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Response Note

An Elementary Defense of Judicial Majoritarianism

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In *The Core of the Case Against Judicial Review*, the eminent Jeremy Waldron challenges defenders of judicial review to tender “any elementary defense of judicial majoritarianism.”¹ Judicial majoritarianism is defined as the deciding of legal issues by the use of majority voting among judicial officers entrusted with the power of judicial review.² This challenge then illuminates a substantial issue for defenders of judicial review. If Waldron’s intuition is correct, and defenders of judicial review cannot justify the use of judicial majoritarianism, then judicial review might also be without justification. In light of this, we aim to answer Waldron’s challenge. Specifically, we will demonstrate that Waldron’s challenge exposes no *new* problem regarding judicial review—the problem of judicial majoritarianism is simply reducible to the original debate about judicial review.

Waldron’s challenge to provide an elementary defense of judicial majoritarianism may proceed from one of two distinct claims. First, Waldron may be simply suggesting that judicial majoritarianism effectively makes

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1. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1392 (2006) [hereinafter *Judicial Review*]; see also Jeremy Waldron, *Deliberation, Disagreement, and Voting*, in DELIBERATIVE DEMOCRACY & HUMAN RIGHTS 210, 222–23 (Harold Hongju Koh & Ronald C. Slye eds., 1999) (stating that we require a general theory that reconciles deliberation, disagreement, and voting).

2. Waldron, *Judicial Review*, *supra* note 1, at 1391.

courts functionally equivalent to legislatures—thereby undermining the need for judicial review.³ Alternatively, Waldron may be suggesting that majoritarian decisionmaking (“MD,” as he calls it) is inconsistent with prevailing justifications of judicial review.⁴ While it is unclear which of these positions Waldron espouses,⁵ we will address each in turn.

I. MD and the Functional Equivalence of Courts and Legislatures

The first possibility is that Waldron’s challenge proceeds from the following argument: Judicial review and legislatures both utilize MD. Therefore, judicial review is functionally equivalent to the process of legislative decision making. However, courts are less representative (and thus less democratic) than legislatures. Ergo, judicial review is inferior to legislative decision making.

However, this first argument misses the point; the simple fact that courts utilize MD does not indicate that courts are equivalent to quasi-legislatures. To see this, first note that there seem to be two different reasons why decision makers might use majoritarian processes. The first reason is to express the wishes of the people on a preference-based rationale. The second is to maximize the chances of getting the right answer. The second seems to be the dominant reason why the judiciary utilizes majority voting. So, even though both legislatures and judiciaries use majority voting, judicial majoritarianism seems to be in service to a different end—namely, the right answer.

This just highlights the differing roles of the legislature and judiciary; the legislature should express the will of the people, and the judiciary should ensure that, whatever the present will of the people may be, the society is just. This difference in role is not contravened by the use of MD, for there are significant differences between courts and legislatures that ensconce the justice-seeking role of the courts—courts are independent, comprised of rights-focused experts, *et cetera*.⁶ Waldron might respond that the relevant

3. *See id.* (arguing that courts use MD, just like legislatures, but lack the justification that legislatures do because courts are not representative) Admittedly, this reading of Waldron’s statement may be implausible, but, in the interests of completeness and caution, it behooves us to consider it and answer it, in turn.

4. *See id.* (asserting that even if the arguments for judicial review are conceded, the use of MD requires further justification, indicating that MD may undercut those arguments).

5. It is also possible that Waldron espouses both of these views or some other view not articulated.

6. *See, e.g.,* CHARLES BLACK, A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED 125 (1997) (“Human rights claims are made *in the name of the law*, as the outcome of reasoning from commitment; judges are practiced in this kind of reasoning, and some of them are expert at it.”); LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 199 (2004) (pointing out “structural features of a constitutional judiciary that make it a promising environment for the contestation of rights”); Owen Fiss, *Two Models of Adjudication*, in HOW DOES THE CONSTITUTION SECURE RIGHTS? 36, 43 (Robert A.

similarities between the institutions are overwhelming, thereby mitigating the case for judicial review.⁷

Note that at this point, neither side's responses persist toward MD—the focus has returned to the well-known justifications of judicial review. Waldron could potentially respond that he has added something to the dialectic by exposing, via his *initial* appeal to the presence of MD in both courts and legislatures, that judicial review is inferior to legislative decision making because of the countermajoritarian difficulty inherent in judicial review. However, it is hard to argue that the countermajoritarian difficulty rates further discussion—it is “probably the dominant theme in contemporary legal scholarship about judicial review.”⁸ Consequently, this formulation of Waldron's challenge adds nothing *new* to the dialectic.

