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## DWORKIN'S INCOMPLETE INTERPRETATION OF DEMOCRACY

ALEXANDER LATHAM\*

### ABSTRACT

*This essay mounts an immanent critique of Dworkin's defense of judicial review. Taking Dworkin's methodology of constructive interpretation as my starting point, I argue that when analyzing the role that political institutions play in democracy, Dworkin fails to take his own method far enough. In particular, he limits his constructive interpretation of democracy to the practice of voting, overlooking the distinctive democratic values implicit within the institutions and practices of legislation by representative assembly. Ironically, given his well-known critique of majoritarian democracy, this failure leads Dworkin to adopt majoritarianism as a starting point when assessing particular institutions. A more thoroughgoing interpretation of democratic practices would identify certain nonmajoritarian virtues of legislatures, making the case for judicial review less clear-cut than Dworkin's incomplete interpretation suggests.*

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\* Lecturer in Law, Swansea University. I would like to thank Tarik Kochi, Cormac Mac Amhlaigh, Lindsay Stirton, Kenny Veitch and Neil Walker for their comments on earlier drafts.

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*INTRODUCTION*

Of all the constitutional lawyers and political theorists to address the issue, Ronald Dworkin has gone the furthest in developing a fully-fledged argument designed to disabuse us of any democratic uneasiness that we might have about judicial review.<sup>1</sup> Dworkin had no time for those cautious theories that, out of fear of offending principles of democracy, seek some strategy to avoid judges having to invoke substantive value grounds to support their decisions.<sup>2</sup> Nor would Dworkin rest with the intuitively attractive response that, while judicial review might not be a democratic procedure, it is nevertheless justified by other political values, such as freedom, equality or justice.<sup>3</sup> Judicial review, Dworkin tells us, protects substantive democratic values, so that when a judge uses her own interpretation of what amounts to ‘cruel and unusual punishments’ or ‘equal protection of the laws’, for instance, she is doing precisely what democracy requires of her.

Dworkin’s theory rubs up against two convictions that many people hold more or less instinctively: the first is that democracy requires a

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<sup>1</sup> RONALD DWORKIN, *LAW’S EMPIRE*, chap 10 (1986), *What is Equality? Part 4: Political Equality*, 22 U.S.F.L. REV. 1 (1987) [hereinafter *What is Equality?*]; *Equality, Democracy and Constitution: we the people in court*, XXVIII ALBERTA LAW REVIEW 324, 329 (1990) [hereinafter *Equality, Democracy and Constitution*]; *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* chap 1 (1996) [hereinafter *FREEDOM’S LAW*]; *JUSTICE FOR HEDGEHOGS*, chap 18 (2011).

<sup>2</sup> Classic works along such lines include L. HAND, *THE BILL OF RIGHTS* (1962); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1986); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

<sup>3</sup> See, e.g., LAURENCE H. TRIBE AND MICHAEL C. DORF, *ON READING THE CONSTITUTION* (1991).

decision-procedure that is at least roughly majoritarian; the second is that judges ought not to rely on their own political opinions but instead base their decisions on the law. Dworkin's response to the first is that the 'majoritarian premise'<sup>4</sup> relies on a crudely statistical conception of collective action, which conflates it with a mere aggregation of individual actions. If we take seriously the claim that democracy means collective self-rule, Dworkin argues, we should view democracy as a form of partnership between all citizens acting collectively. This does not require majoritarian decision-making, but it does require protecting all citizens' rights to ensure each is treated as a true member of the partnership.<sup>5</sup>

To the concern that judges should follow the law and not their own personal views, Dworkin's response is to deny the distinction, at least in such hard-and-fast terms. When Dworkin says that judges should bring their own convictions to bear on constitutional issues he means neither that they should rely on brute subjective 'political preferences' nor that they should attempt to divine some transcendental 'natural law'. Rather, the values deployed by the Dworkinian judge are to be found embedded within extant legal and political practices.<sup>6</sup> Thus, says Dworkin, when a court strikes down legislation on the basis of a 'moral reading' of the constitution, it is not arrogantly raising itself above the rest of society, but endeavoring to remain faithful to the ongoing practice of self-government and to the core values of the political community.<sup>7</sup>

Criticisms of Dworkin's defense of judicial review tend to target either his anti-majoritarianism or his claim that a constructive interpretation of the constitution can yield a set of principles of political morality that is distinguishable from the individual value orientations of particular justices.<sup>8</sup> In this essay I mount an attack from the opposite direction. Rather than criticizing the methodology of constructive interpretation, I argue that Dworkin does not carry it through fully enough. Dworkin employs

<sup>4</sup> As he calls it in *FREEDOM'S LAW*, *supra* note 1, at 19.

<sup>5</sup> *Equality, Democracy and Constitution*, *supra* note 1, at 337ff; *FREEDOM'S LAW*, *supra* note 1, at 20ff; *JUSTICE FOR HEDGEHOGS*, *supra* note 1, at 384.

<sup>6</sup> See generally *LAW'S EMPIRE*, *supra* note 1, *passim*.

<sup>7</sup> *LAW'S EMPIRE*, *supra* note 1, 399; *FREEDOM'S LAW*, *supra* note 1, 32-5.

<sup>8</sup> For a critique of Dworkin's anti-majoritarianism see Jeremy Waldron, *The Constitutional Conception of Democracy*, in *LAW AND DISAGREEMENT* 282 (1999). Scepticism about the ability of constructive interpretation to yield a coherent set of principles distinct from the value orientations of the individual judge is a common theme in across some otherwise very different criticisms of Dworkin, for example: John Mackie, *The Third Theory of Law*, 7 *PHIL. AND PUB. AFFAIRS* 3 (1977); Andrew Altman, *Legal Realism, Critical Legal Studies and Dworkin*, 15 *PHIL. AND PUB. AFFAIRS* 205 (1986); Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U CINN. L. REV.* 849 (1989); Michael W McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution* 65 *FORDHAM L. REV.* 1269 (1997).

constructive interpretation to derive the moral reading of the constitution, and he applies it to the practice of voting to discern the symbolic values of the electoral system (which, he argues, are not threatened by judicial review). I agree with Dworkin that such interpretation reveals values immanent within the political practices of western democracies. But Dworkin's interpretation of democracy pulls up short. His presentation of representative institutions as being of purely instrumental value amounts to a failure to interpret constructively the practice of legislation. In fact, the symbolic significance of courts and legislatures is 'thicker' than Dworkin recognizes, and thus his defense of judicial review is altogether too quick.

