The Proceduralist Case for Judicial Review

ABSTRACT

This article analyzes a majority's decision to institute judicial review as a method of final decision-making on questions of constitutional rights. Adopting the proceduralist viewpoint, the article argues that this type of decision—involving majoritarian renunciation of its own power—requires a greater justification than majority decisions that do not alter future decision-making procedures. That greater justification requires these types of decisions, decisions this article terms "delegation decisions," to satisfy two conditions. First, the procedural mechanism the majority gives power to must be a fair procedure. Second, the procedural mechanism must also be appropriate for decisions of the kind it is supposed to make. The article then argues that proceduralists can embrace these conditions and that judicial review satisfies them. Judicial review as practiced by an ideal constitutional court is a fair procedure for rights questions because it exemplifies qualities such as anonymity and neutrality that are central to procedural fairness. And a constitutional court is appropriate for deciding constitutional rights questions because its virtues—particularly its transparency, deliberative capacity, principled reasoning, and impartiality—are relevant for these questions and mitigate distortions in the decision-making process concerning rights.

INTRODUCTION

In his *Notes on the State of Virginia*, Thomas Jefferson famously remarked: "An elective despotism was not the government we fought for."[1] He believed—and most democratic theorists after him still believe—that even a despot elected through fully democratic procedures is illegitimate. It is, in fact, one of the most strident critiques of democracy that it appears to allow precisely this kind of troublesome transfer of power.[2] This article focuses narrowly on these types of decisions: decisions by which the majority votes to give up some or all of its decision-making authority. This kind of majority decision would be made when, for instance, the majority elects a dictator with plenary power or when the majority chooses to create a judiciary with the power of judicial review.[3] These decisions have in common the majority's voluntary relinquishment of its own power over some or all future decisions. Some theorists—Jefferson presumably included—would place limits on what powers a majority can legitimately relinquish. Others hold that limits on majoritarian decision-making are wrongheaded and dangerous. Against this background, the history of constitutional democracy is aptly viewed as an attempt to define the proper boundaries of majority decision-making.

Democratic proceduralists see democracy as intrinsically valuable insofar as it treats individuals fairly. In the pure version of proceduralism, "[t]he results are made legitimate by being the results of the procedure."[4] Whatever the outcome of the assembly's vote, proceduralists anchor legitimacy in the decision-making procedure itself. Democratic

[1] Thomas Jefferson, *Notes on the State of Virginia* (Richmond, Va: J.W. Randolph, 1853), p. 195.

[2] Elaine Spitz, *Majority Rule* (Chatham, NJ: Chatham House Publishers, 1984), p. xi: "Because the moral acceptability of suicide is problematic, there was widespread conviction that something was wrong with a system [i.e. democracy] that apparently allowed for it."

[3] In 1992, citizens of the Republic of Ghana voted for a new Constitution that provided its judiciary with the power of judicial review and citizens with the right to "apply to the High Court for redress" of alleged constitutional violations. *See* 1992 Constitution, Republic of Ghana, art. 33.

[4] Thomas Christiano, *The Rule of the Many: Fundamental Issues in Democratic Theory* (Boulder, CO: Westview Press, 1996), p. 35.

instrumentalists, on the other hand, believe that democracy is valuable because "democratic procedures are the all-things-considered best means of implementing or ascertaining what justice requires."[5] Because democratic procedures are valued instrumentally, we ought to assess the performance of democratic procedures according to a "result-driven"[6] standard. Consequently, limits on majority power are appropriate when majorities reach outcomes that instrumentalists think defective in some important way—e.g., on grounds of justice, goodness, or the common weal. Instrumentalists would thus think that majorities should not have the power to cede authority to a dictator through majority vote because that would (in most cases) produce very bad consequences.

It is clear from this description that instrumentalists need no elaborate framework to determine when majorities should have the power to relinquish authority. Under the instrumentalist viewpoint, majorities can do so legitimately when, and only when, doing so produces good results. The goodness of the consequence (however measured by the instrumentalist) is both necessary and sufficient for the majority's relinquishment of power. But any critique of the majority's decision to hand over authority to another procedure seems hard to square with a proceduralist account of the value of democracy, an account that is formally unconcerned with the wisdom, rightness, or justness of the outcomes of democratic procedures.[7] In fact, pure proceduralists hold "that political outcomes would be just in virtue of having been generated by the inherently just democratic procedure."[8] Even impure proceduralists point to procedures as the legitimating component of democratic decision-making and are, too, formally

[5] *Id*. at 181.

[6] Ronald Dworkin, *Freedom's Law: The Moral Reading of the Constitution* (Cambridge, Mass.: Harvard University Press, 1996), p. 34.

[7] See Christiano, "The Authority of Democracy," 266.

[8] Christopher G. Griffin, "Debate: Democracy as a Non-Instrumentally Just Procedure," *Journal of Political Philosophy* 11 (2003): 116.

unconcerned with outcomes. Why not then just jettison proceduralism as an inadequate account of the value of democracy?

Consider the paradigmatic question of a conscientious citizen: why should I obey a law that I disagree with? Democracy, as an attempt to answer this question, can be thought of as a procedural device for making decisions in the face of reasonable disagreement.[9] John wants A, Sally wants B, and Remi wants A; when we feed these inputs into the democracy machine, it spits out choice A. But, as Richard Wollheim asks "why should someone who has fed his choice into the machine and then is confronted by the machine with a choice non-identical with his own, feel any obligation to accept it." Why, in other words, should Sally accept that A is somehow binding on her? The proceduralist claims that the answer to that question is that choice A was made by employing a fair decision-making procedure. By treating her fairly, the procedure put her and all the other citizens' preferences on a level playing field. In a world of ineradicable moral disagreement, there can be no ultimate arbiter of moral or political truth to which Sally could appeal to "prove" that her policy preference was best. In the absence of some such overarching standard, fair treatment is the most we can expect from the process that creates binding decisions for us.

While the full merits of proceduralism are beyond the scope of this article, I assume that proceduralism gives the most complete and philosophically satisfying response to the question of political legitimacy. That response, in short, is that "the source for democratic legitimacy is found in citizens' participation in a process or a series of processes in which they each have

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[9] *See* CHRISTOPHER J. PETERS, A MATTER OF DISPUTE: MORALITY, DEMOCRACY, AND LAW 123 (2011) ("[D]emocracy . . . is a reasonably accurate means of resolving prospective disputes about the content of legal rules.")

equal power in decision making."[10] Sally should be willing to accept the decision that the democracy machine produces once she understands both the mechanism by which it produces the decision and the inputs.[11] So long as it is functioning correctly, the democracy machine produces outcomes that a majority of the voters desired. And, if we recognize the fact of reasonable disagreement, we also see the fundamental importance of "the procedures by which [we] settle on a single set of institutions even in the face of disagreement about so much that we rightly regard as so important."[12] A fair procedure may be that all that we can settle on. But that does not minimize the importance of the procedure or the role it plays in our decision-making. On the contrary, it escalates procedural concerns—and procedural values—to the forefront of democratic theory.

