AN "INDISPENSABLE FEATURE"? CONSTITUTIONALISM AND JUDICIAL REVIEW

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In *Cooper v. Aaron*,[1] an opinion drafted by Justice William Brennan and delivered by Chief Justice Earl Warren for a unanimous Court,[2] the Supreme Court provided an influential gloss on *Marbury v. Madison* and its declaration of the power of judicial review.[3] *Marbury*, the Court asserted in *Cooper*, declared the "basic constitutional proposition" that "the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the country as a permanent and indispensable feature of our constitutional system."[4]

In many ways, of course, it is true that judicial review, and the kind of judicial supremacy the Court articulated in *Cooper*, has been understood as an indispensable feature of the American constitutional system. One of the useful things about Jeremy Waldron's book *Law and Disagreement*[5] is that it provides a basic challenge to this idea. Waldron asks whether judicial review is a unique and idiosyncratic aspect of the American constitutional system, one that is dispensable to constitutionalism more broadly; and whether it would be possible to have a constitutional system that did not include judicial review. This is an interesting and an important question, one that is not ordinarily given enough attention.[6]

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1. 358 U.S. 1 (1958).
2. *See* BERNARD SCHWARTZ, SUPER CHIEF 295–96 (1983).
3. *Cooper*, 358 U.S. at 18 (citing Marbury v. Madison, 5 U.S. 137, 177 (1803)).
4. *Id*. at 17–18.
5. JEREMY WALDRON, LAW AND DISAGREEMENT (1999).
6. Alexander Bickel set the tone for American academic "constitutional theory" by taking judicial review and the basic features of the U.S. Constitution as given and merely asking how judicial review should be exercised. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 14 (1962). There are exceptions, however: see, for example, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999), which presents arguments against judicial supremacy in the realm of constitutional law; see also CONSTITU-

At first glance, this seems like an obvious issue—of course one can have a constitutional system unlike the American system. For a long time, judicial review was unique to the American context, although it has since been exported to many other countries.[7] But as Waldron emphasizes in the book, constitutionalism has increasingly been identified with something like judicial review; if not American-style judicial review, then some other type of specialized constitutional review. Accordingly, judicial review is progressively regarded as an indispensable feature of any kind of constitutionalism.

It is therefore worthwhile to rethink this basic premise. In particular, Waldron is useful in highlighting the ways in which democracy shares the same assumptions with constitutionalism itself, or, more broadly, with liberalism (of which constitutionalism can be seen as a particular aspect). Waldron develops a compelling argument that democracy and liberalism—or democracy and constitutionalism—are neither contradictory nor necessarily in tension with one another. Rather, democracy and liberalism arise out of the same foundations and could be reconciled in important ways such that one need not choose between them. Correctly understood, one can instead ground constitutionalism in a broadened democracy. Contrast this vision with the way constitutionalism is normally discussed in academic constitutional theory, which still largely revolves around a framework that ultimately stems from the New Deal (and the Progressive Era) that Bickel referred to as the counter-majoritarian difficulty. The "counter-majoritarian difficulty" aims to make sense of an assumed tension between constitutionalism and democracy.[8]

Waldron suggests that there may be an alternative way of thinking about constitutionalism itself that circumvents some of these problems. In doing so, Waldron highlights what he calls the "circumstances of politics"—the idea that there is fundamental disagreement about what the correct goods of politics are and what rights individuals have.[9] Waldron believes that these disagreements cannot be simply wished away.[10] As a consequence, we must think about how to

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TIONAL POLITICS (Sotirios A. Barber & Robert P. George eds., 2001), which presents alternatives to judicial review by allusion to other constitutional systems.

7. For example, new democracies in South Africa and in Central and Eastern Europe have adopted systems of judicial review. *See* WALDRON, *supra* note 5, at 286.

8. BICKEL, *supra* note 6, at 16–17. For a discussion of the roots of contemporary constitutional theory, see LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 13–59 (1996); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PENN. L. REV. 971 (2000).

