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Value Pluralism, Constitutionalism, and Democracy: Waldron and Berlin in Debate

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Abstract: Jeremy Waldron claims that Isaiah Berlin wrongly neglects, and is hostile to, constitutional and democratic institutions. I argue that although Berlin offers no extended discussion of constitutionalism or democracy, he is not hostile to them. Moreover, the logic of Berlin's value pluralism is strongly supportive of these ideas—for example, it fits well with constitutionalist notions such as the separation of powers and checks and balances. On the other hand, Waldron's rejection of judicial review on the ground of democracy is questionable in these same pluralist terms. Here I argue that Berlinian pluralism supports democracy as long as this is inclusive in its outcomes. But contemporary democracy cannot be relied upon to be sufficiently inclusive, in part because of the effects of the war on terror and the rise of populism. Under these conditions it is unwise for pluralists to dispense with judicial review.

In 2012 Jeremy Waldron delivered his inaugural lecture as Chichele Professor of Social and Political Theory at Oxford, a piece later included in his *Political Political Theory*.[1] The central theme of his lecture was that the study of political theory at Oxford, and in the UK more generally, suffers from an especially serious case of a more widespread affliction in the discipline, namely, the neglect of institutions. Compared with American universities, those of the UK are especially poor in this respect. But the tendency everywhere is to treat political theory as a branch of moral philosophy, focusing on normative values, principles, and arguments, and to neglect issues of how those norms are expressed in or contained by political structures such as legislatures, executives, and judiciaries. Much of this trend follows in the wake of Rawls's focus

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[1]Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Cambridge, MA: Harvard University Press, 2016). Parenthetical references in the text are to this work.

on justice as the paramount value in politics. Although Waldron does not deny the importance of justice, he objects that "precious little attention is paid in the justice industry to questions about political process, political institutions, and political structures" (3).

The most prominent target of Waldron's wrath is one of his predecessors in the Oxford chair, Isaiah Berlin. For Berlin, Waldron writes, political theory is "moral philosophy applied to social situations" (4).[2] "To read almost any of Berlin's work is to read essays that are resolutely uninterested in the political institutions of liberal society. Beyond airy talk of freedom and openness, Berlin was simply unconcerned with the ways in which liberal or democratic political institutions might accommodate the pluralism he thought so important in human life" (4–5). Especially disappointing is Berlin's neglect of, indeed hostility to, the constitutionalism of the Enlightenment, a neglect and hostility he carries over into his attitude to democracy.

I begin this paper by offering a defense of Berlin against Waldron's criticisms. Berlin, I argue, makes little mention of constitutionalism and democracy in his work but he is not hostile to them. However, I am more interested in taking a step beyond Berlin: whatever his own views may have been, the logic of his political thought tends very much to the support of both constitutionalism and democracy. That is because there are strong links between these ideas and Berlin's central notion of value pluralism, the idea that fundamental human values are irreducibly multiple, incommensurable, and often conflicting. A good deal of what Waldron says actually bears this out. His support for the separation of powers, for example, fits well with the value-pluralist outlook.

On the other hand, Waldron's well-known rejection of judicial review is questionable in these same terms. Waldron's position is based on democracy: judicial review is allegedly undemocratic. I argue that Berlinian pluralism, too, fits with democracy as long as this is inclusive in its outcomes, respecting the rights of individuals and minorities. Only in this way are all relevant voices properly respected, hence all relevant values. However, contemporary democracy cannot be relied upon to be sufficiently inclusive. In part this is an effect of current political phenomena such as the war on terror and the populism that has become so powerful. But underlying these developments is a permanent tendency in human societies toward hostility to minorities—a point conceded by Waldron himself. Under these conditions it is unwise for pluralists to dispense with judicial review.

[2]Quoting Berlin in an interview published in Isaiah Berlin and Ramin Jahanbegloo, *Conversations with Isaiah Berlin* (New York: Scribner's, 1991), 46. Waldron describes Berlin as speaking in "a 1997 interview a few months before his death" (*Political Political Theory*, 4), but Jahanbegloo makes it clear that his interviews with Berlin took place in 1988 (*Conversations with Isaiah Berlin*, xiii–xiv).

The paper is divided into six sections. I begin by setting out Waldron's criticism of Berlin, to which I reply that Berlin should be acquitted of the hostility to constitutionalism and democracy that Waldron attributes to him. Second, I go beyond Berlin by arguing that his value pluralism can be used to provide positive support for constitutionalism and democracy. The third section examines Waldron's "democratic constitutionalism" from a pluralist point of view, endorsing his support for the separation of powers and extending this to a pluralist case for checks and balances. Fourth, however, I question his argument against judicial review on both general and pluralist grounds, arguing that it depends on an unrealistic assumption about the inclusivity of contemporary democracy. Fifth, I set out a series of positive arguments in favor of judicial review, all based on pluralist starting points. Finally, I respond to an objection alleging that value pluralism is too equivocal a basis on which to defend specific democratic institutions, judicial review in particular.

Does Berlin Reject Constitutionalism and Democracy?

According to Waldron, Berlin's work is marked by a serious and culpable neglect of the constitutionalism of the Enlightenment. The institutional designs proposed by thinkers such as Montesquieu, Voltaire, Madison, and Hume amount to a body of work that "is massively important," having "transformed our political thinking out of all recognition," and leaving as its legacy the American and French Revolutions, their constitutions, and their rejection of monarchical and aristocratic political forms. Yet "Berlin, supposedly one of our greatest interpreters of Enlightenment thinking, had very little to say about this heritage of thought and constitutional achievement. I have ransacked his work and I mean it: there is almost nothing on Enlightenment constitutionalism in his writings—some few rags and paltry blurred shreds of paper here and there, but nothing of any significance" (274).

Why was this? Waldron suggests various possibilities. The most obvious is that Berlin "was just uninterested in this aspect of the Enlightenment," indeed that "he just wasn't interested in law, constitutions, or institutional politics generally" (287, 275). Waldron judges this to be "probably the best explanation" (287). Nevertheless, a further possibility, Waldron thinks, is that Berlin deliberately avoided discussing Enlightenment constitutionalism because it was an inconvenient truth. "This was not a blind spot at all but deliberate avoidance of an aspect of the Enlightenment heritage that would have falsified Berlin's central proposition that Enlightenment social design was a matter of monistic and bullying perfectionism" (287).

As is well known, Berlin traced the Soviet form of totalitarianism to the scientistic and therefore monistic stream of thought that he found in the Enlightenment. Waldron sees Berlin as equating all Enlightenment institutional design with that tendency. "He proceeded in his work as though all

attempts at social and political design were on a par, and as though everything invested in the eighteenth-century constitutionalist enterprise was beneath contempt" (275). "According to Berlin, Enlightenment social design was arrogant and monistic, seeking a fatuous reconciliation of all values and a comprehensive solution of all conflicts in a glittering work of reason" (283). But Berlin found that the constitutionalist strand of Enlightenment thought did not fit this pattern, so he deliberately ignored it in order to preserve the overall narrative. At least, this is a possibility, but Waldron reflects that it is such "a frightful thing to say about a public intellectual" that we should put it aside and return to "maybe the more charitable explanation" that Berlin simply was not interested in Enlightenment constitutionalism (275). So charitable is Waldron that he repeats the charge of deliberate suppression later (287).

To this Waldron adds the thought that yet another reason for Berlin's alleged indifference or hostility to democratic institutions may be that he is indifferent or hostile to democracy itself. According to Waldron, Berlin was at best "not particularly concerned with political participation"; at worst his "general hostility to democracy and participatory liberty … is a matter of record" (285, 286).