In this light, the task of this article is twofold: first, to provide a procedural framework that clarifies when decisions delegating authority to new procedures (e.g., electing a dictator or voting to institute judicial review) are legitimate; and second, to sketch an account of how judicial review satisfies this framework's conditions. Because it assumes the proceduralist standpoint, my argument relies on no procedure-independent criteria when it comes to assessing the decisions to institute judicial review or elect a dictator. It does, however, assume one fundamentally substantive axiom about human beings: each individual is born free and equal and, as such, is entitled to respect as a moral agent.[13] This commitment undergirds the desirability of democracy as the optimal political arrangement, and serves to situate this article in

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[10] Corey Brettschneider, *Balancing Procedures and Outcomes Within Democratic Theory: Core Values and Judicial Review*, 53 POL. STUDIES 423, 424 (2005).

[11] Cf. Joshua Cohen, *Pluralism and Proceduralism*, 69 CHI.-KENT L. REV. 589, 617 (1994) ("[P]eople say, truthfully, that there are outcomes they find objectionable but which they would be willing to tolerate if they were given a fair chance to make their case. They do not regard the fact that a fair political process produces a bad legislative outcome—even a deeply morally objectionable outcome—as sufficient reason for condemning the process as unjust and for urging its replacement with an alternative.").

[12] JEREMY WALDRON, LAW AND DISAGREEMENT 3 (2001).

[13] Valentini, "Justice, Disagreement, and Democracy," 177.

liberal democratic theory.[14] It is a starting point for settling the later disagreement between proceduralists and instrumentalists about the value of democracy, not a concession to the instrumentalist account. Because the overwhelming majority of instrumentalists and proceduralists accept this premise, its acceptance does not pre-judge the issue of political legitimacy. But it does indicate that any account of legitimacy will have to show how and why that theory vindicates the individual interests in liberty and equality.

The article proceeds in two stages. Part I argues that there is an important and consequential distinction between substantive decisions that directly adjust benefits and burdens (e.g., a minimum wage law) and process-altering decisions that alter the procedures by which future decisions are made (e.g., the election of a dictator). The first of these decisions is not obviously open to direct critique by the proceduralist, assuming fair procedures were followed in making it. But the second, I argue, is squarely in the proceduralist's evaluative domain. After drawing this distinction, Part II argues that the legitimacy of the latter type of decision rests on it satisfying two conditions: (1) the new procedure to which an issue is delegated must be a fair procedure, and (2) the new procedure must be an appropriate procedure for making decisions on the delegated issue. Part II also sketches the case for judicial review's legitimacy on this account, assuming that the practice has been instituted by a majority vote on the matter. Finally, Part III responds to the objection that these criteria are outcome-based criteria that cannot properly be invoked by the proceduralist.

[14] Corey Brettschneider's novel "value theory of democracy" invokes a different (but related) set of "three core values of democracy: equality of interests, political autonomy, and reciprocity." Brettschneider, "The Value Theory of Democracy," 261.

I. ON PROCESS AND SUBSTANCE

This Part distinguishes between two types of decisions that can be made by majority decision—assuming throughout the article that majority decision is a fair procedure and that it is the default fair procedure in a democracy.[15] The first type of decision directly alters the substantive distribution of resources, while the second type of decision alters only the procedures used to make decisions on future issues. Though there might be questions on the margins, it is usually clear when a decision alters a decision-making procedure. That is, "we are familiar with cases in which the use of decision-procedure A yields as an output the conclusion that, henceforth, procedure B, rather than A, should be used."[16] The decision to enact a minimum wage law, for example, does not itself change the way in which future decisions, on minimum wage or other issues, are made. But the decision to elect a dictator necessarily changes the procedure for future political decisions. To make this clearer, imagine three decisions made by the majority using fair decision-making procedure X:

D1: All children under sixty pounds must be secured in a car seat while riding in an automobile.

D2: No public monies shall be spent on the education of African-Americans.

D3: All decisions regarding A-type issues should be made using procedure Y instead of procedure X.

The first decision (D1) is unproblematic. We think this is exactly the sort of decision that can be made by the state and justified on the basis of the procedure followed, even if—or especially if—there is deep disagreement about the best way to protect children riding in cars or the weight at which some such protections become futile or counterproductive. For proceduralists, the use of fair procedure X makes this decision legitimate.

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[15] See Jeremy Waldron, "A Majority in the Lifeboat," *Boston University Law Review* 90 (2010): 1043.

[16] Jeremy Waldron, "A Right-Based Critique of Constitutional Rights," *Oxford Journal of Legal Studies* 13 (1993): 40.

The second decision (D2) is seriously troublesome. Most battles over the merits of judicial review are waged over issues of this sort.[1] There is no doubt that at least one of the functions of judicial review is to protect the rights of minorities.[1] But D2 is not the kind of decision that this article focuses on. Rather, this article focuses on a different type of decision—the decision to institute judicial review in the first place. Without that prior decision, D2 cannot be remedied except by a later majority vote. It should be noted that judicial review is not always, or even usually, instituted by a majority vote of the citizens.[1] But a narrow focus on creation by this means serves two important goals: first, it allows the testing of judicial review's legitimacy not by an ad hoc analysis of its democratic benefits or deficits, but by a framework that analyzes when majority decisions to relinquish power more broadly are legitimate; second, majoritarian authorization for judicial review provides the practice its best democratic bona fides and thus provides a firmer test case for assessing the claim that judicial review is *never* legitimate in a democracy.[1]

With this in mind, the third decision (D3) is most relevant to our discussion of judicial review. It bears emphasizing that there is a fundamental distinction between decisions like D2 and decisions like D3. D2 is a substantive decision that directly adjusts the benefits and burdens of those subject to the power of the state. D3, on the other hand, distributes neither benefit nor burden—at least not formally. This article contends that decisions like D3 ought to be evaluated differently than substantive distributional decisions.[1] I call decisions that alter the process by which future decisions are made—e.g., D3—"delegation decisions." I use the term "delegated" in a slightly technical way to mean that ultimate and final decision-making authority is given, by

means of a majority vote, to a nonmajoritarian procedure.[17] I intend to include by this term instances of complete delegation where, for instance, a majority votes to elect a dictator, as well as partial delegation where a majority vests ultimate authority for only one issue or matter in another, nonmajoritarian procedure. And I mean to exclude by this term instances where the majority retains authority to "undo" the delegation by another simple majority vote. Though the distinction between delegation decisions and nondelegation substantive decisions may not always be clear, the decisions of concern here—about judicial review and dictatorship—fall squarely on the delegation side. So even though there is some question on the margins, I echo Richard Arneson's insistence in another context that "the existence of a gray area does not threaten my use of the distinction."[18]

When majoritarian procedures are altered, even when they are altered by majoritarian means, the decision requires a greater justification than when majoritarian procedures are unaltered by a majority decision. In other words, delegation decisions require a sort of justification that ordinary substantive decisions do not. This follows from the proceduralist account of legitimacy. Here it is necessary to clarify that I use legitimacy as a normative, as opposed to purely descriptive, term. On the normative reading, "democratic legitimacy gives people a [defeasible[19]] reason to support or not to challenge democratic institutions and the resulting decisions."[20] If majority decision is the default fair decision-making procedure in a

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[17] For an interesting and vaguely similar account, see Ross Carrick, "The Procedural Democratic Legitimacy of Constitutional Courts," 7, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1986857> (accessed May 21, 2013).

