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# The Core of an Unqualified Case for Judicial Review

A REPLY TO JEREMY WALDRON AND  
CONTEMPORARY CRITICS

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## INTRODUCTION

Should courts in free and democratic societies possess “the authority to strike down legislation when they are convinced that it violates individual rights”?<sup>1</sup> The practice of judicial review assigns such authority to the courts, and thus removes many fundamental political issues from the control of the democratically elected legislature. Advocates of judicial review argue that the protection of individual rights through judicial review is necessary in order to make possible the goal of self-government that motivates democratic theory. The defining quality of democratic government—according to such leading theorists as Ronald Dworkin, Joshua Cohen, and Cécile Fabre—is not unconditional fidelity to the preferences of the majority, but rather the joint and equal participation of citizens in the process of self-government.<sup>2</sup> According to these theorists, democracy is

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<sup>1</sup> Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1348 (2006) [hereinafter Waldron, *The Core of the Case*].

<sup>2</sup> See RONALD DWORGIN, *TAKING RIGHTS SERIOUSLY* 82–90 (1977) [hereinafter DWORGIN, *TAKING RIGHTS SERIOUSLY*] (arguing that judicial decisions in civil cases should be determined by considerations of principle (which respect rights), not considerations of policy (which weigh consequences)); Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 68–70 (James Bohman & William Rehg eds., 1997) [hereinafter Cohen, *Deliberation*] (arguing that the protection of rights is justified by “notions of autonomy and the common good,” and not by the consequences produced); Cécile Fabre, *A Philosophical Argument for a Bill of Rights*, 30 *BRIT. J. POL. SCI.* 77, 79, 91 (2000) [hereinafter Fabre, *A Philosophical Argument*] (arguing that constitutional rights should be enforced by the judiciary because they are moral rights against the state, not because the judiciary is more likely to protect these rights); Cécile Fabre, *Constitutionalising*

realized only when each member of society participates on equal terms in the construction of shared political institutions and policies. Members of society may enjoy the right to participate in this fashion, they argue, only if the power of the majority is limited to ensure that political power is exercised in a manner ensuring respect for individual rights. Only institutions that guarantee respect for rights in this manner, it is argued, in fact secure conditions within which each member of society participates on equal terms. Judicial review is thus required in order to limit the power of the majority in a manner that makes democratic self-government possible.

These arguments in favor of judicial review have been disputed by recent work in legal theory, in particular the writings of James Allan, Richard Bellamy, Dario Castiglione, James Tully, and Jeremy Waldron.<sup>3</sup> These theorists argue that vesting the courts with the authority to strike down legislation enacted by a representative legislature is inconsistent with the democratic idea of government by the people. Additionally, these theorists argue that democracies should assign the power to resolve questions regarding the nature and extent of individual rights to the majority of citizens and their representatives. According to this view, the institutional features of a constitutional democracy—including judicial review and supermajority provisions—that remove such questions from the public agenda are disrespectful to citizens who would prefer to enact legislation that is forbidden or prevented by institutional constraints on the will of the majority.

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*Social Rights*, 6 J. POL. PHIL. 263, 266 (1998) [hereinafter Fabre, *Constitutionalising*] (arguing that any consequentialist argument for protecting constitutional rights “must ultimately appeal to moral [that is, non-consequentialist] considerations”).

<sup>3</sup> See RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENSE OF THE CONSTITUTIONALITY OF DEMOCRACY* (2007) [hereinafter BELLAMY, *CONSTITUTIONALISM*] (questioning the effectiveness and legitimacy of judicial review as a supplement to democracy); JAMES TULLY, *STRANGE MULTIPLICITY* (1995) (arguing that entrenched rights must be modifiable through political action by the majority to reflect cultural diversity); JEREMY WALDRON, *LAW AND DISAGREEMENT* 209–312 (1999) [hereinafter WALDRON, *LAW AND DISAGREEMENT*]; James Allan, *Bills of Rights and Judicial Power—A Liberal’s Quandary*, 16 OXFORD J. LEGAL STUD. 337, 352 (1996) (arguing that the values that justify respect for rights also justify the rejection of entrenched rights); Richard Bellamy, *The Political Form of the Constitution: The Separation of Powers, Rights, and Representative Democracy*, 44 POL. STUD. 436, 456 (1996) [hereinafter Bellamy, *Political Form*] (arguing that modern democratic societies improperly privilege respect for rights over respect for the will of the majority); Richard Bellamy & Dario Castiglione, *Constitutionalism and Democracy—Political Theory and the American Constitution*, 27 BRIT. J. POL. SCI. 595, 617–18 (1997) (arguing that rights protections in a democracy must ultimately be subject to the will of the majority); Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18, 51 (1993) [hereinafter Waldron, *A Right-Based Critique*].

Jeremy Waldron presents a particularly powerful account of these arguments against judicial review in his influential piece: *The Core of the Case Against Judicial Review*.<sup>4</sup> His article arguably presents the most significant challenge to judicial review that has appeared in the recent legal literature.<sup>5</sup> As the title of his article suggests, Waldron argues that courts in a democratic society cannot legitimately claim authority under that society's constitution to strike down legislation enacted by a democratically elected legislature on the grounds that the legislation violates rights. He asserts that in a democracy, only the elected representatives of the people can legitimately resolve disagreements regarding the nature and extent of individual rights.<sup>6</sup>

In *The Core of the Case*, Waldron argues that the most fundamental commitment of a democracy is, "the imperative that one be treated as an equal so far as a society's *decisionmaking is concerned*,"<sup>7</sup> and this commitment applies with maximum force to the "intractable, controversial, and profound questions"<sup>8</sup> regarding the nature and extent of rights protections. Is a fetus a person with a right to life? Is flag burning a protected form of political speech? Does a terminally ill person have the right to end his or her life? According to Waldron, these issues are too substantial and controversial to be removed from the jurisdiction of democratic politics.<sup>9</sup> In a democracy, according to Waldron's

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<sup>4</sup> See Waldron, *The Core of the Case*, *supra* note 1.

<sup>5</sup> Waldron's arguments have stimulated responses from many leading legal scholars, including the following: COREY BRETTSCHEIDER, DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF-GOVERNMENT (2007) [hereinafter BRETTSCHEIDER, DEMOCRATIC RIGHTS]; MICHAEL J. PERRY, CONSTITUTIONAL RIGHTS, MORAL CONTROVERSY, AND THE SUPREME COURT (2009); LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION (2008); Corey Brettschneider, *Popular Constitutionalism and the Case for Judicial Review*, 34 POL. THEORY 516 (2006) [hereinafter Brettschneider, *Popular Constitutionalism*]; Yuval Eylon & Alon Harel, Essay, *The Right to Judicial Review*, 92 VA. L. REV. 991 (2006); Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975 (2009) [hereinafter Fallon, *Constitutional Constraints*]; Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1694 (2008) [hereinafter Fallon, *The Core of an Uneasy Case*]; Annabelle Lever, *Democracy and Judicial Review: Are They Really Incompatible?*, 7 PERSP. ON POL. 805 (2009) [hereinafter Lever, *Democracy and Judicial Review*]; Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286 (2012); Edward Rubin, *Judicial Review and the Right to Resist*, 97 GEO. L.J. 61 (2008).

<sup>6</sup> Waldron, *The Core of the Case*, *supra* note 1, at 1390–91; see WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 211–54.

<sup>7</sup> Waldron, *The Core of the Case*, *supra* note 1, at 1375.

<sup>8</sup> *Id.* at 1350 (quoting RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 74 (1996) [hereinafter DWORKIN, FREEDOM'S LAW]).

<sup>9</sup> When citizens or their representatives disagree about what rights we have or what those rights entail, it seems something of an insult to say that this is not something they are to be permitted to sort out by majoritarian processes, but that the issue is to be assigned instead for final determination to a small group of judges.

view, such issues can only be resolved through the deliberations of the people's elected representatives.<sup>10</sup>

As should be readily apparent, Waldron's case against judicial review is actually a case against the constitutional protection of rights. He argues not that courts function improperly under existing constitutional arrangements,<sup>11</sup> but rather that the existing arrangements are inconsistent with the central commitments of a democratic society. Waldron concedes that the argument presented in his article merely expands and develops a critique of the constitutional protection of rights that he has presented continuously over the last twenty-two years.<sup>12</sup> These writings have inspired a significant body of work by scholars such as James Allan, Richard Bellamy, Dario Castiglione, and James Tully,<sup>13</sup> all of whom develop arguments that support the thesis that the constitutional entrenchment of rights<sup>14</sup> is inconsistent with democracy. The critique of rights theory advanced in these works, known as the "majoritarian critique," argues that democracies should assign the power to resolve questions regarding the nature and extent of individual rights to the people's elected representatives and not to the judiciary.

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WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 15; see Waldron, *The Core of the Case*, *supra* note 1, at 1348–50.

<sup>10</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 10–17, 211–14, 221–23, 243–52.

<sup>11</sup> Such arrangements are those within which citizens enjoy the benefit of constitutionally entrenched rights (e.g., freedom of speech, due process, equal protection under the law)—rights that protect citizens against invasion by the majority of the fundamental interests protected by these rights.

<sup>12</sup> In *A Right-Based Critique of Constitutional Rights*, he argues that entrenched constitutional rights are inconsistent with the notion of respect for persons, which is implicit in the idea of the person as a bearer of rights. Waldron, *A Right-Based Critique*, *supra* note 3, at 19–20. In *The Dignity of Legislation*, Waldron argues that the legislature is a forum that is not less worthy to resolve the "most serious issues of human rights that a modern society confronts" than courts "with their wigs and ceremonies." JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 4–5 (1999) [hereinafter WALDRON, *DIGNITY*]. In his book *Law and Disagreement*, he argues that the majority most legitimately resolves disagreements regarding the nature and extent of rights guarantees through a democratic political process. WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 15.

<sup>13</sup> See, e.g., BELLAMY, CONSTITUTIONALISM, *supra* note 3, at 26–48 (questioning the effectiveness and legitimacy of judicial review as a supplement to democracy); TULLY, *supra* note 3, at 58–212 (arguing that entrenched rights should be modifiable through political action by the majority); Allan, *supra* note 3, at 352 (arguing that the values that justify respect for rights also justify the rejection of entrenched rights); Bellamy, *Political Form*, *supra* note 3, at 452–55 (questioning the assumption that judicial review is necessary to protect the fundamental rights of citizens in a constitutional democracy); Bellamy & Castiglione, *supra* note 3, at 612–18 (arguing that rights protections in a democracy must ultimately be subject to the will of the majority).

<sup>14</sup> A right is constitutionally entrenched if the constitution requires that the provision containing the rights protection cannot be amended by a simple majority vote.

In *The Core of the Case*, Waldron focuses on the most abstract elements of this argument.<sup>15</sup> His purpose in presenting his case in this manner is to identify “a core argument against judicial review that is *independent of both its historical manifestations and questions about its particular effects*.”<sup>16</sup> Waldron suggests that focusing on the argument at this level of abstraction reveals that advocates of judicial review have underestimated the complexity of the issues involved and have, therefore, neglected important considerations—particularly the effects of rights guarantees on the rights of individual citizens to influence policy decisions. These advocates, he suggests, stress the importance of “ensur[ing] the appropriate outcome,”<sup>17</sup> because “if the wrong answer is given [regarding questions of principle], then rights will be violated.”<sup>18</sup> Waldron goes on to argue that theorists who make such arguments pay “insufficient attention to the point that although outcome-related reasons are very important in . . . decisionmaking about rights, reasons of other kinds may be important too.”<sup>19</sup> In particular, Waldron stresses the “process-related” concern that disagreements about rights in a democracy must be resolved through a procedure that respects “the right to have one’s voice counted.”<sup>20</sup> The theorists who privilege outcome-related reasons neglect this equally fundamental concern, Waldron argues, by employing a narrowed focus on getting questions of principle *right*.

It is clear, even in this brief summary, that Waldron’s argument relies upon a surprising and controversial assumption: that advocates of judicial review base their arguments on the claim that judicial review is *necessary* in order to ensure appropriate outcomes or consequences—that is, in order to ensure consequences that are more just. Waldron, in other words, relies on the assumption that his philosophical opponents are “consequentialists,”<sup>21</sup> and this central assumption is hereinafter referred to as the “consequentialist assumption.” Strikingly,

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<sup>15</sup> Waldron, *The Core of the Case*, *supra* note 1, at 1351–52. He states that his aim is “to take off some of the flesh and boil down the normative argument to its bare bones . . . [to] set[] out the core case against judicial review in abstraction from its particular consequences.” *Id.*

<sup>16</sup> *Id.* at 1351.

<sup>17</sup> *Id.* at 1373.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1374.

<sup>20</sup> *Id.* at 1373.

<sup>21</sup> Consequentialism is an approach to ethics that judges the moral value of an action or event entirely by its consequences. According to consequentialism, the morally right action is the one with the best overall consequences. See generally CONSEQUENTIALISM (Stephen Darwall ed., 2003) (presenting classic and contemporary texts examining and justifying consequentialism).

Waldron's leading philosophical opponents in this debate—most notably Joshua Cohen, Ronald Dworkin, Cécile Fabre, and Stephen Holmes—are noted for their rejection of consequentialist arguments.<sup>22</sup> The most persuasive arguments for judicial review are, as this article discusses below, the product of an important strand of democratic theory that stresses the constitutive role of rights in defining and enabling democratic institutions.<sup>23</sup> This theory—better known as the constitutionalist view—holds that democracy involves more than the mere satisfaction of the preferences of the majority. Rather, democracy is a form of self-government by a people that only exists when the power of the majority is limited to ensure that political power is exercised in a manner reflecting equal concern and respect for the interests of each member of society.<sup>24</sup> Therefore, the constitutionalist view concludes that the courts perform a role essential to the maintenance of healthy democracy when they implement rights protections through judicial review.<sup>25</sup> Since Waldron's philosophical opponents are noted for their rejection of consequentialism, Waldron's assertion

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<sup>22</sup> See Cohen, *Deliberation*, *supra* note 2 (arguing that the protection of rights is justified by “notions of autonomy and the common good,” and not by the consequences produced); DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 2, at 82–90 (arguing that judicial decisions in civil cases should be determined by considerations of principle (which respect rights), not considerations of policy (which weigh consequences)); Fabre, *Constitutionalising*, *supra* note 2 (arguing that any consequentialist argument for protecting constitutional rights “must ultimately appeal to moral [that is, non-consequentialist] considerations”); Fabre, *A Philosophical Argument*, *supra* note 2 (arguing that constitutional rights should be enforced by the judiciary because they are moral rights against the state, not because the judiciary is more likely to protect these rights); STEPHEN HOLMES, *PASSIONS AND CONSTRAINTS: ON THE THEORY OF LIBERAL DEMOCRACY* 27 (1995) (arguing that liberal constitutionalism “is a norm-based, not an interest-based, theory”).

<sup>23</sup> See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 2, at 266–78; DWORKIN, *FREEDOM'S LAW*, *supra* note 8, at 3–38; Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195, 240 (Jon Elster & Rune Slagstad eds., 1988); Joshua Cohen, *Democracy and Liberty*, in *DELIBERATIVE DEMOCRACY* 185 (Jon Elster ed., 1998) [hereinafter Cohen, *Democracy*].

<sup>24</sup> See DWORKIN, *FREEDOM'S LAW*, *supra* note 8, at 3–31; HOLMES, *supra* note 22, at 27–36; JOHN RAWLS, *A THEORY OF JUSTICE* 200–06 (1971); Cohen, *Democracy*, *supra* note 23, at 185; Fabre, *A Philosophical Argument*, *supra* note 2, at 95–98.

