup>116</sup> Of course, in our actual societies it is not feasible to institute direct democracy on all decisions. I will elaborate on this when discussing Waldron’s views on representative democracy, but for now I want to emphasize that he sees it as vital that the justification for political structures and processes that may compromise this ideal, nonetheless are rooted in the demand for a right of all members of a society to participate in the resolution of political disagreements that affect them. Waldron says that:

The processes that this involves [resolving disagreements] may be complex and indirect; there may be convoluted structures of election and representation. But they are all oriented in the end towards the same ideal: participation by the people – somehow, through some mechanism – on basically equal terms. This means that there cannot be a democracy unless the right to participate is upheld, and unless the complex rules of the representative political processes are governed, fundamentally, by that right. If some are excluded from the process, or if the process itself is unequal or inadequate, then both rights and democracy are compromised.<sup>117</sup>

Waldron argues that the right to participate (which he takes to be the same as the right to vote) is grounded in the recognition that we as citizens can be bearers of rights. Our capacity as rights bearers entails that we can also deliberate and decide issues of rights. We have a right to participation because it is the extent of our duties that are being decided. That these decisions impact us in important ways is a strong argument for us to demand that we have a say in the decision. Or in Waldron’s somewhat weaker words, thus accounting for the counter-majoritarian features of actual democracies: “[...] I have a right to a say in the decision-mechanisms which control their [our duties] orchestration”.<sup>118</sup> This is not to say that

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<sup>115</sup> Waldron, *Law and Disagreement* (1999), 282.

<sup>116</sup> *Ibid.*, 283.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*, 234.

a single vote will satisfy the right to participation. The right to participation is not just any old majoritarian element in a state structure. For instance, a system of benevolent absolutism, even if it is combined in some way with an elected body that has some measure of influence, is not sufficient to satisfy the right of participation. It is important for Waldron that the popular element is *decisive*.<sup>119</sup> In addition, the demand for participation is not simply an individual matter. It extends to all rights bearers, meaning all citizens. This adds a further requirement of participation, that it be fair. Demanding a right to participation implicitly acknowledges that my voice is not the only one in society, and that my voice ought to count no more or less than the voices of other right-bearers.<sup>120</sup>

In “The Liberty of the Ancients Compared with that of the Moderns” Benjamin Constant makes the point that given the scale even of his contemporary society were such that there is a real question to be asked if our individual political power is really something that is significant. It certainly does not feel significant:

His personal influence is an imperceptible part of the social will which impresses on the government its direction... Lost in the multitude, the individual can almost never perceive the influence he exercises. Never does his will impress itself upon the whole; nothing confirms in his own eyes his own cooperation.<sup>121</sup>

In terms of the equality of political power Waldron goes a very long way in agreeing with Dworkin in that the harm done to me if I am denied the right to participation, is not connected to any loss of either political impact or influence as Dworkin defines the terms. In discussing a hypothetical citizen, that is excluded from a decision about his rights, Waldron says that he will feel slighted, but that:

To feel this insult does not require him to think that his vote – if he had it – would give him substantial and palpable power. He knows that if he has the right to participate, so do millions of others. All he asks – so far as his participation is concerned – is that he and all others be treated as equals in matters affecting their interests, their rights, and their duties.<sup>122</sup>

But Waldron nonetheless insists that while the scale of a society will make my single votes impact vanishingly small, this is no reason to ignore that there actually is an impact. Comparing it to other forms of collective action among large numbers of people he says that

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<sup>119</sup> Ibid., 235.

<sup>120</sup> Ibid., 236.

<sup>121</sup> Constant, “The Liberty of the Ancients Compared with that of the Moderns” (1969), 316.

<sup>122</sup> Waldron, *Law and Disagreement* (1999), 239.



while I may not be able to identify any contribution I make one way or the other, this does not entail that I am entitled to ignore the burden of participation in collective decisions.

Though it is true that the enterprise does not require the participation of absolutely everyone (and so it does not require *my* participation, provided enough others take part), still there is no reason of fairness for me in particular to relieve myself of the burden of participation, given that the participation of most [citizens] is required.<sup>123</sup>

This is not to say that we have a duty to participate, the burden of participation meant here is simply the cost of time or effort political participation requires. As an example, the municipality of Oslo have the possibility of temporarily prohibiting the driving of cars that run on diesel fuel as a measure to reduce air pollution on days when the air quality is particularly bad. Leaving political controversies and potential fines aside, Waldron's argument would be that while it is true that my individual contribution to the air quality is negligible by itself. I am still not entitled to ignore my responsibility not to drive a diesel fuelled car, simply because of the scale of the problem. The feeling that participation in political processes on a large scale are impersonal and pointless viewed from the individual perspective is a consequence of trying to use small scale ideas about agency and responsibility where they are not appropriate. Thus, this feeling is not a consequence of majoritarianism.

Because we live side by side with millions, we must address our common problems on that sort of scale. If we believe that everyone affected by a problem has a right to a say in its solution, then there is nothing to do but set up a procedure for counting, and somehow assessing millions of individual opinions.<sup>124</sup>

So, while Waldron admits that the difference a single vote makes in a majoritarian decision is vanishingly small, he nonetheless insists that it is an important difference, nonetheless. And that this is not captured, if we like Dworkin, see voting simply as a signal or symbol of the equal importance of all members of a political community. This being said, Waldron approvingly cites Dworkin's conception of communal collective action. Here Waldron makes the point that true membership of a democracy is not simply a matter voting or other forms of formal participation. A vote will not make up for one's interests being persistently ignored by the community of which he is a member.<sup>125</sup> Underlining the importance of rights for

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<sup>123</sup> Ibid., 240.

<sup>124</sup> Ibid., 110.

<sup>125</sup> Ibid., 273 and 283-4.

Waldron's conception of democracy he says that in exercising our right to participation we have an impact on the lives of our fellow citizens. "Having this impact on others is permissible only under certain conditions, and those conditions may be represented as rights held by anyone who is liable to be subject to such impact".<sup>126</sup> Primarily these are conditions like free speech and freedom of association, rights that enable "a broader deliberative context in civil society for formal political decision-making".<sup>127</sup> Which is to say that just because I have a vote, does not mean that I cannot criticize political structures for their lack of democracy or equality. To elaborate on this point, I would say that Waldron here also points to broader considerations of the kind of structures and rights that – under the imperfect organisation of representative democracy as the expression of the will of the people – make it more reasonable to argue that politicians in a legislature can represent the citizenry in a meaningful way. Something that is important for Waldron's defence of legislatures as a forum for the expression of the will of the majority, and the dissent of the minority, to hold up.

### **3.3. Waldron on Representative democracy.**

A great deal of *Law and Disagreement*, as well as many other of Waldron's writings in political philosophy is concerned with what might be called a rehabilitation of legislatures and legislation. It is Waldron's contention that much of political philosophy has been operating with an idealized view of the judiciary and an unduly negative view of the legislatures. One example of this is that many legal scholars and philosophers treat the legislature as a single agent, and talk of the intention of a statute, disregarding the fact that legislatures are pluralistic and rarely agree on what the intention of a statute is, even if they agree that it ought to be enacted. Something that is more relevant to my concerns here is Waldron's view that in debates about constitutional entrenchment of rights and judicial review, many theorists view the supreme court as an enlightened forum of principle, suitable for reasoning about the truth of what rights we have and what they entail. While legislatures are places of self-interested haggling, unfit for any kind of principled and reasoned debate. To be clear, it is not that Waldron believes we necessarily need to be less cynical of legislatures or electoral politics. But rather that if we are to be cynical about legislatures, then we ought to be equally cynical about the judiciary. When we are debating actual societies, this will also be a question of the actual conditions of that society. That is, to what extent has the legislature and courts proved themselves to merit either optimism or scepticism? If one or both merit scepticism, then this is important for any evaluation of their democratic legitimacy. And

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<sup>126</sup> Ibid., 284.

<sup>127</sup> Ibid., 283.

Waldron would not advocate for the wonderful deliberations of legislatures in societies where their particular legislatures have proven themselves to be anything but. Waldron's argument against judicial review is limited to societies we would generally count as democratic, and I will return to this point in my discussion of Waldron's arguments against judicial review.

In principle, Waldron believes that cynicism about legislatures is unwarranted. The background conditions of this optimism are, of course, the circumstances of politics. Especially the circumstance of reasonable disagreement means that legislatures are in fact very well placed to deal with the issues we need to decide collectively in a way that respects disagreement, rather than pathologize it. Waldron's positivity about legislatures lie in their ability to represent the diverse opinions of us as citizens. Importantly: "Legislatures in the modern world do not just assemble and vote. They deliberate: that is, their members *talk* to one another about the measures they are considering".<sup>128</sup> That this deliberation takes place among people who fundamentally disagree with each other explains the various rules for debate and decisions we find in legislatures. Christopher Zurn lays out Waldron's case for legislatures as a good way of dealing with the circumstances of politics in three distinct considerations:

- 1) The large number of representatives and the diversity of opinions reflect the diversity of opinions in the electorate.
- 2) The rules that regulate debate and voting in a legislature are designed to reach an authoritative decision in the face of disagreement.
- 3) Majority rule is a non-arbitrary way of respecting the diversity of opinions.<sup>129</sup>

The first argument is based on the circumstance of disagreement, the second is concerned with the ability to reach a decision without assuming agreement on either principles or concrete statutes, and the third focus on the idea that in addition to being a successful technical device for deciding in issue, majority rule as a principle carries with it a normative foundation. Compare, for instance, tossing a coin and voting. Both are decision procedures that do not, *prima facie*, privilege one view over another. And as such they both respect disagreement. But Waldron's right of participation gives us additional reasons for preferring a majority vote over tossing a coin, beyond the fact that tossing a coin can be more likely to lead to worse outcomes. One thing that should be noted here, however, is that in the end

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<sup>128</sup> *Ibid.*, 69.

<sup>129</sup> Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (2009), 144.

representative government does end up being a necessary evil as compared to direct democracy. One that is justified, given the scale and complexity of our societies, but an evil nonetheless.

Furthermore, is the issue to what extent it is reasonable that a representative, elected legislature can be a mirror of the larger demos as Waldron wishes. It is possible, without being unreasonably cynical, to point out ways in which members of legislatures openly or covertly attempt to corrupt the representative part of government.

### **3.4. Waldron on Constitutionalism.**

It is, unfortunately, somewhat unclear what Waldron actually believes about constitutionalism. To begin with, Waldron is very critical of the view of constitutional precommitments as a situation in which the members of a political community bind themselves to a set of rights so that they do not later, in a state of panic or fear, violate those same rights. A metaphor of this kind of constitutional precommitment on the part of a political community is due to Jon Elster. In *Ulysses and the Sirens* Elster compares a constitutional precommitment to Ulysses ordering his crew to bind him to the mast so that he could resist the song of the sirens. Waldron believes this is an extraordinarily unhelpful image, partly because it compares a political community to a single agent, and partly because it compares the desire for later changes to a kind of weakness of the will. This is what Waldron speaks of as pathologizing disagreements. If the political body really is Ulysses, and his intention to not give in to the siren song is the rights protected in the constitution – that would make anyone disagreeing with the set of rights protected by the constitution Ulysses under the influence of the siren song. This is a problem because it labels disagreements about constitutional rights as an error, ignoring that we are always disagreeing about what rights we ought to have or not, including what rights ought to be protected by a constitution (if any). Particularly the latter ignores the circumstance of disagreement.