Waldron's thesis is striking, but how accurate is it? First, his contention that Berlin wrote very little about institutions in general and Enlightenment constitutionalism in particular is broadly correct. The contention becomes less convincing when Waldron extends it to Berlin's followers, since many people influenced by Berlin have used his work to write about institutions of various kinds.[3] Still, it is true that although Berlin himself wrote "in the

[3]To consider only those influenced by Berlin's value pluralism (rather than by his conceptions of negative and positive liberty etc.), these include several authors who have written about constitutional structure: Richard Bellamy, *Liberalism and Pluralism: Towards a Politics of Compromise* (London: Routledge, 1999); Richard Bellamy, "Liberalism and the Challenge of Pluralism," in *Rethinking Liberalism*, ed. Richard Bellamy (London: Pinter, 2000); William Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge: Cambridge University Press, 2002); William Galston, "Pluralist Constitutionalism," *Social Philosophy and Policy* 28, no. 1 (2011): 228–41; Iddo Porat, "The Plural Implications of Value Pluralism: A Comment on Maimon Schwarzschild's 'On This Side of the Law and On That Side of the Law,'" *San Diego Law Review* 46, no. 4 (2009): 909–24; Maimon Schwarzschild, "On This Side of the Law and On That Side of the Law," *San Diego Law Review* 46, no. 4 (2009): 755–72. Berlinian pluralism has also been applied to issues in public administration: Hendrik Wagenaar, "Value Pluralism in Public Administration," *Administrative Theory and Praxis* 21, no. 4 (1999): 441–49; Michael Spicer, "Value Pluralism and Its Implications for American Public Administration," *Administrative Theory and Praxis* 23, no. 4 (2001): 507–28; Michael Spicer, *In Defense of Politics in Public Administration: A Value Pluralist Perspective* (Tuscaloosa: University of Alabama Press, 2010); David Thacher and Martin Rein, "Managing Value Conflict in Public Policy," *Governance* 17, no. 4 (2004): 457–86.

abstract about processes and mechanisms for conflict and balancing, it was the Enlightenment constitutionalists who sought to actually specify these processes in institutional terms" (284). This is fair enough, but an obvious reply is a simple appeal to division of labor. No one can write about everything that is important. Waldron has focused on institutions, Berlin on other matters. Should Waldron be taken to task for not spending more time on what interested Berlin?

What did interest Berlin? To identify Berlin's scholarly priorities is to acknowledge an important reason for them that Waldron does not mention. Berlin has a reputation as a leading liberal thinker, yet it has sometimes been noticed that he writes relatively little about the foundations of liberalism and a great deal about the foundations and the political psychology of antiliberal views. His fascination with the writers of the Counter-Enlightenment—Vico, Herder, Hamann, Maistre—is a case in point.[4] He explains that these are the thinkers who present the strongest challenges to his own liberal and Enlightenment views: "If you believe in liberal principles and rational analysis, as I do, then you must take account of what the objections are, and where the cracks in your structures are, where your side went wrong: hostile criticism, even bigoted opposition, can reveal truth."[5] Berlin defends liberalism and the Enlightenment indirectly by looking at the alternatives.

But how can that be right given Waldron's stronger claim (or speculation) that Berlin is not merely neglectful of Enlightenment constitutionalism but actually hostile to it? The answer is that Waldron's stronger claim is mistaken. Berlin does not need Waldron's charity because there is nothing to excuse. He is not hostile, as Waldron supposes, to everything about the Enlightenment. Admittedly Berlin is often careless in his treatment of the Enlightenment, making it seem as though he thinks that it was all of a piece and that the piece in question was false and dangerous. But this is far too simple a picture of Berlin's position. He clearly accepts the Enlightenment values of individual liberty, equality, and the authority of human reason, broadly understood. "Fundamentally, I am a liberal rationalist. The values of the Enlightenment, what people like Voltaire, Helvétius, Holbach, Condorcet, preached, are deeply sympathetic to me."[6]

Another topic for Berlinian pluralism is transitional justice: Jonathan Allen, "A Liberal-Pluralist Case for Truth Commissions: Lessons from Isaiah Berlin," in *The One and the Many: Reading Isaiah Berlin*, ed. George Crowder and Henry Hardy (Amherst, NY: Prometheus, 2007).

[4]Mark Lilla, "Wolves and Lambs," in *The Legacy of Isaiah Berlin*, ed. Ronald Dworkin, Mark Lilla, and Robert B. Silvers (New York: New York Review Books, 2001).

[5]Berlin and Jahanbegloo, *Conversations with Isaiah Berlin*, 70–71.

[6]Ibid., 70. For various aspects of Berlin's relation to the Enlightenment and Counter-Enlightenment, see Joseph Mali and Robert Wokler, eds., *Isaiah Berlin's Counter-Enlightenment* (Philadelphia: American Philosophical Society, 2003).

What Berlin opposes is a particular stream of Enlightenment intellectual methodology: namely, scientism and the monism that scientism encourages.[7] Consequently, he rejects the kind of utopian social engineering that results from applying such an outlook to social reform. Berlin takes aim at the kind of institutional design that, in Waldron's apt words, seeks "a fatuous reconciliation of all values and a comprehensive solution of all conflicts"—the design of communist utopianism, for example. But that does not mean that he rejects a more accommodating institutional design that leaves room for—is designed around—liberty and pluralism: to wit, Enlightenment constitutionalism. There is no evidence that Berlin opposes that kind of constitutional design.

Matters are similar when it comes to Berlin's attitude to democracy. It is true that Berlin does not have as much to say about democracy as he does about forms of liberty. It is also true that when he does touch on democracy it is often to stress that liberty and democracy are distinct ideas and that they may come into conflict.[8] On the whole, it is fair to say that Berlin is less enthusiastic about democracy than about liberty. However, it is going too far to claim that Berlin's attitude to democracy is one of "hostility." Merely to point out that liberty and democracy may conflict is not necessarily to favor liberty in that conflict. Berlin makes it clear that liberty is not always overriding when it collides with other values.[9] Moreover, the "Search for Status" section of "Two Concepts of Liberty" is an extended argument to the effect that the demand for national self-determination is an important political goal that may reasonably override negative liberty.[10]

From Value Pluralism to Constitutionalism and Democracy

Berlin may say little about constitutionalism and democracy but he is not hostile to these ideas. Indeed, I want to take a further step: irrespective of Berlin's own views, the logic of his political thought tends very much to support both constitutionalism and democracy. The reason is that there are strong links between both of these concepts and Berlin's central notion of

[7]See, e.g., Isaiah Berlin, introduction to *The Age of Enlightenment: The Eighteenth-Century Philosophers*, ed. Isaiah Berlin (New York: Brazilier, 1957); Isaiah Berlin, "The Concept of Scientific History," in *Concepts and Categories: Philosophical Essays*, ed. Henry Hardy, 2nd ed. (Princeton: Princeton University Press, 2013); Isaiah Berlin, *Three Critics of the Enlightenment: Vico, Hamann, Herder*, ed. Henry Hardy, 2nd ed. (Princeton: Princeton University Press, 2013).

[8]Isaiah Berlin, "Two Concepts of Liberty," in *Liberty*, ed. Henry Hardy (Oxford: Oxford University Press, 2002), 208–12.

[9]Ibid., 172–73.

[10]Ibid., 200–208.

value pluralism. Berlin was not interested in making this connection—he had other things to do. But the connection is there to be made.

Berlin's value pluralism is the idea that the most fundamental human values are objective and universal, but also irreducibly multiple, potentially conflicting, and incommensurable.[11] The main contrast is with moral monism, which holds that there is a single formula for ranking or resolving conflicts among basic goods that applies in all cases. Modern examples include utilitarianism and Kantianism; Berlin focuses on the political theories of Plato, Hegel, Marx, and others, that look forward to the realization of a single perfected social and political system. He argues that such views are dangerously utopian, as borne out by the fate of Marxism in the twentieth century.

Moral monism is also false, in Berlin's view. The truth is that the moral universe is deeply pluralistic: "The world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realisation of some of which must inevitably involve the sacrifice of others."[12] There is no uniquely correct formula for the resolution of all value conflicts. Our ordinary experience tells us this, and we have no reason to believe that we will transcend this condition in the future.

This leaves us with a serious problem, however: When incommensurable values conflict, how do we choose between them? In the absence of a single ranking or formula, how do we decide a conflict between liberty and equality, for example, or justice and compassion?