<sup>25</sup> See DWORKIN, *FREEDOM'S LAW*, *supra* note 8, at 3–31 (arguing that “[d]emocracy means government subject to conditions,” *id.* at 17, and that judicial review in democratic societies thus provides the basis for a superior form of republican deliberation and democratic government, *id.* at 29–31); HOLMES, *supra* note 22, at 27–36 (arguing that the enforcement of limits on the power of electoral majorities are democracy-reinforcing); RAWLS, *supra* note 24, at 200–06 (arguing that the enforcement of constitutionalized restrictions on the will of the majority is necessary to ensure the justice of democratic institutions); Cohen, *Democracy*, *supra* note 23, at 185 (arguing that the enforcement of rights protections constitutes an element of democracy rather than a constraint on it); Fabre, *A Philosophical Argument*, *supra* note 2, at 95–98 (arguing that judicial enforcement of rights guarantees by striking down legislation that violates fundamental rights is essential in order for a set of institutions to count as a democracy).

that his philosophical opponents rely upon consequentialist reasoning requires careful examination, particularly since this assertion has significantly influenced recent contributors to the debate over judicial review.<sup>26</sup>

While Waldron argues that advocates of judicial review neglect important considerations, his own presentation in *The Core of the Case* is surprisingly inattentive to the constitutionalist arguments offered by Dworkin, Cohen, Fabre, Holmes, and others.<sup>27</sup> Waldron can hardly deny the centrality and significance of the constitutionalist view of democracy—a view that stresses the constitutive role of rights in democratic forms of society—since he devotes approximately one third of his most recent book on rights theory<sup>28</sup> to responses to objections that the view raises. Why, then, does Waldron virtually ignore issues raised by the constitutionalist argument in *The Core of the Case*? The short answer is that he stipulates the following assumption at the outset that eliminates the need to discuss the constitutive role of rights: “[G]eneral respect for individual and minority rights is a serious part of a broad consensus in the society.”<sup>29</sup> In other words, one should assume that the vast majority of members of society “keep their own and others’ views on rights under constant consideration . . . [and] are alert to issues of rights in regard to all the social decisions that are . . . discussed in their midst.”<sup>30</sup>

Certainly, one would have less reason to view the constitutional protection of rights as an essential feature of a democratic political institution if one could confidently assume—as Waldron has—that most members of most societies were profoundly committed to respect for individual and minority rights. However, Waldron’s assumption is both extremely optimistic and highly implausible.<sup>31</sup> Moreover, in making this

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<sup>26</sup> See generally BELLAMY, CONSTITUTIONALISM, *supra* note 3, at 90–100 (arguing that Dworkin cannot justify his alleged claim that court resolutions of questions regarding rights produce the best “results’ at promoting democratic rights,” *id.* at 93); Fallon, *The Core of an Uneasy Case*, *supra* note 5; Lever, *Democracy and Judicial Review*, *supra* note 5.

<sup>27</sup> See generally DWORKIN, FREEDOM’S LAW, *supra* note 8 (arguing that the judicial enforcement of entrenched rights is an essential institutional feature of a healthy democratic society); HOLMES, *supra* note 22 (arguing that entrenched rights perform an essential structural role in democratic forms of government); Cohen, *Deliberation*, *supra* note 2 (arguing that entrenched rights guarantees are an essential feature of democratic government, properly construed); Fabre, *A Philosophical Argument*, *supra* note 2 (arguing that the entrenchment of rights is essential for the legitimacy of democratic forms of government).

<sup>28</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 190–312.

<sup>29</sup> Waldron, *The Core of the Case*, *supra* note 1, at 1365.

<sup>30</sup> *Id.*

<sup>31</sup> Modern history is replete with instances in which this assumption has proven to be catastrophically false. Recent examples of genocide from Bosnia, Rwanda, and Darfur, for example, exemplify the predatory pursuit of group interests at the



assumption central to his analysis, Waldron narrows his discussion in a manner that obscures the strongest arguments for the legitimacy of judicial review. Indeed, his arguments systematically underestimate the importance of securing the constitutive conditions of legitimate democratic self-government; as a result, his argument insufficiently attends to the question of when legislation by the majority constitutes a legitimate exercise of political power. It is as though he raised the issue of the legality of flag burning and then simply ignored the question of whether flag burning is a protected form of speech.

The purpose of this article is twofold: (1) to argue that Waldron's case against judicial review is fatally flawed; and (2) to defend a constitutionalist case for judicial review that is responsive to contemporary critiques.<sup>32</sup> This article proceeds in four parts. Part I examines the basis for Waldron's assumption that the leading arguments offered by proponents of judicial review rely upon consequentialist assumptions and argues that Waldron misrepresents the principal arguments offered in favor of judicial review by basing his criticisms of these arguments upon that assumption. After rejecting Waldron's consequentialist assumption, Part II outlines the leading arguments that support the constitutional entrenchment of rights protections—the practice that generates the court's authority to strike down legislation. Part III then assesses Waldron's critique of these arguments, focusing on his claim that pluralistic disagreement regarding the necessary conditions for the establishment of legitimate democratic institutions renders the entrenchment of any particular account of these conditions disrespectful to those who dissent from that account.<sup>33</sup> After assessing Waldron's critique, Part IV provides a constitutionalist case for judicial review by arguing that (1) constitutional rights enable, rather than restrict, majority rule because such rights define the category of preferences that is relevant to democratic

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expense of responsible civic engagement. See JULIE FLINT & ALEX DE WAAL, *DARFUR: A SHORT HISTORY OF A LONG WAR* 33–96 (2008) (describing the political processes that led to atrocities in Darfur); MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND GENOCIDE IN RWANDA* 185–233 (2001) (arguing that millions of Rwandans intentionally and enthusiastically collaborated in a collective act of genocide); ED VULLIAMY, *SEASONS IN HELL: UNDERSTANDING BOSNIA'S WAR* 73–118 (1994) (describing Serbian collective responsibility for atrocities in Bosnia).

<sup>32</sup> See generally BELLAMY, *CONSTITUTIONALISM*, *supra* note 3 (questioning the assumption that judicial review is necessary to protect the fundamental rights of citizens in a constitutional democracy); TULLY, *supra* note 3 (arguing that entrenched rights should be modifiable through political action by the majority); Allan, *supra* note 3 (arguing that the values that justify respect for rights also justify the rejection of the enforcement of entrenched rights by the courts).

<sup>33</sup> WALDRON, *LAW AND DISAGREEMENT*, *supra* note 3, at 221, 238.

decision-making; and (2) judicial review performs an essential function in implementing constitutional rights. This article ultimately concludes that judicial review constitutes an essential element of democratic forms of government; and therefore, that the arguments that judicial review is inconsistent with democracy—offered by Waldron and others—fail.

## I. WALDRON'S CONSEQUENTIALIST ASSUMPTION

In *The Core of the Case*, Waldron grounds his criticisms of the leading arguments for judicial review in the assumption that the principal advocates of judicial review rely upon consequentialist arguments. That is, he argues that when theorists argue in favor of judicial review, they rely primarily on the argument that assigning the authority to resolve fundamental questions regarding rights to courts, rather than legislatures, produces consequences that are more just (the “consequentialist assumption”).<sup>34</sup> Waldron assigns such a significant portion of his article responding to consequentialist arguments that his case against judicial review can be said to stand or fall with his assumption that the case for judicial review is, essentially, consequentialist.<sup>35</sup> Since, as will be argued, the consequentialist assumption is false, Waldron's reliance on this assumption reveals his case to be fatally flawed.

It is important to note the extraordinary and counterintuitive nature of Waldron's consequentialist assumption at the outset. Waldron's critique of the principal arguments in favor of judicial review depends upon the consequentialist assumption—the assumption, that is, that advocates of judicial review rely primarily upon consequentialist arguments. Yet the principal advocates of judicial review—particularly John Rawls and Ronald Dworkin—are noted for their rejection of consequentialism.<sup>36</sup> The social practice of respecting the rights of

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<sup>34</sup> Waldron suggests that judicial review advocates' reliance upon a result-based criterion might not be fully consequentialist because the results in question have a partially deontological character since they are essentially connected to the protection of rights. Waldron, *The Core of the Case*, *supra* note 1, at 1374. Waldron's suggestion, however, is unpersuasive. Consequentialism simply requires the employment of a criterion that defines value as a function of results or consequences.

<sup>35</sup> *Id.* at 1376–86.

<sup>36</sup> Waldron identifies Rawls and Dworkin as the principal advocates of the case for judicial review (the view that Waldron rejects) by placing quotes from each of these theorists in the epigraph to his most developed critique of judicial review. WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 209. Rawls is particularly noted for his rejection of utilitarianism, which is the principal contemporary theoretical representative of consequentialism. The principle of utility, Rawls argues, is “inconsistent with the idea of

members of society requires that the majority may not pursue collective goals when doing so compromises the fundamental interests of some person or group,<sup>37</sup> while consequentialism requires that the community should maximize the realization of social benefits regardless of effects on the interests of individuals or groups.<sup>38</sup> John Rawls cites this disregard for the fundamental interests of individuals and groups as the defining characteristic of consequentialism in its purest form: classical utilitarianism.<sup>39</sup> Utilitarianism, Rawls argues, does not “take seriously the plurality and distinctness of individuals.”<sup>40</sup> Dworkin is similarly notorious for the argument that decisions of law must be justified on the basis of considerations of principle, not policy. Policy considerations, Dworkin notes, require the realization of good outcomes in the future, while considerations of principle require that a defensible legal decision must look back to the facts that generated the case or controversy in order to determine which party has a right that the court should decide in its favor.<sup>41</sup> While consequentialism is essentially forward-looking, Dworkin’s approach to reasoning and justification is resolutely backwards-looking. It would, in fact, be quite surprising if Dworkin and other advocates of judicial review were consequentialists, since there is an obvious inconsistency between consequentialism and the advocacy of judicial review designed to vindicate rights.

The principal theorists who argue in favor of judicial review—such as Dworkin and Cohen—thus reject consequentialism. Why, then, does Waldron insist on attributing

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reciprocity implicit in the notion of a well-ordered society.” RAWLS, *supra* note 24, at 14. Dworkin labels consequentialist arguments in law “argument[s] of policy,” and argues that legal decisions in hard cases “should be generated by principle not policy.” DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 2, at 84.

<sup>37</sup> Rights theorists argue that this kind of respect for rights is a requirement of justice and legitimacy because free and equal persons who chose the principles to regulate their civic relations under fair conditions would never consent to principles that failed to provide such protection. See JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* §§ 22–24 (Peter Laslett ed., Cambridge Univ. Press 1988) (1968); RAWLS, *supra* note 24, at 13.

<sup>38</sup> Consequentialists argue that all moral and political questions, including questions involving rights, should be determined based upon an assessment of the consequences produced. See, e.g., Philip Pettit, *Consequentialism*, in *CONSEQUENTIALISM* 95–107 (Stephen Darwall ed., 2003).

<sup>39</sup> Classical utilitarianism asserts that all moral and political questions should be resolved in the manner that maximizes happiness. According to this view, rights should be respected only when doing so maximizes total or average happiness. Classical utilitarianism is thus committed to the view that the community should maximize surplus regardless of effects on the interests of individuals or groups. See, e.g., RAWLS, *supra* note 24, at 22–27.

<sup>40</sup> *Id.* at 29.

<sup>41</sup> DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 2, at 82–90.

to these theorists consequentialist arguments that they in fact reject? Waldron first states the consequentialist assumption in *Law and Disagreement*—the book that provides the most fully developed account of Waldron’s critique of judicial review—and Waldron justifies his reliance on this assumption on the basis of his interpretation of arguments that Dworkin developed in *Freedom’s Law*—the book in which Dworkin provides the final statement of his arguments in favor of judicial review.<sup>42</sup> Remarkably, Waldron adopts the consequentialist assumption based on his reading of a single passage in *Freedom’s Law*, a passage that, as will be argued, he misinterprets. Waldron compounds this interpretive error by treating this passage both as the summation of Dworkin’s views on judicial review and as representative of the entire body of literature that advocates judicial review.<sup>43</sup> Waldron’s insistence that advocates of judicial review rely primarily upon consequentialist arguments is particularly unfortunate because this insistence has influenced and misled not only scholars who share Waldron’s critical attitude towards judicial review,<sup>44</sup> but also scholars who argue in favor of judicial review.<sup>45</sup> Waldron’s influence over other participants in the debate introduces a new level of confusion into a discourse that has never been characterized by conceptual clarity.<sup>46</sup>

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<sup>42</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 294–95. In *The Core of the Case*, Waldron cites passages from Joseph Raz and John Rawls to support his view that advocates of judicial review offer consequentialist arguments. Waldron, *The Core of the Case*, *supra* note 1, at 1368, 1376–79. This article will discuss Waldron’s reliance on these passages below.

<sup>43</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 294–95; Waldron, *The Core of the Case*, *supra* note 1, at 1369–86. Waldron treats this passage as representative of the work of all of the major advocates of judicial review.

<sup>44</sup> See BELLAMY, CONSTITUTIONALISM, *supra* note 3, at 90–100.

<sup>45</sup> See, e.g., Fallon, *The Core of an Uneasy Case*, *supra* note 5, at 1695–99. Fallon accepts Waldron’s assertion that the principal arguments offered by advocates of judicial review are consequentialist, and he is persuaded by Waldron’s critique of straightforward consequentialist arguments for judicial review. *Id.* at 1696–99. Fallon argues, however, that judicial review is justified because it strengthens the protection of fundamental rights by creating multiple veto points to prevent rights violations. *Id.* at 1705–10, 1735–36. In focusing his defense of judicial review on the outcomes produced in a legal system that includes judicial review, Fallon thus allows Waldron’s consequentialist assumption to determine the substance of his (Fallon’s) defense of judicial review. See Lever, *Democracy and Judicial Review*, *supra* note 5. Lever accepts Waldron’s claim that advocates of judicial review offer consequentialist arguments, while its critics offer procedure-based arguments. *Id.* at 805–07. She also accepts his conclusion that consequentialist arguments for judicial review are inconclusive, but she rejects his claim that procedure-based arguments bear heavily against judicial review. *Id.* at 808–09, 813–16. Lever’s attempt to generate procedure-based arguments for judicial review, however, is infected by Waldron’s consequentialist focus—she argues primarily that the procedure-based virtue of judicial review is its tendency to produce beneficial effects by providing otherwise unavailable opportunities for wronged persons to vindicate their rights. *See id.* at 815–16.

<sup>46</sup> The conceptual clarity of discussions of judicial review is generally undermined by the failure of many participants in the discussion to distinguish between

### A. *Misinterpreting Dworkin*

In Waldron's defense, it should be noted that the passage in *Freedom's Law* that inspired his acceptance of the consequentialist assumption is somewhat ambiguous and confusing. Moreover, Dworkin does seem to intend that this passage should characterize a major portion of his contribution to rights theory and the case for judicial review. Despite the obscurity in Dworkin's language, it is clear that this passage cannot support Waldron's interpretation.<sup>47</sup> The language reads, in relevant part:

What shall we say about the remaining questions, the institutional questions the moral reading does not reach?

I see no alternative but to use a result-driven rather than a procedure-driven standard for deciding them. The best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions actually are, and to secure stable compliance with those conditions.<sup>48</sup>

On first reading, Waldron's interpretation does not seem completely unreasonable. In the above passage, Dworkin does write that he favors a result-driven standard. Initially, then, Waldron's assumption that Dworkin—in this passage—argues in favor of adopting those institutional arrangements that protect rights most successfully seems to be a plausible reading of Dworkin's argument. Plausibility, however, is not enough. Waldron's argument in *The Core of the Case* is anchored in the assumption that these sentences have precisely the meaning he assigns to them.

A more careful reading of these sentences establishes that they do not in fact have this meaning. According to Waldron, the "best answers" to which Dworkin refers are the answers to the specific questions of law presented by the particular case or controversy in question.<sup>49</sup> Dworkin's language, however, refers to "the best answers to the essentially moral question of what the democratic conditions [the conditions that must be satisfied before a true democratic community can be said to exist] actually are."<sup>50</sup> Therefore, the "best answers" to which Dworkin refers are answers to fundamental questions of moral philosophy, and the institutions that will provide the

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democracy and majoritarianism. The significance of this distinction is discussed below. See *infra* Sections II.A, III.C.

<sup>47</sup> The second and third sentences provide the basis for Waldron's interpretation.

<sup>48</sup> DWORKIN, *FREEDOM'S LAW*, *supra* note 8, at 34.

<sup>49</sup> WALDRON, *LAW AND DISAGREEMENT*, *supra* note 3, at 291–92.