Furthermore, and perhaps ironically, Dworkin's failure in this regard manifests itself in a curious priority that is granted to majoritarianism in his account of democracy. Limiting his interpretation of democracy to the practice of voting leads him to accept majoritarianism as a basic starting point from which departures must be justified on instrumental (i.e. output-related) grounds. But a more thoroughgoing constructive interpretation of the practice of legislation by representative assembly would find that it promotes values that are neither majoritarian nor instrumental. Legislative procedures express a commitment to the ideal that government ought to be steered not simply by a statistical *majority* opinion, but by a discursive and inclusive *public* opinion. Once this is recognized, then the case for judicial review becomes, at the very least, rather less clear-cut.

The structure of this essay is as follows: In the first section I give an overview of Dworkin's methodology of constructive interpretation, enriching it with insights from Charles Taylor, who has, in a somewhat different register, developed a similar approach. The second section then examines Dworkin's conception of democracy. The third section sets out Dworkin's institutionalization of democracy and his defense of judicial review. In section four I argue that the very virtue that seems to recommend courts as arbiters of disputes over the extent of fundamental rights – their *impartiality* – is linked with a way of thinking about constitutional politics that is problematic for democracy, casting doubt on Dworkin's claim that judicial review provides an arena of contestation that is 'directly connected to [citizens'] moral lives'.<sup>9</sup> In the final section I argue that Dworkin overlooks the indispensable role that the representative legislature plays as the focal point of political debate. Although legislatures do not, of course, always live up to the ideal, if we overlook the part that legislatures play in the symbolic constitution of the political community we risk losing grasp of an important aspect of democracy's value.

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<sup>9</sup> *What is Equality?*, *supra* note 1, at 29.

### I. THE METHODOLOGY OF CONSTRUCTIVE INTERPRETATION

Dworkin's philosophy is characterized by a staunch refusal to address questions about the meaning of concepts in a way that is divorced from our everyday understandings of those concepts and the practices in which they feature. While the likes of G.A. Cohen would have us 'retreat to justice in its purity,' to find a concept that 'transcends the fact of the world,'<sup>10</sup> Dworkin maintains that a normative political theory must take the form of a *constructive interpretation* of existing practices.

Constructive interpretation requires us to adopt what Dworkin calls the 'interpretive attitude,' a stance with two components. Firstly, someone who holds the interpretive attitude towards a practice believes that the practice does not simply exist as a matter of descriptive fact, but that it 'serves some interest or purpose or enforces some principle,' that is to say, it has a certain value.<sup>11</sup> Secondly, she will view the true requirements of the practice as not purely a matter of convention, but rather as sensitive to the practice's point, so that what the practice truly requires is not necessarily what the practice has historically been taken to require. On this view, practice and value are conceptually indissociable. As Dworkin puts it: 'Value and content have become entangled.'<sup>12</sup>

Dworkin draws an analogy between interpretation of a social practice and interpretation of art and literature: in each case interpreters aim to construct an account of something that has been created by a person or persons but that exists as an independent entity separate from its creator(s). Constructive interpretation, be it of a social practice or of a piece of art, involves 'imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong.'<sup>13</sup> Note that an interpretation does not simply deduce but *proposes* value for a practice. Just as a set of scientific data will always be compatible with more than one explanation, so too will the brute facts about people's behavior be consistent with more than one interpretation of the value implicit in a practice. There is no value-neutral mechanism for determining between competing interpretations: Our choice must reflect our view of which interpretation proposes the most value for the practice, i.e. which portrays the practice in its 'best light.'<sup>14</sup> It follows, of course, that interpretation is a controversial activity: Different persons' interpretations

<sup>10</sup> G.A. COHEN, RESCUING JUSTICE AND EQUALITY 291 (2008).

<sup>11</sup> RONALD DWORKIN, LAW'S EMPIRE, *supra* note 1, at 47.

<sup>12</sup> *Id.* at 48.

<sup>13</sup> *Id.* at 52.

<sup>14</sup> *Id.* at 47.

will conflict, and thus stand in competition with one another.

Dworkin provides a useful three-stage heuristic for thinking about what interpretation of a practice involves.<sup>15</sup> In the first, ‘preinterpretive’ stage, we identify the rules and standards that we take, provisionally, to provide the content of the practice. We then move to the ‘interpretive’ stage, at which we settle on some general justification for the main elements of the practice, i.e. an account of what value the practice realizes and how it does so. Such an account must combine two dimensions of interpretation: Our theory must at once both ‘fit’ and ‘justify’ our practice. Finally comes the ‘postinterpretive’ stage, in which we adjust our sense of what the practice ‘really’ requires so as better to serve the value that we have identified. Dworkin’s schema is helpful so long as we do not mistake it for a concrete procedure that we must always self-consciously follow, or (worse) an algorithm for success. The three ‘stages’ of interpretation are not analytically discrete. Dworkin makes clear that even at the preinterpretive stage, a degree of interpretation is necessary in order to identify the object of the interpretation.<sup>16</sup> Furthermore, the progression through the three stages is not linear: At any point the interpreter could find, for example, that there is no way of reconciling any general justification with the practice he is interpreting and so be forced to return to the preinterpretive stage to see if some different initial selection would be more fruitful. The different stages of interpretation do not so much flow in chronological progression as sit in a kind of reflective equilibrium. Nevertheless, the three stages – (1) identifying and individuating a practice, (2) deriving an account of its value, and (3) making proposals for reform – correspond to tasks a sound interpretation must complete.