Against Ulysses, Waldron sets out Bridget. Bridget is torn between competing conceptions of religious belief. One day she decided on a traditional faith in a personal God. Her commitment to this view is such that she locks the door of her library of theological books and gives the key to a friend, saying that the friend ought under no circumstances to return the key, even if Bridget were to ask, insist, or beg. Predictably, Bridget's confidence that she has chosen the correct conception falters, and she asks for the key back.<sup>130</sup> The difference between Bridget and Ulysses is that it is clear that Ulysses is not a rational actor.

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<sup>130</sup> Waldron, *Law and Disagreement* (1999), 268-269.

When he begs to be released from his bonds he is expressly not rational. The same is not the case for Bridget. For her friend to deny Bridget the key would, according to Waldron, be to: “[...] take sides, as it were, in a dispute between two or more conflicting selves or two or more conflicting aspects of the same self within Bridget, each with a claim to rational authority”.<sup>131</sup> Ulysses under the influence of the siren’s song is not rational and so has no such claim.

In general Waldron seems very critical of any kind of constitutional controls on the deliberations and decisions of the citizens of a democracy. The reason for this is, fundamentally, his identification of democracy with the right of participation, that is, citizen’s ability to responsibly participate in the collective decisions of the political community.

The identification of someone as a right-bearer expresses a measure of confidence in that person’s moral capacities – in particular his capacity to think responsibly about the moral relations between his interests and the interests of others. The possession of this capacity – a sense of justice, if you like – is the primary basis of democratic competence. Our conviction that ordinary men and women have what it takes to participate responsibly in the government of their society is, in fact the same conviction as that on which the attributes of rights is based- [...] We are not entitled to secure stability at the cost of silencing dissent or disenfranchising those who express it. *And we should not use the ideas of constitutional caution or constitutional commitment as a way of precluding effective deliberation on a matter on which the citizens are still developing and debating their views.*<sup>132</sup>

And furthermore, he says that while it may seem good to us now to enshrine a particular view on rights, it is plausible that later generations will want to change that view. Any framers of a precommitment ought to, says Waldron:

[...] Ask themselves: is there a reason now to doubt that this provision will seem reasonable as a precommitment to those whom it constrains in the future? It seems to me that the existence of good faith disagreement about the content of the precommitment at the time that it is proposed is *always* a reason for answering that question in the affirmative.<sup>133</sup>

Waldron is clearly on the populist side of this debate, but it is, as I said, somewhat unclear to what degree. His clear emphasis on the value of majority rule as a neutral decision procedure in the controversial circumstances of politics suggests that he would be sceptical of any entrenchment of higher or constitutional law. In *Law and Disagreement*, Waldron certainly

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<sup>131</sup> Ibid., 269.

<sup>132</sup> Ibid., 282, my italics.

<sup>133</sup> Ibid., 275.

appears to be very sceptical of constitutional entrenchment.

While Waldron may accept a basic constitutional document, as well as a bill of rights, it seems that he would not accept that it would be harder to change constitutional law than ordinary law. So, for instance, to require a supermajority to change or amend a constitutional document would be democratically illegitimate. But he also says this about the possibilities of implementing procedures that slow down or hinder the process of legislation:

The legislative process may be made more complex and laborious, and in various ways it may be made more difficult to revisit questions of principle for a certain time after they have been settled. (Such ‘slowing-down’ devices may also be supported in the political community by values associated with ‘the rule of law’.) None of this need be regarded as an affront to democracy; certainly a ‘slowing-down’ device of this sort is not like the affront to democracy involved in removing issues from a vote altogether and assigning them to a separate non-representative forum like a court. However, as I argued in chapter twelve, democracy *would* be affronted by any attempt to associate such ‘slowing down’ with the idea that there is something pathological about one side or the other in a disagreement of principle.<sup>134</sup>

This quote suggests that Waldron’s scepticism about constitutional entrenchment may be construed as less radical than it first seems. Christopher F. Zurn interpretation of Waldron places him squarely in the radical side of the argument. On Zurn’s view, Waldron would object to any form of entrenchment of higher law, even in cases that relate to rule of law (like wrongful imprisonment or right to a fair trial) as well as the design and division of power between different governmental and judicial institutions.<sup>135</sup> But as Zurn himself notes, Waldron ought to be in favour of some kinds of entrenchments, and there is some uncertainty as to what Waldron’s actual commitments are. This does not, however, convince Zurn that Waldron is not against constitutional entrenchment as such, and he describes him as sceptical.

He also takes Waldron to explicitly reject the constitutionalization of a bill of rights.<sup>136</sup> I do believe, however, that Zurn’s interpretation of Waldron sees his position as more radical than it necessarily is. To a large degree this is Waldron’s own fault, as he does not explicitly say what he thinks about the rule of law, nor the structurations of political institutions. He is squarely focused the issue of rights. And he has, especially in *Law and Disagreement*, few good things to say about constitutional entrenchments. But in “The Core of the Case Against Judicial Review”, one of his assumptions about the kind of societies his arguments against

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<sup>134</sup> Ibid., 306.

<sup>135</sup> Zurn, *Deliberative Democracy and the institutions of judicial review* (2009), 146-147.

<sup>136</sup> Ibid., 147.

judicial review can apply is that the society has a genuine commitment to rights:

[W]e may assume also that the society cherishes rights to an extent that has led to the adoption of an official written bill or declaration of rights of the familiar kind. [...] This is supposed to correspond to, for example, the rights provisions of the U.S. Constitution and its amendments, the Canadian Charter of Rights and Freedoms, the European Convention in Human rights (as incorporated, say, into British law in the Human Rights Act), or the New Zealand Bill of Rights Act.<sup>137</sup>

While Waldron does not believe that constitutional entrenchment of rights is necessary for a society to be committed to rights in the proper way, he does not reject it outright in “The Core of the Case Against Judicial Review”. One reason for this is that bills of rights do not simply specify a list of concrete rights that citizens have. I believe Waldron can accept a constitutionally entrenched bill of rights as democratically legitimate because such bills of rights do not give clear answers to questions about what rights its citizens have or don’t have. Following Dworkin, we could say that they may partly state concrete rights (e.g. the right to vote), but they will also contain abstract principles and rights that will be subject to disagreement in the society. Taking this approach, Waldron could argue that the entrenchment of a bill of rights is no problem to its democratic legitimacy, because it does not decide the issue. Democratic legitimacy rears its head as a challenge only when we have to decide this or that concrete issue of rights. In this context, it is not the entrenchment of a commitment to rights that is problematic, the problem arises when we give unelected judges the final word in decisions about what rights we actually have. Because it is at this point that members of the political community can claim that their voice has been ignored in this decision.

In the following I will first present the argument against strong judicial review in “The Core of the Case Against Judicial Review”, before examining Zurn’s reconstruction of the formal argument he believes Waldron makes. I will argue that Zurn’s interpretation, while legitimate (given the ambiguity of Waldron’s theory of democracy), puts Waldron in the position of articulating a wholesale rejection of constitutionalism in favour of majority rule. I also believe that Zurn’s central objections to this argument can be better dealt with by a weaker version of the argument than the one Zurn reconstructs. Waldron’s views as expressed in “The Core of the Case Against Judicial Review” also gives reasons to believe that the weaker version is one that Waldron himself would prefer.

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<sup>137</sup> Waldron, “The Core of the Case Against Judicial Review” (2006), 1365.

### 3.5. Waldron on Judicial Review.

Waldron is decidedly of the opinion that strong judicial review is lacking in democratic legitimacy. His argument is, however, limited to societies that fulfil fairly stringent conditions in terms of their democratic character and culture. These are presented in “The Core of the Case Against Judicial Review”:

- 1) Democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage.
- 2) A set of judicial institutions, again in reasonably good working order, set up on a nonrepresentative basis to hear individual lawsuits, settle disputes, and uphold the rule of law.
- 3) A commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights.
- 4) Persistent, substantial, and good-faith disagreement about rights (i.e., about what the commitment to rights actually amounts to and what its implications are) among the members of the society who are committed to the idea of rights.<sup>138</sup>

In short, these are conditions meant to pick out modern constitutional democracies like Norway, the United States, and the U.K, to mention a few. Waldron is also arguing against strong judicial review. In this debate, he distinguishes between two kinds of arguments for or against judicial review: Outcome-related and process-related. Outcome-related reasons are those connected with reaching the right decision. Ronald Dworkin’s main reason for supporting judicial review, at least as he presents it in *Justice for Hedgehogs*, is of this kind. He believes that, on balance judicial review in the U.S. has led to better decisions on rights, than would have happened if it did not take place. Process-related reasons on the other hand are not concerned with outcomes but with deciding who is and who is not allowed to be part of the decision, independently of what their opinions on the matter is. Especially important here will be considerations that deal with the fairness of a given decision procedure. I will deal with outcome-related reasons, before moving on to process-related reasons.

### 3.6. Outcome-Related Reasons.

Outcome related reasons are often associated with the case for judicial review.<sup>139</sup> But Waldron believes this is a mistake. According to him, outcome-related reasons can cut in both directions. While legislatures are sometimes vulnerable to overreaches of power that rights are meant to guard against, courts can be problematic in other ways when we consider outcome-related reasons. Waldron specifically mentions that courts can have a difficult time

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<sup>138</sup> Ibid., 1360.

<sup>139</sup> Dworkin’s position is one example of this.



dealing directly with the moral issues cases about rights represent, focusing instead on things like legal precedent and textual interpretation<sup>140</sup>

Waldron discusses three kinds of outcome-related reasons in favor of judicial review: orientation to particular cases, orientation to a bill of rights, and that they are required to give reasons for their decisions.

In a system of strong judicial review, concrete individual cases of potential rights violations are brought before the supreme court. This is an advantage for courts because they are confronted with actual cases of potential injustice. But Waldron argues that this is mostly a myth. Speaking about the U.S. judicial system he says that:

By the time cases reach the high appellate levels we are mostly talking about in our disputes about judicial review, almost all trace of the original flesh-and-blood rights-holders has vanished, and argument such as it is revolves around the abstract issue of the right in dispute. Plaintiffs or petitioners are selected by advocacy groups precisely in order to embody the abstract characteristics that the groups want to emphasize as part of a general public policy argument".<sup>141</sup>

When we are talking about judicial review, deliberations and cases are concerned with highly abstract discussions of political and legal principles. And it is not as if legislatures are barred from considering concrete cases. Both in hearings and deliberations politicians frequently use actual or hypothetical examples of how a decision about rights might affect individuals.