Berlin suggests many possible answers without pursuing any in detail.[13] Perhaps his dominant view is that although pluralism rules out the absolute ranking of basic values—that is, it denies the possibility of rules for ranking that apply in all cases—there may be a conclusive reason for ranking basic values in context. While justice may not always come before loyalty, there may be conclusive reason to favor justice in a particular situation.[14] In

[11]References to value pluralism occur throughout Berlin's work, but see in particular "Two Concepts of Liberty"; "Alleged Relativism in Eighteenth-Century European Thought," in *The Crooked Timber of Humanity: Chapters in the History of Ideas*, ed. Henry Hardy, 2nd ed. (Princeton: Princeton University Press, 2013); "The Pursuit of the Ideal," in *Crooked Timber of Humanity*; "My Intellectual Path," in *The Power of Ideas*, ed. Henry Hardy, 2nd ed. (Princeton: Princeton University Press, 2013); *Three Critics of the Enlightenment*; Isaiah Berlin and Bernard Williams, "Pluralism and Liberalism," in *Concepts and Categories*. For interpretations of Berlin emphasizing his value pluralism see George Crowder, *Liberalism and Value Pluralism* (London: Continuum, 2002); George Crowder, *Isaiah Berlin: Liberty and Pluralism* (Cambridge: Polity, 2004); Galston, *Liberal Pluralism*; John Gray, *Isaiah Berlin: An Interpretation of His Thought*, rev. ed. (Princeton: Princeton University Press, 2013).

[12]Berlin, "Two Concepts of Liberty," 213–14.

[13]See, e.g., Berlin, "Pursuit of the Ideal," 17–20.

[14]Berlin and Williams, "Pluralism and Liberalism," 326.

particular, Berlin looks to the context provided by cultural tradition: "When these rules or principles conflict in concrete cases, to be rational is to follow the course of conduct which least obstructs the general pattern of life in which we believe."[15] This approach is broadened by Bernard Williams to include a wider historical context, such as that represented by the notion of "modernity."[16]

My suggestion here is that another possible response to the problem might be to appeal to the authority of institutions, and specifically to institutions with the two features to which Waldron draws attention: constitutionalism and democracy. How does Berlinian value pluralism relate to Enlightenment constitutionalism and to democracy? In each case there are significant links to be uncovered.

In both cases the first point to make is that value pluralism implies a commitment to a diversity of values within a particular society.[17] As Bernard Williams writes, "If there are many and competing genuine values, then the greater the extent to which a society tends to be single-valued, the more genuine values it neglects or suppresses. More, to this extent, must mean better."[18] To take value pluralism seriously is to acknowledge the full range of human values and to be willing to promote as extensive a selection of those values as possible within the relevant social and historical circumstances.[19]

[15]Berlin, introduction to *Liberty*, 47; see also ibid., 42, and "Pursuit of the Ideal," 18.

[16]Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument*, ed. Geoffrey Hawthorn (Princeton: Princeton University Press, 2005); Bernard Williams, *Philosophy as a Humanistic Discipline*, ed. A. W. Moore (Princeton: Princeton University Press, 2006). For other responses to the problem of value pluralism see John Kekes, *The Morality of Pluralism* (Princeton: Princeton University Press, 1993); Ruth Chang, ed., *Incommensurability, Incomparability, and Practical Reason* (Cambridge, MA: Harvard University Press, 1997); John Gray, *Two Faces of Liberalism* (Cambridge: Polity, 2000); Galston, *Liberal Pluralism*; Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory*, 2nd ed. (Basingstoke: Palgrave Macmillan, 2006); Jonathan Riley, "Isaiah Berlin's 'Minimum of Common Moral Ground,'" *Political Theory* 41, no. 1 (2013): 61–89.

[17]It has been objected that value pluralism is purely a position of metaethical description from which no norms follow: Robert Talisse, *Pluralism and Liberal Politics* (New York: Routledge, 2012), chap. 4. However, I follow John Kekes's account of pluralism as also "an evaluative theory, because it is not an uncommitted analysis of the relations among various types of values involved in good lives but a theory motivated by concern for human beings actually living good lives. Consequently, pluralism is at once descriptive and evaluative" (Kekes, *The Morality of Pluralism*, 10). Pluralists are interested not just in the fact of plural values but also in the content of those values.

[18]Bernard Williams, introduction to *Concepts and Categories*, xxxvii.

[19]The pluralist norm of value diversity involves considerations not only of multiplicity but also of coordination, since some goods will conflict. The link between diversity thus understood and pluralism is a controversial position that I have defended in

Given the broad connection between pluralism and value diversity, how does constitutionalism enter the picture? A cogent argument is provided by William Galston. First, "while pluralists cannot regard social peace and stability as dominant goods in all circumstances, they recognize that these goods typically help create the framework within which the attainment of other goods becomes possible."[20] For pluralists, values of social order cannot be absolutely overriding, since no single value is absolutely overriding. But in most cases these values are especially important for the purpose of social organization, since they create the conditions necessary to enable other goods to flourish.

Consequently, Galston argues, pluralists should accept a set of "minimum conditions of social order," which include "clear and stable property relations, the rule of law, a public authority with the capacity to enforce the law," and so forth.[21] In other words, the achievement and maintenance of social order and stability require institutions, or established and continuing laws, customs, and practices.

Further, each society will organize its social order and institutions in its own way, and its "constitution" is precisely the general pattern of public organization that is peculiar to that society: "every political community assumes a distinctive form and identity through its constitution."[22] A given constitution emphasizes those public values that are most important, or most fundamental, to the society in question. Because these differ from case to case, constitutions differ; no single version is appropriate universally or superior to all others. So, a constitution need not (until we know more about the particular social context) be written, or democratic, or liberal, or derived from popular sovereignty.

However, a constitution must perform certain functions, Galston believes. It must "rest on, and often declare, a principle of authorizing legitimacy," create and define "a political community's governing powers," direct public affairs "toward distinctive ensembles of public purposes," and set out a level of "'higher' than ordinary law" which can be used to "validate ordinary law."[23]

The role of a constitution as "higher law" deserves attention because it seems to raise a problem for pluralists. Galston observes that a constitution

several places: see, e.g., Crowder, *Liberalism and Value Pluralism*, chap. 6; Crowder, *Isaiah Berlin*, 156–59. For a critical response see Patrick Neal, "The Path between Value Pluralism and Liberal Political Order," *San Diego Law Review* 46, no. 4 (2009): 859–82, to which I reply in George Crowder, "Value Pluralism, Diversity and Liberalism," *Ethical Theory and Moral Practice* 18, no. 3 (2015): 549–64.

[20]Galston, "Pluralist Constitutionalism," 236.

[21]Ibid.

[22]Ibid., 238.

[23]Ibid., 229–30.

"represents an authoritative partial ordering of public values. It selects a subset of worthy values, brings them to the foreground, and subordinates other values to them. These preferred values then become the benchmarks for assessing legislation, public policy and even the condition of public culture."[24] For pluralists, in other words, the "higher law" aspect of constitutionalism implies a ranking of values. In any such case a pluralist would have to ask why those specific values should be selected and held up as benchmarks rather than others.

The answer lies in Galston's careful phrase, "partial ordering." While value pluralism is defined by its rejection of absolute ordering, or formulas for ranking basic values that apply in every case, pluralists can (as noted before) endorse partial ordering, or rankings that apply only in specific circumstances or contexts. Thus, Galston notes that the privileging of constitutional principles does not necessarily apply in exigent circumstances where they conflict with public order, or in a personal context where an individual's core identifying values are at stake. Moreover, the emphasis on constitutional values as against others in the public sphere does not preclude the possibility of conflict among constitutional values, such as basic rights, themselves.

Recall, too, that on Galston's account a given constitution is not a universal prescription but the specific choice of a particular society. This, too, is linked with the notion of a contextual rather than absolute ranking, since it suggests that a given constitution will reflect a given cultural tradition. The US Constitution, for example, expresses a political culture that is not the same as that of the UK or Australia, whose constitutions will correspondingly differ.