II. The Consistency of Judicial Review Justifications and MD

Alternatively, Waldron could be criticizing judicial majoritarianism on the grounds that MD is inconsistent with prevailing justifications of judicial review. At this point, it is important to recognize that defenses of judicial review can be characterized as falling into one of two categories: instrumentalist or non-instrumentalist.⁹ Despite what Waldron may imply, neither type of defense of judicial review is inconsistent with MD.¹⁰

Instrumentalist arguments address judicial review as a means of ensuring good contingent consequences.¹¹ To illustrate, a typical instrumentalist defense of judicial review looks like this: The mistreatment of minorities is a danger of majoritarianism. However, judicial review can act as a check so that majorities may not run roughshod over minorities. Therefore, judicial review is desirable, contingent on its ability to check majorities, because it promotes a good state of affairs by reducing the risk of minorities suffering mistreatment.¹²

Goldwin & William A. Schambra eds., 1985) (suggesting that the independence of judges is what makes them uniquely capable of enacting justice).

7. See Waldron, *Judicial Review*, *supra* note 1, at 1392 (arguing that due to the similarities between legislative processes and judicial review, an elementary defense of judicial majoritarianism is called for).

8. Edward Rubin, *Judicial Review and the Right to Resist*, 97 GEO. L.J. 61, 65 (2008).

9. Alon Harel & Tsvi Kahana, *The Easy Core Case for Judicial Review 1* (Sept. 23, 2008) (unpublished manuscript, on file at <http://ssrn.com/abstract=1272493>).

10. In the sections that follow, we will illustrate this by addressing representative examples of instrumentalist and non-instrumentalist positions.

11. See Harel & Kahana, *supra* note 9, at 3–4 (stating how instrumentalist arguments justify judicial review based on desirable contingent consequences).

12. THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 1 (1996) (“It is common wisdom that a fundamental purpose of judicial review is to protect minority rights from majoritarian overreaching.”). This is just one of the many instrumentalist arguments in support of judicial review. Another famous argument in favor of judicial review asserts that judicial

Consider now non-instrumentalist defenses, which assert that judicial review intrinsically fulfills an obligation of the state.¹³ An illustrative non-instrumentalist argument proceeds thusly: Each individual possesses the right to a hearing so that he may express his grievance. In order to preserve such a right, a body must exist that genuinely considers that individual's grievance and provides a reasoned justification for whatever response that grievance elicits. Such a body must be independent of the legislature and possess court-like features.¹⁴ These characteristics define judicial review. Thus, judicial review provides the only way to fulfill the state's obligation to preserve the right to a hearing.¹⁵

Note the subtle distinction between these two types of defenses. The non-instrumentalist defense asserts that judicial review is being *utilized* to fulfill an obligation (e.g., the preservation of an individual's right to a hearing). However, this does not equate to an instrumentalist argument because judicial review *intrinsically* fulfills the state's obligation—it is not simply a matter of contingency.

To illustrate, assume as a contingent fact that judicial review frequently results in wrong decisions—thus not fulfilling the promise of the hypothesized good consequences of judicial review. Assume also that these wrong decisions are reached by bodies that exhibit the characteristics of judicial review as defined by the non-instrumentalist. Such a situation would undercut the instrumentalist arguments for judicial review: Judicial review is used as a tool to try to bring about particular good consequences, but it fails in that endeavor. Therefore, judicial review is a poor tool and its continued use is unjustified.

However, for non-instrumentalist arguments, these observations about the failures of judicial review are irrelevant. Judicial review is intrinsically tied to the state's fulfillment of its obligations because, for example, it is

review improves the democratic process and the operation of representative institutions. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87 (1980). Yet another asserts that judicial review leads to the stability of legal decisions and settlement of disputes. Larry Alexander & Fredrick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Larry Alexander & Fredrick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2000). Finally, another argument claims that judicial review facilitates realizing the ideals of “dualist democracy.” BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6–10 (2000). We assert that, for each of these instrumentalist arguments, there is an analogous answer to the objection that they are inconsistent with judicial majoritarianism, but in the interest of avoiding repetitiveness we do not detail them here.

