



## JUDICIAL REVIEW AND INDIVIDUAL SELF-RULE

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1. According to conventional wisdom, as well as to common sense, evaluations of judicial review confront an important trade-off: in many central cases, they have to settle how merit points for the institution as a guardian of fundamental individual rights should be traded off against demerit points for it as a producer of counter-majoritarian -- and hence, presumptively illegitimate -- outcomes.<sup>1</sup> Now, when someone declares that such-and-such conventional wisdom has governed the discussion of a certain question, one naturally expects an announcement that this someone will proceed to shatter, puncture, or otherwise debunk that wisdom -- especially when the wisdom takes the form of a dichotomy or supposed trade-off. Such prospects are exciting, I admit. Unfortunately, however, I am constrained in the matter by the conviction that -- here, anyhow -- the convention is really pretty sensible. So I am not going to debunk it. Nor, indeed, shall I offer to adjudicate the trade-off it enshrines. Instead, I am going to *defend* the conventional wisdom about judicial review against the efforts of two would-be debunkers, Ronald Dworkin and Jeremy Waldron.

In a series of recent works,<sup>2</sup> Dworkin has argued for a conception of democracy according to which judicial review is fully consistent with democracy.

Many institutional arrangements are compatible with the moral reading, including some that do not give judges the power they have in the American structure. But none of these varied arrangements is in principle more democratic than others. Democracy does not insist on judges having the last word, but it does not insist that they must not have it (*FL*, p. 7).

On Dworkin's conception, a counter-majoritarian decision by (e.g.) the Supreme Court does not, at least not over a wide range of questions, result in *any* demerit points for the institution at all; and this because such decisions are not even presumptively illegitimate or offensive to democracy. Dworkin is thus led explicitly to reject the conventional wisdom about judicial review and its associated trade-off.<sup>3</sup> More

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<sup>1</sup> This way of framing the issue has certain obvious empirical presuppositions. It presupposes, e.g., that a main effect of many judicial decisions -- notably, those of the Supreme Court -- *is* to safeguard fundamental individual rights, as well as that when the Supreme Court does guard these rights, it sometimes does so against the grain of majority opinion. Both of these presuppositions can certainly be challenged. See, e.g., Gerald N. Rosenberg, *The hollow hope: Can the courts bring about social change?* (Chicago: University of Chicago Press, 1991). Moreover, such challenges are plainly to the point: depending on which of these presuppositions is satisfied, the operation of judicial review may -- even within the terms of the conventional wisdom -- reflect pure credit on the institution, pure discredit, or raise no special problem. In all three cases, the envisioned trade-off simply dissipates. Nevertheless, I am not myself going to engage the empirical side of the issue.

<sup>2</sup> I shall concentrate on the Introduction to his *Freedom's Law* (Cambridge, Mass.: Harvard University Press, 1996). References to this work will be abbreviated as *FL*.

<sup>3</sup> 'So the academic debate is widely thought to be about how far democracy can properly be compromised in

specifically, he rejects this trade-off by dispensing with its dimension of potential *demerits*, thereby clearing the way for a ringing endorsement of the institution of judicial review.

Likewise, but to opposite effect, Jeremy Waldron has argued for dispensing with the dimension of potential *merit* embraced by the conventional trade-off, i.e. the dimension along which the courts are supposed to score points for protecting fundamental individual rights.<sup>4</sup> His argument is based on the nature, not of democracy, but of principles of authority (though he adds that majority rule is the most democratic principle of authority). All of which leads him to a stinging critique of judicial review:

Members of the higher judiciary in the United States have the power to revise the official understanding of rights for that society and, when they do, their view prevails. ... [T]his arrogation of judicial authority, this disabling of representative institutions, and above all this quite striking political inequality, should be frowned upon by any right-based theory that stresses the importance of democratic participation on matters of principle by ordinary men and women.<sup>5</sup>

Dworkin and Waldron agree, then, in their rejection of the conventional trade-off. Where they disagree is in identifying *which* of its dimensions is defective. Dworkin denies (but Waldron agrees) that judicial review always loses points for legitimacy insofar as it produces counter-majoritarian decisions; and Waldron denies (but Dworkin agrees) that judicial review gains points for legitimacy insofar as it protects fundamental individual rights. My own view, to re-iterate, is that the conventional wisdom is right to suppose that, as an institution, judicial review is liable to assessment along *both* dimensions, gaining points on one and losing them on the other. Consequently, the central question for assessors of judicial review is whether the points it gains for protecting fundamental individual rights *outweigh* the points it loses for thwarting the will of the majority. We should notice a further point in this connection, namely, that Dworkin and Waldron also implicitly agree in pursuing the strategy of arriving at a clear verdict about judicial review without having to face, and so to answer, that tough question. While I shall not pretend to answer that tough question here, my defence of the conventional wisdom amounts to the insistence, as against Dworkin and Waldron, that assessments of judicial review cannot avoid facing it.