<sup>50</sup> DWORKIN, *FREEDOM'S LAW*, *supra* note 8, at 34.

“best answers” are those that are best equipped to provide the most carefully reasoned responses to fundamental questions of moral philosophy. Furthermore, Dworkin provides an explicit account of the considerations he views as relevant in determining which institutions are equipped to generate the “best answers,” and these considerations have nothing to do with an institution’s ability to resolve questions of law presented in particular controversies in a manner that produces the best consequences—that is, in a manner that protects rights most effectively.<sup>51</sup>

Although Waldron forms his consequentialist assumption based on Dworkin’s discussion of these issues in *Freedom’s Law*, Dworkin actually presents his full account of the relevant issues in *Law’s Empire*.<sup>52</sup> Dworkin argues that an advocate of the view that the legislature will provide the best answers to fundamental moral questions—e.g., how should the Court balance fairness and justice in interpreting the Equal Protection Clause?—must be prepared to argue that their position is justified either by considerations of justice or by considerations of fairness.<sup>53</sup> If the advocate offers a case based upon considerations of justice, the advocate must make one of two possible arguments. The first argument would be that members of a society are simply not entitled to rights protections at all, which is to say that the legislature’s judgments regarding the substance and extent of rights protections must always be decisive.<sup>54</sup> In order to justify this view, however, the advocate must defend the implausible claim that members of a democracy are entitled to no protections at all against the will of the majority.<sup>55</sup> The second argument

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<sup>51</sup> RONALD DWORKIN, *LAW’S EMPIRE* 369–79 (1986) [hereinafter DWORKIN, *LAW’S EMPIRE*].

<sup>52</sup> “I have tried to describe [the democratic conditions] elsewhere, and will only summarize my conclusions here.” DWORKIN, *FREEDOM’S LAW*, *supra* note 8, at 24. In *Law’s Empire*, Dworkin outlines his argument that the courts, and not the legislature, are best equipped to generate answers to fundamental moral questions in a manner that ensures that democratic constitutional arrangements are more just. DWORKIN, *LAW’S EMPIRE*, *supra* note 51, at 374–76. The outline establishes the nature of the considerations that Dworkin views as relevant to the question of which institutions are equipped to provide the best answers to the fundamental moral questions that are central to democracy. *See id.* at 373–79.

<sup>53</sup> For the purposes of this argument, Dworkin defines “justice” and “fairness” as separate and discrete political virtues. DWORKIN, *LAW’S EMPIRE*, *supra* note 51, at 374. A political response to a fundamental moral question realizes the virtue of *justice* if it brings political arrangements closer to realizing what political morality “actually requires.” *Id.* An interpretation realizes the virtue of *fairness* if it causes political arrangements to correspond more closely to views about political morality that are actually held by members of the community. *Id.*

<sup>54</sup> *Id.* at 374–75.

<sup>55</sup> Such a view would be implausible because, to accept the view, one would have to assume that the Bill of Rights is actually intended to perform no function.

would be that legislatures are more likely than courts to generate the best answers to fundamental moral questions.<sup>56</sup> However, as Dworkin notes, there is no compelling reason to assume, a priori, that this claim is true,<sup>57</sup> nor does an assessment of the relative quality of historical judgments by courts and legislatures on fundamental moral questions provide adequate support for such a claim.<sup>58</sup>

If the argument is grounded in considerations of fairness instead, then the advocate must argue that it is somehow fairer in a free and democratic society for the legislature to resolve fundamental moral questions.<sup>59</sup> In order to justify this view, however, Dworkin notes that the advocate must defend two implausible claims. The first claim would be that fairness requires that the power of the majority can only be limited by restrictions that members of this majority actually accept.<sup>60</sup> According to this view, for example, if the majority of voters in the post-Civil War South refused to accept restrictions on their power to reestablish slavery, then they would have the power to reestablish slavery, and this power would not be limited by any rights claims of their potential victims. Under this view, the decisions to strike down statutes in *Brown v. Board of Education*,<sup>61</sup> *Sweatt v. Painter*,<sup>62</sup> *Lawrence v. Texas*<sup>63</sup>—and every other case in which the Court struck down a statute enacted by a representative legislature—must be viewed as clearly and obviously wrong. The second claim would be that fairness is *the* paramount political value, meaning that if fairness and basic questions of human dignity conflict, as demonstrated by the slavery example above, fairness (or deference to the will of the majority) must always prevail. According to such a view, we must—again—necessarily conclude

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<sup>56</sup> *Id.* at 375.

<sup>57</sup> *Id.*

<sup>58</sup> As Dworkin notes, if the United States had assigned the authority to the legislature, rather than the courts, to resolve the moral questions raised during the civil rights movement, public schools would have remained segregated, poll taxes and literacy tests would have continued to prevent the vast majority of blacks in Southern states from registering to vote, and state legislation would have continued to require “separate but equal” treatment of blacks in many dimensions of political and social life. *See id.* at 375–76.

<sup>59</sup> *Id.* at 375.

<sup>60</sup> *Id.* at 376.

<sup>61</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (striking down state laws establishing separate public schools for white and black students).

<sup>62</sup> *Sweatt v. Painter*, 339 U.S. 629 (1950) (striking down a Texas state law excluding black students from the state law school).

<sup>63</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down sodomy laws in Texas that criminalized same-sex sexual activity and invalidating similar sodomy laws in thirteen other states).

that the *Brown*, *Sweatt*, and *Lawrence* cases were decided incorrectly. If legal decisions should always privilege fairness over justice, then the will of the majority—as expressed in the relevant legislative enactments—to continue segregation, to exclude minorities from the state law school, to allow state officials to suppress reports of their misconduct through frivolous libel actions, and to deny privacy protections to gay citizens should clearly have justified decisions upholding the statutes challenged in each of the cited cases. Arguments that the legislature will provide the best answers to fundamental questions in moral philosophy, Dworkin concludes, are simply unpersuasive.<sup>64</sup>

Certainly, the outline of the argument that Dworkin provides is far from dispositive. Indeed, Waldron is entitled to dispute both Dworkin's account of the structure of the argument and Dworkin's specific conclusions. Dworkin's outline does, however, specifically describe the considerations that he views as relevant in identifying the institution best equipped to resolve foundational moral questions for a free and democratic society. These considerations are clearly not consequentialist. Thus, when Waldron, in *The Core of the Case*, argues that Dworkin relies on consequentialist arguments in support of judicial review, he fundamentally misrepresents Dworkin's arguments.

### B. *Attributing Consequentialism to Other Advocates of Judicial Review*

In *The Core of the Case*, however, Waldron no longer relies exclusively upon passages from Dworkin to support his view that the arguments of leading advocates of judicial review rely upon consequentialist reasoning. Instead, Waldron cites Joseph Raz and, remarkably, John Rawls.<sup>65</sup> The language that he cites from Raz and Rawls, however, fails to provide plausible support for the claim that the leading advocates of judicial review are consequentialists despite their explicit disavowals of consequentialism. Raz has never been a leading participant in the debate over judicial review,<sup>66</sup> and the language that Waldron cites from Raz is from an article whose topic is neither

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<sup>64</sup> DWORKIN, *LAW'S EMPIRE*, *supra* note 51, at 376–77.

<sup>65</sup> Waldron, *The Core of the Case*, *supra* note 1, at 1374, 1376.

<sup>66</sup> Raz focuses on more fundamental and abstract questions such as the normativity of law, the basic structure of legal systems, and the relation between law and morality. See JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* (1970) (examining the structure of legal systems); JOSEPH RAZ, *THE AUTHORITY OF LAW* (2d ed. 2009) (examining the normative basis of the law); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986) (examining the foundations in value theory of respect for freedom and autonomy). He has not written a single article, chapter, or book specifically focusing on judicial review.



judicial review nor the constitutional protection of rights.<sup>67</sup> Similarly, the language that Waldron cites from Rawls is ironically language in favor of resolving contested questions by majority decision, language that is incompatible with consequentialist logic.<sup>68</sup> In the passage that Waldron cites, Rawls rejects the views of consequentialists who argue that social choice should take account of the relative intensity of preferences<sup>69</sup> and asserts that majority rule secures “the greater justice of the legal order”<sup>70</sup> within well-ordered institutions. Rawls argues that majority rule should therefore not be compromised in order to maximize preference satisfaction.<sup>71</sup> Presumably, Waldron must agree with this argument.

In *The Core of the Case*, Waldron fundamentally mischaracterizes the leading arguments in favor of judicial review. As a result, none of the responses that he provides to arguments in favor of judicial review are relevant to the argument, much less persuasive. Therefore, Waldron’s argument against judicial review as presented in *The Core of the Case* is fatally flawed since he fails to address any of the significant counter-arguments offered by proponents of judicial review. Waldron has argued articulately against the real case for judicial review in his earlier work,<sup>72</sup> however, and this earlier work demands a fair examination. The next section will set out the arguments supporting judicial review that are actually offered by its leading proponents, arguments Waldron addresses in his earlier work.

## II. CLASSICAL ARGUMENTS SUPPORTING JUDICIAL REVIEW

Judges derive their authority to strike down legislation primarily from the rights-conferring provisions of the Bill of Rights. If the constitutionally entrenched rights contained in the Bill of Rights reduce the power of the majority, in what sense

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<sup>67</sup> Waldron, *The Core of the Case*, *supra* note 1, at 1374 n.71 (citing Joseph Raz, *Disagreement in Politics*, 43 AM. J. JURIS. 25, 45–46 (1998)). “A natural way to proceed is to assume that the enforcement of fundamental rights should be entrusted to whichever political decision-procedure is, in the circumstances of time and place, most likely to enforce them well . . .” Raz, *Disagreement in Politics*, *supra*, at 45.

<sup>68</sup> Waldron, *The Core of the Case*, *supra* note 1, at 1374 n.71 (citing RAWLS, *supra* note 24).

<sup>69</sup> That is, Rawls rejects the view that social choice should assign greater weight in policy decisions to the views of persons who care most intensely about an issue. Intensity of preference should not justify unequal political influence.

<sup>70</sup> RAWLS, *supra* note 24, at 230.

<sup>71</sup> *Id.* Rawls argues that justice in a well-ordered legal order is best secured by majority rule, and that majority rule should therefore not be compromised in order to maximize preference satisfaction. *Id.*

<sup>72</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 3.

is their enforcement by courts consistent with democracy? Democratic theory offers three principals, and related, responses to this question. The authority of judges to protect rights by striking down legislation, it is argued,<sup>73</sup> is necessary in order to realize: (1) the goal of self-government that motivates democratic theory; (2) the legitimacy of political institutions; and (3) the constitutive elements of a democratic form of government.<sup>74</sup> These arguments suggest that in limiting the power of the majority, constitutionally protected rights establish the necessary conditions for legitimate democratic self-government.

### A. *The Goal of Self-Government*

Advocates of judicial review and of the majoritarian critique disagree fundamentally regarding the defining qualities of democracy. Proponents of the majoritarian critique<sup>75</sup> view the satisfaction of the preferences of the majority as both necessary and sufficient for the realization of democracy.<sup>76</sup> Proponents of judicial review, however, argue for an alternate conception of democracy called the “constitutional conception,” which asserts that the defining quality of democratic government is not unconditional fidelity to the preferences of the majority, but rather the joint and equal participation of citizens in the process of self-government.<sup>77</sup> Democracy, according to this view, is realized when each member of society is guaranteed the right to participate on equal terms in the process of self-government.<sup>78</sup> This view argues that democracy is an attractive form of

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<sup>73</sup> *E.g.*, DWORKIN, FREEDOM’S LAW, *supra* note 8, at 17 (arguing that “[d]emocracy means government subject to conditions”); BRETTSCHEIDER, DEMOCRATIC RIGHTS, *supra* note 5, at 9 (arguing that rights protections are “central to the ideal of democracy”); Cohen, *Democracy*, *supra* note 23, at 186 (arguing for a conception of democracy as the product of “free public reasoning among equals” (emphasis omitted)); Fallon, *The Core of an Uneasy Case*, *supra* note 5, at 1699, 1724–35 (arguing that the institution of judicial review is actually well designed to safeguard individual rights and will therefore “actually enhance, rather than undermine, a . . . [democratic] regime’s overall political legitimacy”).

<sup>74</sup> DWORKIN, FREEDOM’S LAW, *supra* note 8, at 17, 24–25.

<sup>75</sup> The majoritarian critique of judicial review argues that questions regarding rights should not be decided by judges; rather, those questions should be resolved by the elected and democratically accountable representatives of the majority. *See* WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 108–16.

<sup>76</sup> *Id.*

<sup>77</sup> Joshua Cohen and Ronald Dworkin offer distinct but related accounts of this argument. Since both accounts work from similar considered judgments to closely related conceptions of democracy, this subsection discusses the two accounts together. This article adopts Dworkin’s title for this account (the “constitutional conception”) rather than Cohen’s (the “deliberative conception”) to underline the connection to the notion of entrenchment. *See* DWORKIN, FREEDOM’S LAW, *supra* note 8, at 17; Cohen, *Democracy*, *supra* note 23, at 185–87.

<sup>78</sup> DWORKIN, FREEDOM’S LAW, *supra* note 8, at 17.

government because it makes possible a form of life in which persons can genuinely be said to govern themselves.<sup>79</sup> Each person can genuinely be said to participate as an equal in the process of self-government, the constitutional conception argues, only when each person's interests are treated with equal concern and respect, so that persons "can appropriately regard themselves as partners in a joint venture."<sup>80</sup>

Satisfaction of the condition of equal concern and respect requires that the state must limit the influence of certain types of preferences on the process of social choice.<sup>81</sup> In particular, preferences inconsistent with the fundamental democratic commitment to political equality should never exercise a decisive influence over collective decisions.<sup>82</sup> Persons disadvantaged by policies deriving their support from such preferences would be deprived of liberties or opportunities precisely because "they are thought less worthy of concern and respect than others are."<sup>83</sup>

The requirement that democracy should filter the process of social choice to limit the influence of such preferences thus expresses a constitutive condition that defines the proper relation between preferences and democratic decision-making. Constitutional rights are designed to realize this requirement by limiting the influence on social choice of preferences inconsistent with the democratic commitment to political equality.<sup>84</sup> In filtering the output of social choice in this manner, entrenched rights implement the requirement that the legitimate exercise of political power must reflect equal concern and respect for each citizen, thus, performing an important role in satisfying the necessary conditions of democratic self-government.<sup>85</sup> Accordingly, when courts enforce constitutionally protected rights, they perform an essential role in securing the necessary conditions of democratic self-government.

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<sup>79</sup> *Id.* at 22.

<sup>80</sup> *Id.* at 25.

<sup>81</sup> *Id.* at 22–26.

<sup>82</sup> DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 2, at 232–38, 266–78. This argument has been presented most forcefully by Dworkin, but is also favored by Cohen, Holmes, and most other advocates of the constitutionalist conception. See Cohen, *Democracy*, *supra* note 23, at 212–21 (arguing that preferences to implement policies that cannot be justified to those affected are unacceptable inputs into democratic social choice); HOLMES, *supra* note 22, at 172–77 (arguing that constitutional restrictions on the power of the majority are necessary to prevent the majority from creating conditions that undermine the capacity of citizens for free, informed, and creative choice).

<sup>83</sup> DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 2, at 275.

<sup>84</sup> *Id.* at 232–38.

<sup>85</sup> *Id.*

### B. *The Legitimacy of Political Institutions*

A second set of arguments in favor of judicial review focuses on the relationship between consent, legitimacy, and restriction on the power of the majority. In a democracy, exercises of political power derive their authority from the will of the majority. But not every exercise of power authorized by the majority is legitimate. For example, if legitimate political power must derive from the consent of the governed, then the employment of political power to enslave or disenfranchise a resistant minority is not legitimate. Even if authorized by the majority, such an exercise of power fails the test of legitimacy since it could not achieve the consent of the victimized minority. A sovereign power that enacts legislation violating the conditions of political legitimacy forfeits its own legitimacy.<sup>86</sup> Accordingly, unless the power of the majority is limited so that the policies that it authorizes are legitimate, exercises of power by the majority do not reliably constitute legitimate acts of self-government. In order to establish and maintain a democratic form of government, the majority must therefore exercise its power within the limits set by the conditions of political legitimacy.