[18] Richard J. Arneson, "Debate: Defending the Purely Instrumental Account of Democratic Legitimacy," *Journal of Political Philosophy* 11 (2003): 125.

[19] Though Peter says that legitimate decisions create binding reasons, I prefer a formulation that creates a lesser, but still real, obligation on the part of participants. Brettschneider makes a similar point: "[D]emocratic procedures create *pro tanto* duties to obey, albeit duties that can be overridden." Brettschneider, "Judicial Review and Democratic Authority: Absolute v. Balancing Conceptions," *Journal of Ethics and Social Philosophy* (2011): 7-8.

[20] Fabienne Peter, *Democratic Legitimacy* (New York: Routledge Press, 2009), p. 56.

democracy, then the decisions made by the majority that do not alter future processes need no further justification from the proceduralist. Substantive (as opposed to delegative) majority decisions are, because of their procedural pedigree, per se legitimate. The outcome of the decision is not relevant to the existence of the obligation to follow it.[21] The provenance of the decision is what gives it legitimacy. This is the case for normal, substantive majority decision-making. To see why, we need only to recall that proceduralists anchor legitimacy in the fairness of the process, and where concerns about the fairness of the process are absent—as the case would be for normal substantive decisions made by majority vote—the authorizing process is sufficient.

But delegation decisions are different. The procedural provenance of the decision can no longer give citizens the same kind of reason to follow the decision. It can no longer be *sufficient* (though it is still necessary). It would be illogical to tell a citizen that she should follow decision D merely because it was produced by procedure P if D *just is* the rejection of P. The grounding of D, because it *necessarily* relies on P (for the proceduralist), is undercut when P is removed. Importantly, this does not mean that majority decision can never alter majority procedures. It simply means that something more is required to justify these delegation decisions than is required to justify substantive decisions.[22] Delegation decisions cannot undermine their own foundation by eliding the very fairness on which their legitimacy relies. I deal with the objection that this argument is no longer proceduralist in Part III but first I turn to the additional procedural conditions that I argue are necessary for delegation legitimacy.

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[21] But, as Eric Beerbohm helpfully points out, the obligation remains defeasible: "[W]hether a law is *democratic* depends upon the fair process by which citizens participated in its production. It is a further question whether the law is all-things-considered morally justified." Beerbohm, "Democracy as an Inflationary Concept," *Representation* 47 (2011), 22.

[22] Brettschneider raises a similar point in "Balancing Procedures and Outcomes Within Democratic Theory: Core Values and Judicial Review," 430.

II. LEGITIMATING DELEGATION

The majoritarian creation of judicial review is a delegation decision because it alters the procedure by which certain rights-questions are decided. In a state without judicial review, the majority conclusively determines what rights citizens have and what counts as an infringement of those rights. Because voting to institute judicial review involves delegation, the decision must fulfill the two conditions of delegation legitimacy: institute both a fair procedure and one that is appropriate for these types of rights questions.

A. CONDITION ONE: THE FAIRNESS FACTOR

The first condition requires that, in order for a delegation decision to be legitimate, the new procedure to which it delegates issues must be a fair procedure. Before analyzing this condition, it is necessary to deal with an objection to the necessity of procedural fairness. A critic might question why the *new* procedure that is employed for making decisions on the delegated issue must be fair if we are already assured that the original procedure that generated the new procedure was fair. That is, if we assume majority vote is fair, then why should we the have to analyze the fairness of the procedure that subsequently takes the place of majority vote for some issues.

We can think through an answer to this question by imagining the situation aboard a crowded lifeboat where not all of us can remain. Jeremy Waldron and Ronald Dworkin, representing opposite spectrums of the proceduralist-instrumentalist divide, both agree that it would be unfair here to use majority vote to decide whom we should force to leave the lifeboat. But Waldron persuasively argues that it is perfectly fine to use majority vote to decide which procedure, among all those possible, to use for the first order decision about whom to actually

throw off.[23] We could use majority vote, in other words, to decide between drawing straws, picking lots, or other procedures for making the lower-level decision about who should go overboard. Importantly, however, Waldron recognizes that the choice of which procedure to use for deciding whom to throw off should be between procedures other than majority vote.[24] That is, we shouldn't be able to use majority vote at the second level to choose majority vote as the first-level procedure for deciding whom to throw off. It strikes me that this is a strong case for the notion that even the new procedures to which a majority delegates decision-making authority must be fair. There would be no reason for an individual to follow the majority's decision to institute an unfair procedure for deciding whom to throw off. If majority vote would be unfair to decide the question directly, then using majority vote to pick majority vote as the method would likewise be unfair. It seems, then, that the delegated procedure must also be fair in order for it to command adherence as the product of a legitimate decision.

Returning to the condition itself, the fairness criterion requires that the new procedure to which the delegable issues are delegated be a fair one. Here I draw on two primary values of majority vote—neutrality and anonymity—that are central to its fairness and show how they can be exemplified by judicial review. Before this, however, I should clarify the role of this argument in my defense of judicial review. In this section, I need only show that judicial review is a *fair* procedure for deciding an outcome on a question of constitutional rights. This is a rather low threshold. Multiple, competing procedures are fair (e.g., lottery, coin flip, etc.) and fairness alone is too a thin a concept to rest democratic legitimacy on. Yet fairness is still necessary for legitimacy. Here, rather than simply make a thin argument from intuition that judicial review satisfies our considered notion of fairness, I make the stronger claim that it exemplifies (several

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[23] Waldron, "A Majority in the Lifeboat," 1050-51.
[24] *Id*.

of) the values of procedural fairness that majority vote does. If this stronger claim fails, the argument that judicial review is still "fair" in the way that a coin flip or lottery draw is fair would suffice to satisfy condition one.

Instantiation of four central procedural values is commonly thought to form the core of the procedural fairness of majority vote: decisiveness, anonymity, neutrality, and positive responsiveness.[25] Relevant here, anonymity means that the procedure reaches the same outcome if two participants trade preferences—the procedure is blind to *who* holds which preference. In other words, "anonymity means that the winner(s) should not depend on which voter has which preference; only the preferences themselves matter."[26] Neutrality is the reverse: if the preferences trade places the outcome is the same—the procedure does not favor one outcome over any other. May's theorem has shown that majority vote uniquely satisfies these four criteria in a choice over two alternatives.[27] But an ideal form of judicial review can, I argue, exemplify traits of both neutrality and anonymity. And the exemplification of these two important procedural properties provides more than just intuitive reasons to believe that judicial review is a fair method for making decisions about individual right.