As for the judiciary's orientation to a bill of rights, the issue here is that it is not the case that a bill of rights settles the issue. This is a matter of disagreement and interpretation. Nor is it clear that this makes the case any better for judicial review. For instance, excessive orientation to a particular text and some canonical form of words may obfuscate, rather than clarify the issue. I believe, for instance, that it is at least debatable how the obsession with the formulation of the right to bear arms has been enriched by discussions about what literal meaning of the second amendment really is. Waldron also points out that:

At the very least, courts will tend to be distracted in their arguments about rights by side arguments about how a text like the Bill of Rights is best approached by judges. American experience bears this out: The proportion of argument about theories of interpretation to direct argument about the moral issues is skewed in most judicial opinions in a way that no one who thinks the issues themselves are

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<sup>140</sup> Ibid., 1376.

<sup>141</sup> Ibid., 1379-78.

important can possibly regard as satisfactory.<sup>142</sup>

Waldron suggests that this, in part, is because judicial review is so controversial. In order to maintain the image of the judiciary as dispensing neutral legal decision, rather than controversial political decisions, the real issue can become obfuscated. In the words of Waldron: “Because judges (like the rest of us) are concerned about the legitimacy of a process that permits them to decide these issues, they cling to authorizing texts and debate their interpretation rather than venturing out to discuss moral reasons directly”.<sup>143</sup> This is also quite similar to Dworkin’s criticism in connection with his idea of a moral reading in the constitution.

That a benefit of judicial decision-making is that they state their reasons is quickly dispatched by Waldron.<sup>144</sup> Nor is it much of a defence of judicial review, and I don’t know if many have actually held it. Suffice it to say that legislators also give reasons for their opinions and decisions. And, again, provided that legislators and judges are engaged in the same endeavour, there is no prima facie reason to prefer legal reason-giving rather than more broadly political or moral reason-giving.

A fourth consideration that Waldron does not deal with, but that I want to consider nonetheless, is that judges, by virtue of their education and legal experience are better suited to evaluating cases of rights than legislators (or philosophers or ordinary citizens for that matter). One way of specifying this is to say that judges are better at leaving aside prejudices, private attachments and antagonisms when deciding cases. These are considerations that, in Dworkin’s word, can “spoil politics”. To begin with, there is little doubt that judges are better at deciding cases of judicial review, qua legal cases. To interpret the law and relevant precedents, as well as evaluating the cases made by the lawyers on either side of the case, as well as writing their decisions or dissents, is after all what judges are trained to do. But a case of judicial review is not an ordinary criminal case or civil suit. An important consideration is that a constitution and bill of rights does not clearly settle matters of rights one way or the other. This means that decisions about rights, whether made in courts or legislatures, are political decisions, in large ways and small they influence the policies and statutes of a political community. Courts use different language, and to a certain extent, different arguments, than legislators or ordinary citizens, but they are political. Politics of a different

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<sup>142</sup> Ibid., 1381.

<sup>143</sup> Ibid., 1381.

<sup>144</sup> Ibid.,1382-83.

kind that what happens in the legislature, but politics nonetheless. To maintain that such questions are best left to judges is a position that is vulnerable to charges of paternalism. It is often easier to assume that disagreement is not reasonable, that those who disagree with me are not just wrong, but wrong for the wrong reasons, such as selfishness, prejudice, stupidity, contrarianism, and privilege. In the cases where this truly is the case, we might have some reason to be optimistic about judges' ability to sort out the reasonable arguments from the unreasonable arguments. But a defence of judicial review that assumes that this is the rule, rather than the exception, seems to me overly sceptical about the reasoning powers of both citizens and legislators. Judicial review is not an institution that will guarantee and protect treasured liberal rights like free speech in all circumstances. As Waldron says: "A practice of judicial review cannot do anything for the rights of the minority if there is no support at all in the society for minority rights".<sup>145</sup> The case in which this might be true is when an elite of judges and politicians have a serious commitment to rights, but the majority of a society does not. In this case, the fact that judges are not subject to popular elections make them less vulnerable to public pressure, and therefore more likely to protect a minority. Of course, this view of the distribution of concern for rights is literally elitist. In actual societies this might be the case or it might not. But if we think that modern democracies are of this kind, and that we need strong judicial review to limit the problem, then most arguments for the institution would take on a different tone. As Waldron says:

Maybe there are circumstances – peculiar pathologies, dysfunctional legislative institutions, corrupt political cultures, legacies of racism and other forms of endemic prejudice – in which the cost of obfuscation and disenfranchisement are worth bearing for the time being. But defenders of judicial review ought to start making their claims for the practice frankly on that basis – and make it with a degree of humility and shame in regard to the circumstances that elicit it. rather than preaching it abroad as the epitome of respect for rights and as a normal and normatively desirable element of modern constitutional democracy.<sup>146</sup>

At the end of the day, outcome-related reasons for or against judicial review are, in my opinion, highly problematic to evaluate. It is difficult to imagine how we could even empirically go about evaluating this. Historically, both courts and legislatures have made decisions we now consider either good or bad or somewhere in between. It is beyond the scope of my thesis to attempt an evaluation of outcome-related reasons here. But I would suggest that it is difficult to see how outcome-related reasons could pose a strong argument

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<sup>145</sup> Ibid., 1404

<sup>146</sup> Ibid., 1406.

for the eminency of courts over legislatures if we agree that also the former are engaged in political debates. It is furthermore very difficult to evaluate a counterfactual claim of the kind Dworkin makes when he says that, overall, judicial review has made the U.S. a better democracy than if a system of judicial review had not existed. Even in the absence of judicial review, social and political battles would have existed, and they would have been controversial. What the outcome of those struggles would have been if decided by a legislature rather than a court is anybody's guess, and would primarily rely on assumptions about a counterfactual past. Waldron also points to the legislative debate about abortion in the U.K in 1966 as an example of principled and responsible debate about individual rights. Such considerations can serve as a reason to be somewhat more hopeful about the reasoning abilities of legislatures.

The conclusion for Waldron is that outcome-related reasons ought to be considered neutral in terms of an argument for or against judicial review. Further backing this point for Waldron is the fact of reasonable disagreement about rights. In many contemporary democracies, difficult and controversial issues of rights are subject to very real disagreements that we ought to respect. This respect means giving each citizen a voice and a vote in the decision. Putting the final authority of the interpretation of the extent and scope of constitutional rights direct electoral control violates this respect. This is essentially Waldron's process-related reason for the lack of democratic legitimacy of strong judicial review, when compared with legislatures.

### **3.7. The Process-Related Argument.**

Waldron's main argument against judicial review is what he calls process-related. It is an argument that, hopefully, is somewhat familiar. He imagines a citizen Cn who is going to be bound or burdened by a decision she disagrees with. If Cn will not change her mind, and is not unreasonable; how can we answer her when she asks why she ought to accept this decision and abide by it? Specifically, Waldron has her asking two questions:

- 1) Why should this bunch of roughly five hundred men and women (the members of the legislature) be privileged to decide a question of rights affecting me and a quarter billion others?
- 2) Even if I accept the privileging of this five hundred, why wasn't greater weight given to the views of those legislators who agreed with me?<sup>147</sup>

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<sup>147</sup> Ibid., 1387.

Waldron's answer is that the process that arrived at the answer was arrived at fairly. Fairly for Waldron meaning that it was a majoritarian decision that gave everyone affected a voice and a vote. The first question about why such a small number of people are privileged to make decisions that affect everyone is answered by a theory of fair elections in which all citizens were treated when deciding who was going to be a member of the legislature. The second question is answered by Waldron by citing the majority decision as a fair and equal. He does not provide an in-depth argument for the fairness of majority decisions, but says that:

Better than any other rule, MD is neutral as between the contested outcomes, treats participants equally, and gives each expressed opinion the greatest weight possible compatible with giving equal weight to all opinions. When we disagree about the desired outcome, when we do not want to bias the matter up-front one way or another, and when each of the relevant participants has a moral claim to be treated as an equal in the process, then MD – or something like it – is the principle to use.<sup>148</sup>

In addition to this basic defence of the majority decision, this reply to Cn also gives reasons for why MD is used by the legislature. For Waldron, the general idea is that by having a relatively large number of representatives in legislatures, and having them use MD to decide matters, legislatures are set up so as to best provide a reasonable approximation of how the citizenry at large would have decided issues. The response to Cn is that legislators are elected and decide matters in a way that respects the views and voices of all citizens to the greatest possible degree:

We give each person the greatest say possible compared with an equal say for the others. That is our principle. And we believe that our complicated electoral and representative arrangements roughly satisfy the demand for our political equality – that is equal voice and equal decisional authority.<sup>149</sup>

These answers to the disgruntled citizen are a defence of the legitimacy of the decision and the institution that made it. But it is also important to note that Waldron's view of legitimacy here is decidedly procedural. That is, political decisions are given legitimacy, not because of the substance of the decision, but because the decision was reached through a fair procedure. Waldron wants a procedural defence rather than a substantive defence because of the second circumstance of politics. Waldron does not want that the answer to Cn's questions involve the claim that her view is wrong. Instead he sees a good decision-procedure as one that respects democracy as self-government; in this way Waldron sees majority rule, tempered by a commitment to rights and a democratic culture, as the true mark of democratic legitimacy.

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<sup>148</sup> Ibid., 1388.

<sup>149</sup> Ibid., 1388-1389.

But it is at the same time important to remember that it is not Waldron's argument that this is always the case. In cases where a commitment to individual and minority rights are lacking, or political institutions are not in "good working order", he is not committed to insisting that decisions made under such circumstances are democratically legitimate, simply because those who decided followed an accepted procedure. It is within the core cases Waldron's four assumptions pick out that his argument applies.

This is Waldron's core argument against judicial review. What is interesting is that while it is a familiar argument, in that is very similar to the counter-majoritarian difficulty, it is subject to conditions that are quite stringent. While meant to cover many actual democracies, the assumptions about core societies are quite demanding and emphasize a political community's commitment to the rights of all citizens as crucial in protecting minority and individual rights. Another part of this is that it is not just personal interests or preferences that are counted in the majoritarian process. What is counted is the good-faith opinions of its citizens.

In the following chapter I will more closely examine some aspects of Waldron's and Dworkin's conceptions. I argue that Dworkin's conception does not sufficiently respect the ideal of democracy as self-government. I also believe that Waldron faces challenges in meeting this demand. I will point to what I believe are the main problems with Waldron's account, and put particular emphasis on doubts about his democratic commitment. As a reply to this I also introduce an approach due to Allan C. Hutchinson called *strong democracy*. This conception is similar to Waldron's in its emphasis on citizen's participation in government. But Hutchinson uses this to recommend significant and widespread changes in current constitutional regimes.