An argument that establishes the legitimacy of a sovereign's employment of power will also establish the obligation of its citizens to obey its political decisions. Dworkin argues that the dual relation of the notions of legitimacy and obligation define a legitimate form of government as a government in which "constitutional structure and practices are such that its citizens have a general obligation to obey [its] political decisions."<sup>87</sup> Therefore, the necessary conditions of legitimacy are the conditions that must be satisfied before citizens have a political obligation to obey the government's decisions.<sup>88</sup>

Dworkin first identifies the three mainstream arguments that legal scholars and theorists view as viable justifications for political obligation: Lockean tacit consent theory, Rawls' natural duty concept, and the fair play argument.<sup>89</sup> Dworkin rejects each of the three accounts as an acceptable foundation for political obligation because each faces overwhelming objections.<sup>90</sup> First, Lockean tacit consent theory fails to justify political obligation because tacit consent is not given freely through a choice among genuine alternatives. According to this interpretation of

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<sup>86</sup> See LOCKE, *supra* note 37, at §§ 22–24.

<sup>87</sup> DWORKIN, *LAW'S EMPIRE*, *supra* note 51, at 191.

<sup>88</sup> *Id.* at 191–92.

<sup>89</sup> *Id.* at 192–94.

<sup>90</sup> *Id.*

the Lockean view, consent is inferred simply because citizens continue to live in the community and benefit from the protection of the state.<sup>91</sup> Since this tacit consent is not the product of conscious or informed reflection, it provides no real foundation for arguments in favor of political obligation. Second, John Rawls's notion of a natural duty to support just institutions fails to explain how citizens under a just government could have a special duty to obey the political decisions of that particular government.<sup>92</sup> The theory, that is, fails to explain why natural duty does not require equal support for the authority of any and all just institutions. As a result, the theory cannot justify a particularized obligation to respect the authority of any single state or set of political institutions. Finally, the fair play argument assumes that people incur obligations simply by receiving unsolicited benefits. According to this theory, a person who has received benefits under an existing political organization has an obligation to accept the authority of the political decisions of that organization. The simple act of accepting benefits, according to this argument, constitutes consent sufficient to justify political obligation. As Dworkin points out, however, this theory moves much too quickly in inferring consent from the acceptance of unsolicited gratuitous benefits.<sup>93</sup> It is not plausible to suggest that persons incur powerful obligations simply by accepting things they did not seek.

Dworkin argues instead that political obligation is most plausibly justified through an account of the special responsibilities that are generated when persons participate in social practices.<sup>94</sup> For example, persons who assume the role of friendship take up certain obligations of fidelity, honesty, and reciprocity. One does not formally consent to these obligations; they are simply part of what it means to participate in this particular practice. Similarly, participants in the social practice of self-government assume certain obligations simply through their intentional choice to participate.

While intentional participation in the practice of self-government is a necessary condition of political obligation, it is not sufficient. For example, person *A*'s duties to person *B* after

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<sup>91</sup> According to Dworkin's account of Lockean tacit consent theory, citizens tacitly consent to the authority of the state if, after reaching the age of consent, they do not emigrate. *See id.* at 192.

<sup>92</sup> According to Dworkin's account of the natural duty of justice, moral persons have a duty to support "just or nearly just" institutions. *Id.* Dworkin, however, notes that such a natural duty of justice would be too general to justify the legitimacy of any particular regime. *Id.*

<sup>93</sup> *Id.* at 193–95.

<sup>94</sup> *Id.* at 196–200.

intentionally assuming the role of friendship to person *B* are contingent upon the acceptance of reciprocal duties by person *B*. Similarly, participation in the practice of joint self-government grounds an obligation to obey the will of the majority only if relations among the participants in this practice are characterized by reciprocity. Dworkin argues that reciprocity in the context of self-government requires that participants in the practice view themselves as subject to special obligations that hold distinctly among members of the group.<sup>95</sup> They must recognize these obligations as personal, running from person to person within the group, and as flowing from a general responsibility of equal concern for the well-being of each member of the group.<sup>96</sup> Only if the obligations are generated through a political process in which the well-being of each member is treated with equal concern and respect can individuals view themselves as participating under conditions of true reciprocity, and only under such conditions does an obligation to obey exist.

This argument, this article suggests, offers an interpretation of a claim made by Dworkin in *Taking Rights Seriously*.<sup>97</sup> In that earlier work, he argues that an institution's authority over persons is limited by the best understanding of what it is fair to assume that persons who accept the authority of the state have undertaken to accept in participating in the social practice of civil society.<sup>98</sup> Dworkin's discussion of political legitimacy in *Law's Empire* offers an account of what it is fair to assume that persons undertook to accept in participating in democratic self-government. Such persons, Dworkin concludes, implicitly accepted only political authority that treats the interests of each member of society with equal concern and respect.

If one accepts the argument that a political process committed to equal concern for each citizen must reject preference inputs into social choice that are inconsistent with the fundamental democratic commitment to political equality, then this analysis of political legitimacy establishes that legitimate political institutions must similarly restrict the influence of such preferences as determinants of social choice. In

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<sup>95</sup> *Id.* at 199.

<sup>96</sup> *Id.* at 199–200.

<sup>97</sup> DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 2, at 101–07. Dworkin illustrates this point in his analysis of the institutional rights and obligations that are generated through the decision to participate in a chess tournament. *Id.* at 101–05. Participants in a chess tournament accept the obligation to respect the referee's authority to resolve contested readings of the rules, but only if the referee supplies judgments of a particular type: judgments that are based upon considerations that reflect the character of the practice of chess-playing. *Id.* at 102–05.

<sup>98</sup> *Id.* at 104–05.

addition, if one accepts the related argument that constitutional rights are the political mechanism that most effectively protects citizens from the effects of such preferences, then this analysis supports the claim that when courts enforce constitutional rights, they perform a function necessary to the preservation of healthy democracy.

C. *Precommitment and the Constitutive Elements of Democracy*

A third argument in favor of judicial review focuses on the role of the courts in implementing basic undertakings to which members of a legitimate political society commit to at its founding. Precommitment consists of the decision to restrict future freedom of choice in order to realize benefits that result from such self-constraint.<sup>99</sup> This idea is well represented by the example of Ulysses,<sup>100</sup> who literally restricted his freedom by binding himself to his ship's mast in order to realize the benefit of hearing the Sirens.<sup>101</sup> Similarly, a society that precommits to respect an entrenched right to free speech realizes the benefit of free public discussion and debate.<sup>102</sup> Since the entrenchment of rights involves a society's collective decision to restrict future freedom of choice, the decision to entrench rights may be viewed as a form of precommitment to rules that are necessary conditions for the realization of democratic institutions.<sup>103</sup>

The analogy between the entrenchment of rights by a society and intentional precommitment by an individual, however, is imperfect. A society does not choose to precommit with the unified self-awareness of an individual. Therefore, the model of precommitment will yield valuable insights regarding the nature of entrenched rights only if it distinguishes between "self-binding" and "incidental" constraints.<sup>104</sup> Self-binding involves the intentional adoption of a constraint on the agent's decision set.<sup>105</sup> Incidental

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<sup>99</sup> JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 76–77 (rev. ed. 1984) [hereinafter *ELSTER, ULYSSES*].

<sup>100</sup> HOMER, *THE ODYSSEY* bk. 12, ll. 160–204 (Edward McCrorie trans., 2004).

<sup>101</sup> Jon Elster offers, as a counterpoint, the more contemporary example of Johnny Hodges, the extravagant jazz musician, who restricted his freedom by arranging to be paid on a daily basis in order to secure the benefit of control over his tendency to spend his money immediately. See *ELSTER, ULYSSES*, *supra* note 99, at 38.

<sup>102</sup> HOLMES, *supra* note 22, at 169–72.

<sup>103</sup> *Id.*; see also *ELSTER, ULYSSES*, *supra* note 99, at 36–111 (arguing that self-binding is an effective method for addressing collective weakness of the will); Holmes, *supra* note 23, at 195, 240.

<sup>104</sup> JON ELSTER, *ULYSSES UNBOUND* 4 (2000) [hereinafter *ELSTER, ULYSSES UNBOUND*].

<sup>105</sup> *Id.*

constraints, however, involve limitations on that decision set which may have been adopted for reasons other than self-binding, but which nevertheless produce the benefits of self-binding.<sup>106</sup>

Only the latter notion of self-binding as an incidental constraint is relevant to an analysis of the entrenchment of rights by a society. It is therefore inappropriate when developing an account of self-binding as a justification for judicial review, to apply the notion of self-binding to this phenomenon, since: (1) a society is not an individual; (2) there is no reliable method for determining whether ratifiers of entrenched rights are motivated by the desire to bind themselves in order to realize resulting benefits; and (3) ratification by a particular generation of citizens could not precommit future generations.<sup>107</sup> However, the notion of an incidental constraint performs a potentially important explanatory function in an account of the status and justification of entrenched rights. Entrenched rights—which, like other incidental constraints, may have been introduced for reasons unrelated to precommitment—nevertheless generate benefits of the kind associated with self-binding. Bills of rights containing adequate protections of freedom of expression, religion, assembly, and conscience, as well as equal protection and due process guarantees, limit the decision set of the majority in a manner that puts in place the necessary conditions for democratic government. Enforcement of these rights through judicial review secures those conditions.

The above arguments suggest that when societies entrench rights as elements of their basic institutions (e.g., by adopting a Bill of Rights), the entrenchment of rights performs an enabling function in making possible the realization of democratic institutions. In securing procedural and substantive guarantees that are necessary conditions for the realization of democracy, the entrenchment of rights contributes practically to the achievement and maintenance of democratic forms of government. Furthermore, the entrenchment of rights attempts to ensure that the political arrangements realized approximate the democratic ideal of legitimate self-government by requiring that citizens must be guaranteed equal standing as co-legislators and equal concern and respect for their interests as subjects. Since judicial review performs an important role in implementing

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<sup>106</sup> Bicameralism, as Elster notes, is often “introduced by elite minorities to control popular majorities.” ELSTER, ULYSSES, *supra* note 99, at 90. Nevertheless, “by virtue of its delaying and cooling down properties,” bicameralism produces benefits generally associated with precommitment. *Id.* This beneficial effect arguably both justifies the institutional form and explains its persistence.

<sup>107</sup> See ELSTER, ULYSSES UNBOUND, *supra* note 104, at 167–74.



such rights, judicial review necessarily performs an essential role in securing the necessary conditions for a healthy democratic self-government. This section has reviewed the classical arguments for judicial review; the next section assesses Waldron's responses to these arguments, as developed in his earlier work.<sup>108</sup>

### III. WALDRON'S CRITIQUE OF CLASSICAL ARGUMENTS FOR JUDICIAL REVIEW

Waldron rejects the constitutionalist arguments for judicial review discussed in Part II, arguing that the practice of judicial review transfers the authority to resolve important issues to an "undemocratic"<sup>109</sup> branch of government. While Waldron devotes little attention to constitutionalist arguments for judicial review in *The Core of the Case*,<sup>110</sup> he discusses these issues exhaustively in his earlier work. The discussion of his views in this section therefore describes and assesses arguments developed in the critique of constitutionalism and judicial review that Waldron presents in his earlier work.

It is important to emphasize that Waldron offers two distinct lines of attack against judicial review. First, he argues that advocates of judicial review ground their justifications of judicial review in the consequentialist assumption, but, as argued in Part I, this argument against judicial review fails. Second, Waldron develops a series of arguments criticizing the constitutionalist justification of judicial review. In developing his critique of the constitutionalist conception, Waldron argues that constitutionalist advocates of judicial review (a) insufficiently attend to "the right to have one's voice counted"<sup>111</sup> in resolving controversies in a democracy; (b) assign the authority to resolve fundamental questions regarding the meaning and extent of rights to an "undemocratic" branch of government; (c) fail to take proper account of the good faith commitment to rights that should be assumed to exist in democratic societies; (d) underestimate the significance of pluralist objections to the argument that entrenched rights are a necessary condition of legitimacy; and (e) model the entrenchment of rights inaccurately

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<sup>108</sup> See WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 209–312; WALDRON, DIGNITY, *supra* note 12, at 124–66.

<sup>109</sup> Waldron considers the judiciary to be an "undemocratic" branch of government because judges are usually appointed rather than elected. Waldron, *A Right-Based Critique*, *supra* note 3, at 39.

<sup>110</sup> In this article, Waldron responds almost exclusively to the consequentialist argument in favor of judicial review that he attributes to his interlocutors. Waldron, *The Core of the Case*, *supra* note 1, at 1369–406.

<sup>111</sup> *Id.* at 1373, 1375.

as a form of precommitment.<sup>112</sup> This section rejects that set of arguments because it insufficiently attends to the question of when legislation by the majority constitutes a legitimate exercise of political power.

A. *Waldron's Critique I: Judicial Review Fails to Show Respect for Persons*

Waldron argues that judicial enforcement of entrenched rights prevents members of the democratically elected legislature from performing their “normal functions of revision, reform, and innovation.”<sup>113</sup> Thus, because it interferes with the proper functions of representative government, judicial review involves the “peculiar insult” of depriving persons of the power to make decisions that are centrally important to their rights and interests.<sup>114</sup> Therefore, legitimate political institutions should assign the authority to resolve questions regarding rights to the majority and its representatives.<sup>115</sup>

At the core of Waldron's argument is the claim that the entrenchment of rights is inconsistent with respect for persons. First, Waldron claims that respect for persons requires strict adherence to the principle of majority rule.<sup>116</sup> Second, he notes that the entrenchment of rights is necessarily inconsistent with that principle.<sup>117</sup> Therefore, he concludes, the entrenchment of rights is inconsistent with respect for persons. Note, however, that Waldron's argument merely stipulates, rather than argues for, an account of what respect for persons requires.<sup>118</sup> Respect for persons, Waldron stipulates, requires strict adherence to the principle of majority rule.<sup>119</sup> This stipulated assumption dismisses without comment the obvious objections to such a premise, objections that are both supported by extremely persuasive arguments and grounded in fundamental elements of the background political tradition.<sup>120</sup> As discussed above,

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<sup>112</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 209–312.

<sup>113</sup> *Id.* at 221.

<sup>114</sup> *Id.* at 15, 212, 238.

<sup>115</sup> *Id.* at 15, 238–39, 249–52, 254, 291–302.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Stipulation involves the dogmatic assertion of a position while offering no supporting justification.

<sup>119</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 15, 238–39, 249–52, 254, 291–302.

<sup>120</sup> See, e.g., LOCKE, *supra* note 37, at 323–33 (arguing that respect for members of civil society requires the enforcement of rights protections that limit the power of the legislature); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 62–64, 99–104, 188–92 (Roger D. Masters ed., 1978) (1762) [hereinafter ROUSSEAU, THE SOCIAL CONTRACT] (arguing that respect for members of civil society requires the creation of institutions that

proponents of the constitutional conception of democracy argue that strict adherence to the principle of majority rule—unconstrained by judicial review—fails to show adequate respect for persons.<sup>121</sup> Indeed, constitutionalists argue that such an approach impermissibly risks depriving persons of adequate power to influence political decisions that affect their interests.<sup>122</sup> In order to defend his view that judicial review impermissibly constrains the majority, Waldron must defend his central assumption that respect for persons requires strict majority rule, notwithstanding the objections raised by constitutionalists.