9. WALDRON, *supra* note 5, at 101–03.

10. *Id*.

design both a political system and a political theory that accounts for some constant level of disagreement among people, rather than simply assuming the possibility of universal agreement. Rather than having substantive theories of justice, we must also consider the forms of politics and how politics ought to be conducted in a world in which people continue to disagree about basic questions of justice. I think this project very usefully connects a broader current of political philosophy to what could be known as constitutional theory.

Most of the scholarship that currently flies under the label of "constitutional theory," however, is primarily concerned with telling the Supreme Court what it ought to do.[11] Constitutional theory in this mode in fact shares many of the same defects in political philosophy to which Waldron calls our attention: an unwarranted confidence that we know the right answers to the hard political questions and that we simply want somebody to impose those answers on the world for us.[12] But we can also think about constitutional theory more broadly, as concerned with questions of institutional design and constitutional maintenance that can provide for a political world in which there is both fundamental disagreement and a respect for rights, and how to make those consistent with one another.[13]

Waldron's work immediately provoked me to incorporate his ideas into some of the ways I had been thinking about constitutionalism and judicial review. Waldron ultimately concludes that we should abandon judicial review entirely.[14] I do not want to make a frontal attack on that argument. I believe, however, that Waldron's starting point and the central theoretical points made in most of *Law and Disagreement* may still allow room for an institution that resembles judicial review. Maybe not judicial review as it has been practiced in the United States over most of the twentieth century, but, nonetheless, something like constitutional review which may well be worth preserving. My central aim here is to suggest possible roles and functions

11. *See* Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 1 (1998) (defining constitutional theory as "the effort to develop a generally accepted theory to guide the interpretation of the Constitution of the United States").

12. WALDRON, *supra* note 5, at 1–4.

13. *See, e.g.*, Alan Patten, *Political Theory and Language Policy*, 29 POLITICAL THEORY 691 (2001) (concerning institutional design of multilingual political systems); Keith E. Whittington, *Herbert Weschler's Complaint and the Revival of Grand Constitutional Theory*, 34 U. RICH. L. REV. 509 (2000) (reviewing MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999)) (championing Professor Tushnet's effort to return constitutional discourse to its "grander tradition . . . that is more concerned with governmental systems and political authority than judicial doctrine").

14. WALDRON, *supra* note 5, at 211–312.

that courts might play in exercising a kind of judicial review in ways that are roughly consistent with, or work within the gaps of, Waldron's core theory.

Why would we still have judicial review in a political world that looks more or less as Waldron describes it? The core defense of judicial review is offered by Alexander Hamilton in the *Federalist Papers*.[15] It is worth noting that Hamilton primarily envisioned the institution of judicial review as a useful check on the temporary missteps of legislative majorities.[16] In the legislative majorities' more sober moments, in fact, it is likely that they would basically agree with and accept the kind of wisdom that the courts are capable of offering during turbulent times. The judiciary is not positioning itself against permanent majorities; it is not trying to tell legislative majorities or the American people that they cannot have what they are convinced that they want.[17] Rather, in particular moments when the people have lost

15. THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.").

16. *Id*. at 469.

> This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

Id. Of course, Hamilton also argues that the courts should enforce the boundaries of the delegated power that the people authorized the legislature to exercise. "It is far more rational to suppose that the courts were designed to be an intermediary body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority." *Id*. at 467. In this argument Hamilton firmly aligns the courts with the people and does not seem to envision dangers arising from permanent popular majorities hostile to constitutional liberties.