Where a constitution is a result of a decision made by, or attributable to, "the people," there is a link with democracy.[25] As in the case of pluralism and constitutionalism, so in the case of pluralism and democracy there is good reason to believe that, whatever Berlin's own views may have been, a close positive relation can be traced. The essence of democracy is allowing or enabling a range of different voices to have a say in the process of governance. If, as seems likely, those different voices are bearers of a range of different values, then democracy begins to recommend itself as a political expression of value pluralism.

To put this relation round the other way, value pluralism implies a commitment to a diversity of values within a particular society, and that diversity is in turn promoted by democracy. Williams, following Berlin, was immediately concerned to connect pluralist diversity with liberalism.[26] The greatest

[24]Ibid., 238.

[25]Galston, *Liberal Pluralism*, 88.

[26]Williams, introduction to *Concepts and Categories*, xxxvii–xxxviii. For other, more detailed attempts to link pluralism with liberalism see Crowder, *Liberalism and Value Pluralism*; Crowder, *Isaiah Berlin*; Galston, *Liberal Pluralism*.

range of values would be enabled by liberal rights and liberties, which would open doors to many pursuits and ways of life. But a similar point could be made on behalf of democracy: to promote the value diversity commended by pluralism is to turn away from hegemonic politics towards the inclusion in the political process of many different voices. While liberalism enables people to pursue their own values, democracy makes it possible for those values to be voiced publicly and made part of the process of collective self-government. As Richard Bellamy expresses it, "By allowing preferences, interests and values to be voiced, rather than excluding them from debate … democratic politics enables the attitudes of hegemonic groups to be challenged, forces minority or hitherto marginalized positions to be addressed, and so is sensitive to difference and avoids domination."[27]

At least, democracy promotes diversity, including a diversity of values, if it is inclusive rather than merely majoritarian. Majority rule has always been the standard device for translating the democratic idea into practice, but majoritarianism can, of course, be abused. The well-known problem of the tyranny of the majority arises when the majority uses its power not simply to defeat minorities in debate but to oppress them, treating them without respect and violating their rights. This exclusive or corrupt kind of democracy is likely to reduce the range of options available to people, and perhaps reduce the extent to which their views can be heard in the first place. Consequently, pluralism suggests a commitment not to mere majoritarianism but to democracy at its most inclusive. In Berlin's words, "Democracy is not *ipso facto* pluralistic. I believe in a specifically pluralist democracy, which demands consultation and compromise, which recognizes the claims—rights—of groups and individuals [and] which, except in situations of extreme crisis, is forbidden to reject democratic decisions."[28]

Waldron's Democratic Constitutionalism

From a value-pluralist perspective there is good reason to regard political institutions as important, and to want these to be characterized by constitutionalism and democracy. What will such institutions look like? Here I return to Waldron, who gives his position the promising label of "democratic constitutionalism."

How does Waldron bring constitutionalism and democracy together? Two prominent features of his view are his defense of the separation of powers and his claim that, with some qualification, legislation should not be subject to judicial review. Waldron's support for separation of powers is very much in line with Berlinian value pluralism, but his rejection of judicial review is open to question on the same ground.

[27]Bellamy, "Liberalism and the Challenge of Pluralism," 194.
[28]Berlin and Jahanbegloo, *Conversations with Isaiah Berlin*, 144.

Waldron defines separation of powers as "a qualitative separation of the different functions of government—for example, legislation, adjudication, and executive administration" (45). This is a different idea from the "dispersal" of power, which prevents power from concentrating in any one set of hands, since that is possible without separating functions (49). It is also distinct from checks and balances, in which one exercise of power is reviewed by another—again, this does not necessarily involve the separation of functions. Waldron's question is: What, if anything, justifies the doctrine of the separation of powers as such, independently of the cognate notions of dispersal and checks and balances?

He finds that "the canonical literature" gives no clear answer. Montesquieu, for example, speaks vaguely of the separation of powers being essential to "liberty," or the avoidance of tyranny. But he does not explain why.[29] The object lesson is that of "Turkish justice," in which the sultan possesses all the powers of government and uses them arbitrarily (58). But why should an adequate remedy for Turkish justice not be dispersal of power into multiple hands? What is added by separation of powers into multiple functions?

Waldron's answer is that separation of powers is needed to reflect the idea of "articulated governance" (62). Political power is not a simple whole but a complex series of components—legislative, executive, judicial—each with its own distinctive character. The components are "articulated" in a process in which each plays a distinctive role, contributing to the overall purpose of governing. Consequently, the "integrity" of each link in the process should be maintained: each "should do its own work" and not contaminate or be contaminated by the others (65).

The value-pluralist resonance of this view is readily apparent. Democratic governance is a pluralist rather than monist enterprise, containing multiple elements that can be distinguished from one another and assigned different functions and ends. True, every link in the chain of democratic governance answers to "concerns about liberty, dignity, and respect" that animate the process as a whole (64). But each link also embodies its own particular, distinct values: in the case of legislation, the values of democratic recognition and deliberation; for the executive, decisiveness and impartiality in application of the laws; for the judiciary, the virtues of impartial interpretation. The different tasks of governance express different norms. Indeed, the principal values embodied in articulated governance are incommensurable; the better understanding of democratic governance is pluralist rather than monist.

Value pluralism also suggests a point not stressed by Waldron: that separation of powers needs to be supplemented by the further idea of checks and balances. The message of pluralism is not only that institutional norms are

[29]Elsewhere Waldron finds Montesquieu more helpful and chides Berlin for not appreciating this: ibid., 276–78.

distinct from one another but also that there is no absolute hierarchy among them. Consequently, there is no absolute hierarchy among the institutions that express those norms. "It is probably a mistake," writes Waldron, "for any branch of government to assume the mantle of popular sovereign" (43). There may be (at least according to the traditional public-policy model) a sequential order that begins with an initiative of the elected executive and proceeds to legislation, which is then implemented by administration and interpreted or reviewed by the courts. But this does not indicate that any one phase is more important or valuable than any other in absolute terms—all make a distinctive contribution to the articulated whole. The institutional expression of this view is the checking and balancing of each institution by the others. Decisions "ought to be as sensitive as possible to the views of all elements in the polity" (43). As Michael Spicer writes, constitutional checks and balances "provide multiple veto points" that "make it less likely that important values will be overlooked in shaping public policy decisions."[30]

The notion of checks and balances leads to the second of the themes I take from Waldron's democratic constitutionalism, that of judicial review of legislation. Waldron formulates the issue as follows: "Should judges have the authority to strike down legislation when they are convinced that it violates individual rights?" (195). Note that this question concerns only judicial review of legislation, not of executive action, which Waldron believes raises other issues, and to which he is more sympathetic. In addition, although Waldron identifies various forms of judicial review, he is concerned only with the "strong" family of versions, which include a court's striking down of a piece of legislation (199–200). Waldron's question is whether judicial review is justified in these strong terms.

His basic answer is no, subject to a qualification I come to in a moment. The fundamental problem is the undemocratic nature of judicial review, which empowers unelected officials to override decisions made by elected representatives.[31] Given the link between value pluralism and democracy, this looks like a concern for pluralists, too.[32] Most of Waldron's discussion is directed

[30]Spicer, "Value Pluralism and Its Implications for American Public Administration," 522.

[31]See also Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999). For a range of other views on the merits of judicial review in relation to democracy, see Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 2000); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004); Corey Brettschneider, "Popular Constitutionalism and the Case for Judicial Review," *Political Theory* 34, no. 4 (2006): 516–21; Ronald C. Den Otter, *Judicial Review in an Age of Moral Pluralism* (Cambridge: Cambridge University Press, 2009).

[32]See Richard Bellamy, who rejects judicial review in favor of democratic negotiation and deliberation: Bellamy, *Liberalism and Pluralism*; Bellamy, "Liberalism and the Challenge of Pluralism."

to the context of the United States. But his deeper point is that judicial review is illegitimate wherever it occurs because of the conflict with democracy that is inherent in it. That is an issue for all liberal democracies.