Waldron addresses these objections in his argument for a rights-based solution to the problem of disagreement regarding the proper nature and extent of rights guarantees. Since reasonable persons disagree regarding the proper answers to many central questions regarding rights, Waldron argues, conflicting views regarding those questions must be resolved through some political process.<sup>123</sup> The fundamental question in establishing such a process must be the following: who is to have the authority to resolve questions regarding the nature and the extent of rights?<sup>124</sup> And Waldron argues that the most persuasive answer to this question is: the majority, in its exercise of the right of political participation.<sup>125</sup>

While acknowledging that the right of participation is no less controversial than other fundamental rights,<sup>126</sup> Waldron argues that this right grounds a uniquely appropriate method for resolving contested questions regarding rights.<sup>127</sup> Since the claim

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transform the “will of all” into the General Will by restricting the power of the legislative will in a manner that prevents the enactment of legislation that protects particular (rather than general) interests); IMMANUEL KANT, RECHTSLEHRE 387–90, 457–61 (Allen Wood ed., 1996) (1797) (arguing that respect for members of civil society requires limitation of the power of the sovereign, which must satisfy a specific criterion: it must be at least possible that the united will of the whole nation could agree to the sovereign’s enactments); JOHN STUART MILL, ON LIBERTY 49–60 (Jonathan Bennett ed., 2005) (1859) (arguing that respect for persons requires restriction of legislation to enactments that satisfy the harm principle); GEORG W. F. HEGEL, PHENOMENOLOGY OF SPIRIT 557–61 (A. V. Miller trans., 1977) (1807) (arguing that respect for persons requires the creation of institutions that make possible a community of freedom made actual); RAWLS, *supra* note 24, at 3–4, 13, 57–73, 214–20, 273–76 (arguing that respect for persons requires the creation of institutions that protect basic liberties, ensure equal opportunity, and guarantee fair compensation); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 150–52 (1974) (arguing that respect for persons requires respect for entitlements); DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 82–90 (arguing that respect for persons requires equal concern and respect for the interests of each member of society).

<sup>121</sup> See *infra* Section II.A.

<sup>122</sup> See *infra* Section II.A.

<sup>123</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 250.

<sup>124</sup> *Id.* at 252.

<sup>125</sup> *Id.* at 15, 212, 249–52.

<sup>126</sup> *Id.* at 232.

<sup>127</sup> *Id.* at 249.

that persons should possess rights is “based on a view of the human individual as . . . a thinking agent, endowed with an ability to deliberate morally,”<sup>128</sup> a method of conflict resolution that submits questions regarding rights to the moral deliberations of individuals “calls upon the very capacities that rights *as such* connote.”<sup>129</sup> This solution constitutes a “rights-based solution” to “the problem of authority . . . [regarding] rights”<sup>130</sup> because it assigns decisive authority regarding fundamental questions of rights to the moral deliberations of rights-bearers.

Since rights theory requires viewing persons as thinking beings possessing the ability to deliberate morally, Waldron argues, rights theory necessarily assumes that persons are competent to exercise the authority to resolve controversies concerning rights.<sup>131</sup> Therefore, an appropriate solution to the problem of disagreement regarding rights is to permit those competent persons to exercise their collective authority.

Note, however, that this argument involves a slide between two views that a rights theorist might make about persons as thinking beings. The first view assumes that persons merely have the potential to reason morally. The second view assumes that persons not only have the potential to reason morally, but also reliably employ that potential for moral judgment responsibly. Waldron assumes that rights theorists must make the latter assumption—that persons can be trusted to employ moral judgment responsibly. But a rights theorist who views persons as thinking beings with the potential to exercise moral judgment is not necessarily committed to the view that those persons can be relied upon to exercise that potential responsibly.<sup>132</sup> In fact, Rousseau—who Waldron cites approvingly as a seminal theorist of participatory law-making<sup>133</sup>—argues that citizens who are competent to deliberate morally would nevertheless necessarily employ their legislative authority

<sup>128</sup> *Id.* at 250.

<sup>129</sup> *Id.* at 249–52 (footnote omitted). That is, since—in Waldron’s view—the argument that persons must be viewed as possessing rights is necessarily based upon the assumption that such persons possess the power to deliberate morally, Waldron’s solution of resolving questions about rights by allowing public moral deliberations to generate the answers calls on the quality that justifies the very claim that persons possess rights. Waldron, *A Right-Based Critique*, *supra* note 3.

<sup>130</sup> WALDRON, *LAW AND DISAGREEMENT*, *supra* note 3, at 249, 254.

<sup>131</sup> Waldron’s language here makes it clear that he assumes that competence to deliberate morally and competence to resolve controversies concerning rights are entirely equivalent. The remainder of this subsection disputes this assumption.

<sup>132</sup> As Cécile Fabre argues persuasively, “there is no inconsistency in saying that human beings are *able* to think and act morally on the one hand, and that they quite often commit appalling acts on the other hand.” Fabre, *A Philosophical Argument*, *supra* note 22, at 91 (emphasis added).

<sup>133</sup> WALDRON, *DIGNITY*, *supra* note 12, at 33.

unjustly unless the power of the majority is institutionally limited.<sup>134</sup> Only if the will of the majority is suitably constrained, Rousseau argues, will citizens realize their potential to legislate justly.<sup>135</sup> In other words, some constraint is necessary to ensure that persons employ their faculty of moral judgment responsibly.

While rights theories necessarily assume that rights-bearers possess the potential to exercise moral judgment, Waldron's argument is based instead on the assumption that rights theories must presuppose the responsible employment of that potential, and this assumption goes far beyond the qualities "that rights *as such* connote."<sup>136</sup> Indeed, Waldron's argument for a rights-based solution is grounded, not merely in the assumptions "that rights *as such* connote," but rather in an idealized conception of the human condition; Waldron, that is, argues explicitly that social theory should be based upon the assumption that members of society, generally, can be relied upon to employ the faculty of moral judgment responsibly.<sup>137</sup> Certainly, "[i]f men were [such] angels" as Waldron appears to assume, "no government would be necessary."<sup>138</sup> Since government is necessary, Waldron's idealized conception of both people and legislative bodies is highly questionable, and certainly goes beyond the qualities that "rights *as such* connote." Since Waldron fails to argue persuasively that his "rights-based solution" is grounded merely in the qualities that "rights *as such* connote," his argument fails to justify his rights-based solution to the problem of resolving controversies regarding rights.

In failing to argue persuasively for a rights-based solution to the problem of disagreement regarding rights, Waldron fails to

<sup>134</sup> JEAN-JACQUES ROUSSEAU, THE SECOND DISCOURSE 173, 177 (Roger Masters & Judith Masters trans., 1964) [hereinafter ROUSSEAU, THE SECOND DISCOURSE]. In the absence of constraints upon the political power of the majority, Rousseau argued, majority rule necessarily leads to "the ultimate stage of inequality . . . the fruit of an excess of corruption." *Id.* at 177. See Alexander Kaufman, *Reason, Self-Legislation, and Legitimacy: Conceptions of Freedom in the Political Thought of Rousseau and Kant*, 59 REV. POL. 25, 25–26 (1997), for a discussion of Rousseau's account of the necessary conditions of a just social order.

<sup>135</sup> ROUSSEAU, THE SECOND DISCOURSE, *supra* note 134, at 173, 177.

<sup>136</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 252. In referring to the qualities "that rights *as such* connote," Waldron means to refer to the qualities that we must assume that people possess if we are reasonable in viewing them as the possessors of right-claims. *Id.*

<sup>137</sup> "The attribution [of rights to individuals] . . . is typically an act of faith in the agency and capacity for moral thinking of each of the individuals concerned." *Id.* at 250.

<sup>138</sup> THE FEDERALIST NO. 51 (James Madison). Madison argued that government was necessary precisely because men (and women) are *not* angels and can be counted on to pursue self-interest at the expense of the collective good. Since Waldron insists that men (and women) can be counted upon to pursue the collective good and not self-interest, Madison would presumably view Waldron as a person who views men (and women) as angels. *See id.*

defend his central assumption—the assumption that respect for persons requires strict majority rule—against the objections raised by the constitutional conception (the view favored by advocates of judicial review). Two of Waldron’s central arguments against judicial review—the arguments that judicial review (a) involves a failure of respect for persons,<sup>139</sup> and (b) improperly excludes persons from power in making decisions affecting their rights and interests<sup>140</sup>—rely upon this assumption. Since these arguments rely upon an assumption that Waldron is unable to defend, both of these arguments necessarily fail. Since Waldron therefore fails to defend his argument that judicial review is inconsistent with respect for persons from the objections to that argument raised by constitutionalists, Waldron’s first argument against judicial review fails.

*B. Waldron’s Critique II: Judicial Review Undermines the Democratic Character of Institutions*

Waldron argues that in assigning the authority to resolve controversies regarding rights to the courts, theories of judicial review undermine the democratic character of institutions, since “[t]here is something lost, from a democratic point of view, when an unelected and unaccountable individual or institution makes a binding decision about what democracy requires.”<sup>141</sup>

Waldron assumes that the courts’ resolution of issues is inherently less democratic than resolution through the legislature. Yet, as discussed above,<sup>142</sup> the liberal political tradition<sup>143</sup> supports the view that checks on majoritarian power such as judicial review, are central and essential elements of a democratic political culture.<sup>144</sup> In particular, advocates of the constitutional conception argue that citizens cannot be secure in their rights to participate on equal terms in civil society unless society ensures that there are mechanisms in place that constrain the

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<sup>139</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 15, 212, 238.

<sup>140</sup> *Id.* at 293.

<sup>141</sup> *Id.*

<sup>142</sup> *See supra* Part II.

<sup>143</sup> *See generally* LOCKE, *supra* note 37 (arguing that the authority of any legitimate sovereign must be limited by unconditional rights protections guaranteed by law); ROUSSEAU, THE SOCIAL CONTRACT, *supra* note 120 (arguing that the legislation of the General Will must be regulated by institutional constraints guaranteeing the double generality of the law); THE FEDERALIST NO. 78 (Alexander Hamilton) (arguing that representative government properly operates to restrict the influence of majority preferences).

<sup>144</sup> *See supra* Section II.A.

power of the majority.<sup>145</sup> Since the majority cannot plausibly oversee the enforcement of rights whose purpose is to constrain the power of the majority, specialized institutions must perform this function instead. The courts—with their expertise in interpreting the practical implications of the legal tradition—are the proper institution to oversee the protection of rights in a healthy democracy.<sup>146</sup>

Waldron responds to this argument by simply denying the claim that the majority cannot oversee the protection of citizens' rights.<sup>147</sup> The assignment to the majority of the authority to make decisions regarding the nature and extent of the majority's political power, Waldron argues, is not a circular proceeding.<sup>148</sup> Some political actor, Waldron claims, must possess the power to resolve these issues, and it seems most appropriate to assign such power to the persons whose interests are at stake.<sup>149</sup> Contrary to Waldron's assumption, however, the problem of reasonable disagreement regarding rights in a democracy cannot be resolved simply by determining where to locate the authority to resolve questions regarding rights. If binding limits on the power of the majority are a necessary precondition of a healthy democracy,<sup>150</sup> as the constitutional conception argues, then assigning the authority to resolve a question regarding rights to that same majority is an inadequate solution. Rights cannot operate as constraints on the power of the majority if that majority also possesses the power to determine both the meaning and range of application of those rights.<sup>151</sup> Contrary to Waldron's assertions, the problem is not only that the majority becomes the judge in its own case,<sup>152</sup> but rather that if such power is assigned to the majority, then constitutional rights no longer limit the power of that majority.

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<sup>145</sup> See DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2; DWORKIN, FREEDOM'S LAW, *supra* note 8; Cohen, *Democracy*, *supra* note 23.

<sup>146</sup> See DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2; DWORKIN, FREEDOM'S LAW, *supra* note 8; Cohen, *Democracy*, *supra* note 23.

<sup>147</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 298–300.

<sup>148</sup> *Id.* at 298.

<sup>149</sup> *Id.* at 293–94.

<sup>150</sup> The constitutional conception of democracy “denies that it is a defining goal of democracy that collective decisions always or normally be those that a majority or plurality of citizens would favor if fully informed and rational. . . . Democracy means government subject to conditions . . . of equal status for all citizens.” DWORKIN, FREEDOM'S LAW, *supra* note 8, at 17. These conditions include, but are not limited to, respect for rights to free speech and expression, universal suffrage, and freedom of conscience. *Id.* at 24–26.

<sup>151</sup> “A right against the Government must be a right to do something even when the majority thinks it would be wrong to do it.” DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 194. “[D]ecisions about rights against the majority are not issues that in fairness ought to be left to the majority.” *Id.* at 142.

<sup>152</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 296–302.

Therefore, Waldron's argument fails to respond to the concerns raised by the constitutional conception.

Moreover, Waldron's argument assumes that the democratic pedigree of the representative legislature is superior to that of the judiciary.<sup>153</sup> Representative government, however, is itself incompletely democratic.<sup>154</sup> The Federalists<sup>155</sup>—the politician/scholars who transformed democratic theory into workable institutions—argued that representative government is desirable precisely because the representatives chosen will not represent the views of their constituents literally.<sup>156</sup> Indeed, James Madison argued that elections lead to the selection of persons both different from and superior to their constituents,<sup>157</sup> and that these representatives will use their superior judgment to further the interests of the community.<sup>158</sup>

If representative government is only incompletely democratic, then the democratic pedigree of the legislature is not necessarily superior to that of the courts, which protect rights that establish the necessary conditions of democratic self-government. Waldron's assumption that the democratic pedigree of the legislature is necessarily superior to that of the courts cannot be accepted without further argument. Therefore, Waldron fails to offer an adequate defense of his claim that the assignment of the authority to resolve questions regarding the meaning of rights to the courts undermines the democratic character of institutions.

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<sup>153</sup> *Id.* at 293.

<sup>154</sup> As discussed below, representatives do not represent the views of their constituents literally. Rather, constituents elect apparently qualified individuals to exercise their best judgment in order to protect the interests of their constituents. It is understood that, in many cases, the representative will not vote as the majority of his constituents would have voted. See JOHN DUNN, *INTERPRETING POLITICAL RESPONSIBILITY* 26–44 (1990); HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 144–67 (1967).

<sup>155</sup> Alexander Hamilton, John Jay, and James Madison. See generally GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787* (1998) (discussing the centrality of the writings of Hamilton, Jay, and Madison in justifying and securing support for the Constitution during the ratification).

<sup>156</sup> THE FEDERALIST NO. 57 (James Madison). See BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT* 166 (1997), for a helpful discussion of the non-identity between representative institutions and majoritarian government.

<sup>157</sup> THE FEDERALIST NO. 57 (James Madison).

<sup>158</sup> As Pitkin describes this relation, the representative is not bound by a mandate to represent the literal views of her constituents, but rather is endowed with independence to employ her judgment to realize her constituents' interests. See PITKIN, *supra* note 154, at 116–67, 145.



C. *Waldron's Critique III: Judicial Review Assumes That Citizens Cannot Govern Themselves in Good Faith*

Waldron argues that democratic theory should work from the assumption that the vast majority of citizens are reliably committed to respect for the rights of other citizens.<sup>159</sup> If this assumption is accepted, then democratic societies require neither the constitutional protection of rights nor the institution of judicial review since the majority can be trusted to act from its good faith commitment to respect for rights. Modern history, however, is replete with instances in which this assumption fails. Recent examples of genocide from Eastern Europe and Africa<sup>160</sup> exemplify the predatory pursuit of group interests at the expense of responsible civic engagement. A theory of rights that presumes citizens act primarily from responsible respect for the rights of others has little practical value. Historical evidence provides no support for such a bold ontological assumption.<sup>161</sup> Nevertheless, Waldron insists that one should view rights-bearers as acting from “good-faith disagreement.”<sup>162</sup> Indeed, Waldron characterizes concerns regarding the potential abuse of unconstrained majority power as “a panic about self-government in the political realm.”<sup>163</sup>

Why does Waldron insist that rights theory should work from the idealized assumption that majoritarian politics resembles “a good faith disagreement of principle,” rather than “a feeding frenzy of interest”?<sup>164</sup> Waldron offers two justifications

<sup>159</sup> “My argument has proceeded on the premise that democratic politics need not be like . . . a feeding frenzy of interest . . .” WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 304.

<sup>160</sup> See VULLIAMY, *supra* note 31, at 73–118 (describing Serbian collective responsibility for atrocities in Bosnia); MAMDAMI, *supra* note 31, at 185–233 (arguing that millions of Rwandans intentionally and enthusiastically collaborated in a collective act of genocide); FLINT & DE WAAL, *supra* note 31, at 33–96 (describing the political processes that led to atrocities in Darfur).