17. The idea that the courts might have to stand against permanent popular majorities was suggested by some in the early republic in relation to the property of the wealthy, but became a more central theme of constitutional thinking only after Reconstruction highlighted the problem of race and industrialization and gave new significance to the problem of economic class. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 119–122 (1990) (suggesting that certain Framers envisioned judiciary as impartial body, immune from influence of factions, that would protect popular right to own private property); ROBERT COVER, *The Origins of Judicial Activism in the Protection of Minorities*, *in* NARRATIVE, VIOLENCE, AND THE LAW 13, 23–24 (Martha Minow et al. eds., 4th ed. 1998) (suggesting that "massive retreat from protecting Black rights between the 1870s and the 1920s" indicates that reconstruction-era Court was neither activist nor anti-majoritarian); HOWARD GILLMAN, THE CONSTITUTION BESIEGED 102–110 (1993) (chronicling Court's struggle against classist and special interest legislation in Industrial Age).

their heads, the courts might step in and offer some corrections and appeal to the more sober sense of the people.

It is difficult to instantiate such a practice. Once a court is given that kind of power, it is likely to be permanently convinced that the people will eventually agree with its own vision of politics and how politics ought to operate. Likewise, it is difficult to instantiate in a practice like American judicial review where there is no formal procedure for legislatures to respond to what the Supreme Court has done. It should be noted, however, that informally, and in historical practice, Congress has in fact found a variety of ways to challenge the Court or suggest that the Court itself has erred. Congress has entered into various kinds of dialogues with the Court that attempt to find some shared position that is acceptable both to the judicial majority and to the legislative majority.[18]

It is notable, however, that Waldron's suggestions regarding the way democracy should work and about the kinds of assumptions that liberalism makes about individuals as rights-bearing creatures are still consistent with some kind of institution that offers a sober second thought about the decisions that are actually made in a particular institutionalized setting. In many cases, Waldron specifically describes particular institutional features of legislatures, and how these drop out of certain philosophical assumptions regarding how legislatures might work and certain needs and functions that legislatures serve. Nevertheless, Waldron's work operates at a fairly high level of abstraction with relatively little attention paid to specifics about the institutional designs of legislatures. For example, he evinces no particular concern about features of representative government, about how legislatures might best represent particular constituencies, nor about the problematic aspects of the relationship between the constituent principals and their particular agents within the legislature. Sometimes, Waldron switches from discussing legislatures to direct democracy and referendum,[19] and yet there is no real discussion of the particular problems associated with such, and how deeply, for example, we might think that voters facing ballot measures have thought through the problems raised by those measures. Given those kinds of real-world institutional features of practical politics, it may make sense to have a spe-

18. *See* LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 247–59 (1988) (describing instances in which Congress and Supreme Court have collaborated to effect mutually acceptable laws).

19. *See* WALDRON, *supra* note 5, at 235–41. In his discussion of the rights of citizens to participate in political decisions concerning rights, Waldron fails to draw meaningful distinctions between direct democracy and representative democracy. *Id*.

cialized institution that can also offer at least a closer look at the kinds of decisions that are produced by democratic bodies, even recognizing that those democratic bodies may be able to take another stab at the decision after any such review.

Secondly, it may also be possible for an institution with power of judicial review to insist on certain kinds of procedural checks on what democratic and legislative majorities have done. For example, the judiciary might impose higher fact-finding hurdles on the legislature before it adopts certain kinds of policies. The Rehnquist Court has suggested that it is attempting to do this in some of its federalism decisions, insisting that Congress build a factual record to justify enhanced federal authority that would encroach on the traditional authority of the state governments.[20] Regardless of the adequacy of the Rehnquist Court's performance in these particular cases, it may make sense for a court to insist that laws are well-considered with some evidence of proof to represent a clear view of what legislative majorities, and perhaps democratic majorities more broadly, actually believe.[21]

To that degree, there would be a consistency between a court insisting on some further demonstration of the adequacy of the legislative decision-making process, and the actual results that legislatures have reached, with Waldron's basic concern that ultimately issues of principle have to be settled by the rights-bearers themselves. It should be possible within Waldron's general approach to recognize that particular institutions of democratic decision-making, such as legisla-

20. *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 369–373 (2001) (finding that record of state discrimination against disabled individuals fell short of proving pattern of discrimination necessary to enact ameliorative federal legislation); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (explaining that, although lack of support for legislation is not determinative in inquiry into Congress' power to enact statute, Congress' failure to show pattern of age discrimination among state governments suggests Congress had no reason to believe legislation was necessary in that area); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 640–641 (1999) (commenting on Congress' failure to document state conduct that infringed on patent rights when it enacted Patent Remedy Act); United States v. Lopez, 514 U.S. 549, 562–63 (1995) (noting that Congress failed to provide factual record demonstrating firearm possession in school zone substantially affected interstate commerce).