There are two ways to characterize neutrality as a procedural value. What we might call thin, or formal, neutrality merely mandates that the procedure itself evince no bias toward one or another outcome. Christopher Peters offers an illustration of how formal this concept of thin neutrality is: "Suppose the rule in the applicable jurisdiction is that verdicts in civil cases must be unanimous. This procedure—a form of minority rule, as it gives disproportionate power to a

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[25] See Kenneth O. May, "A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision," *Econometrica* 20 (1952).

[26] On the robustness of majority vote, p. 957.

[27] Peter sums of the force of May's work: "Kenneth O. May shows that majority rule is the only social decision rule that satisfies four minimal axioms. The work that these axioms do is to specify a fair democratic procedure." Peter, "Democratic Legitimacy and Proceduralist Social Epistemology," *Politics, Philosophy & Economics* 6 (2007): 333.

small number of holdouts—also is 'neutral as between the contested outcomes' in the sense that it does not incorporate some inherent preference for one verdict over the other."[28] But this thin concept is not what we value when we value the fact that a procedure is neutral among outcomes.

What we really value is thick neutrality. For a decision procedure to exhibit thick neutrality, the procedure must treat participants' views equally in some relevant respect. It may require equal weight (in, say, the voting context), equal voice (in, say, a dispute resolution setting), or equal chance (in, say, the lottery draw). The particular kind of equality that is necessary for thick neutrality requires attention to the broad, overarching context of the decision.[29] Majority decision in the voting context is thickly neutral in this sense because it gives "each individual's view the greatest weight possible in this process compatible with an equal weight for the views of each of the others."[30] This is what thick neutrality requires in the voting context.

But in the dispute-resolution context—where judicial review is situated—mere equal voting power would likely not be neutral among outcomes in the thick sense. Thick neutrality here requires that each side have an equal voice before the arbitrator. This is precisely what ideal judicial review does. It is thickly neutral because each side is afforded an equal voice—not just through the formality of equal argument time, but also through an equal opportunity to persuade the judges. The procedure is thickly neutral so long as the judges declare the winner to be the one with the "better" argument *ex post* and have not made up their minds *ex ante*.

[28] Christopher J. Peters, *A Matter of Dispute* (New York: Oxford University Press, 2011), p. 124-25.

[29] Even if this makes fairness partially relative to the context, it is still a relativity that is far more blunt than the appropriateness inquiry. It considers one component of fairness to demand different qualities in large subcategories of human action, whereas the appropriateness inquiry looks to the very specific context of individualized decision-making.

[30] Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999), p. 137.

The second important fairness value that judicial review exemplifies is anonymity. A decision procedure "is anonymous if and only if no difference is made in the collective ordering if the identity of the owner of the preference ranking is changed."[31] Or we could say that the procedure is anonymous if the outcome remains the same when the litigants change sides. Notice that neutrality and anonymity both get at the same concern: we don't want decisions made for irrelevant reasons, whether in the context of voting or deciding disputes (or, we might add, in the context of deciding whom to throw off the lifeboat). But they get at that concern differently. Neutrality requires that no outputs be favored; anonymity that no inputs be. In the context of judicial review, this means not only that judges must decide cases *ex post* instead of *ex ante* (the neutrality factor), but also that nothing about who the particular litigants are influences their decision (the anonymity factor). We could test the anonymity of the judicial procedure by determining whether the outcome would change if the litigants reversed their roles. So long as the outcome would remain the same, judicial review is an anonymous procedure.

I have argued that judicial review as a procedure for constitutional rights questions can exemplify both the kind of neutrality and the kind of anonymity that we think crucial to procedural fairness. But there is also another aspect to judicial review that deserves mention. In nearly all the multi-member constitutional courts in the world, decisions are made on the basis of simple majority vote. Though it is beyond the scope of this article to deal with how this internal mechanism might further affect the analysis, it should be sufficient to say that it does nothing to *undermine* the case for the procedural fairness of judicial review. To the extent it matters (from a

[31] David M. Estlund, *Democratic Authority: A Philosophical Framework* (Princeton: Princeton University Press, 2008): p. 78.

procedural perspective) that judges use majority vote, it only helps the case for judicial review's legitimacy.[32]

That judicial review is both anonymous and thickly neutral provide compelling reasons to think it is fair. The procedure is more than just the final vote that the judges make on the case. It involves argument, persuasion, deliberation, compromise, and other aspects of collective decision-making characteristic of a "forum of principle."[33] Yet it is possible that a procedure could possess these attributes and still be an all-things-considered *unfair* procedure; so too could another procedure lack one or both of these attributes and still be an all-things-considered *fair* procedure. The argument here does not, in other words, prove in any strict sense that judicial review is fair. What it does do is give us more than just intuitive reasons to think that the practice is fair. Beyond this, however, our intuitions that it is fair are powerfully convincing.[34]

B. CONDITION TWO: APPROPRIATENESS

Condition two requires that the new procedure be an *appropriate* procedure for the kind of decision delegated to it. The need for a value of appropriateness arises from the recognition that there must be some kind of agreement or "fit" between the subject matter of the decision and the procedure employed to make it. This, I submit, is fundamentally different from requiring simply that the procedure be fair. Take, for example, a coin flip. We can all agree that flipping a coin is a fair decision-making procedure. So too may be drawing straws, choosing by lottery, and many other types of procedures employed in everyday decision-making. But we would also all

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[32] Some argue that it does nothing either way, e.g., Guha Krishnamurthi et. al. in "An Elementary Defense of Judicial Majoritarianism," *Texas Law Review See Also* 88 (2009): 33.

[33] Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), p. 33.

[34] For instance, it is reported that in the United Kingdom, 71 percent of the population supported instituting strong judicial review when this option was being considered. See Waldron, "A Right-Based Critique of Constitutional Rights," 46. This would be hard to square with a belief that the procedure was unfair. Waldron marvels over this aspect of judicial review: "It is remarkable that people put up with this—for example that supporters of Vice-President Gore were willing to accept the bare majority decision in *Bush v. Gore*." Waldron, "Five to Four: Why do Bare Majorities Rule on Courts?," 23 n. 40. And yet it seems that our considered judgments do reveal judicial review to be a fair decision-making procedure for constitutional rights questions.

agree that using that coin flip to decide whether an accused murderer is guilty or not is *inappropriate*. As Adam Samaha puts it, "[f]lipping a coin to decide a case is among the most serious forms of judicial misconduct."[35] I think this is more than a matter of mere semantics. That is, flipping a coin does not cease to be *fair* in the context of a judge's decision about an accused's guilt. Rather, its procedural flaw is that it is not appropriate for deciding that type of question.