<sup>161</sup> An ontological claim aims to define the nature and structure of the world. An author’s ontological assumptions constitute her foundational assumptions about the conditions of the world that are relevant to her argument. The persuasiveness of the author’s argument thus depends entirely on the truth of the propositions contained in his/her ontological assumptions. If one of those propositions (e.g., the claim that majoritarian politics generally takes the form of good faith disagreement) is in fact false, then the argument necessarily fails. Examples from recent history provide strong support for the view that Waldron’s ontological assumption should be rejected. See, e.g., VULLIAMY, *supra* note 31, at 73–118 (describing Serbian collective responsibility for atrocities in Bosnia); MAMDAMI, *supra* note 31, at 185–233 (arguing that millions of Rwandans intentionally and enthusiastically collaborated in a collective act of genocide); FLINT & DE WAAL, *supra* note 31, at 33–96 (describing the political processes that led to atrocities in Darfur).

<sup>162</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 13, 304.

<sup>163</sup> *Id.* at 303.

<sup>164</sup> *Id.* at 304.

for this claim. First, Waldron asserts that rights theories that aim to guard against the abuse of power by the majority improperly base their arguments upon a mistrust of fellow citizens that “does not sit particularly well with the aura of respect for their autonomy and responsibility that is conveyed by the substance of the rights which are being entrenched.”<sup>165</sup> Theories grounded in the assumption that persons possess the dignity and autonomy that justify the entrenchment of rights, Waldron argues, cannot consistently assume that citizens participating in the democratic process will act primarily on predatory motives.<sup>166</sup>

Putting aside the fact that Waldron’s assumptions ignore centuries of racist legislation passed by federal and state legislatures,<sup>167</sup> it is important to emphasize that theories of entrenched rights are not necessarily grounded in concerns regarding predatory motives. A concern regarding the influence of the passions on political judgment has arguably played a more important historical role in motivating the entrenchment of rights in political institutions.<sup>168</sup> Indeed, the Federalist Papers justified institutional limits on the power of the majority as necessary to limit the influence of passions on adopting legislation.<sup>169</sup> Therefore, Waldron’s critique—which assumes a

<sup>165</sup> *Id.* at 222.

<sup>166</sup> *Id.* at 258.

<sup>167</sup> During the 1890s, majorities in the democratically elected state legislatures of eleven southern states adopted new state constitutions that disenfranchised virtually all black voters in those states through a combination of literacy tests, poll taxes, and residency requirements. In the first decades of the twentieth century, most southern legislatures adopted state laws segregating schools, colleges, hospitals, orphanages, prisons, and public facilities. Most of these laws remained in effect until the passage of the Civil Rights Act in 1964. The members of the state legislatures who voted for these laws and the voters who supported them can hardly be described as the product of good faith civic-minded political engagement in pursuit of the public good. See DAVID FREMON, *THE JIM CROW LAWS AND RACISM IN THE UNITED STATES* 1–105 (2014); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 8–97 (2004); LESLIE V. TISCHAUSER, *JIM CROW LAWS* 1–106 (2012). Admittedly, the U.S. Supreme Court has not covered itself in glory, either, on questions of race. The first use of judicial review after *Marbury v. Madison* was the Court’s decision in *Dred Scott v. Sandford*, in which the Supreme Court gratuitously ruled in dicta that African-Americans could not be citizens of the United States. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404–05 (1856).

<sup>168</sup> This concern was central to the thought of Alexander Hamilton, as will be discussed below. Locke argues that rights protections and rules of law were necessary because lack of such restraints made the sovereign “licentious.” LOCKE, *supra* note 37, at 235–36. Rousseau argues that, unless institutional constraints ensured that laws satisfy the constraint of double generality—thus ensuring protections of the rights of the individual—public discourse would be dominated by “the unbridled passions of” all. ROUSSEAU, *THE SOCIAL CONTRACT*, *supra* note 120, at 157.

<sup>169</sup> Alexander Hamilton, for example, worried about the influence on legislation of “those ill humors, which . . . sometimes disseminate among the people themselves, and . . . occasion dangerous innovations in the government.” THE FEDERALIST NO. 78 (Alexander Hamilton).

primary concern to guard against predatory motives—reflects an imperfect understanding of the concerns that motivate democratic political communities to entrench rights in their constitutions.

Moreover, the argument that concerns regarding predatory behavior are inconsistent with the necessary assumptions of rights theory fails because it attributes excessively demanding assumptions to rights theories.<sup>170</sup> Waldron asserts that a theory of rights must assume that rights-bearers reliably act responsibly in employing moral judgment. As discussed above,<sup>171</sup> however, that theory requires only the more modest assumption that persons possess the *potential* to exercise responsible moral judgment.<sup>172</sup> Since rights theory is not committed to the assumption that citizens will reliably act responsibly, it is consistent for rights theories to guard against the effects of predatory motivations on legislation.

Waldron's second justification for insisting that rights theorists should assume that disputes regarding rights proceed from good faith disagreement of principle reflects his desire "to develop a rosy picture of legislatures and their structures"<sup>173</sup> in order to counteract what he views as the equally rosy pictures offered by defenders of rights and judicial review.<sup>174</sup> Waldron claims that Dworkin bases his rights theory on a view of the court as a "forum of principle."<sup>175</sup> Then why, Waldron asks, should Waldron's own attempt to work up a theory of rights based on the view of majoritarian politics as a process of good faith engagement be viewed with skepticism?

This argument, however, is based on a faulty analogy. Waldron clearly means to claim that Dworkin makes the factual assumption that courts actually operate as "forum[s] of principle."<sup>176</sup> Since Dworkin employs an idealized factual assumption in his theory, Waldron argues,<sup>177</sup> it is equally plausible for Waldron to rely upon an idealized factual assumption. But Waldron fundamentally misinterprets Dworkin's argument, which does not contain an idealized factual assumption. Dworkin employs the phrase "forum of principle" to

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<sup>170</sup> As discussed *supra* Section III.A, Waldron similarly overstates the presuppositions of rights theory in his argument for a "rights-based" solution to the problem of disagreement about rights. *See supra* Section III.A.

<sup>171</sup> *See supra* Section III.B.

<sup>172</sup> *See supra* Section III.A.

<sup>173</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 32.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

refer to a particular approach to legal reasoning.<sup>178</sup> A court acts as a forum of principle when a judge assigns the highest priority to considerations of principle, rather than to considerations of policy.<sup>179</sup> Dworkin assumes that many judges do not reason in this manner,<sup>180</sup> and his arguments are designed to *persuade* judges to adopt this approach.<sup>181</sup> If Dworkin were—as Waldron claims—making the descriptive claim that courts always *do* operate as forums of principle, then his claim would be factually inaccurate—at best an idealization. Dworkin’s claim, however, is normative rather than descriptive because he argues that courts “should” operate as forums of principle.<sup>182</sup> If Dworkin’s claim were descriptive, his argument would be that courts *already* operate as forums of principle.

Despite Waldron’s claim to the contrary,<sup>183</sup> Dworkin’s argument does not rely on the factual assumption that courts are *forums of principle*. Waldron’s argument that his idealization of democratic politics is analogous to Dworkin’s reference to the court as a forum of principle is therefore unpersuasive.

Waldron’s argument relies heavily on the factual assumption that political conflict generally reflects good-faith engagement, notwithstanding the fact that such an assumption is inconsistent with routine, everyday experience.<sup>184</sup> Moreover, Waldron fails in his attempt to justify reliance on that factual assumption as analogous to elements of Dworkin’s argument. Since Waldron’s assumption that political conflict generally reflects a good-faith engagement is highly implausible, his argument that citizens of democracies should rely on that assumption when designing their institutions—thus eliminating the need for judicial review to protect individual rights—is fundamentally and fatally flawed.

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<sup>178</sup> RONALD DWORKIN, A MATTER OF PRINCIPLE 69 (1985).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* Dworkin argues that courts “should make decisions of principle rather than policy—decisions about what rights people have under our constitutional system rather than decisions about how the general welfare is best promoted.” *Id.* at 69.

<sup>182</sup> A descriptive claim is an assertion about the way things are, while a normative claim is an assertion about the way things should be. The statement, “In general, courts do not operate as forums of principle,” is a descriptive claim. The assertion, “courts should operate as forums of principle,” is a normative claim.

<sup>183</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 32.

<sup>184</sup> See the discussion of this assumption earlier in this subsection, *supra* Section III.C.

D. *Waldron's Critique IV: The Entrenchment of Rights Is Not a Necessary Condition of Legitimate Government*

Waldron next criticizes the constitutionalist argument that the *entrenchment* of rights is a necessary condition of legitimate government. Waldron, in fact, concedes that the assurance of certain rights protections may be among such necessary conditions.<sup>185</sup> For example, he argues that “[d]emocracy and majority-decision make moral sense only under certain conditions,” the “most obvious” of which is the protection of “free speech and freedom of association—rights which establish a broader deliberative context in civil society for formal political decision-making.”<sup>186</sup> Nevertheless, Waldron still insists that the entrenchment of rights cannot itself be such a necessary condition.<sup>187</sup> Reasonable persons will predictably disagree regarding the nature of the necessary conditions of democratic legitimacy.<sup>188</sup> Waldron argues that no political theory can generate a plausible basis for the entrenchment of individual rights in the face of such disagreement.<sup>189</sup>

Waldron’s argument, however, proves too much. If the fact of disagreement undermines the authority of any given claim regarding the necessary conditions of legitimacy, then the fact of disagreement similarly undermines the authority of any participatory institution. That is, Waldron cannot consistently appeal to the fact of disagreement to undermine claims regarding the necessary conditions of political legitimacy unless he also accepts the fact that the argument from disagreement similarly undermines his own case for the authority of democratic participation. Waldron’s argument appears to undermine the claims to legitimacy of all theories of democratic institutions, including his own.

Waldron assumes that he has avoided this result because his argument for a rights-based solution to the problem of political disagreement provides independent support for the

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<sup>185</sup> “No one thinks that any old bunch of people is entitled to impose a decision on others, simply on the ground that there are more individuals in favour of the decision than against it.” WALDRON, *LAW AND DISAGREEMENT*, *supra* note 3, at 283.

<sup>186</sup> *Id.* Waldron, remarkably, argues that the majority, in a legitimate democracy, is not unconditionally “entitled to impose a decision on others, simply on the ground that there are more individuals in favour of the decision than against it.” *Id.* Waldron’s argument here is remarkable because it seems to contradict his general claim that majorities—in democracies—must possess the authority to resolve all contested questions regarding rights. *See id.* at 251–52, 302–05.

<sup>187</sup> *Id.* at 284–85.

<sup>188</sup> *Id.* at 299–301.

<sup>189</sup> *Id.* at 294–95.

authority of majoritarian institutions.<sup>190</sup> If, as discussed above, that argument fails, then Waldron can only defend the authority of participatory institutions on the basis of substantive arguments that will also face significant disagreement.<sup>191</sup> Therefore, Waldron cannot consistently argue against the notion that the entrenchment of rights is a necessary condition for democratic legitimacy by appealing to the fact of disagreement unless he also abandons his commitment to the view that the majority should possess the authority to resolve questions regarding the nature and extent of individual rights. Since Waldron maintains his commitment to the latter view, his objection to entrenched rights as a necessary condition for democratic legitimacy fails.

*E. Waldron's Critique V: Precommitment Models the Entrenchment of Rights Imperfectly*

Waldron argues that the notion of precommitment imperfectly models the entrenchment of rights. In a true case of precommitment, the agent knows precisely the action she wishes to avoid.<sup>192</sup> For example, Ulysses—who intentionally precommits to achieve the particular purpose of hearing, but not responding to, the Sirens—knows that he wishes to avoid responding to the Sirens' song.<sup>193</sup> However, in a body politic, opinions differ as to the kind of legislation that rights should preclude. Waldron emphasizes that these differences of opinion reflect a reasoned disagreement about the nature and extent of the rights guarantees that society should recognize.<sup>194</sup> Waldron argues that under such conditions, the entrenchment of rights reflects not consensual precommitment, but “the artificially sustained ascendancy of one view in the polity over other views.”<sup>195</sup>

His argument would be quite persuasive if theorists such as Jon Elster and Stephen Holmes—both of whom have developed influential accounts of the precommitment argument<sup>196</sup>—argued that the entrenchment of rights constituted a form of “self-binding,” or the form of precommitment which

<sup>190</sup> See *supra* Section III.A.

<sup>191</sup> Such substantive arguments would include the claims that (i) respect for persons requires that decisions about rights claims must be decided by the majority or its representatives; and (ii) the right to participate must be assigned priority over all other rights in a democratic form of government. Both arguments are plausible but highly controversial.

<sup>192</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 262.

<sup>193</sup> HOMER, *supra* note 100.

<sup>194</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 264.

<sup>195</sup> *Id.* at 268.

<sup>196</sup> See ELSTER, ULYSSES, *supra* note 99, at 36–111; HOLMES, *supra* note 22, at 27.

involves the intentional adoption of a constraint. Democratic theory, however, models entrenched rights as a form of “incidental constraint,” a constraint which does not necessarily involve intentional “self-binding,” but which nevertheless produces benefits equivalent to those of “self-binding.”<sup>197</sup> Elster’s and Holmes’s accounts of precommitment are thus descriptive rather than normative, and offer an explanation of the function and benefits of a particular social practice, rather than a justification for its authority.

Waldron’s reference to the *artificially sustained ascendancy* of one view in the argument from precommitment reveals the manner in which his analysis falters. Waldron views theories of precommitment as an attempt to provide a normative justification for entrenched rights.<sup>198</sup> However, these theories offer only an account of the function of constitutional entrenchment as a social practice and of the benefits realized through such a practice.<sup>199</sup> While the identified benefits of entrenching individual rights do suggest reasons for maintaining the practice,<sup>200</sup> no effort is made to determine the status of these reasons relative to reasons for abandoning the practice. Therefore, theories of precommitment do not offer a systematic normative argument justifying the entrenchment of rights.

In *The Core of the Case*, Waldron claims that theories of precommitment have “been thoroughly discredited in the literature.”<sup>201</sup> However, in support of this claim, Waldron only cites Elster’s recent concession—in *Ulysses Unbound*<sup>202</sup>—that the model of precommitment as “self-binding” fails to provide a plausible model for entrenched rights.<sup>203</sup> The cited passage fails to support Waldron’s claim, however, since Elster continues to maintain that the model of precommitment as an “incidental constraint” remains a valuable and robust analytic tool for rights theory.<sup>204</sup> Elster does not argue that the notion of precommitment is an inappropriate metaphor for entrenched rights; rather, he asserts that theories of rights that represent entrenched rights as a form of precommitment should define

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<sup>197</sup> HOLMES, *supra* note 22, at 134–77. The entrenchment of rights, it is argued, performs an enabling function in making possible the realization of democratic institutions. *Id.*

<sup>198</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 257–60.

<sup>199</sup> *See supra* Section II.C.

<sup>200</sup> *See supra* Section II.C.

<sup>201</sup> Waldron, *The Core of the Case*, *supra* note 1, at 1393.

<sup>202</sup> *See* ELSTER, ULYSSES UNBOUND, *supra* note 104, at 36–111; Waldron, *The Core of the Case*, *supra* note 1, at 1393.

<sup>203</sup> *See* ELSTER, ULYSSES UNBOUND, *supra* note 104, at 90–96.

<sup>204</sup> *Id.* at 90.

the relevant notion of precommitment as a form of “incidental constraint” instead of a form of “self-binding.”<sup>205</sup> Accordingly, the Elster citation provides no support for Waldron’s claim that the notion of rights as a form of precommitment is “discredited in the literature.”<sup>206</sup> Since Waldron fails to establish either that theories of precommitment model entrenched rights imperfectly or that theories of precommitment have been discredited in the literature, Waldron’s objection to the model of precommitment’s account of the entrenchment of rights necessarily fails.