At least, Waldron claims to show that judicial review is illegitimate in these terms if he is granted four assumptions—this is the qualification mentioned above. These assumptions are required for what he calls his "core" case against judicial review. If they do not hold, then the situation becomes "non-core" and he concedes that he will be forced away from his favored line of argument towards some other line he does not specify (239–41). The four assumptions are that we are dealing with a broadly democratic society (1) whose principal democratic institutions are "in reasonably good working order"; (2) with a judicial system that is "again is reasonably good order"; (3) most of whose members and officials are committed "to the idea of individual and minority rights"; (4) where there is, nevertheless, "persisting, substantial and good-faith disagreement" about what the rights referred to in (3) actually contain and imply (203).

Given these four assumptions, Waldron argues as follows. He begins by distinguishing between considerations of "outcome" and considerations of "process" (214–15). "Outcome" is about getting the true or correct result from a decision; "process" is about having a legitimate procedure independent of the result. These are distinct considerations: it would be possible to get the right answer from an illegitimate procedure, and the wrong answer from a legitimate procedure.

It may be tempting, Waldron observes, to align outcome-related considerations with the justification of judicial review, and process-related considerations with the case against. That is, it might be supposed that democratic procedure favors legislation while the wisdom and impartiality of the courts is more likely to lead to a correct outcome. In that case, the question whether judges should be allowed to override legislators would turn into the question whether outcome should override process.

This way of framing the issue would be a classic instance of the problem of value pluralism. Waldron recognizes outcome and process as not merely distinct but also incommensurable goals when he asks, "how do we weigh these process-related and outcome-related considerations? We face the familiar problem of trying to maximize the value of two variables, like asking someone to buy the fastest car at the lowest price" (217). Which institutional option is chosen would depend on how we weigh or rank the pertinent considerations. The answer to this question is unclear in the absence of a general system for ranking or commensurating them.

"I think I can cut through this Gordian knot," Waldron writes. "What I will argue is that the outcome-related reasons are at best inconclusive. They are important, but they do not (as is commonly thought) establish anything like a clear case for judicial review. The process-related reasons, however, are one-sided. They operate mainly to discredit judicial review while leaving legislative decision-making unscathed" (217). In effect he cleverly

finesses the pluralist choice between norms by neutralizing one of them. On the issue of outcome he declares a draw between judges and legislators, so process becomes decisive. And on process, legislation wins hands down.

The detailed moves by which Waldron reaches this conclusion can be consolidated into two key lines of argument, corresponding to considerations of outcome and process. First, on the score of outcome it is sometimes said that judicial review is superior because of the impartiality of judges compared with the self- or partisan interest of legislators. Waldron responds that this claim violates his assumption (3), that most officials are committed to the idea of rights—those of other people as well as their own and their supporters'. To the extent that "sectarian pressures" nevertheless creep into legislation, these have been known to influence judicial reasoning, too (218). For these and other reasons, Waldron sees the rival claims of legislation and judicial review as on a par when it comes to outcome.

When it comes to process, however, Waldron sees legislation as possessing a clear advantage. Legislators are appointed by process of fair election, and the standard procedure of majority decision-making within legislatures is neutral among outcomes and reflects a paradigm model of equal treatment. Judges, on the other hand, are appointed by methods at various removes from democratic control. Their decision-making procedures are in no way representative of public opinion. To the argument that they speak for the people through bills of rights, Waldron replies that bills of rights "bear on" questions of rights without "settling" them—that is, judges are left with considerable, undemocratic discretion to determine the details of those rights (232). In short, while legislative procedures "respect the voices and opinions of the persons—in their millions—whose rights are at stake in these disagreements and treat them as equals in the process … an additional layer of final review by courts adds little to the process except a rather insulting form of disenfranchisement and a legal obfuscation of the moral issues at stake in our disagreement about rights" (244).

Democracy: Ideal and Reality

Waldron's argument against judicial review is debatable at several points, but I focus on his assumption (3), namely, that all members of the society, including legislative representatives, "take rights seriously" and that their concern for rights "is not just lip service"; that "they keep their own and others' views on rights under consideration, and they are alert to issues of rights in regard to all the social decisions that are canvassed or discussed in their midst" (207). Commitment to rights is typically evidenced by the enactment of a written bill of rights, although this need not be "entrenched or part of a written constitution" (208). If assumption (3) holds, rights will be protected as well by legislators as by judges. But how securely does assumption (3) hold?

First, assumption (3) has to be read alongside assumption (4): "that there is substantial dissensus as to what rights there are and what they amount to"

(209). This is part of the more general phenomenon of reasonable disagreement about social norms that characterizes modern societies.[33] Waldron is explicit in allowing that reasonable disagreement can extend to "central applications" of rights, "not just marginal ones" (210). For example, while we can suppose, under assumption (3), that all members of the society are committed to some notion of freedom of speech, there may be reasonable disagreement about how far that principle extends to protect unpopular speech "in a time of national emergency" (209). Where there is a bill of rights, this "bears on, but does not resolve, the issues at stake in the disagreements" (211).

So, the first question is: May there not be a point at which a society's commitment to rights (assumption (3)) is hollowed out or weakened by its reasonable disagreement about their content (assumption (4))? Waldron asks us to assume a society characterized by a delicate balance between commitment and questioning. But may there not be cases where the questions people raise about what a right "amounts to," or how it should be interpreted or applied, begin to undermine the whole notion of the right? For example, if a society claims to be committed to "the idea" of free speech, yet is not prepared to uphold free speech "in a time of national emergency," can that society really be said to be committed to any right of free speech worthy of the name? In that case Waldron's assumption (3) is too weak to offer much protection for rights; it is effectively undermined by assumption (4). Consequently, the likelihood of legislation suppressing rights is increased and the case for judicial review strengthened.

Waldron would no doubt reply that assumptions (3) and (4) are not so seriously at odds. While it is possible that disagreement about rights may be so deep that it undermines those rights, that need not be the case. Of course, there will always be reasonable disagreement about details and applications concerning rights. But fundamental rights can be taken seriously even in the face of inconvenience or unpopularity or difficult and exceptional circumstances such as national emergency. Where that is so, individuals and minorities have real protection from attempts to undermine their rights through legislative process. In that case the legislative process will be better defended against the need for judicial review. Let us suppose, then, that this stronger version of assumption (3) would be adequate to protect rights in spite of any reasonable disagreement there may be under assumption (4). The supposition is that the two assumptions are consistent in principle.

However, perhaps the problem with Waldron's argument is not internal consistency but empirical reality. An insistence on a broadly realistic approach to political theory is an abiding theme in Waldron's work, captured in the very title of his *Political Political Theory*. His respect for empirical

[33]On this point Waldron cites the authority of Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), but extends Rawls's insight from disagreement about conceptions of the good to include conceptions of the right as well.

evidence can be seen in his exhortation to political theorists that they should "dovetail their work with" political science, conceived as "the study of how politics actually works within the institutions we have established" (8).[34] So, the thrust of Waldron's own approach makes it reasonable, indeed necessary, to test his assumptions against the empirical evidence of how politics is actually working and what people are actually thinking.

The empirical question here is: Are the public and its legislators really committed to preserving rights as Waldron's assumption (3) supposes? Or might the reality of public and legislative opinion in actually existing political societies, even if these are liberal-democratic, be better reflected by the weaker reading of assumption (3), which really amounts to its rejection? If so, then of course the case for reliance on legislation will be diminished and there will be a corresponding opening for judicial review.