21. *Cf.* Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1197, 1206–07 (2001) (arguing that while it can be valuable for Supreme Court to use fact-dependent standards of review, Court should only employ such standards when Congress has incentives to accurately gather facts); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544–48 (1983) (suggesting that unless statute explicitly gives courts power to create or revise form of common law, court application of statute should be restricted to circumstances anticipated by legislature).

tures, are imperfect institutions. In practice, for example, legislatures are not merely legislative institutions. Legislators have multiple roles to fulfill, in addition to making law, that include overseeing government administration and serving constituents. As a consequence, the legislature may not always give sufficient attention to particular concerns such as civil liberties. In passing specific laws, therefore, it may make sense for courts to insist on some further demonstration from legislatures that they have performed their legislative role properly and responsibly.

Thirdly, Waldron gives no real attention to a problem that is very present in the American context: federalism. Much of the constitutional review by the Supreme Court, including many of the most controversial invalidations of laws, has not been exercised against Congress and national democratic majorities, but rather has been employed against state legislatures in their representation of local political majorities. Those local political majorities may themselves be consistent with national political majorities—such that a flag desecration statute in Texas may be consistent with the policy preferences of majorities in Congress and in most other states as well—but they may often represent distinctive local commitments that are largely inconsistent with those of national majorities. This problem of local majorities versus national majorities creates a difficulty for organizing a political community constitutionally, and Waldron gives no real attention to this difficulty.

As Lucas A. Powe has recently shown, *Cooper v. Aaron* itself, and some of the Warren Court's most famous exercises of the power of judicial review, were primarily concerned with checking local outliers and bringing them into line with the preferences and practices of national political majorities and national government officials.[22] The most controversial assertions of the power of judicial review by the Supreme Court were made, for example, to bring the South and its particular set of racial policies in the 1950s and 1960s into line with the increasingly progressive and liberal views of larger national majorities;[23] to bring the state of Connecticut and its particular laws on contraception into line with what mainline Protestant churches and the

22. *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 372–77, 379–81, 394–98 (2000) (describing Warren Court's success at forcing outlier states into conformation with practices espoused by majority of states or national government with respect to right to privacy regarding contraception for married people, of indigent criminal defendants to be provided with counsel, and of accused to be informed of rights prior to any questioning).

23. *E.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that race-based segregation of children in public schools violates Fourteenth Amendment's equal pro-

post-Vatican II Catholic Church were increasingly thinking by the 1960s, and to where the other states had already moved;[24] and to bring local police departments, perhaps especially in the South, into line with national police procedures, and what the national administration viewed as consistent with modern law enforcement.[25]

In these cases, judicial review procedures are genuine instances in which the Court is striking down the actions that legislative majorities have taken. But the democratic majorities that are being represented here are local ones, not national ones, and it is not clear how we ought to incorporate the relationships between localities and national majorities into our thinking about rights-bearers and the respect they might be due in any given situation.[26] Waldron's lack of attention to this issue is all the more significant given that the question of judicial review becomes most pressing precisely in the context of federalism. The U.S. Supreme Court has historically been most active in reviewing the constitutionality of state legislation, and it is the integration of Europe and its web of supranational commitments that has introduced the camel's nose of judicial review into the very birthplace of parliamentary supremacy, Great Britain.