When determining whether a certain procedure is appropriate for a particular type of decision, several factors are key. First, the procedural values exemplified by the procedure should be relevant for the kind of decision being made. For example, one of the important procedural values exemplified by the coin flip is equal weighting of the alternatives. So if equal weight were important for the decision being made, then, *ceteris paribus*, a coin flip would be appropriate for making that decision. If, however, the type of decision was not one for which equal weight was a benefit—say, a decision by a group of disagreeable doctors about how to best treat a patient—then a coin flip would be inappropriate to use in making that decision. Note too that we would normally agree that equal weighting in the medical context would miss something important about the nature of these types of decisions (i.e., that there are verifiably right answers in this domain). Second, if the type of issue is naturally prone to distortive influences, the procedure should eliminate the influence of extraneous factors—or at least cabin those factors as much as possible. This second criterion is not primarily a fairness concern because, to the extent the type of decision is incorporated into the analysis, the fairness inquiry paints with too broad a brush to determine if a *particular decision* is prone to distortive influence; the fairness inquiry simply determines whether the procedure is fair in the abstract (or in a broad category of human affairs). For example, deciding by majority vote is a fair procedure in a broad swath of human

[35] Adam M. Samaha, "Randomization in Adjudication," *William & Mary Law Review* 51 (2009): 1.

affairs—from choosing a restaurant for a group dinner to electing the president of a state—but it will be inappropriate in some particular contexts, such as picking which passenger should leave the lifeboat if not all can remain. In other words, the appropriateness inquiry takes a more fine-grained approach to decision-making than the fairness analysis allows.

The importance of this second criterion can be seen in the judge's decision about the accused's guilt. One of the reasons a criminal trial, with its attendant procedural rules, is appropriate for deciding the guilt or innocence of the accused is that the procedure is designed to minimize the risk of irrelevant and arbitrary factors influencing the decision. And removing these extraneous factors does not imply a purely instrumental reason for the appropriateness inquiry. Consider, for instance, that we might want to remove extraneous factors from the decision-making process in the lifeboat without thinking that that improves any kind of instrumental accuracy—if accuracy even has any meaning for decisions made in the lifeboat situation.[36]

The appropriateness condition thus requires choosing from the set of possible fair decision-making procedures one that fits the context. In short, decision-making procedures—even fair ones—are not fungible. This is the point David Estlund misses in his critique of the position he calls "fair proceduralism."[37] From his thin description of fairness—and the recognition that many procedures are "fair"—he concludes that "[f]air proceduralism, which would be satisfied by flipping a coin, is not a plausible account of the superiority of democratic principles and institutions over coin flips."[38] No reasonable account of democratic proceduralism should allow a coin flip to be substituted for majority vote on routine matters of legislation. But without something like the appropriateness condition, proceduralism seems devastated by this

[36] Commenting on this example, Waldron remarks: "I suspect Dworkin is right that a particular decision of this kind is likely to summon up all sorts of motives which, however compelling they are personally for each passenger, are not relevant from the perspective of the group." Waldron, "A Majority in the Lifeboat," 1053.

[37] Estlund, *Democratic Authority*, 83.

[38] *Id*.

critique. As Thomas Christiano notes, "[i]f . . . one thinks that one ought to make decisions democratically and not by lottery, that suggests that something other than procedural fairness is doing important work in the justification of democracy."[39] Christiano, of course, thinks substantive, procedure-independent values should sometimes limit majority decision-making; I contend that the appropriateness condition does this necessary work to circumscribe how the majority can relinquish its power.

In his insightful response to Estlund's argument, Christiano recognizes the importance of the link between the type of decision being made and the procedure employed to make it. Christiano sees this as part of the fairness analysis, that "what fairness demands or even recommends depends on the enterprise that is being regulated by fairness."[40] Eschewing any notion of essential fairness, he argues that Estlund's account creates too stringent a requirement for the fair proceduralist. Like Christiano, I think Estlund's critique of fair proceduralism fails to adequately take stock of the differences in the "enterprise that is being regulated." But I think Estlund is right that procedures such as a coin flip are still "unimpeachably fair procedures."[41] We should not, in other words, vary our concept of fairness to match each individual, micro-level decisional context. Instead, the appropriateness condition offers a way to validate our judgment that some clearly fair procedures—like a coin flip or random lottery—are inappropriate to use in some contexts.

The two overarching principles I identified as guiding the appropriateness analysis can be illustrated in the reasons we reject majority vote as an appropriate procedure in the lifeboat

[39] Thomas Christiano, "Debate: Estlund on Democratic Authority," *Journal of Political Philosophy* 17 (2009): 230.

[40] Christiano, "Debate: Estlund on Democratic Authority," 231. See also *id*. at 232, stating: "Fair contests, fair trials, fair procedures of hiring and firing involve very different criteria of relevance and the fairness is dependent on the nature of the tasks."

[41] Estlund, *Democratic Authority*, 84.

situation. This example highlights how even a fair procedure can be inappropriate in some contexts. (So too does the context in which an accused's guilt is decided by flipping a coin.) Dworkin outlines the procedural problem in the lifeboat situation:

> Suppose passengers are trapped in a lifeboat on the high seas that will sink unless one person—any person—jumps or is thrown overboard. How shall the group decide who is to be sacrificed? It seems perfectly fair to draw straws or in some other way to let fate decide. That gives each person the same chance of staying alive. *Letting the group vote, however, seems a very bad idea because kinship, friendships, enmities, jealousies, and other forces that should not make a difference will then be decisive.*[42]

Dworkin uses the lifeboat situation to argue that majority vote is not an intrinsically fair procedure, but what it really seems to illustrate is that majority vote is *inappropriate* in this situation. By disaggregating the fairness inquiry from the appropriateness inquiry, we can save our intuition that procedures like majority vote, a coin flip, and a lottery draw are fair procedures without having to give up the feeling that there is something wrong about using these methods in particular situations. And any analytical framework that vindicates our considered notions of fairness should be preferred to one that requires rejecting (or reforming) some of our foundational beliefs.

I argued that the concept of appropriateness is illuminated by two principles: (1) the procedure should instantiate values relevant to the decision being made and (2) the procedure should exclude distorting, arbitrary, or extraneous factors. In the lifeboat, we would say that certain procedural values of majority vote, for instance positive responsiveness, are not relevant for deciding this type of question. The principle requiring relevant attributes of the procedure

[42] Dworkin, *Freedom's Law: The Moral Reading of the Constitution*, 139.

fails in the same way that a coin flip among the group of doctors fails. Positive responsiveness to individual preferences is not useful or relevant for decisions in the lifeboat. It is affirmatively harmful in introducing factors that ought to be excluded. Similarly, for the second principle, the decision in the lifeboat is undoubtedly subject to the distorting influence of arbitrary factors. And majority vote does nothing to mitigate or cabin these concerns—it actually exacerbates them. It is therefore not an appropriate procedure to employ in this context.

With this analytical framework in place, we can see how judicial review can be an appropriate procedure for questions of constitutional rights. These reasons need not be instrumental reasons predicated on the notion that judges are more likely to get to the "right" answer than legislatures. "Rather," as Aileen Kavanagh argues, "they are based on general institutional considerations about the way in which legislatures make decisions in comparison to judges [and] the factors which influence their decision."[43] Even if we can't agree on what an instrumental assessment for good or bad outcomes would look like, we can often agree on factors that should not play into considerations of rights questions.