Unfortunately, there is ample reason to believe that assumption (3) is indeed too optimistic. Since the events of 9/11 and the start of the subsequent "war on terror," public attitudes in liberal democracies have shifted away from sympathy with civil liberties and toward greater concern for security at the expense of rights. In the case of the United States, for example, studies have shown how readily people give up their commitment to rights, especially the rights of others, in the face of perceived threats to their safety.[35] This change in American public sentiment has translated into legislation in which long-cherished civil liberties have been eroded, the salient example being the USA PATRIOT Act (2001), with its provisions authorizing indefinite detention of non-US citizens, along with expanded powers of search, seizure, and intelligence gathering.[36] Provisions of this kind have been legislated all over the liberal-democratic world.[37]

[34]See also Waldron's sympathy for Richard Posner's rejection of "moralist" approaches to legal studies in favor of "pragmatic arguments that would accumulate empirical evidence": Jeremy Waldron, "Ego-Bloated Hovel," *Northwestern Law Review* 94, no. 2 (2000): 611.

[35]Darren W. Davis and Brian D. Silver, "Civil Liberties vs. Security: Public Opinion in the Context of the Terrorist Attacks on America," *American Journal of Political Science* 48, no. 1 (2004): 28–46; Marc Hetherington and Elizabeth Suhay, "Authoritarianism, Threat, and Americans' Support for the War on Terror," *American Journal of Political Science* 55, no. 3 (2011): 546–60.

[36]David Cole and James X. Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, 2nd ed. (New York: New Press, 2002); John W. Whitehead and Steven H. Aden, "Forfeiting 'Enduring Freedom' for 'Homeland Security': A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-terrorism Initiatives," *American University Law Review* 51 (2001–2002): 1081–1133.

[37]See Victor V. Ramraj, Michael Hor, Kent Roach, and George Williams, eds., *Global Anti-terrorism Law and Policy*, 2nd ed. (Cambridge: Cambridge University Press, 2012); Fergal Davis, Nicola McGarrity, and George Williams, eds, *Surveillance, Counter-Terrorism and Comparative Constitutionalism* (London: Routledge, 2014).

Another recent anti-rights trend is the rise of "populism." Populism is hard to define with precision, and in particular difficult to separate from extreme forms of nationalism.[38] But there is widespread agreement that there is a general pattern uniting recent political phenomena such as the election of Donald Trump, Brexit, and the influence in France of Marine Le Pen. In these and other cases, populists claim to champion the claims of "ordinary people" against "elites," including professional politicians and experts, who are alleged to have betrayed the people in favor of economic globalization and the interests of foreigners, asylum seekers, and immigrants. These latter groups are often those whose rights are most severely restricted by populist legislation.[39] But populist legislation is capable of demolishing a much wider range of democratic rights, as demonstrated by Viktor Orban's Fidesz party in Hungary.[40]

Waldron may reply that the circumstances of the war on terror and of the current wave of populism are exceptional, or at any rate temporary. When these phases have passed, assumption (3) will be satisfied once more, democratic commitment to rights will be restored to better health. The trouble is that both the war on terror and the rise of populism are sustained by a more deep-seated hostility to minorities that persists in all societies. For example, a recent study has found that the unpopularity of Muslims in the United States has increased little since 9/11, but is maintained by "a general sense of affect" against nonmainstream groups.[41]

Waldron does recognize prejudice against "discrete and insular minorities"—African Americans in the United States, for example—as a major problem in this connection. This is "the sort of noncore case," he concedes, "in which the argument for judicial review of legislative decisions has some

[38]See Ghita Ionescu and Ernest Gellner, eds., *Populism: Its Meaning and National Characteristics* (New York: Macmillan, 1969); Paul Taggart, *Populism* (Buckingham, UK: Open University Press, 2000); Cas Mudde and C. R. Kaltwasser, "Populism," in *Oxford Handbook of Political Ideologies*, ed. Michael Feeden et al. (Oxford: Oxford University Press, 2013); Cas Mudde and C. R. Kaltwasser, eds., *Populism in Europe and the Americas: Threat or Corrective for Democracy?* (Cambridge: Cambridge University Press, 2013); Carlos de la Torre, ed., *The Promise and Perils of Populism: Global Perspectives* (Lexington: University of Kentucky Press, 2015).

[39]See, e.g., Andrej Zaslove, "Closing the Door? The Ideology and Impact of Radical Right Populism on Immigration Policy in Austria and Italy," *Journal of Political Ideologies* 9, no. 1 (2004): 99–118.

[40]Jacques Rupnik, "How Things Went Wrong," *Journal of Democracy* 23, no. 3 (2012): 132–37; Miklos Bankuti, Halmai Gabor, and Kim Lane Scheppele, "Disabling the Constitution," *Journal of Democracy* 23, no. 3 (2012): 138–46; Jan-Werner Mueller, "Eastern Europe Goes South: Disappearing Democracy in the EU's Newest Members," *Foreign Affairs* 93 (2014): 14–19.

[41]Kerem Ozan Kalkan, Geoffrey C. Layman, and Eric M. Uslaner, "Bands of Others? Attitudes toward Muslims in Contemporary American Society," *Journal of Politics* 71, no. 3 (2009): 847–62.

plausibility. Minorities in this situation may need special care that only non-elective institutions can provide" (241). He insists that not all discrete and insular minorities deserve protection, giving the example of Bolsheviks in the United States, and that not every minority is discrete and insular. However, these observations are not much to the point. Even if American Bolsheviks do not deserve rights-protection (why not?), and even if not all minorities are discrete and insular, it is clear that there are discrete and insular minorities that are subject to persistent prejudice and deserve protection. It is hard to avoid concluding that Waldron has conceded a significant case for judicial review.

Note also that the same phenomena that have reduced the public commitment to rights in liberal democracies can also be seen as objectionable from the perspective of value pluralism. The attitudes and legislation typical of the war on terror make security overriding at the cost of the important values embodied in the rights it displaces. Populism elevates the supposed "will of the people" to a position of primacy, with the same consequences.[42] Prejudice against minorities involves a refusal to consider the values implicit in ways of life other than one's own. In short, the denigration of basic rights is a marker for a failure to respect the full range of human values acknowledged by pluralists.

However, to show the limitations of public opinion and elected legislatures when it comes to the protection of rights, and consequently the promotion of plural values, is not necessarily to show that judges will do any better. In terms of Waldron's argument, even if assumption (3) does not hold and the core argument does not go through, it does not follow automatically that judicial review must be defensible. Could it be that a society's judicial decision-making is "no less corrupt or no less contaminated with prejudice than the society's legislative decision-making" (241)? There is, of course, some truth in this suggestion; judges have often been guilty of adopting biased or limited perspectives.[43] So, it remains for the defenders of judicial review to make a positive case in its favor.

Value-Pluralist Defenses of Judicial Review

I can see three principal lines of argument along which judicial review can be defended on the basis of value pluralism: one appealing to cultural and historical context, another to the judiciary's relative insulation from public opinion, and a third to the principle of checks and balances.

[42]Jan-Werner Müller, *What Is Populism?* (Philadelphia: University of Pennsylvania Press, 2016).

[43]For an entertaining survey in the UK context see David Pannick, *Judges* (Oxford: Oxford University Press, 1988), chap. 2.

First, then, I mentioned earlier that one standard way of settling conflicts of incommensurable values is to refer to context, in particular the context of cultural tradition. In this way a case might be made for judicial review by locating it within just such a tradition. So, for example, judicial review might be defended in the United States by invoking American political culture. One obvious weakness of this kind of argument is its limitation to particular cultures, although in the case of judicial review this institution is now endorsed in virtually all liberal-democratic political cultures, even those without written constitutions (e.g., the UK) or bills of rights (e.g., Australia). More troublesome is the objection that the mere existence of a cultural tradition is not a guarantee of its desirability.

Second, defenders of judicial review can emphasize that judges are in varying degrees insulated by their institutional position from the kind of populist public opinion that undermines rights. This is also a pluralist point given that, as I have argued, the same political tendencies that have threatened rights are also threats to value diversity. Waldron, of course, makes judicial insulation the leading exhibit in his case against judicial review: it is this that, in his view, makes judicial review undemocratic. But when public opinion is problematic for reasons such as those already mentioned, judicial insulation begins to look like an advantage. Indeed, it could be argued that, in offering protection to rights under conditions of hostile public opinion, it is the judiciary that is more genuinely "democratic" in the inclusive as opposed to merely majoritarian sense of the word. This, too, is a pluralist argument, since it is inclusive rather than merely majoritarian democracy that is endorsed by pluralism. Pluralists want voice to be given to all relevant values and interests, not just those backed by the greatest numbers.