## Chapter 4: A Basic Tension.

I began this thesis with a question about the *democratic* legitimacy of judicial review. At the outset, this is a question that is quite limited in its scope. It concerns a small part of a much larger political framework. But the scope of the debate about judicial review is much broader than it may seem at first. That is, the debate about judicial review and its democratic legitimacy is intrinsically linked with much broader questions about the proper conception of democracy. Arguments for or against judicial review depend on the underlying conceptions of democracy and constitutionalism. Thus, what at first seems like a limited question about the role of the judiciary in constitutional interpretation and protection of rights, also raises questions about democracy itself.

[...] It seems that the crucial fault lines in the debates concerning judicial review run mainly along the cleavages between different conceptions of the legitimacy of democracy, of constitutionalism, and of their interrelationships. They do not seem to run mainly along the lines – as jurisprudential scholarship often assumes – of different conceptions of judicial assertiveness and passivity, or of different methods of constitutional and statutory interpretation.<sup>150</sup>

### 4.1. Dworkin and Waldron on Democracy.

In line with this, Dworkin's and Waldron's respective positions on the legitimacy of judicial review represent different conceptions of democratic legitimacy. But despite their differences, I also want to emphasize that there are similar features in Waldron's and Dworkin's conceptions of democracy. And this is not really so surprising. They are both part of a classical liberal tradition that is both very concerned with rights, and the source and legitimacy of coercive political power. And they also generally embrace, with the exception of judicial review, democratic institutions and practices found in the United States in particular.<sup>151</sup> They also view political rights as ultimately being moral rights. Thus, the question of whether a society upholds and protects rights, and that they do this in the proper way is a question of political morality.

Nonetheless their differences are substantial and deep. Fundamentally, Dworkin's theory advances a conception of democracy that is a comprehensive and substantive view of justice.

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<sup>150</sup> Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (2009), 223.

<sup>151</sup> Waldron, for instance, marks down bicameralism as a prominent feature of democracy. Norway is one example of a democracy with a unicameral parliament. Overall 40 % of parliaments in the world are bicameral while 60% are unicameral. In Europe, only 35 % are bicameral, while 65% are unicameral. (Numbers taken from the Inter-Parliamentary Union: [http://www.ipu.org/parline-e/ParliamentsStructure.asp?LANG=ENG&REGION\\_SUB\\_REGION=All&Submit1=Launch+query](http://www.ipu.org/parline-e/ParliamentsStructure.asp?LANG=ENG&REGION_SUB_REGION=All&Submit1=Launch+query))

For Dworkin, the true test of democracy lies in the kind of political decisions a society makes. Democracy is possible only to the extent that the result of such decisions is to enact and uphold the conditions that enable us to view ourselves and our fellow citizens as partners engaged in a common enterprise, one that we collectively take responsibility for. This enterprise is democratic to the extent it respects Dworkin's substantive democratic conception.

Opposite Dworkin, Waldron centres his conception of democracy on the procedures by which political decisions are made, rather than the particular outcome of the procedures. For Waldron, the fact that there is reasonable disagreement about what counts as the right or wrong decisions means that we ought to seek out a conception of democracy that does not attempt to take sides in a controversial debate about what the correct conception of justice is. Democracy for Waldron focuses on what he terms the most basic right: the right of participation. Following this, the democratic conception is centred on the notion of self-government.

In the following I want to present what I believe is the main argument against Dworkin's conception of democracy: that it ultimately fails to do justice to the notion of democracy as self-government.

I will then move on to Waldron's conception and point to a tension in his conception of democracy connected with the concept of reasonable disagreement and his principle of legitimacy. Furthermore, I will question Waldron's assumption that legislatures can effectively and reliably function as a mirror for the deliberative decisions that would take place if decisions were undertaken by the demos as a whole.

#### **4.2. Substance and Paternalism.**

Dworkin's conception of democracy represents an ambitious and impressive project that connects politics, ethics, and morality in order to protect and enhance human dignity. His definition of democratic legitimacy are those institutional arrangements that best fulfil the substantive demands of our rights to dignity. The true test of democracy for him is that our equal status as individuals are respected. This is an appealing conception, but its substantive nature is also a problem. Primarily because it does not do justice to the deep connection between democracy and participation.



As a matter of fact, there are, and will be, disagreements about what the conception of justice that Dworkin presents actually entails, especially in concrete cases. For Dworkin, this disagreement is explained as being a product of different interpretations of abstract values and principles. But Dworkin must hold that some interpretations are successful and some are not. And the correct view is democratic while the incorrect is not, *regardless* of what the popular majority is. The value that Dworkin places on participation in one's own government is mostly symbolic. The value of free and fair elections is that they confirm our status as equal members of a shared community, not that these equal members need to actually have a say. In this way, there is in principle nothing wrong with judge Learned Hand described as "being ruled by a bevy of platonic guardians". Provided these platonic guardians uphold the true moral principles and are clever enough to not compromise the sense of equality and community in the polity.

It is not without reason that this view has a smattering of paternalism. The deeper issue here is that it is possible that arguing for a substantivist understanding of democratic legitimacy makes popular participation unimportant as a condition for legitimacy. At least when it comes to the basic conditions for democracy. Which is to say that the basic constitutional principles and rights, does not depend on participation for their legitimacy. Electoral politics is fine for policy questions that do not involve basic principles or rights. But when it comes to these fundamental issues, it is the Dworkian substantive account that is the standard for legitimacy, regardless of what citizen's themselves might actually think. In the words of Zurn:

Dworkin seems to be saying, in effect, that the people are allowed to be sovereign with respect to policy decisions, but when it comes to principles and rights, they must simply submit to the paternalistic imposition of the "conditions of democracy" by an unaccountable Hercules. Under this division of labor, the moral competence of citizens does not and cannot extend to collective decisions concerning the fundamental conditions under which they are going to regulate their lives together.<sup>152</sup>

It is deeply problematic for Dworkin's conception of democracy that it does not give enough due to the idea of democracy as self-government. The charge of paternalism is one that is clearly brought out in Dworkin's view on judicial review. That the judiciary is likely to better protect the conditions for a democratic partnership than would a legislature or other institutions depend on two elements: Scepticism toward the ability of electoral politics to protect the democratic conditions and optimism toward supreme court justices' ability to do the same.

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<sup>152</sup> Ibid., 123.

### 4.3. Procedure and legitimacy.

Waldron is very clear that participation matters. The right to participation and self-government is *the* basic democratic right. One issue for Waldron, however, is that this principle alone appears to capture the reality of our contemporary political institutions and our other democratic practices rather poorly. That is, *prima facie*, Waldron's preferred form of government would not be simply democracy but the democracy of ancient Athens. Where all citizens meet regularly to debate and decide the issues that face the community. And all decisions are made by a majority vote. Contemporary democracies are a lot more complicated than this. The institution of representative government itself, not to mention constitutionalism, seems to run counter to this idea of simple majority rule.

His ultimate justification for such apparent anti-democratic practices are restricted to them being a necessary evil. Even if this is a convincing defence, there would still be a pressure, given Waldron's conception, to push and argue for a much more radical change in the way our democracies operate, than to simply scrap strong judicial review. But it is unclear in Waldron's writings about democracy if he endorses such radical changes. In fact, he seems at the whole rather content with most aspects of the democratic system of the United States and comparable nations. This also includes bicameralism, which, in theory and in practice, is a feature of the legislature that is meant to restrict or at least slow down the ability of the people's representatives to enact legislation.

A crucial feature of Waldron's theory is that when there is disagreement among citizens about a decision we ought to treat this disagreement as *reasonable*. Reasonable disagreement stretches to basic political principles and values. But the acknowledgment of reasonable disagreement is combined with a principle of democratic legitimacy that stands in tension with the acknowledgment of reasonable disagreement.

In addition, Waldron is largely preoccupied with formal equality of political power. For him, such equality appears to be guaranteed so long as all citizens are able to vote for their preferred political representatives at regular intervals. But this view risks missing important structural and cultural aspects that also influence and impact the fairness and equality of a democratic system. That is, while political office, is formally open to anyone regardless of education, class, wealth, race, gender, or sexuality, it is still possible that there are social and economic structural inequalities that hinder certain groups access. That the ranks of politicians have little connection to, or understanding of the citizens they are meant to

represent is a widespread complaint in many democracies. Waldron recognizes this and speaks of the importance of democratic culture, but he does not draw these considerations into his principle of legitimacy.

Waldron's emphasis on the right to vote as the feature of a democracy that best encapsulates the basic right to participation also seems somewhat paradoxical, considering the difference my single vote is likely to make is precisely nil. Waldron believes this is the consequence of addressing collective decisions when citizens number in the millions and billions. And the diversity of good-faith opinions among these millions and billions gives us good reasons for not simply taking sides in a substantive debate, but thinking about how the political decisions we must make in the face of disagreement ought to be taken.

#### **4.4. A Tyranny of the Majority?**

To a large degree defenders, of judicial review are worried about the potential for a tyranny of the majority, if legislatures are left with the final word on rights. We risk the majority disenfranchising a minority, and unjustly depriving them of their rights. This is no idle worry. There are plenty of historical examples of this kind of injustice. One is the treatment of unwanted groups in Germany before and during World War 2, another is of racism and slavery in the United States.

Waldron wants to mitigate this worry. The first question is what tyranny actually is. If we define tyranny as what happens when someone is denied rights, then tyranny is a danger in any disagreement about rights. The side claiming a right expanded, or new rights, will feel that if their view does not go through then tyranny is the result. And in some cases, both sides will feel that rights have been denied if their argument does not go through. So tyranny is likely to happen if we acknowledge that our democratic institutions, judicial and legislative, will sometimes make mistakes. The question Waldron then asks is whether tyranny by a majority is any worse than tyranny of other kinds. I think that he's being somewhat facetious in asking the question. But he's hinting at the idea that we know of many prejudiced majorities that actually have deprived minorities of their rights. So, our association of tyranny of the majority to very racist and violent societies can make tyranny of the majority seem quite bad. But prejudices also affect the judiciary.

Waldron suggests that we ought to distinguish between two kinds of majorities and minorities: topical and decisional. A topical minority or majority are the group or groups

whose rights are at stake in an issue, while a decisional minority or majority are making the decision. According to Waldron, the cases we ought to be most concerned with are situations in which the members of the decisional majority are the same as the topical majority, while membership of the decisional minority are the same as the members of the topical minority. Waldron uses the example of racial injustice to illustrate this: “White legislators (decisional majority) vote for white privilege (topical majority); black legislators lose out in the struggle for equal rights for blacks. These are cases, I submit, that we should be particularly concerned about under the heading of “tyranny of the majority.””<sup>153</sup> Waldron admits that topical minority or majority is a loose term, but that this looseness is not a problem. His point is that: “[...] not everyone who votes for the losing side in an issue about rights should be regarded as a member of the group whose rights have been adversely affected by the decision”.<sup>154</sup>

The term topical is very loose, and subject to a lot of reasonable disagreement. Even what ought to count as a group that deserves rights protections is subject to heated debate. So, as an analytical tool for identifying tyranny I’m not sure that topical and decisional minorities and majorities are a big help.