There is a final point on which Dworkin and Waldron agree; and this brings me to the second part of my title. They agree -- it is explicit in Dworkin, but I think also implicit in Waldron -- that the value of positive freedom, or individual self-rule, bears on the issue of political legitimacy, and so on the assessment of judicial review. Here, for once, I concur. But I also think that a proper appreciation of the requirements

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order to protect other values, including individual rights. ... In many ways, however, this new view of the debate is as confused as the older one. I shall try to convince you to see the constitutional argument in entirely different terms: as a debate not about how far democracy should yield to other values, but about what democracy, accurately understood, really is' (*FL*, p. 15).

<sup>4</sup> J. Waldron, "Rights and Majorities: Rousseau revisited," in J. Chapman and A. Wertheimer (eds.), *Majorities and Minorities*, NOMOS XXXII (New York: New York University Press, 1990), pp. 44-75; "A Right-Based Critique of Constitutional Rights," *Oxford Journal of Legal Studies* 13(1) (1993), pp. 18-51; *Law and Disagreement* (Oxford: Clarendon Press, 1999), part III. References to *Law and Disagreement* will be abbreviated as *LD*.

<sup>5</sup> Waldron, "A Right-Based Critique," p. 42. *Cf. LD*, p. 15.

of individual self-rule can only, and plainly does, lend support to the conventional wisdom about judicial review. Hence I shall attempt to show not only that Dworkin and Waldron fail to debunk the conventional wisdom, but also, more specifically, that appeals to self-rule in pursuit of that end are misguided because self-defeating.

2. To deliver on these goods, let me begin by stating, simply and dogmatically, what I take to be the correct conception of what is required for an individual to rule himself or herself in political community with others.

As it happens, this is a conception I take over from Rousseau,<sup>6</sup> who was interested in many of the same issues that arise in the assessment of judicial review. Although the present discussion is not at all historical, it will, I hope, also serve to illustrate the insight that is sometimes to be gained from re-visiting a contemporary issue in an historical light.

I shall focus on the hard case of self-rule, which is to explain how an individual rules herself in obeying a community decision from which she *dissents*. It may be that the correct account of this hard case does not generalise to all cases in which we wish to speak of individual self-rule. But I shall not be concerned to decide this question, as our attention will be restricted throughout to the case of dissent. *Rousseau's claim* -- as I shall call it -- is that, in obeying the decision from which she dissents, an individual is nevertheless plausibly counted as ruling herself if an objective condition and a subjective condition are *both* satisfied. The *objective* condition is that the decision promotes the individual's interest. By 'interest' here, I have in mind a critical notion of interests, according to which what is in someone's interest can be disconnected from his preferences and need not be confined to his narrow self-interest.<sup>7</sup> The *subjective* condition is that there is some sense in which the individual accepts that the decision is in her interest.

No doubt it would help to have an example, as well as some elucidation of the slippery sounding phrase 'some sense in which' that appears in the subjective condition. Let me borrow the following example from Dworkin:

Suppose the legislature enacts a law making it a crime for someone to burn his own American flag as an act of protest. Suppose this law is challenged on the ground that it impairs democratic self-government, by wrongly constricting the liberty of speech, and a court accepts this charge and strikes down the law (*FL*, p. 32).

Here the relevant community decision procedure is judicial verdict; and the effect of the decision at hand is to disable the citizens from making laws criminalising all flag-burnings. Let us say that obedience to this decision requires refraining from efforts to have all flag-burnings criminalised (or, perhaps better, abstaining from interference with acts of flag-burning).

Now consider an individual -- call him George W. -- who believes that laws against flag-burning are required to promote the common interest. Despite this belief, he does obey the court's decision.

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<sup>6</sup> For a defence of this reading of Rousseau, see my "What is the General Will?," *The Philosophical Review* 109 (4) (2000), pp. 545-581.

<sup>7</sup> For a helpful discussion of this notion, see Raymond Geuss, *The idea of a critical theory* (Cambridge: Cambridge University Press, 1981), ch. 2.