I hasten to add that the kind of antipopulist insulation I am commending here is not a matter of demographic elitism. A persistent complaint against the judiciary is that it is unrepresentative of the population at large, its members drawn from a narrow elite that excludes women and minorities.[44] Few would defend this, least of all pluralists. They would support a more representative judiciary on the same grounds as those on which they would defend democracy: a range of different voices implies respect for a range of different values.

Rather, the insulation I have in mind refers to the judiciary's institutional independence—that is, the courts' independence from other institutions in the political system, and consequently their independence from the political pressures channeled by those other institutions. This is not simply a matter of unelected appointment. Most judges in most jurisdictions across the world are appointed by means other than election, but unelected appointment is not essential to judicial independence. James Gibson points out that

[44]See, e.g., Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism* (Aldershot: Ashgate, 1999), 103–5.

the great majority of American state judges are elected but they are still strongly perceived by the public as impartial decision makers.[45] For Gibson, what makes judges legitimate in the eyes of the public is a combination of several factors, including their procedural rectitude, their expertise in the law, and their capacity to reach decisions that are "fair and just."[46] These are factors that mark the judiciary as independent from other democratic institutions; its role is to make even-handed and fair legal decisions, not to reflect public sentiment. Moreover, that role is endorsed by public opinion itself. Whether judges are elected or not (and even whether they are demographically representative or not), the institution of the judiciary aspires to an independence that equips it to defend rights against populist pressure.

It might be objected that I am unfairly comparing the judiciary at its best with legislatures at their worst. Can judges not be moved by populist concerns that undermine rights, just like legislators? Earlier I conceded that it is possible for judges to be biased or limited in outlook, so where is the superiority of the judiciary in this matter?

The point is about institutions, not individual cases. Even at their best, legislatures can undermine rights because their role is to represent the interests and ideologies of their constituents and supporters. Where these run counter to rights, legislators are only doing their job in opposing the rights in question, or at least in arguing for interpretations of those rights that suit their supporters' interests. The courts, on the other hand, aspire to impartiality among competing interests when they interpret and apply the law. Individual judges can fail to meet that aspiration, of course. Moreover, there are also structural obstacles to complete impartiality. Judges inevitably have to decide matters that have a political content, since these involve judgments about the public interest, and to these decisions they cannot help bringing their own political views.[47] Judicial independence is sensibly seen less as a fact than as "an ideal or set of normative values about courts."[48] Nevertheless, it is a crucial point of distinction that the judiciary possesses such an ideal while legislatures do not. Judicial independence and impartiality are never complete but they make judiciaries more reliable instruments than legislatures for protecting rights.

Third, pluralists might defend judicial review as part of the checks and balances they regard as essential to a healthy constitution. I argued earlier that

[45]Gibson uses survey evidence to argue that, although some campaign activities are viewed more positively than others, "the predominant essence of judicial elections is not foul": James L. Gibson, *Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy* (Chicago: University of Chicago Press, 2012), 141.

[46]Ibid., 88–89.

[47]J. A. G. Griffith, *The Politics of the Judiciary*, 3rd ed. (London: Fontana, 1985).

[48]Terri Jennings Peretti, "Does Judicial Independence Exist? The Lessons of Social Science Research," in *Judicial Independence at the Crossroads: An Interdisciplinary Approach*, ed. Stephen B. Burbank and Barry Friedman (Thousand Oaks, CA: Sage, 2002), 103.

pluralists have reason to endorse constitutional checks and balances as a supplement to the separation of powers emphasized by Waldron. Judicial review is an important component of most systems of checks and balances.

An immediate concern may be that judicial review in fact unbalances the system because, by giving the judiciary the last word, it makes the courts dominant. In pluralist terms, are the values promoted by judicial review allowed to override, without justification, those of the other parts of the system? To answer this question is to consider the precise relation implied by judicial review between the judiciary and other branches, especially the legislature. This will vary in different political systems, and within any one system it may be contested.

In the case of the United States, for example, the proper relation between the Supreme Court and the federal and state legislatures whose statutes the Court reviews is a matter of some dispute. Iddo Porat has identified three different value-pluralist models for that relation proposed in American legal theory.

The first of these may be called "contextual balancing." As Porat explains, the general principle is that, when assessing the constitutionality of legislation, "judges should not give absolute or categorical preference to any one value at the expense of all the other values. A judge should rather strive to reflect the plurality of values in her decisions, by giving voice to all of the possible values and worldviews in society and balancing between them to the best of her abilities, in accordance with the circumstances of the case. Value pluralism therefore connotes judicial balancing."[49] This balancing may be regarded as a matter either of "pragmatic necessity" or of symbolism and expression. In the latter case, "the judicial decision should express respect to each of the values involved in it by giving voice to each and by making sure that no value or interest is left out of the judicial balance."[50] For example, in *University of California v. Bakke*, "Justice Powell contraposed the value of 'color blindness' with the value of 'affirmative action' and reached a compromise that seems to give voice to both: affirmative action would be allowed, but only through an individualized review of applicants rather than through quotas."[51]

However, judicial balancing attracts the familiar democratic objection: these values need to be balanced, but that is the job of the elected legislature rather than the unelected judiciary. This leads to the second model identified by Porat, that of "judicial neutrality" or "judicial deference." Here the Court defers to the legislature, since "the only place to decide between such conflicts would be in the battleground of democratic competition."[52]

[49]Porat, "The Plural Implications of Value Pluralism," 919.
[50]Ibid., 920.
[51]Ibid., 920–21.
[52]Ibid., 921.

But can legislatures always be relied upon to balance all the values relevant to the case? Might there not be a danger that important rights of individuals and minorities will sometimes be pushed aside without due acknowledgment or expression? The third model identified by Porat responds to this worry, aiming at a happy medium between the first two approaches. The starting point or default position for balancing plural values in public policy is acknowledged to be the democratic decision making of legislatures. However, "process theory" recognizes the judiciary as having a role in "regulating the democratic process and in maintaining that it does indeed reflect the plurality of values in society." This is especially so in those cases where "the rights in view are those that pertain to the democratic process itself or enhance the participation of marginalized groups in that process, such as the rights of free speech and equal protection."[53] Again, the argument points to a function for judicial review in response to the kind of problem raised in the previous section, where in a certain climate of public opinion elected legislatures are not reliable guardians of rights.

Armed with this set of alternative models, I am now in a better position to assess whether judicial review tilts the institutional balance too far in favor of the judiciary and against legislatures, at any rate in the American context. In the case of the second model, judicial deference, this is obviously not so; indeed, there may be room for the argument that in this understanding it is the legislature that is too dominant, with corresponding danger to vulnerable rights. Nor is there much cause for complaint on the part of legislatures in relation to the third model, in which judicial review comes in only to regulate democratic decision making, which is explicitly the norm.

Only the first model invites the question of institutional imbalance, and even in that case the question is not unanswerable. While it is true the first model allows more potential than the others for judicial activism, it is going too far to see the model as enabling the judiciary to dominate the system as a whole. Judicial review on this understanding can shape the law through interpretation, but it cannot initiate or change statutes themselves. Those functions remain the preserve of legislatures; the judiciary can check and balance the legislature, not displace it. Institutional balance is maintained even according to the strongest model of judicial review.

Even in a strong tradition, such as that of the United States, and even when this is understood in its strongest interpretation, judicial review is an appropriate institution within a system of checks and balances. Since such a system fits well with a value-pluralist outlook, as argued earlier, judicial review is in tune with pluralism.

[53]Ibid., 923.

Is Value Pluralism Equivocal?