How do we decide which interpretation of a practice is the most attractive? What does it mean for an interpretation to portray a practice in its ‘best light’? We cannot hope to stand outside of our practices in order to judge putative interpretations from an Archimedean perspective. We can only assess interpretations from a viewpoint that is internal to the practices themselves; there is no higher court to appeal to. The test of an interpretation is accordingly whether it is able to formulate more explicitly *what it is that we are already doing*, by capturing the significance of those aspects of activity and norms of behavior that are most central to the practice. This is

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<sup>15</sup> *Id.* at 65-66.

<sup>16</sup> Hart, in his postscript to *The Concept of Law*, misunderstood this aspect of Dworkin’s methodology. Hart argued that the identification of rules and standards at the preinterpretive stage presupposes the existence of a fact-based test for law. See, H.L.A. HART, *THE CONCEPT OF LAW* 266 (3<sup>rd</sup> ed. 2012). However, Dworkin does not, as Hart describes, take ‘preinterpretive’ law as ‘settled’, and interpret it as if it were somehow axiomatic. Constructive interpretation is only complete if the subject-matter chosen in the preinterpretive stage turns out, in light of the work at the interpretive and postinterpretive stages, to be a set of true paradigm instances of the practice.

not to say the role of interpretation is simply to tell us what we already know. Indeed, a theory may provide a perspicuous account of a practice while challenging the views of those engaging in it, perhaps by highlighting an aspect of the world that had previously gone unnoticed. Dworkin's interpretation of law, for example, claims that our existing legal practice presupposes the central importance of the value of integrity, even though such a value has not been explicitly recognized by legal actors. Imputing a concern for integrity to legal actors helps explain their behavior in an attractive way, and thus renders the practice of law more luculent.<sup>17</sup>

Since an interpretation of a practice will usually recommend changes to the way in which the practice is carried out, the process of elucidating a practice is indissociable from the process of its appraisal. This connection between the explanatory and the normative has been neatly expressed by Taylor: 'What makes a theory right is that it brings practice out in the clear; that its adoption makes possible what is in some sense a more effective practice.'<sup>18</sup> Like a map, the test of a theory is how well we can use it to get around: Whether it renders our action less 'haphazard and contradictory,' and more 'clairvoyant.'<sup>19</sup> If a new interpretation gains widespread acceptance, then the practice itself is likely to alter, since people will approach the practice somewhat differently if convinced of the challenging theory. Successful interpretation is therefore capable of giving rise to a virtuous circle in which interpretive insight and improvements to the practice feed off one another. As Dworkin puts it: 'Interpretation folds back into the practice, altering its shape, and the new shape encourages further reinterpretation, so the practice changes dramatically, though each step in the progress is interpretive of what the last achieved.'<sup>20</sup>

Dworkin's methodology, then, is based on the idea that our political practices have certain meanings embedded within them—meanings which, as Taylor has put it, 'are not subjective meanings, the property of one or some individuals, but rather intersubjective meanings, which are constitutive of the social matrix in which individuals find themselves and act'.<sup>21</sup> Constructive interpretation is a matter of bringing these meanings out

<sup>17</sup> Dworkin draws an analogy to the discovery of the planet Neptune: 'Astronomers postulated Neptune before they discovered it. They knew that only another planet, whose orbit lay beyond those already recognized, could explain the behaviour of the nearer planets. Our instincts about internal compromise suggest another political ideal standing behind justice and fairness. Integrity is our Neptune.' DWORKIN, *LAW'S EMPIRE*, *supra* note 1, at 183.

<sup>18</sup> CHARLES TAYLOR, *SOCIAL THEORY AS PRACTICE* 104 (1983).

<sup>19</sup> *Id.* at 111.

<sup>20</sup> *LAW'S EMPIRE*, *supra* note 1, at 48.

<sup>21</sup> Charles Taylor, *Interpretation and the Sciences of Man*, 25 *REV. OF METAPHYSICS* 3, 27 (1971).

into the open, so as to enable the values that they embody to be identified and pursued more effectively. When examining Dworkin's theory of democracy, we should keep in mind his underlying commitment to this interpretive method.

## II. THE 'PARTICIPATORY VALUES' OF DEMOCRACY

In the fourth of his 'What is Equality?' papers, Dworkin draws a distinction between what he calls 'detached' and 'dependent' conceptions of democracy.<sup>22</sup> He describes detached conceptions as based on input, i.e. they judge the democratic character of a political system by looking solely at its procedural aspects, asking whether it distributes political power equally amongst citizens.<sup>23</sup> Dependent conceptions, on the other hand, are described as outcome-based, such that they recommend as democratic whatever political system is most likely to lead to the best substantive consequences.<sup>24</sup> Now it might seem that the distinction between detached and dependent conceptions corresponds to the distinction between noninstrumental and instrumental views of democracy respectively.<sup>25</sup> However, that is not the case, since Dworkin includes as 'consequences' of a political system not only the 'distributive' consequences (such as the rates of taxation and public spending, the substance of the rules of property, contract and tort, and so on), but also what he calls 'participatory' consequences: 'The consequences that flow from the character and distribution of political activity itself.'<sup>26</sup> Dworkin identifies three types of participatory consequence: the 'symbolic value' of the confirmation of the status of citizens as free and equal; the 'agency value' which accrues when politics is connected to each individual's moral experience; and the 'communal value' of a cohesive and fraternal political community.<sup>27</sup>

By including 'participatory consequences' as part of his 'dependent' conception, Dworkin recognizes the noninstrumental, *expressive* value of democracy.<sup>28</sup> Dworkin's symbolic, agency and communal values are not 'consequences' in the instrumental, empirical sense. Unlike the 'distributive' consequences of a political process, the values of political

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<sup>22</sup> *What is Equality?*, *supra* note 1, at 3-8.

<sup>23</sup> *Id.* at 3.