But I believe that his larger point is a valid one. In situations where most members of the society do not care about minority or individual rights we ought to be worried about tyranny. But in situations where this is true, rights violations are likely to be widespread, and to assume that the prejudices plaguing the legislature does not plague the judiciary is a large assumption to make. It is an assumption that also betrays an overly pessimistic view of legislatures and an overly optimistic one of the courts. An aspect of this worry about a tyranny of the majority highlights the importance of democratic culture in preventing unjust political decisions.

I will now examine the underpinnings of Waldron’s conception of democracy, particularly the notion of reasonable disagreement and his principle of legitimacy.

#### **4.5. Reasonable disagreement.**

For Waldron, the circumstances of politics, and especially reasonable disagreement, provides a reason for discounting more substantive conceptions of the kind Dworkin advances because such a view would necessarily privilege one kind of conception of justice. This is why

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<sup>153</sup> Waldron, “The Core of the Case Against Judicial Review” (2006), 1397.

<sup>154</sup> *Ibid.*, 1397, footnote 129.

Waldron believes we must look to procedure rather than outcome if we want to have a conception of democracy that can be accepted by all, regardless of the political or moral leanings they might otherwise have.

David Estlund's "Jeremy Waldron on *Law and Disagreement*", focused on the concept of reasonable disagreement as it was put forth in the book by the same name. According to Estlund:

Waldron's central thesis is that *there is no morally available basis* for constraining majoritarian political procedures by judicial review, or for basing political legitimacy on any tendency of political decisions to be good, or just, or true. Majoritarian processes cannot be subordinated to any particular account of justice, or rights, or even democracy without enshrining some view that is open to reasonable objection.<sup>155</sup>

And furthermore that:

Waldron's critique of judicial review rests, in this book, on his more general view that political justification cannot go farther than the justification of fair majoritarian procedures incorporating large diverse and deliberative bodies of citizens or representatives. Anything more substantive than this fails to respect the wide and reasonable disagreement that actually exists among citizens.<sup>156</sup>

But Estlund believes that this is a view Waldron cannot hold without getting into trouble. At its heart, the problem for Waldron is that Waldron's notion of legitimacy stands in tension with his emphasis on reasonable disagreement. At the outset, Waldron's view as expressed in *Law and Disagreement* is that political decisions are rendered legitimate or authoritative by virtue of the procedure that made them. Estlund dubs this claim *Fair Proceduralism*:

Political decisions can be rendered authoritative on the basis of having been produced by a deliberative majoritarian process that is fair to all citizens and points of view.<sup>157</sup>

Estlund then draws the implication of this claim for the evaluation of legitimacy as being what he calls *No Reasonable Objection*:

Political power is illegitimate unless there is a basis for it that is beyond reasonable objection.<sup>158</sup>

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<sup>155</sup> Estlund, "Jeremy Waldron on *Law and Disagreement*" (2000), 112.

<sup>156</sup> *Ibid.*, 112-113.

<sup>157</sup> *Ibid.*, 113.

<sup>158</sup> *Ibid.*

While *no reasonable objection* is very demanding of what is to count as legitimate political power, it poses a special problem for Waldron because of the importance he puts on reasonable disagreement. On Estlund's explication he formulates this as *Deep Disagreement*:

No position about what is required by fairness or justice or legitimacy is beyond reasonable doubt.<sup>159</sup>

The consequence of *deep disagreement* and *No Reasonable objection* taken together is, of course, that no exercise of political power is ever legitimate. Also known as *philosophical anarchism*.<sup>160</sup> It is important to note that while Waldron does not explicitly endorse *no reasonable objection* as a test for political legitimacy in *Law and Disagreement*. Estlund's claim is that Waldron nonetheless does argue from the principle.<sup>161</sup> If Waldron accepts this principle he is in trouble, because *philosophical anarchism* contradicts any conception of political legitimacy, including the one expressed in the *Fair Proceduralism* principle. That is, Either Waldron must hold that political decisions can never be legitimate, or he can reject the formulation of *deep disagreement*. Estlund suggest that the best strategy for Waldron is to modify *deep disagreement* in such a way that it does not extend to a principle like *Fair Proceduralism*.

The simplest reply to this difficulty would be to say that on the basic principle of legitimacy (fair proceduralism) is beyond reasonable disagreement. Estlund speculates that the reason for Waldron's resistance to this is that if matters of legitimate democratic procedures are beyond reasonable disagreement, then this would open the door to the notion that some epistemic elite could *legitimately* trump the disagreement found among citizens.<sup>162</sup> That is, it would undermine Waldron's case against judicial review. Estlund, for his part, argues that this is not necessarily the case:

The existence of a court with powers to review pertinent legislation may be subject to reasonable objections on other grounds. For example, there may be reasonable doubts whether such a court is likely to better ascertain and implement the proper standard than a majoritarian procedure. So, the slope is not so slippery as Waldron may fear from holding that a conception of democratic legitimacy is beyond reasonable objection to holding that some court must be superior to the legislature.<sup>163</sup>

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<sup>159</sup> Ibid.

<sup>160</sup> Ibid., see also Robert Paul Wolff, *In Defence of Anarchism*, Harper Torchbooks, 1970.

<sup>161</sup> Ibid., 114.

<sup>162</sup> Ibid., 118.

<sup>163</sup> Ibid.

In *Law and Disagreement* Waldron uses reasonable disagreement, also concerning basic political principles, as a way of highlighting a tendency in political discourse of discounting the views of conscientious citizens as not just mistaken, but as a result of bad faith or some defect of thinking and reasoning. And there is good reason to be hesitant in describing our fellow citizens as somehow pathologically mistaken when they disagree with us. But in making reasonable disagreement so deep he effectively undermines his own conception of the legitimacy of majoritarian processes.

In examining the argument Waldron makes against judicial review in “The Core of the Case Against Judicial Review”, it appears that he has taken Estlund’s advice of modifying the assumption of reasonable disagreement. But there are still issues for Waldron’s conception, even if *philosophical anarchism* is avoided.

#### **4.6. Fair proceduralism and “The Core of the Case”.**

Estlund’s suggestion is that Waldron can resist the slippery slide toward accepting judicial review because there can be “reasonable doubt” as to whether courts are actually better at getting issues of rights correctly. In other words, he believes that uncertainty about outcome-related reasons can provide a basis for opposing judicial review.

In “The Core of the Case Against Judicial Review”, Waldron argues against the idea that courts are better than legislatures at getting rights correctly, and he believes we ought to regard outcome-related reasons as neutral on the issue. He then develops his procedure-related argument that tips the balance of argument against judicial review. The centrepiece of his argument against judicial review is his process-related argument that proceeds from an assumption very much like *fair proceduralism*. This is clear in “The Core of the Case Against Judicial Review”, where the central question of legitimacy is framed as how we justify a political decision to a citizen who disagrees with it. Specifically, the question of legitimacy must answer two questions from the disgruntled citizens:

1) Why were these people empowered to make the decision (i.e. members of a legislature or supreme court justices;

and;

2) Why wasn't greater weight given to the views of those who agreed with the disgruntled citizen.<sup>164</sup>

The answer to the first is that in the case of legislators they were elected by a fair process, meaning one that treated all citizens equally. And the answer to the second is that all views were given equal maximal weight.<sup>165</sup> The basic idea at work, then, is that *Fair Proceduralism* provides a principle of legitimacy that even citizens who disagree with a given decision can, and *ought to*, accept. Or in Estlund's words: "Fair proceduralism says that a law is legitimate when it has been produced by a fair process that is fair to all citizens".<sup>166</sup>

Reasonable disagreement about rights is also important for Waldron's core case against judicial review, but *deep disagreement* does not appear to be part of his argument.

Disagreement about rights is his fourth assumption about core societies, but it is not clear how deep Waldron takes this disagreement to reach. On the other hand, his third assumption is that most members of a society has a general commitment to rights:

Although they believe in the pursuit of the general good under some broad utilitarian conception, and although they believe in majority rule as a rough general principle for politics, they accept that individuals have certain interests and are entitled to certain liberties that should not be denied simply because it would be more convenient for most people to deny them.<sup>167</sup>

I believe that Estlund's recommended strategy is the one that Waldron has taken in core of the case. He has given up deep disagreement in favour of a modified version where the principle of legitimacy is not itself subject to disagreement. He then argues that there is sufficient doubt about the superior ability of the judiciary to reach correct decisions about rights so that we ought to regard outcome related reasons as neutral on the issue. His procedural argument is then meant to carry the day.

But even if this strategy does manage to avoid philosophical anarchism, there are still problems for Waldron's core argument. These are of two kinds. The first has to do with fair proceduralism and Waldron's implication that this principle from fairness uniquely picks out

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<sup>164</sup> Waldron, "The Core of the Case Against Judicial Review" (2006), 1387.

<sup>165</sup> Ibid., 1388.

<sup>166</sup> Estlund, "Waldron on *Law and Disagreement*" (2000), 119.

<sup>167</sup> Waldron, "The Core of the Case Against Judicial Review" (2006), 1364.



majoritarian decision procedures. The second address Waldron's assumption that legislatures actually fulfil his own conditions of fairness.

#### **4.7. The Majority Decision and fairness.**

Waldron does not argue explicitly for the fairness of the majority decision (MD), but says that: "Better than any other rule, MD is neutral as between the contested outcomes, treats participants equally, and gives each expressed opinion the greatest weight possible compatible with giving equal weight to all opinions". One way to see this is that his procedural case rests on the notion of legitimacy as fairness. MD is the recommended strategy that maximally fulfils fairness. This account of fairness has two aspects: 1) Fairness requires that all citizens get an equal opportunity to participate in a political decision; and: 2) Fairness requires that each citizen's views are given the greatest weight, compatible with an equal weight for the views of all others.<sup>168</sup>

This is a procedural argument that is meant to recommend a majoritarian decision-procedure as best fulfilling fairness in both aspects. A crucial feature of this is that fairness aspect (2) is rooted in the idea of reasonable disagreement. It is not fair to privilege some views over others, because we do not have access to any independent criteria to base such a privileging on. But this presupposes *deep disagreement*, which is the rejection of the existence of any such criteria. The reason that this poses a problem for Waldron's account, is the fact that fairness aspect 1) does not uniquely pick out majoritarian decision procedures as the fairest one. A coin-flip for instance, is neutral between outcomes and treats participants equally if we are faced with a binary choice.