Finally, I consider an objection from Maimon Schwarzschild, who believes that pluralism is an unreliable basis on which to defend any specific legal or institutional line. "Value pluralism can be invoked, it would seem, on any side, or at least on many sides, of various legal issues."[54] In the case of judicial review, the US Supreme Court, for example, has promoted pluralism through inclusive and tolerant decisions in areas such as equal protection, freedom from censorship, and freedom of religion. On the other hand, "public policy made by the courts tends to be more uniform than policy made by any other institutions of government."[55] "More uniform" implies less pluralistic. The courts are organized in a hierarchy the apex of which (the Supreme Court) decides law for the whole of the United States. "Constitutional adjudication, in particular, tends to impose a single, almost unchangeable standard across the country."[56] Were it not for judicial review, ultimately at the level of the Supreme Court, there would be a mosaic of different laws in the United States, hence a greater diversity of values.

However, Schwarzschild's objection depends on the assumption that the legal uniformity promoted by judicial review must be opposed to pluralism. Schwarzschild supposes that a greater diversity of laws must mean a greater diversity of values. But a mosaic of different laws may be a collection of laws that are each strongly monistic in content, amounting in the end to "a mosaic of tyrannies."[57] By comparison, value diversity may be increased by a single law that expresses greater toleration and respect for different interests and ways of life. Schwarzschild himself observes that many US constitutional decisions of the twentieth century "can be seen … as having greatly promoted pluralism … enhancing the possibilities for more varied political outcomes, welcoming interest groups hitherto excluded, and hence promoting a climate more tolerant of a plurality of values in American life."[58] Since these are the results of the uniform law created by rulings of the Supreme Court, then uniformity cannot be opposed to pluralism of necessity. It is not the uniformity of the law that is crucial but its content.

However, might uniformity be a problem in the following way? Yes, a uniform law, if it has the right content, can promote value pluralism. But so, too, can a mosaic of different laws, even if each is internally monistic, since a diversity of monisms adds up to value diversity overall. So, on the

[54]Schwarzschild, "On This Side of the Law and On That Side of the Law," 756.
[55]Ibid., 759.
[56]Ibid.
[57]Leslie Green, "Internal Minorities and Their Rights," in *The Rights of Minority Cultures*, ed. Will Kymlicka (Oxford: Oxford University Press, 1995), 270.
[58]Schwarzschild, "On This Side of the Law and On That Side of the Law," 761.

one hand *Brown v. Board of Education* increased pluralism in the ways mentioned, but on the other hand a legal landscape that still contained Jim Crow laws would be more various and therefore also commended by pluralism—as Schwarzschild explicitly argues.[59] In that case we would be back to Schwarzschild's overall theme of the equivocal nature of value pluralism: favoring judicial review and opposing it in equal degrees.

Pluralists do have to acknowledge that it is not only liberal societies and practices that have value but also nonliberal or illiberal societies and practices. However, it is hard to believe that the exchange of Jim Crow segregation for African American civil rights is not a net gain for value diversity. Value pluralism is not a relativist view in which cultures or ways of life are indefeasible.[60] Its primary focus is on fundamental human values and its primary normative implication is that the full range of such values should be respected and promoted where possible. From this perspective the loss of Jim Crow is surely outweighed by the gains from *Brown*. On one side Americans lost the values of a narrow and oppressive culture which suppressed the interests and voices of a substantial minority; on the other it gained an outlet for those interests and voices, which have opened out into a further diversity of values. Value pluralism, to repeat, implies support for a diversity of *values*, not necessarily of legal systems or cultures if these are internally monistic.[61]

Where does that leave us with Schwarzschild's argument that value pluralism is indifferent between judicial review and its absence? It is true that pluralism does not favor judicial review over legislative process in all circumstances—to say otherwise would be to endorse the kind of absolute value ranking that pluralism denies. Democratic legislation is adequate to pluralist concerns when conditions apply that amount to something like Waldron's assumption (3): a strong and widespread social commitment to

[59]Ibid., 770.

[60]Berlin's pluralism is alleged to be relativistic by Arnaldo Momigliano, "On the Pioneer Trail," *New York Review of Books*, November 11, 1976, 33–38; Michael Sandel, introduction to *Liberalism and Its Critics*, ed. Michael Sandel (Oxford: Oxford University Press, 1984), 8; Leo Strauss, "Relativism," in *The Rebirth of Classical Political Rationalism: An Introduction to the Thought of Leo Strauss*, ed. Thomas Pangle (Chicago: University of Chicago Press, 1989), 13–18. This is denied by Berlin, "Alleged Relativism in Eighteenth-Century European Thought"; Steven Lukes, "Must Pluralists Be Relativists?," in *Liberals and Cannibals: The Implications of Diversity* (London: Verso, 2003); Jason Ferrell, "The Alleged Relativism of Isaiah Berlin," *Critical Review of International Social and Political Philosophy* 11, no. 1 (2008): 41–56.

[61]I develop this distinction between value pluralism and cultural pluralism in George Crowder, *Theories of Multiculturalism: An Introduction* (Cambridge: Polity, 2013), 157–58, and George Crowder, "Pluralism, Relativism, and Liberalism," in *The Cambridge Companion to Isaiah Berlin*, ed. Steven B. Smith and Joshua L. Cherniss (Cambridge: Cambridge University Press, 2018), 236, 241–43.

individual and minority rights. In that situation there is no need for judicial backup, since rights are reliably protected by democratic political negotiation alone.

However, I have argued that those conditions do not always hold. In recent times the war on terror and the rise of populism have created a climate of opinion in which fundamental rights are under threat. Indeed, there is reason to believe that conditions favorable to rights are to some extent always in doubt because of the persistent possibility of hostility to minorities. To the extent that this is so, a case remains for judicial review to check and balance the legislative process. Of course, the judiciary is itself not always wholly resistant to chilly (or overheated) climates of opinion. Schwarzschild observes that the US Supreme Court has passed through more and less liberal phases in its history, sometimes standing out against conformist attitudes, sometimes reflecting them.[62] However, it remains the case that, however varied its history may have been, the Court has the capacity to check and balance the anti-rights excesses of legislatures. That is an institution worth retaining, on value-pluralist grounds among others.

Conclusion

Responding to Waldron's thesis, I have conceded that Berlin writes little about institutions in general and constitutional and democratic institutions in particular. However, contrary to Waldron, Berlin is not hostile either to constitutionalism or to democracy. Indeed, his value pluralism can be used as a platform from which to argue for both constitutionalism and democracy—in the case of the latter, provided that this is inclusive rather than merely majoritarian.

Waldron's own democratic constitutionalism can be assessed on the same pluralist grounds. Here I find that pluralism endorses Waldron's support for separation of powers and extends that endorsement to constitutional checks and balances. But Waldron's "core" rejection of judicial review is another matter. This position depends crucially on Waldron's assumption (3), that most members of liberal democracies are strongly committed to rights, including the rights of others. Although this claim is not formally contradicted by Waldron's attention to reasonable disagreement, it is empirically unrealistic. Recent political developments such as the war on terror and the rise of populism show the fragility of public commitment to rights, and this is underlined by the permanence of prejudice against minorities, a point conceded by Waldron himself. The upshot is that democratic legislatures, so strongly influenced by public opinion, cannot be relied upon to protect rights, contrary to a key assumption underpinning Waldron's core argument.

[62]Schwarzschild, "On This Side of the Law and On That Side of the Law," 761–62.

Does a value-pluralist approach suggest that judicial review can do any better? The answer is a qualified yes. The same insulation from public opinion that makes judicial review "undemocratic" also gives it an advantage in protecting rights when public opinion is monistic. Under such conditions judicial review can play a vital role in a constitutional system of checks and balances that ensures a hearing for all relevant voices and values. When it plays this role, judicial review can be more truly democratic, in the inclusive sense, than a legislature that respects only the wishes of a majority. It is inclusive democracy rather than mere majoritarianism that is endorsed by pluralism. This is not to say that judicial review cannot fail to play such a role, only that it has the capacity to do so.