Rousseau's claim is that George is plausibly counted as thereby obeying *himself*, and not simply the court, notwithstanding his dissent, if (a) the decision promotes his interest -- i.e, he is, as a matter of fact, wrong to think that laws against flag-burning are required to promote the common interest -- and (b) there is some sense in which *he*, George, accepts that the court's decision promotes his interest. Let me try to explain condition (b), the subjective condition: Its burden is to find some way, other than his *believing it* to be true, for the individual to accept that the court's decision is in his interest. George cannot simply believe it, since *ex hypothesi* this is a case of dissent. A range of senses is available here. But I shall focus on what seems to me to be the weakest coherent sense of 'accept' in which someone can accept that a decision is in his interest.

Suppose George understands himself as identified with his political community, and *therefore* as bound to obey its decisions, even those he believes do not promote his interest. George's self-understanding nevertheless depends, let us also suppose, on his believing that the community's decisions do, on the whole, promote his interests;<sup>8</sup> and that his interests are taken as seriously as those of everyone else. In that case, as long as George's belief that the court's decision about burning the flag is incorrect *does not move him to revise* his self-understanding, the obligation to obey the court's decision is one that George will accept, and accept on the basis of understanding himself as identified with the community.<sup>9</sup> I think it is reasonable to hold that George's self-understanding, together with the fact that he omits to revise it in the light of the court's decision, suffices for him to satisfy the subjective condition.

We should distinguish a strong and a weak version of Rousseau's claim that the objective and subjective conditions I have articulated represent the correct account of individual self-rule. The *weak* version says that these two conditions are *jointly sufficient* to make it plausible that an individual who obeys some community decision from which she dissents nevertheless rules herself in so doing. I shall take it that this weak claim is pretty intuitive.<sup>10</sup> The *strong* version says that these two conditions are (also) *individually necessary* to make this plausible (but *cf.* note 8). I shall also undertake to defend this strong claim. However, I shall do so by considering the objective and the subjective conditions separately, and this in the context of criticising Dworkin and Waldron directly.

This strategy is made possible by the fact that Dworkin and Waldron each rejects the necessity of one of these conditions on individual self-rule, though (once again) they disagree about which condition to reject. As we shall see, Dworkin rejects the subjective condition, while Waldron rejects the objective condition. I shall accordingly defend the necessity of the subjective condition in the course of criticising Dworkin; and defend the necessity of the objective condition in the course of criticising Waldron. Neither,

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<sup>8</sup> Naturally, one may also wish to weaken the objective condition in a symmetrical fashion -- so that it only requires, for example, that the community's decisions do, *on the whole*, promote George's interest.

<sup>9</sup> I have adapted this example from Charles Taylor's instructive discussion in "Liberal Politics and the Public Sphere." See his *Philosophical Arguments* (Cambridge, Mass.: Harvard University Press, 1995), pp. 276-78.

<sup>10</sup> It may be objected that these conditions do not require the individual to participate in the community's decision. I am not sure myself that such participation is strictly a necessary condition on self-rule. But, since the problem of dissent arises even where the most direct forms of participation are in place (e.g., in Rousseau's assembly), the objection is not really to the point here. If need be, the claim of joint sufficiency can be taken as presupposing that the required form of participation, whatever that may be, is already in place.

I shall thereby argue, operates with a plausible conception of individual self-rule. Not only that, but I hope furthermore to show that this implausibility in their respective conceptions of self-rule is intimately related to the implausibility of their symmetrical departures from the conventional wisdom about judicial review.

3. Dworkin's argument is complicated and indirect. I shall focus on its central branch, the aim of which is to refute what he calls the *majoritarian premise*, which holds that

political procedures should be designed so that, at least on important matters, the decision that is reached is the decision that a majority or plurality of citizens favors, or would favor if it had adequate information and enough time for reflection (*FL*, pp. 15-16).

Dworkin holds, reasonably enough, that some such premise lies behind the widespread belief that judicial review compromises democracy. His strategy is to refute the majoritarian premise by refuting three arguments in its favour. I shall confine myself to just one of these exercises, since for the most part Dworkin's criticisms have a common structure.

Consider then what Dworkin calls the 'argument from liberty.' This argument maintains that 'when constitutional disabling provisions, like those found in the Bill of Rights, limit what a majority can enact, the result is to compromise the community's freedom' (*FL*, p. 21). The implication is that such compromises are at least presumptively illegitimate. Dworkin says explicitly that the freedom in question here is positive freedom, which includes the 'right of the people to govern themselves' (*FL*, p. 21).

Before refuting the argument from liberty, Dworkin re-interprets it somewhat. Some clarification is required, he suggests, concerning how this ideal of self-rule applies to dissenting individuals.