But even if we accept fairness aspect (2), Waldron's proposed test would not uniquely recommend majoritarian decision-procedures. To this David Estlund has replied that:

First, it remains unclear why this is a value. It is not explained by procedural fairness [...]. It is not explained by the value of equal respect for persons, since a coin flip or a lottery show no failure of equal respect. If maximizing equal decisiveness is an important value, Waldron needs to say why it is, since it would be the only reason he gives for preferring majority rule to a lottery or a coin flip. Second, even if maximizing equal chance of decisiveness singles out majority rule it also militates in favour of very small legislative bodies. The chance of an individual's being decisive goes down with the size of the assembly".<sup>169</sup>

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<sup>168</sup> Ibid., 1388 – 1389, see also Zurn, *Deliberative Democracy and the Institutions of Judicial Review*, 147 – 148, point e. in his reconstruction of Waldron's argument.

<sup>169</sup> Estlund, "Waldron on *Law and Disagreement*" (2000), 121.

To the latter objection that fairness aspect (2) would be in favour of small legislative bodies, I believe that Waldron could reply that he is not interested in increasing the maximal decisiveness of the political representatives of a legislature. But rather we are interested in the maximal decisiveness of all citizens. For Waldron, a very small legislature would be less likely to represent the diverse opinions extant in the electorate. But there is another problem for Waldron, namely that real worries can be raised about the true representative nature of a legislature.

#### **4.8. Legislatures as a mirror for the demos.**

The main focus here is Waldron's treatment of the representative nature of legislatures. His view of them is that they represent an approximation of how the citizenry as a whole would decide issues:

For legislatures, we use a version of MD [majority decision] to choose representatives and we use a version of MD for decision making among representatives. The theory is that together these provide a reasonable approximation of the use of MD as a decision-procedure among the citizenry as a whole (and so a reasonable approximation of the application of the values underlying MD to the citizenry as a whole).<sup>170</sup>

The reason that legislatures can vindicate the democratic demand of participation is that they properly mirror the deliberations and decisions that would take place if the decision was actually made by the demos as a whole. This is part of Waldron's stated intention to provide a 'rosy' picture of legislatures to complement what he views as a widespread idealization of courts in much political philosophy. This does, however, present a new challenge to Waldron's argument against judicial review. Representative government, in itself, is counter-majoritarian if compared with a system of direct democracy where most decisions are made by a vote in which all citizens can participate. Waldron argues that this is a necessary consequence of living within complicated, large, and diverse, contemporary democracies.

But serious questions can be raised about the representative nature of legislatures. For one, professional politicians in most countries tend to be quite privileged both in terms of economic resources and education. But even excluding this, there are reasonable worries to be had about the ability of politicians to subvert the representative nature of legislatures. And judicial review might be justified because it guards against this kind of subversion.

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<sup>170</sup> Waldron, "The Core of the Case Against Judicial Review" (2006), 1388.

This is a strain of arguments for judicial review that Waldron does not address. One of these is Fallon's argument in "An Uneasy Case for Judicial Review", he suggests that instead of viewing judicial review as an either-or between legislative control or judicial control, it should instead be regarded as an additional veto point for especially important issues. For instance, questions of individual rights.

#### **4.9. Judicial Review and Multiple Veto points.**

In response to Waldron, Richard H. Fallon jr. argues that even assuming that courts are no better at getting to the truth about rights, there is an outcome-related case to be made in favour of judicial review. Fallon suggests that it can be legitimate because it represent an extra protection of rights that a society deems particularly important. "If errors of underprotection – that is, infringements of rights – are more morally serious than errors of overprotection [...] there could be outcome related reasons to prefer a system with judicial review to one without it".<sup>171</sup> Fallon uses the analogy of the jury system in the U.S. as an example. The U.S. jury system requires unanimity from the jurors in order to convict someone for a crime. This is because it would be morally worse to send an innocent person to jail than it would be to let a guilty person go free.

Fallon suggests that outcome related reasons could also be the value of a additional veto point for important decisions: "[...] Might a society reasonable want to create multiple veto points so that governmental action could not occur if *either* a court *or* the legislature thought that the action would violate individual rights?"<sup>172</sup>

#### **4.10. Embracing deep disagreement?**

Estlund recommends that Waldron modify the assumption of deep disagreement because it threatens to undermine his principle of legitimacy that recommends MD as a maximally democratic decision procedure. This undermines his process-related case and results in outcome-related reasons being more important, a case Waldron himself rules as inconclusive. Furthermore, there are also issues concerned with his recommendation that a majority decision uniquely satisfy his demands to fairness.

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<sup>171</sup> Fallon, "The Core of an Uneasy for Judicial Review" (2008), 1699.

<sup>172</sup> Ibid., 1705.

Allan C. Hutchinson has suggested a case against judicial review that is based on the rejection that outcome related reasons ought to be relevant for the debate about judicial review at all. Fundamentally Hutchinson believes that Waldron's assumption that there is truth about rights is mistaken. For instance, the latter argues that courts are not better at getting at the truth about rights than are legislatures. Contrary to this Hutchinson argues that there is no such truth to be had.

In terms of a conception of democracy he rejects the notion that democracy means fulfilling some set of objective values or truths. In other words, he rejects the idea that there is, even in principle, some set of rights that "will always be morally superior".<sup>173</sup> Instead "it is for people to determine themselves what is best for them".<sup>174</sup> What this means is that the standard for what is just or unjust *is* process by which a decision is made:

The lack of any neutral, reliable, or uncontested epistemic procedure by which to resolve disagreements means that there is no way to compare the effectiveness of different institutions in terms of their capacity for determining better or worse outcomes. Indeed, without such a method, the only way to compare and contrast different institutions for resolving rights disputes is by their process-related qualities and strengths.<sup>175</sup>

What Hutchinson is arguing for is a conception of democracy that views it as a social practice rather than as a set of principles or values.

Against this charge of relativism Hutchinson argues that the starting point ought to be already existing democratic practices and institutions. Arguments from fairness and emphasis on participation are here not grounded in anything beyond "communal practices and engagement".<sup>176</sup>

This, of course, opens up both a charge of relativism and a charge of a tyranny of the majority. That is, if there is no independent standard, or no right or wrong answer to questions of rights that face a polity, how can we criticize those decisions if we find them unjust? With the danger of proving that Godwin's law also applies to philosophy: If a society had a majority that was thoroughly Nazified, in addition to being democratic in the sense that it truly allowed for the participation of all citizens in political decisions, would not the interment of undesirables (at the very least) be democratic in Hutchinson's conception?

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<sup>173</sup> Hutchinson, "A Hardcore Case Against of Judicial Review" (2008), 59.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid., 61.

<sup>176</sup> Ibid., 60.

This charge of relativism has long been an issue in moral and political philosophy. The absence of a standard of legitimacy that is independent of the values and principles held in the societies in question implies that whatever a society holds to be legitimate is legitimate. Hutchinson believes that he can resist this charge because his view is not that “all views on all topics are as good or valid as any other”.<sup>177</sup> His position is, instead, that the standard for our moral values is whatever values “pass muster under the prevailing democratic procedures and protocols of justification”.<sup>178</sup> In the specific realm of politics this means that: “Political and moral rights are justified to the extent that a vibrant democracy holds faith with them”.<sup>179</sup> This is more or less what Hutchinson has to say on the subject of relativism.

But this is not necessarily as radically relativist as it may at first seem. The democratic ideal that Hutchinson draws on to formulate his conception of *strong democracy* is an ideal that is taken from the existing political culture and tradition in contemporary democracies, and not grounded in some independent principle beyond our current political discourse.

Burton Dreben has argued that John Rawls, one of the giants in political philosophy, advocates for a similar position. Much debate about Rawls has centred around his theory as a theory of rational decision theory. Dreben argues that while this may be the case in *Justice as Fairness*, Rawls revises his position in the later *Political Liberalism*.<sup>180</sup> According to Dreben, Rawls’ project is to start with “[...] intuitive moral, political considerations, and then you see what they come to. You cannot ground them.”<sup>181</sup> Specifically, Rawls has engaged in an attempt to work out if the notion of a constitutional liberal democracy is internally consistent or not. The strategy is not to ground the pre-eminence of constitutional liberal democracies over all other forms of government in some abstract and neutral principle. Rather, Rawls proceeds from the assumption that constitutional liberal democracy is what we have. And, furthermore, that the institutions and political life of a society express and embody ideas and principles that are shared. Rawls says that:

In a democratic society [and always you must read that as constitutional liberal democratic society] there is a tradition of democratic thought, the content of which is at least familiar and intelligible to the

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<sup>177</sup> Ibid., 61.

<sup>178</sup> Ibid.

<sup>179</sup> Hutchinson, “A Hard Core Case Against Judicial Review” (2008), 61.

<sup>180</sup> Dreben, “On Rawls and Political Liberalism” (2002), 321-322.

<sup>181</sup> Ibid., 322.

educated common sense of citizens generally. Society's main institutions, and their accepted forms of interpretation, are seen as a fund of implicitly shared ideas and principles.<sup>182</sup>

This fund is the starting point for Rawls' theory. The point is not to ground it in a transcendent principle, nor even argue for why this fund ought to be our starting point. The point is to see where it leads.<sup>183</sup> I will not go further in the examination of Rawls' conception of liberal constitutional democracy here. But I hope that these brief considerations present a possibility that taking as a starting point existing ideals and values, for instance, the notion of democracy as popular government, does not lead us to a position where we are forced to admit that no conception is better or worse than any other. The question is what more detailed conceptions we can work out on the basis of our shared fund of ideas.

#### **4.11. Strong Democracy.**

Hutchinson shares Waldron's commitment to popular participation in government. But he views the extent of these commitments to be much more far ranging and demanding than Waldron. According to Hutchinson: "Strong democrats will look to extend and proliferate the opportunities for participation in micro-communities rather than to narrow and accrete decision-making power to small and centralised elites in the name of expertise and truth".<sup>184</sup>

In other words, Hutchinson wants to see an ambitious transformation of democratic institutions and structures. This includes the legislature that Waldron believes is so well situated as an instrument of popular participation. Hutchinson says that:

Rather than function as remote entities that have tenuous claim to democratic legitimacy through occasional elections, they might begin to be less entrenched and more responsive in their designs, deliberations, and decisions; local government would replace federal government at the heart of democratic involvement.<sup>185</sup>

Hutchinson's claim is that if there is to be an institution or institutions that is meant to help protect the rights of citizens, such institutions must themselves be more representative and accountable to popular views.<sup>186</sup> Judicial review does not meet this criterion.

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<sup>182</sup> Rawls quoted in *Ibid.*, 324.

<sup>183</sup> *Ibid.*, 323.

<sup>184</sup> Hutchinson, "A Hard Core Case Against Judicial Review" (2008), 63.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*

In this way, Hutchinson sides with Waldron in the debate about judicial review but resists viewing the debate as a zero-sum choice between legislatures and courts.<sup>187</sup>

This notion of strong democracy also has wide-reaching consequences for the way in which we view constitutionalism. For instance, Hutchinson recommends an idea expressed by the United States founding father Thomas Jefferson: that every generation ought to have the ability to choose the constitution it wanted.<sup>188</sup> This and similar measures suggested by Hutchinson and Colón-Ríos aim to bring the constitution more clearly under democratic control. It is a clear break with a constitutionalist conception that emphasizes the stability of a constitution over the possibilities for actual citizens to change the constitution.