<sup>24</sup> *Id.*

<sup>25</sup> For an overview of the distinction between noninstrumental and instrumental views of democracy, see Tom Christiano, *Democracy*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2015), <http://plato.stanford.edu/archives/spr2015/entries/democracy/>.

<sup>26</sup> *What is Equality?*, *supra* note 1, at 4.

<sup>27</sup> *Id.* at 4.

<sup>28</sup> See also AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 21-3 (2004).



equality, agency and community cannot be conceptually separated from the practice of democracy that gives rise to them. It is not quite right to say that democracy *produces* these values; rather we would say that democracy expresses or honors such values.<sup>29</sup> We can note here that Dworkin's 'symbolic' value is misleadingly named: *All* of the participatory consequences rely on the symbolic status of democratic practices and institutions in order to bear the expressive significance that they do.

The value that Dworkin calls the 'symbolic' value would perhaps be better referred to as 'political equality;' Dworkin also describes it as 'a declaration of equal standing for all'.<sup>30</sup> Dworkin associates this value with voting rights, such that one-person-one-vote signifies a commitment to the equal status of all citizens. But, as Dworkin rightly acknowledges, the shape voting rights must take in order to successfully symbolize equality depends upon contingent historical factors:

Our own history is such that no deviation from equal impact within a district – no deviation, that is, from equal vote – is tolerable for us. That strict requirement would not necessarily hold in a community whose history showed that unequal voting did not itself display contempt or disregard. We can imagine, for example, a society in which people gain votes as they grow older, or in which people acquire more votes by pursuing a course of study genuinely open to everyone, or something of that sort. But in a society like our own, in which the vote has traditionally been an emblem of responsibility, weight, and stake, any violation of equal vote would reflect a denial of the symbolic attachment equal vote confirms.<sup>31</sup>

Here Dworkin recognizes that what amounts to an insult to citizens' political equality depends upon shared understandings which afford significance to particular features of the practice. Unlike, say, physical

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<sup>29</sup> See Philip Pettit, *Consequentialism and Respect for Persons*, 100 ETHICS 116 (1989) (On the distinction between producing and honouring values); See also Ben Bradley, *Two Concepts of Intrinsic Value*, 9 ETHICAL THEORY AND MORAL PRACTICE 111 (2006).

<sup>30</sup> *What is Equality?*, *supra* note 1, at 19.

<sup>31</sup> *Id.* at 19-20. It is worth noting that 'one-person-one-vote' still does not fully characterize US voting law, since the majority of states practice some form of felon disenfranchisement. The significance of historical factors can be seen acutely here, since given the historic legacy of institutionalized racism in the US, the fact that felon disenfranchisement disproportionately impacts African Americans creates (at the very least) a suspicion that this group are not yet fully accepted as equals. (See Alec C Ewald, *Felon Disenfranchisement*, in 2 THE ENCYCLOPEDIA OF CIVIL LIBERTIES IN AMERICA 367 (David Schultz and John R Vile, eds., 2005).)

injury, insult is not a simple consequence of a perpetrator's acts. Rather, it can only be inflicted where there exists a shared background understanding that certain actions bear a certain significance. Because of the particular understanding of the significance of voting that is prevalent in modern western societies, the symbolic status of voting rights entail that one-person-one-vote is an essential requirement of democracy as we know it.

It does not follow that the symbolic expression of political equality requires that each citizen has equal impact on political 'outputs'. Such a requirement would rule out representative government altogether, since a representative structure is necessarily one that gives greater impact to legislators over ordinary citizens.<sup>32</sup> Furthermore, history does not afford a strong symbolic role to equality in the way in which the community is divided into electoral districts: For instance it does not convey disrespect for the people of California that they have far less impact on the constituency of the US Senate than do the citizens of Wyoming.<sup>33</sup>

If the nature of the 'symbolic' value of political equality is straightforward enough, Dworkin's discussion of the 'agency' value is a little more cryptic. The agency value accrues, he says, when politics connects 'each individual, to his or her own moral experience'<sup>34</sup>, so that 'our political life [is] a satisfactory extension of our moral life'.<sup>35</sup> While it is not made completely explicit, Dworkin's discussion of the agency value recognizes two important characteristics of democracy: Democracy is both practical and social. Democracy is essentially *practical* in the sense that democratic processes would not have the same expressive significance were it not for the fact that we are able to use them to make important decisions competently.<sup>36</sup> It is therefore crucial that those aspects of democracy that have socially-recognized symbolic significance are also of practical import. It is only because voting is a practical act of moral agency that the right to vote can serve as a symbol of respect: A *merely* symbolic election would fail in this regard. And it is also crucial that democratic politics is a *social* pursuit. It is not adequate, for democratic citizenship, to allow each person freely to contemplate political issues in private. It is central to one's status as a citizen that one is able to engage in discourse with others and try to persuade them to accept one's own point of view.

Finally, Dworkin's 'communal' value of democracy refers to the idea of self-government.<sup>37</sup> In a genuine democracy, the laws are created by the

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<sup>32</sup> *Id.* at 10-11.

<sup>33</sup> *Id.* at 20.

<sup>34</sup> *Id.* at 5.

<sup>35</sup> *Id.* at 21.

<sup>36</sup> GUTMANN AND THOMPSON, *supra* note 28, at 22.