Why am I *free* -- how could I be thought to be governing *myself* -- when I must obey what other people decide even if I think it wrong or unwise or unfair to me and my family?

What difference can it make how many people must think the decision right and wise and fair if it is not necessary that *I* do? (*FL*, p. 22).

Dworkin's first move is to introduce what we might think of as a *place-holding solution*. He introduces the notion of moral membership in a community, which is *defined* as a kind of membership *such that* dissenting but obedient members count as obeying themselves:

We must describe some connection between an individual and a group that makes it *fair* to treat him -- and *sensible* that he treat himself -- as responsible for what it does. Let us bring these ideas together in the concept of moral membership (*FL*, p. 23).<sup>11</sup>

If I am a *moral member* of some community, then 'its act is in some pertinent sense my act, even when I argued and voted against it' (*FL*, p. 22). This is a 'place-holding' solution because, so far, Dworkin has simply told us what would be needed in order to apply the ideal of self-rule to the case of dissenters, and

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<sup>11</sup> Dworkin's solution is strikingly similar to Rousseau's. As Rousseau would put it, this kind of membership is introduced by an individual's plausibly identifying his true self with the community. Dworkin is conscious of the similarity, explicitly offering 'Rousseau's idea of government by general will' as an example of an allied conception (*Freedom's Law*, p. 20). Not to mention his title.

given us a name for it. As yet, we do not know anything substantive about the nature of moral membership or even whether it is more than an empty solution, a place held open with nothing capable of filling it.

Dworkin's second move is then to propose some substantive content for the notion of moral membership. To this end, he specifies two kinds of condition on moral membership, structural conditions and relational conditions. For our purposes, the *relational* conditions are the significant ones.<sup>12</sup> They describe how an individual must be treated by a genuine political community in order that he or she be a moral member of that community. A political community cannot count anyone as a moral member unless it gives that person a *part* in any collective decision, a *stake* in it, and *independence* from it (*FL*, p. 24).

Dworkin also calls these conditions 'the *democratic* conditions' (*FL*, pp. 17 and 24). Since their specific content does not especially matter to us, let us pass the details over.<sup>13</sup>

We can summarise the upshot of Dworkin's two clarificatory moves as follows: In order for the value of individual self-rule to apply to the case of dissenters, its application must be restricted to communities of moral members; and in order to qualify as a community of moral members, a given political community must satisfy the 'democratic conditions,' i.e. Dworkin's particular interpretation of the relational conditions on moral membership. The joint upshot, accordingly, is that the application of individual self-rule to a given political community *presupposes* the satisfaction of Dworkin's democratic conditions.

Thus clarified, the argument from liberty is not hard to refute. That is because the majoritarian premise *omits* the crucial qualification now built into the argument from liberty, *viz.* that counter-majoritarian decisions compromise self-rule *only if* all the members of the relevant community are moral members. It follows that the majoritarian premise cannot be defended on the basis of the argument from liberty.

To this point, it may seem as though Dworkin's argument is at least consistent with the conception of self-rule I sketched earlier, following Rousseau. But it is not. The critical difference is that Dworkin interprets his 'democratic conditions' -- part, stake, and independence -- purely on the model of what I called the *objective* condition. That is why I said earlier that the further details of Dworkin's conditions did not matter. When it comes to interpreting and applying the democratic conditions in practice, Dworkin's concern is simply to get the answers objectively correct:

How should a political community that aims at democracy decide whether the conditions democracy requires are met? ... 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 (*FL*, pp. 33-4).

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<sup>12</sup> The structural conditions are largely there to ensure that communities of moral members wind up looking something like nations. For example, '[the community] must have been established by a historical process that has produced generally recognized and stable territorial boundaries' (*FL*, p. 24).

<sup>13</sup> For a detailed specification, see R. Dworkin, "Equality, Democracy, and Constitution: We the People in Court," *Alberta Law Review* 28 (2) (1990), pp. 324-346.

This comes out even more clearly in his discussion of how to assess the court's decision in the flag-burning case presented earlier:

If the court's decision is correct -- if laws against flag-burning do in fact violate the democratic conditions set out in the Constitution as these have been interpreted and formed by American history -- the decision is not anti-democratic, but, on the contrary, improves democracy. No moral cost has been paid, because no one, individually or collectively, is worse off in any of the dimensions we have now canvassed (*FL*, p. 32).