Therefore, Waldron’s critique of judicial review fails to establish that this practice (a) is inattentive to the right to have one’s voice count;<sup>207</sup> (b) transfers power to an undemocratic institution;<sup>208</sup> (c) fails to take proper account of the good faith commitment of democratic citizens to respect for rights;<sup>209</sup> (d) underestimates the significance of pluralist objections to the argument that entrenched rights are a necessary condition of legitimacy;<sup>210</sup> or (e) models the entrenchment of rights inaccurately as a form of precommitment.<sup>211</sup> Waldron’s critique of judicial review stands or falls with his critique of the constitutional protection of rights. This section has demonstrated that his critique of the constitutional protection of rights is unpersuasive,<sup>212</sup> and therefore his critique of judicial review also fails. The next section will set out a constitutionalist case in favor of judicial review that is responsive to contemporary critiques.

#### IV. THE CORE OF AN UNQUALIFIED CASE FOR JUDICIAL REVIEW: THE CONSTITUTIONALIST CONCEPTION

When does majority support constitute a sufficient basis for the legitimate exercise of political power? Waldron’s critique of judicial review is most seriously flawed by its failure to address this question adequately. Waldron concedes that majority support does not automatically ensure that an exercise of political power is legitimate.<sup>213</sup> He specifically acknowledges that “[n]o one thinks that any old bunch of people is entitled to impose a decision on others, simply on the ground that there are more

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<sup>205</sup> *Id.*

<sup>206</sup> Waldron, *The Core of the Case*, *supra* note 1, at 1393.

<sup>207</sup> *See supra* Section III.A.

<sup>208</sup> *See supra* Section III.B.

<sup>209</sup> *See supra* Section III.C.

<sup>210</sup> *See supra* Section III.D.

<sup>211</sup> *See supra* Section III.E.

<sup>212</sup> *See supra* Part III.

<sup>213</sup> WALDRON, LAW AND DISAGREEMENT, *supra* note 3, at 283.



individuals in favour of the decision than against it.”<sup>214</sup> Nevertheless, Waldron denies that the proper extent and limits of majority power can be a real question for democratic theory.<sup>215</sup> When the majority over-reaches by denying suffrage to women or minorities, Waldron argues, society is simply “left in a legitimacy-free zone.”<sup>216</sup> He concedes that if the majority violates the necessary conditions of political legitimacy (e.g. by enacting legislation that invades a minority’s fundamental rights), the majority forfeits any legitimate claim to a right to exercise political power and society enters “a legitimacy-free zone.” But Waldron believes that no democratic institutional arrangements are available to prevent such abuses. Rather, “the best that we can hope for is that a legitimate democratic system [re]emerges somehow or other.”<sup>217</sup> According to Waldron’s view, an account of the institutional arrangements that could prevent abuses of majority power is simply beyond the scope of democratic theory.<sup>218</sup>

Yet a theory that takes seriously Waldron’s intuition that a majority is not “entitled to impose a decision on others, simply on the ground that there are more individuals in favour of the decision than against it”<sup>219</sup> requires an account of the relation between majority support and adequate justification for the legitimate exercise of political power. If the fact that “there are more individuals in favour of the decision than against it” is not a sufficient justification for political decisions in a democracy, this must be because fundamental democratic commitments exist that a legitimate democracy must respect even when the majority desires otherwise. However, if this claim were true, then it would seem that a legitimate democratic form of government must regulate the influence on social choice of preferences that are inconsistent with the foundational commitments of democracy. Only if political institutions perform such a function will it be possible to “mak[e] sense of the *democratic* quality of the popular will.”<sup>220</sup> It is therefore implicit in Waldron’s own view that regulation of the relation between preferences and the community’s political choices is a constitutive condition of democracy. In offering an account of the institutional arrangements necessary to regulate the relation between preferences and social choice, then, the constitutionalist

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<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 300.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 283.

<sup>220</sup> Alessandro Ferrara, *Of Boats and Principles: Reflections on Habermas’s “Constitutional Democracy,”* 29 POL. THEORY 782, 783 (2001).

view is more responsive to the theoretical challenges raised by the fact of pluralism than the interpretation offered by majoritarians.

This part of the article will provide an account of constitutionally entrenched rights as institutional features of a democratic political culture that regulate the relation between preferences and the community's political choices. In particular, it will argue that constitutionally protected rights define the class of preferences that may appropriately influence social choice and restrict the political influence of preferences that persons subject to the coercive power of the state could reasonably reject as the basis of a political decision. If this analysis is persuasive, then the enforcement of these rights through judicial review is a practice that is essential to democracy.

#### A. *The Class of Preferences Relevant to Democratic Choice*

While democratic institutions should, in principle, be responsive to preferences, even Waldron's majoritarian theory appears to require regulation of the relation between preferences and the community's political choices.<sup>221</sup> Leading social choice theorists argue that institutional arrangements should regulate the influence of certain categories of preferences on political decisions.<sup>222</sup> According to this literature, there are "reasons, internal to preferences themselves, for disregarding some sorts of preferences" in the process of social choice.<sup>223</sup> The view that the preferences relevant to social choice are merely the person's ranking of various social states, in fact, reflects "an impoverished conception of individual preferences."<sup>224</sup>

An acceptable democratic theory thus requires, as a central element, an account of institutional features—"preference filters"<sup>225</sup>—that regulate the role of preferences in

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<sup>221</sup> See *supra* Part IV (introduction).

<sup>222</sup> See generally ROBERT E. GOODIN, REFLECTIVE DEMOCRACY (2003) [hereinafter GOODIN, REFLECTIVE DEMOCRACY]; Robert E. Goodin, *Laundering Preferences*, in FOUNDATIONS OF SOCIAL CHOICE THEORY 75 (Jon Elster & Aanund Hylland eds., 1986) [hereinafter Goodin, *Laundering Preferences*] (arguing that some preferences may justifiably be considered inappropriate inputs to the social choice process and may therefore be filtered out of the social choice process); Amartya Sen, *Liberty, Unanimity and Rights*, 43 *ECONOMICA* 217 (1976) (arguing that rights properly function to restrict the influence of certain kinds of preferences on social choice); John C. Harsanyi, *Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking*, 61 *J. POL. ECON.* 434 (1953) (arguing that genuine value judgments on social welfare are properly based only on non-egoistic preferences); Bill New, *Paternalism and Public Policy*, 15 *ECON. & PHIL.* 63 (1999).

<sup>223</sup> Goodin, *Laundering Preferences*, *supra* note 222, at 77.

<sup>224</sup> *Id.* at 76.

<sup>225</sup> Conventional social choice analysis takes preferences as "given," without attempting to examine underlying motivation(s). Preferences can, however, be based on a

social decision-making and thus define and regulate the relation between preferences and legitimate exercises of political power. Such an account must examine the feasible forms of preference filter and identify the form that is most consistent with democratic commitments and concerns. Preference filters may filter inputs into or outputs out of the process of social choice.<sup>226</sup> Input filters exclude certain kinds or classes of preferences altogether from the political process. For example, an input filter might exclude from social choice all preferences to deprive other citizens of basic liberties. Since input filters completely nullify the influence of such preferences, this form of filter provides the most comprehensive protection for democratic commitments.<sup>227</sup> This virtue, however, is balanced by the corresponding vice of excluding a large amount of preference information from the process of social choice. Output filters, in contrast, limit only the political effects of certain preferences.<sup>228</sup> This form of filter simply removes certain political options from social consideration, regardless of the degree of preference-based support the option may have.<sup>229</sup> Unlike input filters, then, output filters allow all preference information to count.

If democratic theory aims to facilitate inclusive political institutions in which the ability to participate is restricted only when necessary to ensure free and equal participation by all, then output filters are more consistent with the aims of democratic theory than input filters. Entrenched rights, which prevent the majority from translating certain preferences into legislation inconsistent with fundamental commitments of democracy, function as output filters and therefore correspond to the interpretation of preference filtering that is most consistent with the aims of democratic theory. Entrenched rights acting as output filters, in particular, permit all preferences to affect social choice, but they prevent the majority from translating certain kinds of preferences—such as racial

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wide range of motivations, some of which will be more appropriate as inputs into the social choice process than others. Self-regarding or malicious motives, for example, may constitute less appropriate inputs than altruistic or socially constructive motives. Several approaches to social choice theory propose to limit the preferences permissible as inputs to social decision-making by scrutinizing motivations. See AMARTYA SEN, CHOICE, WELFARE, AND MEASUREMENT 291–326 (The MIT Press ed., 1982); JOHN C. HARSANYI, RATIONAL BEHAVIOR AND BARGAINING EQUILIBRIUM IN GAMES AND SOCIAL SITUATIONS 48–86 (1977); Goodin, *Laundering Preferences*, *supra* note 222, at 91–96. According to these approaches, some preferences may justifiably be considered inappropriate inputs to the social choice process and may therefore be filtered out of that process.

<sup>226</sup> Goodin, *Laundering Preferences*, *supra* note 222, at 91–96.

<sup>227</sup> *See id.*

<sup>228</sup> *See id.*

<sup>229</sup> *See id.*

prejudice—into legislation that overreaches the powers of a legitimate government—such as legislation enslaving members of a minority. Thus, entrenched rights functioning as preference filters serve both the democratic goals of (i) maximal inclusiveness of preference information, and (ii) free and equal participation by all.

### B. *Filtering Preferences*

Rights prevent the majority from translating certain preferences into legislation. But what criterion is most appropriate for distinguishing preferences that are consistent with democratic commitments from those that are not? Dworkin, in his influential rights theory, provides an important account (discussed below) of the status of preferences as inputs into democratic social choice. While certain legal scholars have criticized Dworkin's view,<sup>230</sup> much of this criticism reflects a misunderstanding of the aims and structure of Dworkin's arguments. Nevertheless, these criticisms raise concerns that any account of Dworkin's approach must address. This section of the article responds to the most powerful objections raised by his critics and offers an account of the proper relation between preferences and policy in a democracy.

In early statements of his rights theory,<sup>231</sup> Dworkin argued that preferences are problematic as inputs into democratic social choice if those preferences (1) aim to secure disproportionate influence for some person or group, or (2) reflect a lack of equal respect for other members of society. While Dworkin argues persuasively that preferences with these qualities are inconsistent with the commitments of a democratic culture,<sup>232</sup> it seems more plausible to argue that it is the inadequacy of certain classes of preferences as bases for the justification of social choice—rather than their tendency to secure disproportionate influence or to express disrespect for persons—that justifies the function of rights in filtering the influence of these preferences.

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<sup>230</sup> See, e.g., H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 221–22 (1983); Joseph Raz, *Professor Dworkin's Theory of Rights*, 26 *POL. STUD.* 123, 123 (1978).

<sup>231</sup> See, in particular, DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 2, at 86–90. Dworkin's rights theory argues that (i) legal controversies should be resolved on the basis of principle rather than policy; and (ii) legal rights function to prevent certain kinds of preferences from producing certain kinds of legislation. *Id.* at 86–90, 235–39, 275–78. The latter claim is discussed at length in this section.

<sup>232</sup> DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 2, at 234–38.

### 1. Filtering Preferences Guards Against the Disproportionate Influence of Any Person or Group

Dworkin argues that in order to ensure that a society's political choices assign equal weight to the preferences of all members of a democratic society, public deliberations regarding policy should assign critical weight to personal preferences—preferences that relate to the individual's realization of his or her own advantage—and should not assign decisive weight to external preferences—preferences that relate to the realization of advantage by other persons.<sup>233</sup> An approach that allowed external preferences to determine policy outcomes in such cases would fail to treat all persons with equal concern and respect, since the preferences of persons with effective external preferences would both (a) promote their own advantage through the influence of their personal preferences, and (b) undermine the advantage of others through the influence of their external preferences. Indeed, Dworkin argues that their collective preferences would exert a disproportionate effect on policy.<sup>234</sup> Therefore, Dworkin describes the inclusion of such preferences in social choice as “a form of double counting.”<sup>235</sup>

To illustrate the practical significance of Dworkin's distinction, suppose that all citizens of a southern state in the Jim Crow era had personal preferences that their children enjoy the opportunity to attend the state's university, while some also had external preferences that children from minority families should be denied that opportunity. Suppose, in addition, that the state legislature—on the basis only of the external preferences—enacted legislation barring minority students from attending the university. According to Dworkin's argument, a court considering the constitutionality of the legislation should assign no weight to the fact that the legislation satisfied the external preferences of members of the community. Assigning weight to such preferences, he argues, would give the holders of external preferences a disproportionate influence over the legislative process. If the legislation was enacted only to satisfy external preferences, then the fact that the legislation was the output of a duly constituted legislature should therefore be assigned minimal weight by the court. Rather, if the only argument in favor of the legislation was that it satisfied external

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<sup>233</sup> *Id.* at 232–38, 276–78.

<sup>234</sup> *Id.* at 232–38, 276.

<sup>235</sup> *Id.* at 235.

preferences, the court should have no hesitation in striking the legislation as inconsistent with equal protection under the law.

Dworkin's distinction between external and personal preferences establishes a clear boundary between preferences that may legitimately determine the output of democratic social choice and those that may not. Moreover, Dworkin's approach locates the justification for filtering preferences directly in the failure of holders of objectionable preferences to respect the equal right of each person to pursue his or her ends.<sup>236</sup> Furthermore, as H.L.A. Hart notes,<sup>237</sup> Dworkin's approach provides the basis for a sympathetic reconstruction of utilitarianism with the potential to reconcile that theory with the liberal tradition by incorporating liberal intuitions regarding the inviolability of fundamental rights.<sup>238</sup> Despite these attractive theoretical qualities, both H.L.A. Hart and Joseph Raz reject Dworkin's account of the relative merits of internal and external preferences as determinants of social choice.<sup>239</sup> In particular, both Hart and Raz assert that no preference is counted twice when a political system gives effect to external preferences;<sup>240</sup> and Dworkin's argument does not establish that all external preferences are inappropriate inputs into political justification.<sup>241</sup> If Hart and Raz were correct in arguing that the influence of external preferences on policy does not constitute double-counting, that conclusion would seriously undermine Dworkin's account of the function and justification of political and legal rights.

## 2. Filtering External Preferences Prevents Double Counting

As Hart and Raz interpret his argument, Dworkin recommends filtering external preferences in order to address a procedural defect of majoritarian voting.<sup>242</sup> In this interpretation of Dworkin's view, counting external preferences corrupts

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<sup>236</sup> *Id.* at 234–36.

<sup>237</sup> Hart's positivist theory of law profoundly influenced the development of Dworkin's legal theory. See H.L.A. HART, *THE CONCEPT OF LAW* (3d ed. 2012). Unlike Dworkin, however, Hart is a utilitarian and a consequentialist.

<sup>238</sup> HART, *supra* note 230, at 211–13. Note that, as discussed *supra* Part I, Rawls argues that the defining feature of classical utilitarianism is its disregard for the fundamental interests of individuals and groups, and in particular its disregard for individual rights.

<sup>239</sup> HART, *supra* note 230, at 220–21; Raz, *supra* note 230, at 131.

<sup>240</sup> HART, *supra* note 230, at 221; Raz, *supra* note 230, at 131. The specific content of these objections is discussed *infra* Section IV.B.2.

<sup>241</sup> HART, *supra* note 230, at 221; Raz, *supra* note 230, at 131–32. The specific content of this argument is discussed *infra* Section IV.B.2.

<sup>242</sup> See *supra* Section IV.B.1.

majoritarian voting procedures by assigning twice as much power to influence outcomes to persons with both external and personal preferences as it assigns to persons with only personal preferences.<sup>243</sup> Hart and Raz argue that this claim is false.<sup>244</sup> A social decision procedure that admits votes based upon both external and personal preferences assigns precisely the same weight to each preference, and each preference counts only once.<sup>245</sup> The fact that some people have only personal preferences does not mean that they are treated unequally when votes reflecting the external preferences of others are counted.<sup>246</sup> Indeed, Hart argues that when external preferences are decisive in the vote of a majority to curtail the rights of the minority, the minority's problem is not that they are treated unequally but that they "are too few."<sup>247</sup> Accordingly, Hart and Raz conclude that Dworkin's claim that counting external preferences involves double counting fails.<sup>248</sup>

While this objection would be decisive if Dworkin, in fact, claimed that counting external preferences constituted merely a procedural defect of majoritarian voting procedures, Dworkin's argument does not aim to diagnose these procedural flaws. Rather, Dworkin examines the manner in which the community and its legislators take the preferences of its members into consideration in justifying the community's policy decisions.<sup>249</sup> Suppose, for example, that a state legislature enacts legislation denying certain opportunities to minorities, as Texas state law in the 1940s denied to racial minorities the opportunity to attend the state's law school.<sup>250</sup> If the law were challenged in court, advocates of the legislation could attempt to justify it by arguing that the legislation satisfies the collective preferences of members of the state better than an alternate policy. However, Dworkin argues that if (a) members of both the majority and minority have personal preferences that members of their group should have the opportunity to attend the law school; (b) members of the majority also have external preferences that minority members should be excluded; *and* (c) the claim that enactment of the legislation satisfies the collective preferences of members of the community is true only if the majority's

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<sup>243</sup> See *supra* Section IV.B.1.