<sup>37</sup> *What is Equality?*, *supra* note 1, at 5.

collective agency of the people acting as a whole. A citizen who dissents from a political decision can only be expected to accept that he is nevertheless party to self-government if he has a sense that he belongs to a political community that transcends the particular decision with which he disagrees. This requires that we take 'the people' to be a distinct entity, capable of acting in a way irreducible to any statistical function of the actions of individual citizens.<sup>38</sup> Dworkin calls this view the 'partnership conception of democracy,' since 'it holds that self-government means government not by the majority of people exercising authority over everyone but by the people as a whole acting as partners.'<sup>39</sup> As Dworkin makes clear, this is not such a mysterious phenomenon as it might at first glance appear. He borrows from Rawls the example of an orchestra: It is essential to an orchestral performance not just that a set of musicians simultaneously play some appropriate score, but that the musicians play *as* an orchestra, each intending to make a contribution to the performance of the group, rather than isolated individual recitations.<sup>40</sup> This does not depend on any ontological priority of community over individual, but simply on a certain kind of shared attitude among individuals. Democracy enables citizens taking part in political action to view themselves (authentically)<sup>41</sup> as engaged in a joint venture, such that—like musicians in an orchestra—they can each share in the credit due for the achievements of the community

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<sup>38</sup> Bratman has proffered a 'reductive' account of collective agency which is expressed purely 'in terms of the attitudes and actions of the individuals involved' MICHAEL BRATMAN, *FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY* 108 (1999); *see generally* chaps 5-8. On Bratman's account, a group engages in what he calls 'shared cooperative activity' when each of its members: (i) intend that the group carry out some joint activity; (ii) are mutually responsive to one another's intentions and actions; (iii) are committed to the success of the activity; (iv) are committed to supporting one another in the pursuance of the activity; and (v) are led to carry out the joint activity by virtue of their attitudes (i) – (iv). Bratman's aims are explicitly functionalist: 'What we want to show is that intentions of individuals with these special contents should lead to planning, bargaining and action of those individuals which, taken together, constitute appropriately coordinated planning and unified shared activity.' (*Id.* at 123.) He takes the fact that the complex of interlocking intentions (i) – (iv) is likely to lead consistently mutually-supportive action as evidence that it adequately explains the phenomenon of joint action. However, (i) seems tacitly to assume what Bratman is at odds to deny: the existence of an ontologically irreducible collective agent. More generally, Bratman's functionalist approach is incapable of capturing what we might call the *ethical* significance of joint action: i.e. the fact that joint action is *qualitatively*, and not just functionally, different from a set of mutually responsive individual actions.

<sup>39</sup> JUSTICE FOR HEDGEHOGS, *supra* note 1, at 384.

<sup>40</sup> *Equality, Democracy and Constitution*, *supra* note 1, at 329.

<sup>41</sup> I add this parenthesis to underline the fact that collective agency here is not merely a subjective matter: it depends on, but cannot be reduced to, individual opinions about the nature of the action. It is crucial for democracy that citizens are not brainwashed or misled into thinking that they are engaged in a joint venture: the sense of joint venture must be authentic.

as a whole.

### III. DWORKIN'S ATTEMPT AT INSTITUTIONALIZING DEMOCRACY

Dworkin claims that the participatory values recommend a basic outline of a democratic structure, leaving open a number of specifics to be crafted so as to deal with localized requirements.<sup>42</sup> The 'symbolic' value, as we have seen, requires equality of vote within electoral districts. The 'agency' value requires that citizens are guaranteed the freedom to express their opinions, and that they have 'enough access to influential media . . . to give each person a fair chance to influence others if he or she can.'<sup>43</sup> And the 'communal' value demands that 'collective decisions must reflect equal concern for the interests of all members.'<sup>44</sup> As Dworkin sees it, the symbolic value of equal voting rights sets a default of equality of impact between citizens, from which we should not depart unless two conditions are met: firstly, the different procedure must not outrage any of the participatory values; and secondly, we must have some positive reason to think that a different procedure would considerably improve the quality of political decisions.

The first condition rules out formal electoral discriminations, such as restriction of the franchise to men, whites, property-holders and so on, or any proposal that would give weightier votes to classes of persons thought more likely to make good decisions on political issues.<sup>45</sup> It does not, however, rule out representative government, since this lowers the political impact of all citizens, and thus 'disenfranchises all unelected groups and persons equally.'<sup>46</sup> Furthermore, Dworkin says, we have a positive reason to think representation improves the quality of political decisions, since 'elected officials, rather than popular assemblies, are better able to protect individual rights from dangerous swings in public opinion'.<sup>47</sup> He accordingly concludes that both conditions for departure from equality of impact are met in the case of representative government, so that there can be no general democratic requirement that laws, even on issues of fundamental importance, be put to referendums. Issues of detail, such as the

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<sup>42</sup> See, e.g., JUSTICE FOR HEDGEHOGS, *supra* note 1, at 398-9.

<sup>43</sup> *What is Equality?*, *supra* note 1, at 22.

<sup>44</sup> *Equality, Democracy and Constitution*, *supra* note 1, at 339.

<sup>45</sup> With what I think is a pinch of self-deprecating humour, Dworkin gives the example of a proposal 'that only lawyers and moral philosophers should be allowed to vote on choice-insensitive matters.' See *What is Equality?*, *supra* note 1, at 27. Dworkin does not specify whether he is using 'and' in the conjunctive or the disjunctive.

<sup>46</sup> JUSTICE FOR HEDGEHOGS, *supra* note 1, at 393.

<sup>47</sup> *Id.* at 394.

lengths of parliamentary terms, the system of election and the makeup of electoral districts, must be looked at in the context of the particular community for which they are being considered.

He addresses the question of judicial review in similar manner. Judicial review clearly creates a vast disparity of political impact: It gives a handful of judges the power to overrule policies that are supported by the overwhelming majority of the populace. But, Dworkin argues, the first condition for departure from equal impact is nevertheless met. Firstly, he claims, judicial review does not impair the symbolic value of equal voting rights, since it does not reflect any contempt for or disregard of any group within the community.<sup>48</sup> Secondly, judicial review supports the 'agency value', by providing 'a forum of politics in which citizens may participate, argumentatively, if they wish, and therefore in a manner more directly connected to their moral lives than voting almost ever is.'<sup>49</sup> Finally, judicial review promotes the communal value of democracy, since in upholding individual rights against government violations, it preserves the political community as an inclusive democratic community.<sup>50</sup> He accordingly gives us an account of judicial review as a kind of democratic prophylactic: Without insulting the status of citizens as equals, it protects the community against legislative decisions that would tend to eat away at the egalitarian basis on which it is founded. This still leaves open the second condition, whether judicial review in fact improves the substantive quality of political decisions. Like the issues surrounding the detail of the electoral system, an answer to this question will depend upon a host of factors that vary from place to place. Nothing guarantees in advance that judicial review will make a community more democratic, and Dworkin floats the possibility that other strategies for protecting individual rights against majority domination might prove superior.<sup>51</sup> Nevertheless, Dworkin is confident that in most, if not all actually existing cases, judicial review has had a positive effect. Accordingly, he concludes that judicial review is generally a benefit to democracy.