Consequently, if Rousseau is right that the satisfaction of *some* kind of subjective condition is necessary for someone to be plausibly counted as obeying himself when obeying a decision from which he dissents, then Dworkin's refutation of the argument from liberty does not stand up. This engages what I called the *strong* version of Rousseau's claim about individual self-rule.<sup>14</sup> But surely Rousseau is right. Surely, that is, some kind of subjective condition *is* necessary. Otherwise, how could we distinguish obeying oneself from simply doing what was in one's objective interest? Why is it my *self* that I obey in such cases, as opposed to some impersonal rule-book? Certainly not because what I do is, as a matter of fact, in 'my' interest, as the same thing might be in everyone else's interest as well. By parity of reasoning, I would then be obeying someone else as much, and in exactly the same sense, as I would be obeying myself. This drains the notion of obeying oneself of all distinctive content. Alternatively, how -- without any kind of subjective condition in place -- do we make sense of the *active* element in the correlative notion of self-*rule* or governance? If there is *no* sense in which I accept that what I do is in my interest, if I do not recognise this in any fashion, how can I be said to be *ruling* myself in going along with the community's decision?

Recall our friend George W.. Imagine, contrary to what we said before, that the court's decision in the flag-burning case *does* move him to revise his belief that, on the whole, the community's decisions promote his interests. Imagine that it thereby moves him to abandon his previous self-understanding as identified with his community, according to which he was bound to obey the community's decision because of his identification with it.<sup>15</sup> So described, George does *not* accept, not even in the weakest coherent sense, that the court's decision promotes his interest. It seems very implausible to me, under these circumstances, to count the court's decision as also *George's* decision, and hence implausible to count George as ruling himself if he complies with the decision. Dworkin is therefore mistaken to claim that, here, 'no moral cost has been paid' as long as 'laws against flag-burning do in fact violate the democratic conditions' (*FL*, p. 32). George pays a moral cost, the cost of having his self-rule extinguished, and he pays it even if the court's decision to strike the law against flag-burning down is the right decision.

Of course, this moral cost may be worth paying. Perhaps the gain in terms of safeguarding the

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<sup>14</sup> In Dworkin's language, Rousseau's claim would be that the plausibility of treating an individual as a moral member of her political community *also* depends on there being some sense in which *she accepts that* she has a part in any collective decision, a stake in it, and independence from it.

<sup>15</sup> We need not suppose, implausibly, that the court's decision has this effect in isolation. Suppose, rather, that it belongs to a consistent historical pattern of decisions, from all of which George dissented, and that this decision is simply the proverbial last straw.

common interest in free speech is worth it. That is another question: precisely the question, indeed, that the conventional wisdom says we must face in evaluating judicial review. It may help to see this parallel if we recognise that the focus of concern in Dworkin's argument is not actually a member of the outvoted minority. That is Rousseau's concern, but not Dworkin's. His focus is rather the members of the *majority*, who find that their vote -- e.g., their vote (or that of their representatives) to criminalise flag-burning -- carries the day, only to be overturned by the court.

Suppose that the court's decision is correct -- it safeguards the right of free speech, say, which is in the common interest. The conventional wisdom holds that such gains in the objective correctness of institutional outcomes may nevertheless have to be traded off, as far as political legitimacy is concerned, against losses in the popular acceptance of those outcomes -- losses, e.g., in their acceptance by George and the rest of the majority. Dworkin denies this; and he seeks to bolster his denial by making the relevance of popular acceptance to political legitimacy depend upon the satisfaction of certain objective qualifying conditions, his 'democratic' conditions.

But there is an important mistake in this strategy, which we are now in a position to appreciate. It consists in the fact that, even if we grant Dworkin's contention that only popular acceptance among a community's moral members is relevant to political legitimacy, his position remains implausible. His position remains implausible because, as Rousseau saw, popular acceptance is equally relevant to judgements of moral membership. Hence, if George and the rest of the majority fail to satisfy the *subjective* condition, then they no longer count as moral members of the community and their compliance with the court's decision no longer counts as obedience to themselves. In that case, they still pay the cost of having their self-rule extinguished, a moral cost that continues to be relevant to political legitimacy on Dworkin's own assumptions. So the conventional trade-off simply resurfaces, now in the form of a trade-off between self-rule (rather than mere popular acceptance) and the safeguarding of fundamental rights.

4. Let us now address Waldron. I shall describe less of his position, since it is not as developed as Dworkin's. In fact, I shall only examine two of his claims. Consider a political community whose members are beset by moral disagreements. Waldron's first claim is that such a community requires some authoritative means for taking decisions in the face of those disagreements; and that the principle 'Let the right decision be made' cannot serve as an adequate principle of authority (*LD*, p. 213). The effort to apply this principle will only reproduce the disagreements it was meant to resolve.