Somewhat related to locally enacted legislation is the problem of non-serious legislation: legislation that Congress establishes but does not really believe in. There may be numerous instances in which the Court has struck down legislation that Congress never really intended or expected to stand in the first place or into which Congress certainly had not invested much thought or political capital. In the context of such controversial issues as abortion in the 1980s or slavery in the 1850s, legislators may be quite content for the courts to step in and take such issues off their hands.[27] Likewise, it seems clear that it is

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tection clause); *see* POWE, *supra* note 22, at 490 (claiming that, in *Brown* decision, Court sought to dismantle Southern racial caste system).

24. *E.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (holding Connecticut statute prohibiting use of contraception violated right of marital privacy); *see* POWE, *supra* note 22, at 372–77, 492 (describing *Griswold* as Court's attempt to bring urban Catholic communities into mainstream of American culture).

25. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (holding that criminal suspect must be informed of certain rights prior to police interrogation); *see also* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that indigent criminal defendant has right to be provided with counsel); POWE, *supra* note 22, at 394 (explaining that in *Gideon*, Court forced five outlier states to conform with practice of all other states, whereas in *Miranda*, Court required all states to conform with pre-interrogation procedures followed by FBI).

26. See WALDRON, *supra* note 5, at 221–23, 238–39, for a discussion of the respect due to rights-bearers.

27. *See* Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 45–50, 53–61 (1993) (discussing how, in

politically easy for the legislature to vote for bans on pornography on the Internet, for example, while at the same time recognizing that these prohibitions create a variety of problems from a constitutional perspective and knowing that the Court has the capacity to step in and correct the mistakes.[28] Mark Tushnet has suggested that there may be a problem of "judicial overhang," by which the very presence of judicial review encourages such legislative irresponsibility.[29] Of course, it is also possible that the political attractiveness of such statutes would lead to their passage even in the absence of a judiciary providing a constitutional backstop. In any case, the actual practice of judicial review probably reflects such institutional dynamics, and Waldron does not give sufficient attention to how a representative political system operates and the complications that it creates for readily identifying legislative outcomes with principled democratic deliberation.

A fourth possible function for judicial review, that would seem consistent with Waldron's basic concerns, is institutional boundary enforcement. Chief Justice John Marshall argued in *Marbury* that if a written constitution were to be meaningful, then Congress could not be left to judge the extent of its own powers.[30] This theme has been a central feature of judicial review of federal statutes by the Rehnquist Court as well.[31] Of course, Waldron may note that he is no supporter of written constitutions, so Marshall's argument is beside the point,

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nineteenth and twentieth centuries, politicians went to great lengths to keep divisive issues such as slavery and abortion out of Congress and in province of courts).

28. *See, e.g.*, Communications Decency Act of 1996, 47 U.S.C. §§ 223(a), (d) (1994 & Supp. II 1997), *held unconstitutional in* Reno v. ACLU, 521 U.S. 844 (1997) (holding Act impermissible restriction of freedom of speech where there are less restrictive means of denying minors access to potentially harmful material).

29. TUSHNET, *supra* note 6, at 57–65.

30. Marbury v. Madison, 5 U.S. 137, 177 (1803) (writing that if legislature may, at will, enact laws contrary to constitution "then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable"). Waldron gives some attention to the argument that "allowing the majority to decide upon the conditions under which majority-decisions are to be accepted may be objectionable because it makes them judges in their own case," but he dismisses these concerns by claiming they are inappropriate to "a situation where the community as a whole is attempting to resolve some issue concerning the rights of *all* the members of the community." WALDRON, *supra* note 5, at 296–7.

31. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) ("As we have repeatedly noted, the Framers crafted the federal system of Government so that the people's rights would be secured by the division of power."); City of Boerne v. Flores, 521 U.S. 507, 516 (1997) ("[T]he 'powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.'" (quoting *Marbury*, 5 U.S. at 176)); *see also* Keith E. Whittington, *William H. Rehnquist: Nixon's Strict Constructionist, Reagan's Chief Justice*, *in* THE STRUCTURE OF REHNQUIST COURT JURISPRUDENCE (Earl Maltz ed., forthcoming 2003) (on file with author).

but concern with Congress judging the extent of its own power is a real one. Congressional authority is hemmed in on three sides: by the reserved rights of the people, by the reserved powers of the states, and by the powers lodged in the other departments of the national government. The legislature may find reasons to stretch and break each of these boundaries on its power. Waldron's neglect of the institutional environment, within which legislatures operate, causes him to underestimate the problems associated with leaving the scope of legislative power to the legislature itself.