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<sup>48</sup> *What is Equality?*, *supra* note 1, at 29; *Equality, Democracy and Constitution*, *supra* note 1, at 337-9; JUSTICE FOR HEDGEHOGS, *supra* note 1, at 396.

<sup>49</sup> *What is Equality?*, *supra* note 1, at 29. *See also* *Equality, Democracy and Constitution*, *supra* note 1, at 340-2; and JUSTICE FOR HEDGEHOGS, *supra* note 1, at 396-8.

<sup>50</sup> *Equality, Democracy and Constitution*, *supra* note 1, at 342-6; JUSTICE FOR HEDGEHOGS, *supra* note 1, at 398.

<sup>51</sup> JUSTICE FOR HEDGEHOGS, *supra* note 1, at 398-9. Dworkin gives the example of an elected upper chamber, though it is not clear why he believes the upper chamber need be elected.

#### IV. COURT AS SYMBOL: THE MYTH OF LEGALITY AND THE NEGATIVE CONCEPTION OF CITIZENSHIP

Judicial review does not place decisions about fundamental rights into the hands of just *any* set of experts: It places them specifically into the hands of a *court*. Courts enjoy a particular status in the popular imagination. To put it crudely, people have a generally shared sense of what courts are *for*, and this sense affects both how judges, lawyers and parties to court cases behave and how the public responds to their behavior. The expressive significance of judicial review will hang upon the basic shared understandings of what it means for a controversy to be decided judicially. In this section, I argue that the symbolic significance of courts is ‘thicker’ than Dworkin recognizes, such that his argument that judicial review does not impede the agency and communal values is altogether too quick.

Dworkin’s defense of judicial review relies on the status of courts in the popular imagination. Dworkin needs to be able to answer the question of why judicial review should signify a concern for equality rather than a desire to place government in the hands of an elite: Why is it democratic and not aristocratic? He can answer this question because at a fundamental, abstract level, citizens in western democracies share a set of understandings that distinguish courts from aristocratic bodies. Judges are associated with a particular set of virtues—virtues of impartiality, rationality and fairness—and not with superiority or excellence *simpliciter*. The narrative that justifies their authority speaks of professional learning and institutional independence, not of their possessing gold in their soul.<sup>52</sup> It is this narrative that allows Dworkin to differentiate judicial review from aristocracy, and thus conclude that judicial review does not symbolize a lack of respect for any section of the community.

However, as scholars of cultural symbolism have pointed out, symbols often ‘condense many references, uniting them in a single cognitive and affective field.’<sup>53</sup> Those seeking to defend a political institution must take its significance in its entirety; one cannot pick-and-choose those aspects of symbolic significance that are desirable and hope to discard the others. In the case of courts, the very virtue that seems to recommend them as arbiters of disputes over the extent of fundamental rights—their *impartiality*—is linked with a way of thinking about constitutional politics that is problematic for democracy.

For a number of decades now political scientists have puzzled over

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<sup>52</sup> Cf PLATO, THE REPUBLIC Book III, 415a (H. D. P. Lee tr., 2d ed. 2007).

<sup>53</sup> VICTOR W. TURNER, DRAMAS, FIELDS AND METAPHORS: SYMBOLIC ACTION IN HUMAN SOCIETY 55 (1974); *see also*, VICTOR W. TURNER, THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL 27-30 (1967).

what they have come to call the 'myth of legality': the notion that judicial decision-making is somehow a 'nonpolitical' process.<sup>54</sup> Empirical investigations have found such a view to be widely held (at least in the US),<sup>55</sup> although it is not entirely clear what is meant by 'nonpolitical' in this context, and a number of studies show citizens holding apparently contradictory views.<sup>56</sup> The tenor of much of the political science literature tends to suggest that the myth of legality is, in the words of Caldeira, 'silly formalism,' that 'no one who has taken Introduction to American Government . . . is going to ascribe to.'<sup>57</sup> But, as Caldeira goes on to point out, this attitude simplistically equates the myth of legality with acceptance of what Pound derided long ago as 'mechanical jurisprudence.'<sup>58</sup> The myth, however, should not be seen as acceptance of any particular jurisprudential theory, nor, indeed, as the acceptance of any particular theory at all. In fact, we need some sort of 'myth' of legality in order to accept the very idea of law. To be clear, by myth I do not mean 'a widely held misconception,' but rather 'a symbolic narrative.'<sup>59</sup> Myths are the stories that we tell ourselves so as to bring order to a complex and potentially chaotic world. 'Law' is not a natural kind, an *a priori* concept or the product of pure rational thought; it is a frame through which we organize aspects of our social and political life, and it is sustained by the sharing of a set of reassuring, widely-recognized symbols.<sup>60</sup>

I therefore do not think we should be surprised by the fact that the 'myth of legality' appears to be widespread, or that its content lacks clarity.

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<sup>54</sup> See Gregory Casey, *The Supreme Court and Myth: an empirical investigation*, 8 LAW & SOC'Y REV. 385 (1974); Austin Sarat, *Studying American Legal Culture: an assessment of survey evidence*, 11 LAW & SOC'Y REV. 427 (1977); Dean Jaros and Robert Roper, *The Supreme Court, Myth, Diffuse Support, Specific Support, and Legitimacy*, 8 AM. POL. Q. 557 (1980); John M. Scheb II and William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOC. SCI. Q. 928 (2000); Sara C Benesh, *Understanding Public Confidence in American Courts*, 68 J. POL. 697 (2006); JAMES L. GIBSON AND GREGORY A. CALDEIRA, *CITIZENS, COURTS AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* (2009).