It is no good saying that when people disagree about rights, the view which should prevail is *the truth about rights* or *the best account of rights*. Each theorist regards his own view as better than any of the others.... So this way of settling on a social choice in the face of a disagreement would reproduce exactly the disagreement that called for an authority-rule in the first place. The theory of authority must identify some view as the one to prevail on criteria other than those which are the source of the original disagreement (*LD*, p. 245).

Waldron's second claim is that, even if some adequate principle of authority were known to resolve disagreements correctly,<sup>16</sup> that would not count in its favour. This claim is entailed, e.g., by his contention

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<sup>16</sup> Known, that is, by some.

that, considerations of free speech aside,<sup>17</sup> there is nothing to be said in favour of minority opinions in democratic debate.

What respect, then, is owed to minority opinion in a Rousseauian polity? The provocative answer is none at all, so far as political action is concerned. If there is some sort of argument for the legitimacy of majoritarianism and if votes really do represent opinions on the proper balance of interests in society and not interests themselves, then the majority view should simply prevail, and the minority regard their view as defeated.<sup>18</sup>

The fact that the minority may actually be right, in other words, simply does not count. It is here that Waldron's rejection of the conventional trade-off about judicial review emerges clearly. Even if the courts make correct decisions about rights, this generates no merit points for the institution of judicial review, not as long as the courts' decisions are counter-majoritarian. A court's verdict is just like a minority opinion in that respect.

Waldron's first claim is obviously correct. Nevertheless, his second claim does not follow. Consider, e.g., the principle 'Let the [unelected] judges decide.' As Waldron acknowledges,<sup>19</sup> this principle can serve as an adequate principle of authority; it is thus unlike the principle 'Let the right decision be made,' which cannot. There is accordingly a real point to asking which is the better principle of authority, 'Let the [unelected] judges decide' or 'Let the majority decide.' This is tantamount to asking how we should evaluate the institution of judicial review.

Suppose we start from the assumption, which Dworkin would dispute, that there is some moral loss whenever a community's principle of authority licenses a counter-majoritarian outcome. Let the expression *procedural neutrality* designate the dimension of moral assessment in which this loss is incurred, the thought being that a decision procedure is not fully neutral with respect to the total number of affected opinion-holders unless it simply counts the numbers and decides with the plurality. It follows that the principle 'Let the majority decide' is superior to the principle 'Let the [unelected] judges decide' in terms of procedural neutrality. So far, all grist for Waldron's mill.

But now let us also assume that, in fact, the judges will decide certain issues correctly (i.e., according to people's objective interests) -- rights issues, say. Is there a consequent moral gain to set against the potential losses in procedural neutrality when evaluating the principle 'Let the [unelected] judges decide'? Waldron insists that there is not. Yet nothing in his first claim supports this conclusion. If people disagree about whether the judges will decide correctly, they will, of course, also *disagree about* whether there will be any such gain in letting the judges decide. But that is consistent with the hypothesis that there

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<sup>17</sup> The passage quoted immediately below continues as follows: 'But this response is a little glib. Respect is owed to minority opinions as opinions. They should be aired in debate, and be given an effective chance to win supporters.' Waldron, "Rights and Majorities," p. 65.

<sup>18</sup> Waldron, "Rights and Majorities", p. 65. Cf. p. 70: 'But at [the level of decision-making, the concept of rights as trumps] does not make sense in relation to Rousseauian democracy, for there everything relevant to political justification may already have been considered.'

<sup>19</sup> Waldron, "A Right-Based Critique," p. 32.

really is a gain, and so cannot exclude it. Moreover, disagreements about the existence of this gain will not in the least impair the ability of the principle 'Let the [unelected] judges decide' to function as a principle of authority -- that is, they will not impair its ability to deliver clearly interpretable verdicts in settlement of this or that disagreement.

To appreciate what sort of moral gain there might be in letting the judges decide, we must return to the value of individual self-rule. Self-rule, at least on Rousseau's conception, is distinguished from procedural neutrality by the requirement that decisions promote what is, as a matter of fact, in the individual's interest. According to the strong version of Rousseau's claim, this objective condition is a necessary condition of individual self-rule, whereas no such condition constrains the achievement of procedural neutrality. One option is for us to treat Rousseau's claim as stipulatively defining a value called 'self-rule.' It would then follow trivially that the principle 'Let the [unelected] judges decide' gains a nominal moral advantage under the assumption that the judges will decide rights issues correctly.