Although Waldron provides a careful analysis of the significance of legislatures existing as collective institutions, he does not address the representative character of legislatures and thus does not consider the possibility of agency problems associated with the need for citizens to work politically through representatives. Legislators may develop their own distinctive interests vis-à-vis the people that they supposedly represent. For example, legislators develop an interest in retaining office, and this interest may be the single most important driving force in modern professional legislatures.[32] The Federalist Party's fear of electoral competition helped motivate the passage of the infamous Sedition Act of 1798, which sought to sharply limit the rights of individuals to criticize government officials.[33] Similar concerns encouraged the inclusion of severe limitations on independent political advertising before elections in the recent campaign finance reform movement.[34] Legislative judgments regarding the value and proper scope of free speech are susceptible to a systematic bias toward greater restriction, which an independent judiciary might be able to counteract.

Legislatures are similarly likely to favor drawing political power into their own hands and away from competing institutions. To the extent that the division of political power among multiple institutions and political officials is one mechanism for controlling government and preventing the abuse of power, the effective maintenance of those divisions is a central problem for those concerned with preserving either democracy or liberty. The structural features of the political system have traditionally been a major feature of constitutional theory,

32. *See generally* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974) (assuming that overwhelmingly predominant congressional motive is desire to be reelected).

33. *See generally* JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1956) (presenting general account of Sedition Act).

34. Robert J. Samuelson, *Stranglehold on Speech*, WASH. POST, Mar. 27, 2002, at A21.

yet Waldron gives them minimal attention. Of course, Waldron is under no obligation to provide a comprehensive analysis of constitutionalism, and his primary interest in evaluating the philosophical foundations of lawmaking does not itself suggest the need to take into account such matters of federalism or executive power. But to the extent that Waldron wants to draw strong conclusions regarding the appropriateness of judicial review from this analysis, his limited perspective on constitutionalism creates difficulties.[35]

Finally, there is a real problem of distinct minorities that Waldron largely elides, and it is not clear what scope of rights and political goods we ought to exempt from judicial review under Waldron's understanding. There are a variety of minorities that can be distinguished, identified, and set aside within the democratic and legislative process. It may make sense to attempt to build institutional checks to try to protect them. This is true not only in the obvious case of the American context of racial and ethnic minorities, but also of religious minorities, sectional minorities, partisan minorities in some cases, and a variety of other kinds of separate communities that may exist within a larger political whole. Waldron often talks of a single political community and the need for that single political community to make decisions about its own future. The problem, of course, is that within a polity such as the United States, there is actually a conglomeration of many different political communities, and sometimes those individual political communities are recognizable as being distinct and outside the majority. It is quite possible for the majority to make decisions that primarily affect these communities, but that do not significantly affect the majority itself.

Waldron's lack of discussion of "discrete and insular minorities" is striking from the perspective of American constitutional theory.[36] Waldron approaches the problem of judicial review from a philosophical perspective and his practical reference points are the British Commonwealth countries, not the United States. To challenge the practice of judicial review in the United States, however, we need to confront directly the problem of distinct minorities, especially since this has

35. It may still be possible that we would not want to employ a mechanism like judicial review to monitor and enforce the boundaries of the separation of powers and federalism. *See, e.g.*, JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 171–379 (1980) ("[T]he constitutional issue of whether federal action is beyond the authority of the central government and thus violates 'states' rights' should be treated as nonjusticiable, final resolution being relegated to the political branches—i.e., Congress and the President.").

36. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

been a central justification for the active exercise of judicial review from early in the nation's history.[37]

Waldron addresses the possible judicial protection of minorities only obliquely. He is compelling in emphasizing the unavoidable existence of reasonable disagreement about the best understanding of rights and the ways in which this inescapable disagreement problematizes any easy assertion of rights or claims of rights violations. As he observes, "[N]othing tyrannical happens to me merely by virtue of the fact that *my opinion* is not acted upon by a community of which I am a member."[38] What looks like "tyranny of the majority" to the minority may not be understood as tyrannical at all by those who favor the policy, and this political disagreement cannot be dodged simply by labeling one side tyrannical or by shifting the dispute into the courts.

Waldron further notes that the very same liberal assumptions that ground our commitment to the importance of rights also require us to take seriously the reasonableness of political actors, including political majorities. Both democratic and liberal theory require that we respect our political opponents as capable of acting on their own best moral judgments and not simply voting out of self-interest.[39] But even so, there is reason to believe that self-interest often does play a role in democratic politics, and a cautious constitutional designer will want to take that into account and build safeguards into the constitutional system. Even if we assume that individuals are generally capable of thinking beyond their immediate self-interests and acting morally, and that many of the central disputes regarding rights are at least partly disputes involving real moral disagreement, it may still be the case that we would want to limit the consequences of majority decisions. When majorities declare as a matter of principle that no one is allowed to sleep under bridges or that members of different races must ride in separate railcars, it is worth recognizing that the burdens of those judgments regarding the rights of all citizens are unevenly distributed across the citizenry, and that the moral perspective of the majority may not give adequate account to the concerns of the minority. Judges may be in a better position to recognize those effects, not be-

37. *See* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999) (describing pervasiveness of race-based and class-based "double standards" in criminal justice system); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73–179 (1980) (offering process-based interpretation of post-New Deal judicial review); GILLMAN, *supra* note 17, at 19–99 (discussing role of "faction" and class conflict from founding period through the early twentieth century).

38. WALDRON, *supra* note 5, at 13.

39. *Id*. at 222–23.

cause judges are intrinsically wiser or more worthy to exercise political power than legislators or average citizens, but because their institutional position provides them with different information, perspective, and incentives.[40]

In general, these considerations would suggest that we might want a court to undertake constitutional adjudication, whether it resembles our Supreme Court or a somewhat different kind of constitutional court, so long as the court carefully considers which disputes it adjudicates.[41] There may be many disputes that involve rights claims but which the judiciary should not attempt to settle precisely because it has little to add to the existing debate beyond its institutional assertion of the authority to render such decisions. In many disputes, there may be no question that rights and constitutional values are at stake, but there exist substantial questions as to how the dispute should be resolved. For someone who remains committed to some form of judicial review, Waldron's argument may best be read as counseling judicial humility and a willingness to refrain from exercising power. These are important virtues, rarely found, for all those wielding public power in the name of the people.[42] Nonetheless, there remain many disputes in which we may still want a court to intervene and where a court may strike down the actions of a legislative majority without necessarily violating any of the quite appropriate assumptions that Waldron wants to make about how democratic institutions are grounded in our larger vision of liberalism and constitutionalism.

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40. One difficulty with Waldron's book is that his discussion of rights is pitched at a high level of abstraction. Not only does he avoid specific constitutional cases, but he also avoids discussing particular substantive rights that are of concern in actual politics. It seems likely that Waldron's argument is shaped in part by having certain kinds of rights disputes in mind, ones in which the moral disagreement about rights seems real and the rights at stake seem generally shared. It seems possible that Waldron would approach the question differently if his paradigmatic cases involved factors such as racial segregation or the torture of prisoners.

41. It is worth noting that the judicial restraint that might be drawn out of Waldron's work is not Thayerian constraint. The Waldron-consistent judicial review outlined here would not counsel judges to show restraint in evaluating all legislative decisions equally or employ a general clear-mistake rule before invalidating legislation. *Cf.* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

42. *See* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 127–159 (1999).