<sup>55</sup> A certain caution about drawing generalized conclusions from this empirical data is due owing to the fact that almost all studies have been conducted in the US. However, James L. Gibson et al have found evidence of similar attitudes in a number of EU countries: see James L. Gibson et al, *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343 (1998).

<sup>56</sup> For an overview, see James L. Gibson and Michael J. Nelson, *The Legitimacy of the US Supreme Court: conventional wisdoms and recent challenges thereto*, 10 ANN. REV. L. & SOC. SCI. 201, 209-12 (2014).

<sup>57</sup> Gregory A Caldeira, 88 AM. POL. SCI. REV. 485, 485 (1994), reviewing JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL*.

<sup>58</sup> Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUMBIA L. REV. 605 (1908).

<sup>59</sup> The former definition is from the OXFORD ENGLISH DICTIONARY (2d ed. 2000), the latter from the ENCYCLOPAEDIA BRITANNICA (15th ed. 1994).

<sup>60</sup> See MARTIN LOUGHLIN, *SWORD AND SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW AND POLITICS* chap 2 (2000).

What the empirical studies show is citizens struggling to articulate verbally certain inchoate understandings that are usually expressed symbolically. The way in which the courts are ‘different’ from ‘political’ actors does not permit straightforward definition, but it is nevertheless deeply ingrained into our structures of thought and behavior.<sup>61</sup> It is this understanding that enables us to see courts as ‘impartial’ arbiters. They are certainly not impartial in the sense of not being affected by the outcome of decisions: Judges, like the rest of us, must obey the law. Nor are they impartial in the sense that they may reach decisions by recourse to some algorithm that spares them the need to make normative judgments: This kind of ‘formalism’ is indeed ‘silly’. Their impartiality comes from the fact that they are bound to ‘legal’ as opposed to ‘political’ considerations. And while there are countless competing theories about precisely what this entails for judicial decision-making, these theories only make sense on the understanding that courts *are* different from the ‘political’ branches of government, i.e. that the distinction between law and politics has at least *some* substance. It is this widely shared background understanding that allows us to see judicial review as premised on a liberal ideal of impartiality rather than on an aristocratic supposition of judicial superiority.

The difficulty with this, however, is that background understandings frame not only the decision-process (*nemo iudex in causa sua, audi alteram partem, etc.*), but also the subject-matter of the decision itself. By sending questions about fundamental rights to the courts for determination, judicial review presents such issues as qualitatively differentiated from matters of ‘ordinary politics.’ Furthermore, the supremacy of the courts over Congress promotes the idea of the supremacy of law over politics; i.e. an understanding of politics as being limited within the bounds set by law. This causes problems for both the ‘agency’ and ‘communal’ values of democracy.

The distinction between the ‘political’ and the ‘legal’ casts doubt on Dworkin’s claim that judicial review provides an arena of contestation that is ‘directly connected to [citizens’] moral lives.’<sup>62</sup> Sending an issue to be determined by the court elevates the issue to the level of constitutional law,

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<sup>61</sup> My claim here is supported by the finding, in a number of empirical studies, that there is a positive correlation between strength of adherence to the ‘myth of legality’ and familiarity with/knowledge of the law and courts (Casey, *The Supreme Court and Myth*; Gibson et al, *On the Legitimacy of National High Courts*; Benesh, *Understanding Public Confidence in American Courts*). This correlation is difficult to explain on the assumption that the myth is simply a falsehood, since in that case we would expect experience of the courts to disabuse rather than bolster it. Gibson and Caldeira conclude, sensibly, I think, that exposure to legitimising judicial symbols reinforces the process of distinguishing courts from other political institutions, so that those who are experienced with courts tend to perceive and evaluate their decisions through the frame of law (CITIZENS, COURTS AND CONFIRMATIONS 7-14).

<sup>62</sup> *What is Equality?*, *supra* note 1, at 29.



and thereby marks its *difference* from everyday moral issues. A constitutional ruling presents itself not merely as one side in a moral-political quarrel, but as an authoritative statement of the permissible framework within which such quarrels are to be conducted. Such statements are buttressed by powerful symbolism. This is most obviously manifested in quasi-religious courtroom design and dress and the elaborate use of supplicant honorifics,<sup>63</sup> but perhaps even more important is the symbolic force of the 'sacred text' of The Constitution.<sup>64</sup> This is not to say that judges are presented as infallible, or that constitutional decisions are placed beyond dispute, but rather that constitutional decisions may only be disputed in a certain register: Not the register of everyday morality, or of political action, but the learned, mystifying register of constitutional law. Citizens may indeed 'participate, argumentatively, if they wish'<sup>65</sup> in judicial review, but they can only do so in the sacred language of law. (Furthermore, if they expect results they are best advised to hire an acolyte to speak for them.) The link between the outcome and the citizens' sense of moral agency is, I submit, accordingly diluted.

The image of politics bounded by law also threatens to weaken the 'communal value,' i.e. the ability for citizens to see themselves as engaged in a joint project of self-government. When the most basic questions about the principles upon which the political community is built are presented as questions of law, then we should not be surprised if, as de Tocqueville put it, 'the spirit of the lawyer . . . infiltrates all society.'<sup>66</sup> Judicial review places courts at the pinnacle of the institutional hierarchy and thus presents legal action as the most fundamental way in which citizens may interact with the political community. This projects a 'negative' conception of citizenship according to which the characteristic capacity of the citizen is the ability to secure one's rights as against the state.<sup>67</sup> But without wanting to downplay the importance of government in accordance with the law, 'rights-retrieval'

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<sup>63</sup> Note the US Supreme Court's description of itself on its own website: *The Supreme Court Building: America's Temple of Justice*, <http://www.supremecourt.gov/visiting/TempleOfJustice.aspx>. See also MURRAY J. EDELMAN, FROM ART TO POLITICS: HOW ARTISTIC CREATIONS SHAPE POLITICAL CONCEPTIONS chap 5 (1995); and JEROME FRANK, *The Cult of the Robe*, in COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1950).