<sup>244</sup> HART, *supra* note 230, at 220–21; Raz, *supra* note 230, at 131.

<sup>245</sup> HART, *supra* note 230, at 220–21; Raz, *supra* note 230, at 131.

<sup>246</sup> Raz, *supra* note 230, at 131.

<sup>247</sup> HART, *supra* note 230, at 217.

<sup>248</sup> *Id.* at 216–19.

<sup>249</sup> DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 232–38.

<sup>250</sup> See *Sweatt v. Painter*, 339 U.S. 629, 631, 636 (1950); DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 223, 229–39.

external preferences are made decisive; *then* (d) the legislation would grant disproportionate influence to holders of external preferences, and would therefore fail to treat all members of the state with equal concern and respect.<sup>251</sup> Therefore, in such a case, the claim that the legislation satisfied the collective preferences of members of the community could not justify the enactment of the legislation. Dworkin's argument thus focuses on the weight to be assigned to preference inputs in the justification of policy, and not on the procedural fairness of majoritarian institutions. Hart and Raz therefore fail to provide persuasive objections to Dworkin's account of the function and justification of political and legal rights.

### 3. External Preferences Should Not Be Decisive in the Justification of Law

Hart and Raz argue that Dworkin's argument establishes, at most, that external preferences reflecting disrespect or prejudice are inappropriate inputs into social choice, and not that social choice must restrict the influence of all external preferences.<sup>252</sup> Consider, Hart suggests, the case of external preferences favorable to other persons or groups—for example, the preference of heterosexuals that homosexual relationships should enjoy the same legal protections as heterosexual ones.<sup>253</sup> If the passage of legislation securing this result were realized on the basis of votes reflecting external preferences (preferences of heterosexuals about the pursuit of advantage by homosexuals), it would be implausible to suggest that the holders of those preferences had exercised disproportionate influence on social choice. Therefore, it would be inappropriate to exclude external preferences from social choice in such a case on the grounds that their inclusion would confer disproportionate political influence. But if external preferences are valid inputs into social choice, as Hart concludes, then Dworkin cannot sustain the general claim that external preferences are inappropriate inputs into social choice.<sup>254</sup>

However, Dworkin does not make the general claim that Hart attributes to him. Dworkin argues only that external preferences should not exercise decisive weight in justifying legislation that would put persons at a disadvantage,<sup>255</sup> and not

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<sup>251</sup> DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 232–35.

<sup>252</sup> HART, *supra* note 230, at 221; Raz, *supra* note 230, at 131.

<sup>253</sup> HART, *supra* note 230, at 216.

<sup>254</sup> *Id.* at 218–19.

<sup>255</sup> DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 2, at 232–36.



that external preferences should be excluded generally from social choice. Therefore, Dworkin would agree with Hart that the external preferences of heterosexuals to enact legal protections for homosexuals are legitimate inputs into social choice. Hart's argument thus fails to provide a persuasive objection to Dworkin's argument that it is the proper function of political and legal rights to neutralize the influence of external preferences on legislation that affects citizens' fundamental interests.

#### 4. Filtering External Preferences Is Justified by a Reasonable Rejection Standard of Justification

Even if it is conceded that Dworkin is correct in arguing that political and legal rights are designed to restrict the influence of external preferences on social choice—as Raz argues—Dworkin's account inaccurately describes the defect that justifies excluding preferences from social choice.<sup>256</sup> The preferences of residents of Texas to exclude blacks from their state law school are offensive, not because they exert disproportionate influence on policy, but because they are inconsistent with respect for persons.<sup>257</sup> It is the disrespectful quality of the preferences—and not their external character—that disqualifies them from social choice. Raz claims that Dworkin describes this objectionable character more accurately when he digresses from his discussion of disproportionate influence to note that persons disadvantaged by such preferences would be deprived of liberties and opportunities precisely because the community views the consequences of a collective decision for such persons as less important than the consequences for others.<sup>258</sup>

While Dworkin appears to have accepted this criticism,<sup>259</sup> Raz's argument is far from dispositive. It is possible, while sharing the view that preferences reflecting disrespect for other members of society should not exercise decisive weight in collective social decisions, to resist the argument that such preferences are objectionable because they manifest disrespect. Such preferences often reflect benevolent but misguided paternalism. For example,

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<sup>256</sup> Raz, *supra* note 230, at 131.

<sup>257</sup> See *id.*; see also *Sweatt v. Painter*, 339 U.S. 629 (1950) (striking down a Texas state law excluding black students from the state law school).

<sup>258</sup> Persons disadvantaged by such preferences would suffer lesser life chances precisely because "they are thought less worthy of concern and respect than others are." DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 2, at 275.

<sup>259</sup> In more recent writings, he argues that an adequate system of rights "prohibits legislation that could be justified only by counting, within the overall calculation determining where the general interest lies, preferences directly or indirectly arising from prejudice." DWORKIN, *LAW'S EMPIRE*, *supra* note 51, at 385.

Joshua Cohen notes that the Catholic doctrine forbidding homosexuality appears to be motivated—at least in part—by concern for the moral health of all members of the community, and not by a failure of equal concern and respect.<sup>260</sup>

While preferences that reflect a failure of respect for persons are objectionable, their offensiveness is merely a special case of a more general kind of defect. As in the case of paternalistic preferences favoring antihomosexual legislation, disrespectful preferences are an unacceptable basis for the justification of exercises of collective power because persons subject to that power could reasonably reject a justification that relied upon such preferences.<sup>261</sup> Therefore, the defect in the preferences to be excluded is located in their quality as unacceptable bases for a justification, not in the motivations of the legislators.<sup>262</sup>

According to this view, preferences inconsistent with the commitments of democracy are those preferences that persons subject to the exercise of collective political power could reasonably reject as the basis of a political decision. According to this argument, then, the criterion that identifies preferences consistent with fundamental democratic commitments derives from the contractualist moral framework that constitutes the normative core of modern accounts of legitimacy, political authority, and representative government.<sup>263</sup> The standard of justification for moral judgments in this tradition (as T.M. Scanlon argues in his central account of contractualist moral theory)<sup>264</sup> is the standard of reasonable rejectability: no moral principle can be viewed as justified if the principle could reasonably be rejected by persons who may be affected by the application of that principle.<sup>265</sup>

Consistent with the view defended in this article, rights theory applies a version of this contractualist standard in assessing the appropriate role of preferences in the process of

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<sup>260</sup> Cohen, *Democracy*, *supra* note 23, at 215.

<sup>261</sup> *Id.* at 206.

<sup>262</sup> *Id.* at 222.

<sup>263</sup> Since this view asserts that only preferences that could reasonably be accepted by all affected persons on their own terms are legitimate inputs into social choice, this view is entirely equivalent to the contractarian view that acceptable terms of social cooperation are those that could be unanimously accepted by free and equal persons under fair conditions. See PATRICK RILEY, *WILL AND POLITICAL LEGITIMACY* 125, 163 (1982) for a helpful account of the role of ideas of social contract in the modern political tradition.

<sup>264</sup> T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 189 (1998).

<sup>265</sup> *Id.* at 195. Brettschneider argues that a contractualist justification of democracy constitutes the core of Rousseau's account of "the people as the source of sovereignty." BRETTSCHEIDER, *DEMOCRATIC RIGHTS*, *supra* note 5, at 56–57.

democratic social choice. Under this standard, no preference can be viewed as providing a reason for the adoption of legislation if other persons subject to the political power of the legislature could reasonably reject that legislation. In highlighting the significance of the power of reasonable rejection for individuals who are subject to the collective political power of the state, Scanlon's contractualist theory suggests that Waldron's attempt to generate a theory that fully respects the diversity of beliefs regarding the good may overlook important considerations. While Waldron argues that it is disrespectful for a political process to entrench rules that limit the power of the majority, it is arguably at least equally disrespectful for a community to subject persons to burdensome policies that those persons could reasonably reject. The contractualist view suggests that limits on the power of the majority are required precisely in order to show adequate respect for holders of pluralistically diverse conceptions of the good. Ironically, while majoritarians argue that entrenched rights are inconsistent with respect for pluralistic disagreement, it is precisely the respect for such disagreement that requires entrenched rights to filter the output of social choice.

C. *Justifying the Constitutionalist Conception of Judicial Review*

It is the goal of creating a political context in which the will of the majority can exercise authority in a manner consistent with respect for pluralistic disagreement that requires an account of the relation between preferences and democratic decision-making that places justification at the center of its account of democracy. The constitutional conception argues that an acceptable account of this relation will be grounded in the notion that legitimate exercises of political power must be justified on terms that are at least acceptable to all affected persons.<sup>266</sup> Only when the bases of collective decisions are at least acceptable to all affected persons are all members of society included as equal members in the collective process of social choice.<sup>267</sup>

Waldron resists this conclusion because he claims that an approach that places justification centrally, while possibly appropriate for working out an account of justice, is problematic "as a way of thinking about politics."<sup>268</sup> He notes that politics

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<sup>266</sup> See Cohen, *Democracy*, *supra* note 23, at 222–23.

<sup>267</sup> *Id.*

<sup>268</sup> WALDRON, *LAW AND DISAGREEMENT*, *supra* note 3, at 159. Waldron, that is, argues against approaches to legal reasoning that would consider the fact that an

necessarily involves decisions reached despite the fact that participants “disagree about the values and principles that the merits of those issues engage.”<sup>269</sup> In other words, Waldron argues that an approach that places justification centrally will require the kind of agreement regarding values that politics lacks.<sup>270</sup>

The constitutional conception’s central focus on justification, however, is necessary precisely to address the problem of pluralistic disagreement that Waldron emphasizes. Waldron’s theory addresses this problem by guaranteeing to all citizens the right to participate and then subjecting all persons to the majority’s will.<sup>271</sup> Yet it seems reasonable to conclude that institutions fail to show adequate respect for the personal commitments of pluralistically disagreeing persons when those institutions merely guarantee to minorities the right to vote and express their views but simultaneously fail to protect those minorities against interference by the majority with their fundamental interests. For example, suppose that that a political process guaranteed to members of a homosexual minority the right to participate in political deliberation, but accepted—as legitimate output of that deliberation—legislation that criminalized homosexual relationships. Would such a political process show adequate respect for the views of the homosexual minority? The short answer is “no.” Such a political process would improperly privilege the ability to express views over the ability to act on those views.

Therefore, the constitutionalist view offers a more ambitious interpretation of the idea of respect for pluralistic disagreement than the majoritarian view. Unlike the majoritarian view, the constitutionalist view respects the individual’s interest in pursuing her conception of the good by protecting that interest from interference by the majority.<sup>272</sup> The requirement that legitimate exercises of political power must be justified on terms acceptable to all affected persons prevents collective decisions from justifying disrespectful or paternalistic legislation that would interfere with the individual’s right to pursue his or her own conception of the good. Entrenched rights then implement this requirement by protecting individuals and groups from legislative enactments that could not be justified to all affected persons.

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enactment was unjustifiable to be a powerful objection to the authority of legislation authorized by the majority or their representatives.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *See supra* Part III.

<sup>272</sup> *See supra* Section II.A.

However, it could be argued that the costs to democracy of entrenching rights may be unacceptably high, despite the function that entrenched rights perform in securing respect for pluralistic disagreement.<sup>273</sup> James Bohman, a leading advocate of this position, argues that important aspects of the constitutional conception have the effect of excluding dissenters from public discourse.<sup>274</sup> In particular, Bohman criticizes the requirement that certain kinds of preferences may not count as reasons justifying the exercise of political power.<sup>275</sup> He argues that this aspect of the constitutional conception is unacceptable, as social choice in a democracy is justified on the basis of appeals to multiple values.<sup>276</sup> In the context of democratic deliberation, he asserts that no single value may properly be assigned priority as a ground of democratic legitimacy.<sup>277</sup> Bohman claims that the constitutional conception improperly privileges a single value—reciprocity—to justify political arrangements that will have the effect of suppressing dissent that appeals to other values to ground its objections.<sup>278</sup> Bohman concludes that a more acceptable response to dissent would be to place it at the center of democratic debate.<sup>279</sup>

This argument, however, assumes that entrenched rights exclude the input of persons whose preferences are inconsistent with foundational democratic commitments from democratic social choice. As discussed above,<sup>280</sup> entrenched rights permit all preference information to enter the process of social choice and operate only to prevent that preference input from justifying certain kinds of policy output. Therefore, under a system that includes entrenched rights, the preferences of every person subject to exercises of political power are incorporated in the process of social choice. Under such an approach, dissent can and should be placed at the center of democratic debate.

Entrenched rights merely prevent preference inputs from justifying political decisions that impose disadvantage in ways that could not be justified to all affected persons on terms that they could reasonably accept.<sup>281</sup> Rather than improperly

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<sup>273</sup> James Bohman, *Deliberative Toleration*, 31 POL. THEORY 757, 759, 761–79 (2003); Bonnie Honig, *Dead Rights, Live Futures: A Reply to Habermas's "Constitutional Democracy,"* 29 POL. THEORY 792, 797 (2001); CHANTAL MOUFFE, THE DEMOCRATIC PARADOX 83–105 (2000).

<sup>274</sup> Bohman, *supra* note 273, at 757, 759, 761–75.

<sup>275</sup> *Id.* at 768.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> See *supra* Section IV.A.

<sup>281</sup> See *supra* Section II.A.

restricting the content of legitimate democratic debate, the enforcement of entrenched rights through judicial review preserves its democratic character. If, as majoritarians argue, “the main question for democratic politics is . . . how to constitute forms of power more compatible with democratic values,”<sup>282</sup> democratic politics should assign the highest priority to the preservation and implementation of entrenched rights.

## CONCLUSION

Waldron argues that judicial review lacks legitimacy because constitutionally protected rights do not provide a legitimate basis for judicial restraint over the power of the majority.<sup>283</sup> He argues that in a democracy, the will of the majority must have the final say regarding the nature and extent of rights protections.<sup>284</sup> Arguments for the priority of rights, Waldron insists, are insufficiently respectful of the conceptions of the good held by diverse persons in a pluralistic society.<sup>285</sup>

This article argues that Waldron’s case against judicial review fails because its notion of respect for pluralistic disagreement lacks both ambition and imagination. Respect for disagreement requires more than a guarantee of participation in the political process.<sup>286</sup> An approach that guarantees the right to participate, but allows the majority to disenfranchise or seriously compromise the rights of a minority, improperly privileges the ability to express views over the ability to act on those views.<sup>287</sup> A more balanced approach would recognize the will of the majority as a basis for legitimate legislation only when that will reflects preferences that constitute legitimate inputs into social choice. Such preferences respect commitments arising under each individual’s conception of the good, and can therefore be justified to all persons who are subject to exercises of collective power on terms that those persons can accept.<sup>288</sup> An approach that fails to define the relation between majority support and the exercise of legitimate political power in this way shows serious disrespect for minorities whenever it subjects members of minorities to burdensome policies that the affected persons could reasonably reject.<sup>289</sup> Waldron’s case against judicial

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<sup>282</sup> MOUFFE, *supra* note 273, at 100.

<sup>283</sup> *See supra* Part III.

<sup>284</sup> *See supra* Section III.A.

<sup>285</sup> *See supra* Section III.A.

<sup>286</sup> *See supra* Section II.A.

<sup>287</sup> *See supra* Section IV.C.

<sup>288</sup> *See supra* Section IV.C.

<sup>289</sup> *See supra* Section IV.C.

review thus fails because of its very limited understanding of what respect for disagreement actually entails.