I assume that this option is not terribly profitable, since there is no challenge in having to trade procedural neutrality off against a merely nominal moral advantage. So I shall try, instead, to articulate a genuine moral advantage that communities stand to gain by affirming the value of self-rule as Rousseau conceived it. The advantage of individual self-rule is that it offers specifically to engage the allegiance of dissenting citizens, those who object to this or that particular law. As we shall discover, however, this advantage depends upon affirming the objective condition that distinguishes self-rule from procedural neutrality.

It will help to work with an example. For convenience, let us recycle the issue of burning flags. Suppose the law of our land, as decided by the Supreme Court, permits flags to be burned. A majority of citizens believes that the relevant law flouts the common interest, while an 'enlightened minority' believes the opposite. Despite its dissent, the majority understands itself as identified with the entire community, in a fashion parallel to our friend George W., and the Supreme Court's decision has not disturbed this self-understanding. Imagine that the 'enlightened minority' knows both what the majority makes of the Court's decision and how the majority understands itself.

Now, as I have described the situation, the 'enlightened minority' believes that the law permitting flag-burning satisfies the objective condition: it affirms that, in fact, this law promotes everyone's interest, the majority's included. What difference does this make? Since both the objective and the subjective conditions are satisfied, I think the 'enlightened minority' is justified in regarding the majority as ruling itself when it obeys the Supreme Court's decision. (As I said in §2, I take it that this is pretty intuitive). If the 'enlightened minority' believes in individual self-rule, it will regard the law permitting flag-burning as therefore having greater political legitimacy than it would otherwise have had -- greater legitimacy, in particular, than any law the citizens have not given to themselves. Thus, e.g., the minority will be in a position sincerely to claim that the members of the majority disobey themselves unless they comply with the Court's decision. Moreover, in a community that affirms the value of individual self-rule, this claim of greater legitimacy is asserted in a language that the dissenting majority itself accepts.

However, the 'enlightened minority' can plausibly regard the Court's decision as enjoying this greater political legitimacy *only if* the minority itself believes that the majority's interest is promoted by permitting the flag to be burned. The minority's justification for regarding the majority as ruling itself here depends, that is, upon (its belief in) the satisfaction of the objective condition. To see this, let us consider

two variations on the example.

Recall that the majority believes that the Court's decision permitting flags to be burned flouts its interest. Suppose that the minority now concurs.<sup>20</sup> Let us consider what justification the minority might have for regarding the majority as ruling itself. What about the satisfaction of the subjective condition alone -- the fact that the majority obeys because it still identifies itself with the entire community, believing that, on the whole, the laws promote its interests? The relevance of this fact depends, it seems to me, on whether the laws really do, on the whole, promote the majority's interests. *If they do*, then I readily concede the plausibility of regarding the majority as ruling itself in obeying the Court's decision. But, in that case, it also remains true that the law in question satisfies an objective condition of sorts, albeit a weakened one (*cf.* note 8). So described, the case cannot be used to demonstrate the superfluity of an objective condition on individual self-rule.

To test the necessity of the objective condition on self-rule, we therefore have to examine the case in which the laws *do not*, in fact, promote the interests of the majority, not even 'on the whole.' We may add that the 'enlightened minority' now knows this, too. In this crucial case, the majority's understanding of itself as identified with the entire community is predicated upon its false belief (that the laws promote its interests on the whole). The only justification the minority might have for regarding the majority as ruling itself here is, once again, the majority's satisfaction of the subjective condition. But I do not see how the majority's *deluded* self-understanding can serve to justify anyone who recognises the delusion in regarding the majority as ruling itself.

We have to take seriously the fact that this is a case of dissent. The majority's position is that the law permitting flag-burning *flouts* its interests. Consequently the majority is divided, in a sense, against itself. That is, each individual in it is divided against herself. On the one hand, each member of the majority believes that the law flouts its interests; this half of her self rejects the law. On the other hand, each member also 'accepts' -- resorting to the watered-down form of acceptance secured by the subjective condition -- that the law promotes its interests; this half of her self accepts the law. In crediting such a person with self-rule, one privileges the half of her self that accepts the law over the half that rejects it. Some justification is needed for doing so and the mere fact *that 'she' accepts the law* -- i.e., that she satisfies the subjective condition -- does not count. It does not count because it is equally true that 'she' rejects the law. So another justification is needed.