I will continue by reviewing the tension between democracy and constitutionalism, and further developing the account from Hutchinson and Colón-Ríos and what its practical effects might be.

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<sup>187</sup> Ibid., 62.

<sup>188</sup> Ibid., 64.

# Chapter 5: A Democratic Constitution?

## 5.1. Democracy or Constitution?

Running through this thesis is a basic tension. This is the tension between democracy and constitution. One source of this tension is that they represent two different-principles of legitimacy. Understanding democracy as participation in government means tying the basic principles of legitimacy to a procedural ideal. Namely that the people decide for themselves as equals. Per this principle then, there ought to be no constraints on what the people can and cannot decide to do. But at the same time, the former represents principles of legitimacy that are tied to an ideal about outcomes. That is, per this principle there are constraints. The debate about judicial review brings out this tension more clearly because strong judicial review, gives the judiciary the authority to overrule legislation if they believe it contradicts the constitution. The common way of formulating the problem as having to do with the *democratic* legitimacy of judicial review, highlights this further. If constitution and democracy represent two different principles of legitimacy: one concerned with substantive outcomes, and the other concerned with procedures, then it seems as if we must make a choice between them.

I believe that the tension between constitutionalism and democracy is also connected with modern notions of plurality. To say that ‘the people’ are to create their own constitution, what this ‘people’ actually refers to is a dilemma as well. Is it the actual people living in Norway here and now, or something more hypothetical and abstract? Increasingly we have become sceptical towards appeals to a hypothetical and unified people. In terms of principles of legitimacy, this is a reason to shift the focus from outcome to procedure.<sup>189</sup> We cannot expect people to agree on substance, but maybe they can agree on procedure. At the same time, there is a great deal of disagreement on what is to count as fair, just, and democratic procedures as well. For one thing, differences in procedure can easily lead to differences in outcome. In practice, support or opposition to judicial review tends to shift depending on what we think about certain cases.<sup>190</sup> This will be the case even with a truly democratic procedure of constitutional enactment.

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<sup>189</sup> Chambers, “Democracy, Popular Sovereignty and Constitutional Legitimacy” (2004), 156-157.

<sup>190</sup> Waldron, “Core of the Case Against Judicial Review”, (2006) 1351.



Constitutions provide a stable framework for ordinary electoral politics. It is therefore unappealing to say that we ought to do away with constitutional law as such in favour of parliamentary supremacy.

Dworkin places himself quite firmly on the side of constitutions. While there is a place for participation, the basic principle of legitimacy is tied to a substantive ideal about outcomes. Dworkin wants a constitutional democracy where basic political principles and values are enshrined in a constitution and protected by the judiciary. Popular control does not, in the main, extend to constitutional essentials. Dworkin's support for strong judicial review also means that final authority on constitutional interpretation lies beyond electoral or participatory control. There is a place for democracy here, but it does not extend very far.

On the other side of the tension, Waldron clearly identifies democracy with a right to participation and argues that final authority on constitutional interpretation ought to be in the legislature rather than the court. Waldron's approach favours the democratic side of the tension, advocating giving greater authority to legislatures. He draws out the right to participation as *the* democratic right. From this rights-based standpoint, Waldron advocates for a procedural principle of fairness as the source of democratic legitimacy.

I have argued that Waldron ends up in trouble, in large part because he does not seem to endorse the comprehensive consequences of his account of democratic legitimacy. By comparison, Hutchinson's notion of strong democracy does not suffer from this defect.

In a strong democracy, it is a point of principle and practice that ends and means are integrated as closely as practically possible: The status and legitimacy of the initiating procedures is the benchmark against which both the legal system and any particular enactment's legitimacy can be measured. The greater the extent and quality of participation in the legislative and adjudicative process, the greater the legitimacy of their substantive pronouncements.<sup>191</sup>

Based on a procedural ideal of equal participation, this ideal also leads him to highlight substantive demands like economic equality.<sup>192</sup> This and many other features of society are important for citizen's ability to actually participate in society on a broader scale than today.

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<sup>191</sup> Hutchinson, "A Hard Core Case Against Judicial Review" (2008), 62-63.

<sup>192</sup> *Ibid.*, 37.

These are features that Waldron speaks highly of as part of a democratic culture, but he does not include them as part of his conception of democratic legitimacy.

Hutchinson's approach is also one that clearly subjugate constitutional protections to democratic control. In his own words, strong democracy represents a wager that giving more power to citizens will result in better outcomes: "Its critical wager is that the governed will produce more outcomes which are more conducive to society as a whole than those dictated by abstract and partial principles or by elite institutions or agencies".<sup>193</sup> Strong democracy in this way gives up the notion that we can guard against rights violations and unjust political decisions at the level of philosophical theory. "With democracy comes risk. But that is both the exhilarating promise and the ever present danger of democratic governance".<sup>194</sup>

I do not believe I am alone if feeling that there is something unsatisfactory about simply hoping that increased participation will lead to better outcomes. It appears that the best Hutchinson can do to reassure those who are worried about rights violations or a more general tyranny of the majority, is to say that you will simply have to engage in the political fights in your society and do your best to make sure your side wins. While it certainly is an exciting gamble with high stakes, it is not very reassuring for those who are less confident in the potential results of choosing democracy over constitutional protections.

## **5.2. Ordinary Politics and Constitutional Politics.**

Above I stated the tension between constitution and democracy as one between two competing principles of legitimacy. Either procedure or outcome. This way of formulating suggests that we have to choose one or the other. I want to argue that this is not necessary. A different way of formulating the tension can be found in Bruce Ackerman. He distinguished *normal* politics from *constitutional politics*. The latter were periods of "heightened political consciousness", where 'the people' speak outside of the ordinary institutions of government like the legislature.<sup>195</sup> Simone Chambers writes that: "[...] There are special moments in the life of a political community where deep, 'constitutive' issues gain visibility in the public sphere and lead to a reflexive evaluation of a constitutional tradition or dilemma".<sup>196</sup> By

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<sup>193</sup> Hutchinson and Rios, "Democracy and Constitutional Change" (2007), 10.

<sup>194</sup> Ibid., 10.

<sup>195</sup> Colon-Rios, "The End of the Constitutionalism-Democracy Debate" (2009), 8.

<sup>196</sup> Chambers, "Democracy, Popular Sovereignty and Constitutional Legitimacy" (2001), 161.

contrast, normal politics are periods where it is the government that speaks and we should not automatically interpret the actions of government as the true expressions of ‘the people’.

By using this distinction between normal politics and constitutional politics, we can recognize the tension between constitution and democracy without having to that tension go away. In normal politics, we can more readily accept the need for a representative government that deals with the day-to-day work of politics. It would be cumbersome, to say the least, to run a society by continual referenda or citizen’s assemblies. But because constitutional politics is both more fundamental and intermittent, we can design institutions and processes that draws more on actual participation from actual citizens. A truly democratic enactment of a constitutional order would not eliminate the tension between constitutionalism and democracy. But bringing the constitution more clearly under democratic control could bring us closer to the ideal of popular sovereignty, also at the basic level of constitutional law.

### **5.3. The case of Norway.**

With this latter point in mind, Norway, despite its system of strong judicial review, might not be in such a bad way in terms of the democratic credentials of its constitution. Recall that the Norwegian constitution was extensively revised as recently as in 2014. Fittingly enough, the revision was particularly significant because it extended individual rights protections and officially recognized judicial review. Changes to the Norwegian constitution requires a supermajority in the legislature to change the constitution. Specifically, suggestions for constitutional changes must be put forth within the three first years of a legislative session. The suggested changes are then evaluated, debated and subject to a vote after the subsequent election. The point being that the electorate can review suggested changes before an election, and use their vote in the subsequent election to have their say about whether or not they approve of those changes.

In theory, this arguably puts the Norwegian constitution on a fairly solid democratic footing. While not subject to a referenda or other forms of direct electoral input, the possibility of engaging with the significant changes of the constitution was there. However, Inge Lønning, the leader of the body charged with proposing the constitutional changes, said that the public

debate about the changes was lacking.<sup>197</sup> Legal scholar Anine Kierulf also criticized the revision of the constitution, not because of its content, but because of a lack of citizen's participation. The formal procedures were followed, but Kierulf argued that both the legislative debate, and the broader public debate about the significant changes proposed was lacking, and that this compromised the democratic legitimacy of the changes.<sup>198</sup>

At the face of it, that strong judicial review was enacted so recently would make it the people's preferred option for evaluating the constitutionality of legislation. The significant revision of the Norwegian constitution in 2014 to not only include judicial review in the constitution, but also expanding rights protections, can then be viewed as re-affirming the constitution as the preferred framework of the people themselves. To the extent that the constitution has democratic legitimacy as a whole, the system of judicial review also has democratic legitimacy. The Norwegian courts are protecting the political structures, procedures, and individual rights that the Norwegian people themselves enacted.

#### **5.4. Justification, Application and Judicial Review.**

Making the constitution regularly subject to a referendum, would seem likely to increase the likelihood that the debate is of a better quality the next time we change the constitution. But even if the debate about the 2014 revision of the constitution were of a good quality so that we could say that its democratic legitimacy had been clearly established, there is another problem. And this is directly related to judicial review and a disanalogy between ordinary jurisprudence and constitutional review.

In ordinary criminal law, it is the job of the court to examine a particular case and determine which law (if any) best applies to that particular case. The laws themselves are not up for examination. For instance, if someone is accused of stealing bread, that they did so to feed their starving family, does not impact the court's decision on their guilt.<sup>199</sup> Viewed in this way, courts are not engaged in justifying legal norms, they are simply applying already established norms. Constitutional review as such (not just judicial review) is then not a matter of upholding or implementing some substantive set of values or norms, but simply the application of constitutional norms to concrete cases. Provided these norms were the outcome

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<sup>197</sup> Lunde, «ingen bryr seg om grunnloven», i Aftenposten 6/8-2012. URL: <https://www.aftenposten.no/norge/i/4qrgq/Ingen-bryr-seg-om-Grunnloven>.

<sup>198</sup> Kierulf, "Konstitusjonalisme på norsk", I Klassekampen 25/4-2014. URL: <http://klassekampen.no/article/20140425/ARTICLE/140429962>, 27/08-2017.

<sup>199</sup> Though it may be a reason for leniency in sentencing.

of a fair and democratic process, the democratic worry about judicial review is not so pressing.