I argue that four important procedural values qualify judicial review as an appropriate procedure for deciding constitutional rights questions: transparency, deliberative capacity, principled reasoning, and impartiality. Though these values may also be helpful instrumentally, in leading judges to the "right" answer, any instrumental value they possess—or lack—is irrelevant for my argument.[44] In other words, these are attributes we value regardless of the outcome. And, consistent with the two principles outlined above, these are the kinds of attributes

[43] Kavanagh, "Participation and Judicial Review: A Reply to Jeremy Waldron," 466. To be fair, Kavanagh calls these reasons "instrumental" reasons, but they do not seem to be necessarily so. I hope to show in the rest of this section why they need not be instrumental values only.

[44] Spector also expresses the view that this process is valuable because it "allows the direct participation of the right holder in the deliberation, and warrants that the response, *be it favorable or unfavorable*, will be founded on reasons, reather than sustained by power." Spector, "Judicial Review, Rights, and Democracy," 292 (emphasis adeed).

that are relevant for deciding rights questions and aid in removing arbitrary and extraneous factors from the process.

First, transparency is an important value for government decision-making in general, and regardless of the outcome reached. The ideal constitutional court exemplifies this attribute through, *inter alia*, its published opinion writing process. Rather than simply declare that the petitioners have won, the constitutional court gives reasons for its decisions. There is a complicated literature about what it is courts do (as a descriptive matter) and ought to do (as a normative matter) in giving reasons for their decisions, but the fact that they give reasons at all is important. And so too is the fact that the reasons they give are expected to be intelligible in the unique cultural and moral setting of their society. Note, too, that this is important whatever the court decides. U.S. Supreme Court Justice Clarence Thomas, describing the way he and his clerks write opinions, expressed this view of the intrinsic value of transparency:

> The editing we do is for clarity and simplicity without losing meaning, and without adding things. You don't see a lot of double entendres, you don't see word play and cuteness. We're not there to win a literary award. We're there to write opinions that some busy person or somebody at their kitchen table can read and say, "I don't agree with a word he said, but I understand what he said."[45]

There is great benefit to the public reason-giving that is characteristic of constitutional courts, and this value extends beyond reasons or results that we agree with.

Second, deliberative capacity is a key component of the ideal judicial review process. Deliberation takes place in two phases for the judiciary. The first is through interactions between the litigants and the judges and the second is through interactions among the judges (or between

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[45] Quoted in Conor Friedersdorf, "Why Clarence Thomas Uses Simple Words in His Opinions," *The Atlantic,* February 20, 2013, <http://www.theatlantic.com/politics/archive/2013/02/why-clarence-thomas-uses-simple-words-in-his-opinions/273326/> (accessed March 12, 2013).

the judges and their clerks). The first deliberative component takes place when litigants submit written arguments and present an oral defense of their arguments. As well as serving the transparency function, this opportunity also allows judges to test the strength of arguments presented to them. The second deliberative component takes place after these interactions and occurs when judges confer with one another or with their own staff.

Both kinds of deliberation are also—like transparency—intrinsically valuable. Whether a judge ultimately votes for the petitioner or for the respondent, the fact that she deliberated about the decision is a non-instrumental process value. Recall that in describing the fairness of judicial review, we required the judges to decide questions *ex post*, after listening to the competing claims. Once we have this notion, we can see how deliberation is an important value. The deliberation provides evidence that judges are not making decisions on rights questions by using flawed or faulty logic, or worse, by using irrelevant or arbitrary criteria of better and worse arguments.

The third institutional value of judicial review, principled reasoning, builds on the foundation of transparency and deliberative capacity. Not only does the ideal constitutional court write opinions after deliberation, it also gives the *kinds* of reasons that judges ought to give when deciding rights questions: principled reasons. They are, in short, the kinds of reasons we commonly think are appropriate for theorizing about political morality. As Waldron recognizes, "[i]t is often thought that the great advantage of judicial decisionmaking on issues of individual rights is the explicit reasoning and reason-giving associated with it."[46] It shouldn't matter, for instance, what race, ethnicity, religion, or political party the petitioner belongs to. Nor should it matter that the judge would be better off financially if the respondents won the case. But

[46] Jeremy Waldron, "The Core of the Case Against Judicial Review," *Yale Law Journal* 115 (2006): 1382.

dismissing this kind of blatant bias is only half the account of principled decision-making; Herbert Wechsler famously detailed the other component:

> [T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?[47]

Partial, parochial, and arbitrary reasons are incompatible with the obligations of principled decision-making. So too are insufficiently neutral or general reasons. As Martin Golding describes it, "in a case the resolution of which depends upon taking into account countervailing considerations, principled judgment requires that the decisionmaker formulate a general criterion that shall serve as a principle of decision in cases of its type."[48] Adhering to these generally applicable reasons is what makes the institution principled. From this explication, we can see that "[p]rincipled legal judgment is not so much a matter of content as it is of form."[49] Principled reasoning is thus a procedural value of the constitutional court and has intrinsic value regardless of the outcome.

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[47] Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73 (1959): 15.

[48] M. P. Golding, "Principled Decision-Making and the Supreme Court," *Columbia Law Review* 63 (1963): 50.

[49] *Id*. at 42-43.

Finally, impartiality is a key procedural virtue realized by an idealized practice of judicial review. We can say that "an impartial procedure . . . is one in which factors extrinsic to the merits of a dispute have no tendency to favor one side of the dispute over another."[50] Impartiality is similar to, and includes, the ideas of neutrality and anonymity that I drew upon to show the fairness of judicial review; it might, in fact be thought of as the conjunction of neutrality and anonymity. Impartiality in the constitutional court means that the judges will decide cases based on the strength of the arguments and claims presented to the court and not on extraneous factors. Impartiality does not describe the process of decision-making—that is where principled reasoning comes in; rather, it describes the institutional preconditions necessary for that rationally principled posture. As Kavanagh argues, "[s]ince the court upholding an entrenched Bill of Rights has no interests of its own to further, and is relatively unaccountable to the various political interests in society, it can provide an important forum in which the issues can be decided in light of constitutional principles."[51] Though some scholars see impartiality as an epistemic (and so instrumental) virtue of judicial review, it need not be seen as only valuable in this instrumental sense. Impartiality helps remove the irrelevance. If this is all it did, I think we should still find it valuable.

But even after laying out these four values, and how they are exemplified by judicial review, we still may wonder what this has to do with judicial review's appropriateness for deciding constitutional rights questions. The connection here is that rights questions are particularly suited to procedures exemplifying these four attributes. It is not simply that we value transparency, deliberative capacity, principled reasoning, and impartiality as attributes of decision-making procedures in general (we may in some circumstances and may not in others). It

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[50] Peters, *A Matter of Dispute*, 125.
[51] See Kavanagh, "Participation and Judicial Review: A Reply to Jeremy Waldron," 476.

is that we value these four characteristics when dealing with rights questions in particular. And we value these characteristics for more than their supposed ability to help us get to some desirable outcome.