Now, in the first variation on the example, another justification was available. When one's own judgement is that the relevant law really does promote the dissenting majority's interest, then in crediting the majority with self-rule, one privileges the half of the majority's self that is correct, albeit watered-down, and discounts the half that is incorrect. The minority's justification for privileging the half of the majority's self that accepts the law permitting flag-burning was thus that that half is correct. However, *when one accepts the majority's objection* to the law, that justification is not available. In the crucial second variation on the example, the 'enlightened minority' has somehow to privilege the incorrect half of the majority's self, while lacking a basis on which to discount its correct half. How, in the face of the majority's own objection to the law on flag-burning, can its *watered-down and deluded* acceptance of that law license anyone to credit

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<sup>20</sup> The minority now believes that the particular law in question is not in the majority's interest. It may still believe that the law is in its own interest. For present purposes, that is neither here nor there.

the majority with self-rule?<sup>21</sup> It cannot.

If individual self-rule as Rousseau conceived it is a genuine value, laws that citizens give to themselves have a greater political legitimacy than laws not given by the citizens to themselves. But, as we have seen, such claims of greater legitimacy can only be plausibly asserted in behalf of a law that satisfies an objective condition. The satisfaction of an objective condition is necessary in order to justify privileging the half of a dissenting citizen's self that accepts the law in question over the half that does not.

Say the 'enlightened minority' is right to believe that the majority rules itself in obeying the Supreme Court's decision. That is something to be said in favour of the decision, and of the institution that produced it. Still, it does not follow that the law permitting flag-burning is, all things considered, politically legitimate.

The law remains opposed by the majority; and we have been assuming -- quite reasonably, I think -- that there is also a value of procedural neutrality, which this law plainly violates. Here we return to confront the trade-off enshrined by the conventional wisdom, now in the form of a trade-off between individual self-rule (secured here by safeguarding fundamental rights) and procedural neutrality (understood as the value behind majority rule).

Provided that there is a *prima facie* case for regarding individual self-rule as a genuine value, it cannot simply be assumed that procedural neutrality will prevail in a trade-off against self-rule. Hence, to maintain, as Waldron does, that 'Let the majority decide' is a better principle of authority, all things considered, than 'Let the [unelected] judges decide' *because* it scores higher in terms of procedural neutrality, one must also demonstrate that procedural neutrality is more important than individual self-rule or that the two values do not actually conflict.<sup>22</sup>

As it stands, Waldron's position on judicial review is implausible because he does not even attempt to demonstrate one of these further claims. One explanation for this is that his argument is not meant to be complete. Another, however, is that he overlooks the gap in his argument because he understands self-rule purely in terms of what I have called the subjective condition, thereby assimilating it to procedural neutrality: 'if we take our situation in social life seriously, we may say with Rousseau that the only thing that "self-imposed" can mean in a community is participation on equal terms with others in the framing of laws.'<sup>23</sup> On the account of Rousseau I defend elsewhere (*cf.* note 6), this is a mistake about Rousseau. More importantly, on the account of individual self-rule I have defended here, it is also a mistake about individual self-rule. Not only can 'self-rule' mean something other than procedural neutrality, but it does.

I have not offered any suggestions about how evaluations of judicial review should trade its (alleged) merits as an institution that produces correct outcomes off against its demerits as an institution that

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<sup>21</sup> Notice that this question does not arise for the majority itself. Given that the majority *believes* that, on the whole, the laws promote its interests, the fact that its belief is false must, from the majority's own point of view, remain off stage. Hence questions that presuppose a recognition that the majority's belief is false also remain off stage. For the majority to regard itself as ruling itself, it therefore suffices that it satisfies the subjective condition.

<sup>22</sup> For example, procedural neutrality might be more important because, appearances to the contrary, individual self-rule is not really a value after all. Alternatively, the two values might not conflict here because the judges will not, in fact, decide correctly any more often than the majority of the people or their representatives.

<sup>23</sup> Waldron, "A Right-Based Critique," p. 38.

produces counter-majoritarian outcomes. I have insisted only that some trade-off needs to be made. We have seen that, in their own evaluations of judicial review, Dworkin and Waldron both strive, each in his own way, to avoid this trade-off. By drawing on a certain conception of individual self-rule, I have sought to exhibit the mistakes their respective paths of avoidance involve, and thereby to defend the conventional wisdom about judicial review.

If I am right to attribute this conception to Rousseau, a measure of irony can be added to the final balance. For in denying that a trade-off has to be faced here, Dworkin and Waldron each appeal to Rousseau -- Waldron explicitly and Dworkin at least implicitly (*cf.* note 11) -- and yet it is precisely Rousseau who helps us to appreciate the inevitability of some trade-off along these lines, at least for citizens who aspire to rule themselves.\*\*

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