This is part of Jürgen Habermas' defence of judicial review.<sup>200</sup> He drew a distinction between application and justification discourses in his defence of judicial review. But while the distinction may be useful as an analytical tool, it is not so easy to maintain in practice. The justification and application of norms stand in a reflexive relationship, and ultimately refer back to each other. According to Zurn:

[...] We could only accept the validity of a general norm in a justification discourse in the light of some expectations about how it will work in practice, that is, about how it will concretely affect various persons and their interests. Justification discourses then, inevitably refer back to application discourses. Likewise, as general norms are only provisionally justified in the absence of sufficiently countervailing reasons, new concrete fact situations can arise that cause us to call into question the *prima facie* justification of a general norm, thereby making the previously unproblematic general norm, thereby making the previously unproblematic general norm presumptively unjustified.<sup>201</sup>

The point I want to draw out from this is that constitutional *review* cannot be clearly delineated from the process of constitution *writing*. This means that it is not a sufficient defence for judicial review to argue that it is simply engaged in protecting an already enacted constitution. But by the same token, ordinary jurisprudence is not a clear-cut case of application discourse either. While a court case may end with the application of a general norm on a concrete case, part of the work of the court can also include dealing with the relationship between potentially competing legal rules, and the relationship between them.<sup>202</sup>

The greater problem for giving power of constitutional review to courts is connected to other features that make the analogy between ordinary law and constitutional law problematic.

In the case of ordinary law, what happens when there is uncertainty about how a law ought to be interpreted, or how two different laws relate to each other? A natural answer is that the issue ought to be clarified by those who made the laws, namely the legislature. But in the case of constitutional law neither courts nor legislatures have the proper authority to make

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<sup>200</sup> That judicial review is an application discourse is part of Jürgen Habermas' defence of judicial review. See for instance Zurn (2009) 243-252 for more on his defence in particular.

<sup>201</sup> Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (2009), 257.

<sup>202</sup> *Ibid.*, 247-248.

constitutions. On the framework I have developed here, that power resides, in principle, solely with ‘the people’ themselves.

To begin with, remember that, when discussing constitutional interpretation, Dworkin takes as his starting point that it is unclear what the values embedded in a constitution actually entails. For him this is connected with the semantic nature of constitutions. Much of the language in constitutions is abstract, and refers to abstract values and principles whose interpretation and specification is not uncontroversial. Zurn says that this feature of constitutions can reasonably be seen as a consequence of reaching agreement on constitutional provisions under conditions of unavoidable and reasonable disagreement. Even if there is disagreement about the reasons for endorsing a specific textual formulation, a minimal disagreement can more easily be reached. It is furthermore possible to reach agreement on a specific text, without there being agreement on how that text is to be applied to particular cases.<sup>203</sup> Zurn’s formulation is that constitutional protection inevitably will transmute into constitutional elaboration.<sup>204</sup>

This is why there is also a need to consider the democratic credentials of the institutions that are charged with the interpretation and elaboration of constitutional law. A further difference between ordinary jurisprudence and constitutional jurisprudence arise because neither courts nor legislatures truly have legitimate constitution making power. That power is meant to reside with ‘the people’ themselves, represented by a constitutional assembly.

Another way of seeing the danger here is that in applying constitutional tests to statutes and policies, a constitutional court may engage in forms of constitutional specification that rely on reasons available legitimately only to democratic processes of self-government, and thereby surrender a court’s ordinary claim to legitimacy based on its narrow specialization in legal discourse.<sup>205</sup>

That is, the courts cannot legitimately produce, or even change those norms. That authority rests only with the legislature as representatives of the constitution forming power of the people themselves. But it is a feature of constitutions, and, in particular, rights protections, that they must be elaborated and specified. This means that, in fact, the courts charged with

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<sup>203</sup> Ibid., 258-259.

<sup>204</sup> Ibid., 257.

<sup>205</sup> Ibid., 249.

constitutional review will be engaged in more than simply applying established norms.<sup>206</sup> So even if we were content with the democratic credentials of the constitution, there remains a problem of democratic legitimacy attached to the system of strong judicial review.

### **5.5. An unjust constitution?**

I now want to attempt to draw out the tension between constitution and democracy by virtue of a hypothetical example. Suppose that Norway first enacts measures to bring the constitution more clearly under democratic control in line with the suggestions from Hutchinson. Furthermore, assume that process and the public debate surrounding it is extensive and of high quality. What if the outcome of this process is that the new constitution violates fundamental rights? Say, for instance, Norwegian citizens decide that the threat of terrorism means that we must surrender our right to privacy, and allow for widespread surveillance of all citizens, without a demand for a reasonable cause for such surveillance. After all, if you have done nothing wrong, you have nothing to fear, or so the argument goes.

Thinkers in the classical liberal tradition, like Dworkin, can use their substantive conception of democracy to argue that such constitutional provisions are democratically illegitimate. On this view a right to privacy is a necessary condition for democracy proper. Employing a procedural ideal like the strong democratic one I have recommended here does not allow for this rejoinder. This does not mean that there is nothing for the strong democrat to object to. But the objection must be grounded in the democratic ideal as it is embedded in Norwegian society today. On this view, there is nothing that *prima facie*, disqualifies restricting a right to privacy in a democratic society. This is not to say that rights are not important, nor that there are not better or worse outcomes. Instead the source of these rights is the actual commitment a society have to them. Hutchison's contention is that: "Political and moral rights exist and are justified to the extent that a vibrant democracy holds faith in them".<sup>207</sup> In the hypothetical case here, Norway has decided to not hold faith in the right to privacy. Is the strong democrat then committed to defending this decision as democratically legitimate on grounds of procedural legitimacy? I believe the answer to this is yes. In other words, we ought to bite the bullet, as it were. In my hypothetical case, it is perfectly legitimate to restrict the right to privacy. But it is important to see that any such decision is part of an ongoing democratic

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<sup>206</sup> Recall that it is also a key component of Dworkin's conception that constitutional interpretation is a productive endeavour that requires the use of the moral and political judgement of judges.

<sup>207</sup> Hutchison, "A 'Hard Core' Case against judicial review" (2008), 61.

process, where values, principles, rights, and their moral and political status are under continual development and debate.

But perhaps this example does not go far enough. After all, democratic political participation can still be widespread even though the government can legally read your emails.

Surveillance has been expanded in many democracies, and while problematic they are generally still recognized as democracies. So, what if a democratically revised Norwegian constitution only allow property owning men over 25 years of age the vote? As in the case of a right to privacy there is nothing outside this democratic process that can delegitimize such a decision by virtue of its outcome. By virtue of a procedural ideal this decision *in itself* would be democratically legitimate. But in this case, any subsequent political decision based on this would not be legitimate. I would argue that it would, in fact, cease to be a democracy altogether. Universal adult suffrage is a cornerstone of democratic government.

Referring back to the idea that Norwegian citizens to a large extent share a fund of values and principles embodied in our laws and political traditions, the essential move is to move away from the notion that the constitution ought to be as rigid as possible, and to embrace the possibility of constitutional change rather than fear it. The democratic and political culture of Norway, or any political culture, contains a fund of values and principles that does hold a great deal of sway. This is a contingent fact about Norway and other contemporary democracies.

## **5.6. Referendums.**

Whether as an initiating procedure to call a constitutional assembly or as a ratification of proposed constitutional changes, referendums are an important part of democratizing constitutional politics. But this does not mean that such referenda in themselves are a democratic panacea. Both Napoleon and Hitler used referendums to confirm their status as supreme leader of France and Germany respectively. There are a number of ways that government executives can use referendums in ways that run counter to democratic ideals.

First, referendums ask citizens a yes or no question that they cannot revise. It does not allow citizens to question or deliberate about the questions asked. Second is the question about voter competence. For instance, if the suggested changes to a constitution are many and complicated, votes may be cast for woefully insufficient reasons. Third, referendums are



susceptible to manipulations from executives, media institutions and other individuals or groups.

Further problems arise if we consider that a referendum may pass, but turnout can be low.<sup>208</sup> As such it can be unclear what the result of a referendum actually mean. In short, referendums cannot alone guarantee a good democratic process. In particular, they do not necessarily reflect the kind of expansive and high quality good faith debate we want. It is interesting to note that many of the reasons for being sceptical towards referendums can, and are, also used to express doubts about ordinary elections as well. But in constitutional referendums the stakes are even higher.

The dilemma is that voting and referendums are the obvious choice if we want citizens to have their say. But at the same time, we need to be attentive to the dangers of using referendums. There is also the argument that engaging the citizenry in a referendum can help to improve and increase both participation and deliberation. This does not happen automatically, however. We should be attentive to both formal and informal procedures and institutions that are involved in constitutional referendums, and how they can influence public debate and the degree to which people feel that their arguments have been given a fair hearing. Talking about majority rule, John Dewey said that :

Majority rule, just as majority rule, is as foolish as its critics charge it with being. But it is never merely majority rule. [...] The means by which a majority comes to be a majority is the important thing: antecedent debates, the modification of views to meet the opinions of minorities. [...] The essential need, in other words is the improvement of the methods and conditions of debate, discussion and persuasion”.<sup>209</sup>

Majority rule by virtue of constitutional referendum carries with it the same aspiration. Organising town hall meetings, creating forums where interested citizens can meet and debate the issues at hand, as well as procedures for collating and collecting the views and arguments expressed by the citizenry can help to increase what Dewey called “the methods and conditions of debate, discussion and persuasion”.

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<sup>208</sup> A recent example is the advisory referendum about Catalan independence conducted in 2014. While 81% voted yes, turnout has been estimated to only 37%. The Economist, 10/11-2014. URL: <https://www.economist.com/blogs/charlemagne/2014/11/catalonias-independence-vote>.

<sup>209</sup> Dewey quoted in Chambers, “Constitutional Referendums and Democratic Deliberation” (2001), 243

That we must pay attention to the process that goes before and during periods of constitutional change is also made by Hutchinson and Colón-Ríos:

Although the proposals of a constituent assembly are normally ratified by the electorate before they come into effect, popular participation should not be limited to a process in which experts draft the constitutional text and then submit it to a ‘yes’ or ‘no’ vote in a referendum; it must involve a process in which citizens are allowed to propose, debate, and finally decide on the content of their constitution.<sup>210</sup>

To be sure, there is a balance that must be struck between permanence and fluidity. The period between constitutional assemblies and the percentage thresholds for petitions, are ways of adjusting the balance one way or another. It is also possible to set a minimum percentage of participation in the ratifying referendums. This would also be a way to reducing worries that citizen’s passivity would enable a highly motivated minority to enact changes that does not have majority support.

### **5.7. Final Words.**

There are certainly dangers in opening up the constitution to greater degrees of change. The actual people are not the hypothetical ‘we the people’ we sometimes find in political and legal theory. At the end of the day, taking measures to bring the ideal of popular sovereignty closer to actuality is an exercise in trust in our fellow citizens. It represents the belief that greater degrees of democratic participation, also at the level of basic law, will lead to a society that is more sensitive to the needs and desires of its citizens. The discomfort many feel about such suggestions is understandable. But I believe that this discomfort ought not to serve as a reason for putting the basic laws of our society beyond democratic control.

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<sup>210</sup> Colón-Ríos and Hutchinson, “Democracy and Constitutional Change” (2011), 14.

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