13. Harel & Kahana, *supra* note 9, at 3.

14. *See generally* Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991 (2006); Harel & Kahana, *supra* note 9, at 41–42. A court like the Supreme Court of the United States satisfies the characteristics needed to genuinely consider the individual's grievance and provide a reasoned justification for the court's action.

15. *See generally* Eylon & Harel, *supra* note 14.

required to preserve the right to a hearing. Because these observations do not upset this link, they do not frustrate the non-instrumentalist arguments.

III. An Instrumentalist Defense of Judicial Majoritarianism

Does judicial majoritarianism pose a problem of consistency to instrumentalist defenses of judicial review? As shown, the instrumentalist arguments assert that judicial review is justified because, due to its composition and structure, it results in contingent good consequences (e.g., the protection of minority rights). Thus, Waldron's challenge would be problematic for the instrumentalist argument *only* if the use of MD undercuts the good consequences expected of judicial review.

Yet there is not much reason to believe this is the case. It seems implausible that the use of MD in and of itself would count as a bad consequence. Thus, to frustrate the instrumentalist argument, MD would have to somehow handicap the courts from enacting good consequences. Waldron might retort with the familiar claim that if the courts use MD, then they are just like legislatures and thus equally unable to produce good consequences (but less democratic). The corresponding familiar response is that there are relevant differences between courts and legislatures that make courts more capable. Waldron might disagree; the composition of the judiciary might mirror the makeup of the legislature, resulting in a situation whereby the judiciary is as likely as the legislature to infringe upon minority rights.¹⁶ Waldron is quite correct that such a possibility lingers; this issue is, at its core, an empirical one about whether or not judicial review fulfills its hypothesized promise.

However, note that the focus of this dialectic has shifted back to the original instrumentalist argument regarding judicial review and the contingent good consequences it may offer. The dialectic no longer surrounds MD, but whether judicial review results in the hoped-for consequences.

IV. A Non-Instrumentalist Defense of Judicial Majoritarianism

Is judicial majoritarianism a problem for non-instrumentalist defenses of judicial review? Non-instrumentalist arguments claim that judicial review is justified because it intrinsically fulfills the state's obligations to its citizens (e.g., by protecting an individual's right to a hearing). Thus, judicial majoritarianism would undercut the non-instrumentalist argument *only* if it could be shown that judicial majoritarianism impedes the fulfillment of the state's obligations.

16. Waldron, *Judicial Review*, *supra* note 1, at 1396.

Again, there is little reason to think that judicial majoritarianism would have such an effect. In the illustrative non-instrumentalist argument, judicial review is defended on the grounds that its existence is the only way to preserve the right to a hearing. This right includes the ability to air a grievance, have the state genuinely consider that grievance, and have the state provide a reasoned justification for its action on the grievance. Clearly, MD would not affect the ability of the individual to air his grievance. Nor does it seem that it would affect the ability of the state to genuinely consider the grievance. Though judges may count votes at the end, grievances are still genuinely considered.¹⁷ Finally, the body of judicial review utilizing MD can still provide a reasoned justification for its action—like in the form of an opinion.

Waldron might argue that it is possible that independent court-like bodies are not the only way to preserve the right to a hearing. Though this is a legitimate objection, it deals with the original non-instrumentalist argument. It no longer concerns MD, but relates to the conceptual, intrinsic relationship between judicial review and the right to a hearing. Again, this shifts the debate from the discussion of MD back to the original dialectic.

V. Conclusion

Waldron identifies a problem regarding the compatibility of judicial review and MD that is both noteworthy and provocative. However, responses to this problem are evident and persuasive. In this piece, we have endeavored to meet Waldron's challenge by providing an elementary defense of judicial majoritarianism—a defense which Waldron himself has described as elusive.

17. Jeremy Waldron, *Deliberation, Disagreement, and Voting in DELIBERATIVE DEMOCRACY & HUMAN RIGHTS* 210, 216 (Harold Hongju Koh & Ronald C. Slye eds., 1999) (“For there is surely no doubt that the Supreme Court is a deliberative body . . . even though [, when they disagree,] their disagreement means that, at the end of their deliberation, the matter before them has to be determined by a vote.”).