Recall Dworkin's discussion of the lifeboat situation and the problems with majority vote in that context—"kinship, friendships, enmities, jealousies, and other forces that should not make a difference will then be decisive."[52] The problem was not that these kinds of distractions and irrelevancies impeded the passengers from producing the "right outcome"—whatever that could be—but that it distorted the decision-making process in a way that was inappropriate for rights questions. The four values I have outlined perform the same function. We do not appreciate them because they increase the instrumental probability of good results. We think they are important regardless of whether the outcomes are just or unjust in our opinion. When the judiciary possesses these four values, we have reasons to accept that the decision-making process is one that ought to be respected, irrespective of our particular view of the resulting decision. Much in the same way that the collective opinion of the majority (as expressed in legislation) commands our respect in spite of disagreement, so to do judicial decisions on questions of constitutional rights.

It might be helpful at this point to take a step back and locate the argument of this section in the context of the broader whole. Without this situating, one might be tempted to object that these four values cannot conclusively establish the legitimacy of judicial review. That may be true. They may not *alone* sustain the conclusion that judicial review is a procedurally legitimate institution. But I have not chosen the direct and ad hoc route of arguing that judicial review is legitimate because it instantiates these procedural values that are important for deciding rights questions. Rather, I have set this defense within a broader analytical framework for delegation

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[52] Dworkin, *Freedom's Law: The Moral Reading of the Constitution*,139.

legitimacy. That framework requires that delegation decisions, like the decision to institute judicial review, satisfy two important conditions before they can be deemed legitimate. The argument in this section about the procedural values of judicial review is designed to show that judicial review is an appropriate procedure for deciding rights questions. But one can disagree with my characterization of these values and still maintain that condition two is satisfied by judicial review. Or one can accept my broader analytical framework and reject the conclusion that judicial review satisfies it. The four values that I have imputed to judicial review are the kinds of values that ought to lead us to conclude that judicial review is appropriate for questions of constitutional rights. Combined with the fairness of the procedure, we have reasons—ones agreeable to the proceduralist—to conclude that judicial review is a legitimate institution in a liberal democracy.

III. PROCEDURALISMS, PURE AND IMPURE

In this final Part, I address the objection that the two legitimacy conditions (individually or in conjunction) comprise outcome-based standards that transform my account into an instrumentalist one. I should note at the outset that I have no interest in defending one kind of pure procedural theory of democratic legitimacy. This kind of pure proceduralism entails that there is no standard independent of the procedure by which we *could* judge outcomes. There is no such thing as right or just that is independent of the procedure. The outcome simply is right or just *because* it resulted from the procedure. A situation of fair gambles is supposed to be the paradigmatic pure procedural device: we cannot say that the distribution that results from a situation of fair gambles is right or just independently of the procedures. I do not defend this

theory because it seems to me to leave out important considerations of why we value fair procedures in the first place.[53]

The rejection of (this version of) pure proceduralism, however, is not a rejection of a fundamentally proceduralist account of legitimacy.[54] In other words, one can ground the legitimacy of decisions in the procedure that produced them, without making decisions "evaluable *solely* in terms of the procedure that brought them about."[55] The difference between this kind of impure proceduralism and an impure instrumentalism is that the former makes fair procedures a necessary condition for legitimacy (if not always sufficient), whereas the latter does not. My account keeps procedures in the foreground. This impure proceduralism also allows a criticism of decisions without thereby calling into question their legitimacy. Bad decisions can be legitimate for the proceduralist and may, all things considered, not command our obedience. The instrumentalist lacks an easy way to distinguish between a legitimate yet bad decision and an illegitimate one.

With Christiano, I contend that while "[p]ure proceduralism is completely false to the practice of democratic citizenship[,]. . . the democratic process has an intrinsic fairness."[56] Thus, although we may be able to say that majority decision can result in deeply unjust decisions according to our preferred principle of justice, our principle of legitimacy privileges procedures

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[53] I largely agree with the thrust of Brettschneider's project: "Contra pure proceduralists, however, I suggest that at times procedures can produce outcomes that undermine persons' autonomy and equal status. In such cases, the very democratic rationale for fair procedures has been undermined." Brettschneider, "Balancing Procedures and Outcomes Within Democratic Theory: Core Values and Judicial Review," 424.

[54] *See* Christopher G. Griffin, "Debate: Democracy as a Non-Instrumentally Just Procedure," *Journal of Political Philosophy* 11 (2003): 120 for a proceduralist account that is not purely procedural.

[55] See Christiano, "The Authority of Democracy," 1 (emphasis added). Christiano is a good example of an impure proceduralist of the stripe I describe here. *Id*. at 25.

[56] Christiano, "The Authority of Democracy," 4.

above all else.[57] And the limits that the framework I propose establishes are *procedural* limits on majority vote, not substantive ones.

Yet to even situate this framework in the impure proceduralist camp raises challenging questions of categorization. It is undeniably difficult to determine precisely the boundary between process values and outcome values. For our purposes a helpful starting point is to ask whether the value is a property of the process or of the outcome. But after starting here, we must recognize that there are some values we ascribe to procedures—such as the property "reliable"—that are still ultimately outcome values. We would call a procedure reliable, and thus ascribe the property *to the procedure* and yet we only think reliability is an important value if we think the procedure is reliably producing some desirable result. So while we might think that property-specification is a starting point, we cannot also end there. At this point Joshua Cohen's categorization helps: "a procedural value," he argues, "is a value used for the assessment of procedures without regard to the results of those procedures."[58] It is crucial, therefore, to determine whether the values of "fairness" and "appropriateness" are ascribable because of the results (as reliability is) or without regard to them.

The concern here is that what conditions one and two are really analyzing is the outcome of a delegation decision and not just the process by which it was produced. And the proceduralist was supposed to be unconcerned with outcomes. There is a difference, however, between a substantive outcome and a procedural outcome. I argued earlier that delegation decisions must satisfy more than the minimal legitimacy criterion (i.e., being produced by majority vote) because by changing future decision procedures they potentially undermine their own justification. This is the same reason the proceduralist can analyze the "outcome" of a delegation

[57] See Waldron, "A Right-Based Critique of Constitutional Rights," 32.
[58] Joshua Cohen, "Pluralism and Proceduralism," *Chicago-Kent Law Review* 69 (1994): 606.

decision without becoming an instrumentalist. She may not be able to claim the mantle of pure proceduralism, but she does not become an instrumentalist by analyzing procedural outcomes alone. And it is crucially important that the only outcome that my account of delegation legitimacy allows inquiry into is an outcome that is itself a procedure (and no more). Thus, it is not inconsistent with the reasons that proceduralism is commonly invoked in the first place—namely, that intractable disagreement on what counts as a good decision renders all instrumental accounts pragmatically useless. My account proposes no method to discover whether a substantive outcome is correct, whether some procedure leads to good results, whether it produces the most just society, betters its citizens, or promotes the common good; nor do I employ any other instrumental criteria. The conditions of delegation legitimacy are thus still properly viewed as procedural criteria for democratic decision-making.

And we can observe how they operate as procedural restraints. To use an example from Gerry Mackie's excellent treatment of the concept:

> To manufacture gunpowder, take saltpeter, charcoal, sulfur, and other inputs, and process them in proper quantity, sequence, and conditions. The materials exist prior to the procedure, but they become inputs to the procedure, which further must handle them properly, for example mixing the inputs in the proper proportion. Both the materials *as inputs*, and their right *handling*, are not independent of the manufacturing procedure.[59]

Like manufacturing gunpowder, it is the right handling of decisional inputs that is governed by conditions one and two of my framework. Fairness, for example, is used here to evaluate the resulting procedure. And the fairness of the procedure is not instrumentally valuable to any particular outcome. It is intrinsically valuable. Condition two, the appropriateness condition,

[59] Mackie, "The Values of Democratic Proceduralism," 10.

works similarly. We ascribe the property "appropriate" to the procedure. When analyzing appropriateness we are singularly unconcerned with the consequent decision made using the new procedure. We aren't, therefore, focused on any instrumental benefits that appropriateness provides, but on the fit between the type of issue (i.e. the inputs) and the procedure. Thus, even though conditions one and two look to the "result" of the delegation decision itself, they examine only the procedural values exemplified by the procedural outcome.

There is, then, no good reason to think that a proceduralist cannot subscribe to the two conditions outlined above. The newly delegated-to procedure must be both fair and appropriate. Neither of these conditions hinges on controversial judgments about what procedure promotes the common interest or best serves the common good. In short, the account here is fundamentally procedural. It is *about* procedures all the way down, even if this requires analyzing procedural outcomes.

Once we have seen how each condition remains procedural, we can assess more closely how the principle of legitimacy that these two conditions encompass is itself essentially procedural. First, however, it is useful to distinguish the principle of legitimacy for a simple fair proceduralist:

> Simple Proceduralist Principle of Legitimacy: *Decision A is legitimate if and only if A is the outcome of a fair and appropriate procedure.*

The use of a fair and appropriate procedure is both necessary and sufficient to legitimate decision A. This is the classic proceduralist position that falls prey to the objection of tyranny imposed by the fair and appropriate procedure of majority vote. It has no resources to critique that kind of decision. I have tried to show how a fundamentally proceduralist account can incorporate this

concern in a non-question begging way. My account proposes a significant rider to the simple proceduralist principle:

> Qualified Proceduralist Principle of Legitimacy: *Decision A is legitimate only if A is the outcome of a fair and appropriate procedure. If A is not a delegation decision, then it is legitimate. But if A involves delegation to procedure Z, then Z must be a fair and appropriate procedure.*

Here we can see that production by a fair and appropriate procedure remains a *necessary* condition for A's legitimacy—whether it is a delegation decision or not. But if A is a delegation decision, then the new procedure Z must be a fair and appropriate procedure as well.

Returning once more to the lifeboat example, we can see how the qualified principle works. Running this through the qualified proceduralist principle, we see that the decision about which procedure to use for deciding who should leave the lifeboat is a delegation decision, and consequently needs to be made by a fair and appropriate procedure and in turn prescribe a fair and appropriate procedure. The decision is made using majority vote, and majority vote is fair and appropriate for deciding which procedure to use. So long as one of the new selected procedures is both fair and appropriate for deciding whom to throw off, the delegation decision is legitimate and thereby binds the participants. It is crucial to emphasize that majority vote is not one of the procedures that the participants are choosing from when they prescribe another procedure to use. We already found that majority vote is *not* fair or appropriate for making the decision about whom to throw off, even if it is fair and appropriate for picking which procedure to use to decide that question. Thus, the qualified proceduralist principle of legitimacy does not require complex and controversial judgments about the justice of decisions. *Procedures* are what make a decision legitimate and *procedures* are therefore the source of obligations for citizens.

IV. CONCLUSION

Though critics have been contending for decades that "[t]he American ideal of democracy lives in constant tension with the American ideal of judicial review in the service of individual liberties,"[60] this article has argued that the majority decision to institute judicial review can be legitimated by a proceduralist account. I have made this case by proposing a framework with which to analyze majority decisions to delegate final decision-making authority more broadly. This framework rests on the premise that "the purpose of legitimacy inquiries is to determine whether citizens have a moral reason to accede to political decisions with which they substantively disagree."[61]

The qualified proceduralist principle of legitimacy that I employed was an attempt to instantiate this moral ideal. It required that delegation decisions be authorized by a fair and appropriate procedure and in turn authorize a fair and appropriate procedure. On this account, we have no moral reason to accede to the political decision that elects a dictator. But when judges on a constitutional court have been authorized to exercise judicial review, we have reasons to think this delegation is legitimate. Consistent with the qualified proceduralist principle, the decision to create the constitutional court was made (we stipulated) by a fair and appropriate procedure, majority vote; and, since this creation was a delegation decision, we also had to be sure that the procedure of judicial review is fair and appropriate for its delegated issues. I have argued it is.

Citizens in jurisdictions where courts are authorized to exercise the powers of judicial review have reasons to accept decisions they disagree with. Here Richard Wollheim's paradox of democracy is mirrored in a paradox of judicial review. In a democracy, I might affirm both that A is my preferred outcome (and the one I think most just) and affirm also that B ought to be the

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[60] Robert H. Bork, "Judicial Review and Democracy," *Society* (1986), 5.
[61] Fallon, "The Core of an Uneasy Case for Judicial Review," 1719.

outcome because it received the most votes in the assembly. In the same vein, I might affirm both that a win for the petitioner is my preferred outcome (and the one I think most just) and affirm also that a win for the respondent ought to be the outcome because it received the most votes on the constitutional court. “Anyone,” says Waldron, “whose theory of authority gives the Supreme Court power to make decisions must—as much as any democrat—face up to the paradox that the option he thinks just may sometimes not be the option which, according to his theory of authority, should be followed.”[62] But the paradox dissolves once we separate the issue of good outcomes from the issue of fair procedures. Or as Waldron puts it

> [A] normative political theory needs to include more than just a basis for justifying certain decisions on their merits. It needs to be more than, say, a theory of justice or a theory of the general good. *It also has to address the normative issue of the legitimacy of the decision-procedures that are used to make political decisions in the face of disagreement*.”[63]

The qualified proceduralist principle of legitimacy that I proposed does just that. And because judicial review satisfies that standard, the majority’s decision to institute the practice is legitimate. It is morally binding in a way that the election of a tyrant never could be.

[62] Waldron, *Law and Disagreement*, 247.
[63] Waldron, “The Core of the Case against Judicial Review,” 1406 n. 65 (emphasis added).