<sup>64</sup> See, for example, SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988).

<sup>65</sup> *What is Equality?*, *supra* note 1, at 29.

<sup>66</sup> ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA Volume I, part 2, chap viii (HC Mansfield & D Winthrop eds. and trs., 2000).

<sup>67</sup> The classical exposition of this conception of citizenship is T.H. Marshall, *Citizenship and Social Class*, in CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS (1950). Marshall's idea that it is through enjoyment of an array of liberal-democratic rights that individuals come to see themselves as full members of society bears more than a passing resemblance to Dworkin's account of the 'communal value'.

is not the essence of democratic self-government.<sup>68</sup> If citizens are to view themselves as engaged in a joint project of self-government, they will need a ‘positive’ conception of citizenship, according to which the defining characteristic of a citizen is a voice in deciding the laws by which the community defines itself. The concern here is not just the instrumental one that a society of individualistic rights-claimers will be unstable without widespread civic virtue,<sup>69</sup> it is deeper: If people’s relationship with the state is defined in terms of a list of rights, the full value of self-government is not available to them. A claim of right is an action taken *against* the community, whereas people can only be self-governing insofar as they conceive of themselves as acting *through* the community.<sup>70</sup> By elevating legal action to the highest form of citizen-participation, judicial review celebrates individual rights-retrieval at the expense of more collaborative forms of political engagement. It therefore threatens the ability of citizens to view themselves as a self-governing political community.

#### V. LEGISLATURE AS SYMBOL: THE FOCAL POINT OF THE PRACTICE OF DEMOCRACY

Probably the best known critique of Dworkin’s position—Jeremy Waldron’s ‘core case’ argument—attacks the inequality of impact inherent in a system of judicial review.<sup>71</sup> Dworkin has responded by dismissing

<sup>68</sup> See Charles Taylor, *Cross-Purposes*, in PHILOSOPHICAL ARGUMENTS 200-2 (1995).

<sup>69</sup> See, e.g., STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE AND COMMUNITY IN LIBERAL CONSTITUTIONALISM (1990); WILLIAM A GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES AND DIVERSITY IN THE LIBERAL STATE (1991); and RICHARD DAGGER, CIVIC VIRTUES: RIGHTS, CITIZENSHIP AND REPUBLICAN LIBERALISM (1997).

<sup>70</sup> I do not, however, go so far as to say that ‘the life of the active citizen is the highest life available to us’ WILL KYMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION 294 (2d ed., 2002). Kymlicka wins a pyrrhic victory over ‘civic republicanism’ by presenting it as relying either on an instrumental conception of citizenship (and thus collapsing into ‘liberalism’) or a comprehensive conception of the good life (and thus placing an implausible intrinsic value on political participation) (*Id.*, 294-9). My claim is not about what makes an individual human life go well, all things considered, it is about the kind of relationship that must pertain between citizens in order to make available a particular kind of value that they enjoy by virtue of membership in a democratic community.

<sup>71</sup> JEREMY WALDRON, LAW AND DISAGREEMENT (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006). To summarize briefly, Waldron argues that it is rational and fair to resolve political disagreements by majority-decision. He claims that majority-decision respects individuals in two ways. Firstly, it respects differences of opinion, as it does not require any individual’s opinion to be suppressed. The very idea of taking a vote portrays disagreement as reasonable; it is not necessary to invoke bad faith, ignorance, or latent self-interest to explain dissent. Secondly, it counts each individual equally, by treating each person’s opinion as a reason for deciding in the way that the individual prefers. As Waldron puts it, majority-decision ‘attempts to give each individual’s view the greatest weight possible in this process compatible with an equal weight for the views of each of the others’ (LAW AND DISAGREEMENT 114). Waldron concludes that legislation by representative assembly enjoys greater democratic legitimacy than judicial review, since it provides ‘a reasonable approximation of the use of [majority-decision] as a decision-making procedure among the citizenry as a whole’ (*The Core of the Case Against Judicial Review* 1388).

Waldron's argument as a majoritarian 'fetish.'<sup>72</sup> In this section, it will be suggested that Dworkin is, surprisingly perhaps, susceptible to a similar line of criticism himself: Like Waldron, Dworkin gives an unjustified priority to majoritarianism. Although he argues that representative government does not threaten democracy (because it improves the quality and efficiency of political decision-making), this is not the same as saying that it promotes the expressive values of democracy. Dworkin depicts representative government as a kind of compromise between equality of impact on one hand and quality of outcome on the other, seemingly without considering whether legislation by representative assembly has any distinctive democratic merit in and of itself.

Dworkin is, of course, critical of majoritarian conceptions of democracy. Of his own conception, he says this:

It denies that it is a defining goal of democracy that collective decisions always or normally be those that a majority or plurality of citizens would favor if fully informed and rational. It takes the defining aim of democracy to be a different one: that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect.<sup>73</sup>

In other words: democracy is not identified by an 'input-based' test of statistical equality of impact, nor an 'output-based' test of majority support for laws. The question is to what extent citizens govern themselves collectively through a process that respects each of them as free and equal moral agents.

Given Dworkin's apparently unequivocal rejection of majoritarianism, however, we may well ask why, when appraising institutions, he takes as his default starting position statistical equality of impact. He is happy, of course, to depart from equality of impact so long as such a departure does not signify contempt for or disregard of any group within the community. But if democracy does not demand majoritarianism as a theoretical ideal, then why should statistical equality feature even as a starting-point? It is as if, after expressly rejecting the majoritarian conception of democracy, Dworkin is unable to completely escape its grasp.<sup>74</sup>

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<sup>72</sup> JUSTICE FOR HEDGEHOGS, *supra* note 1, at 395.

<sup>73</sup> FREEDOM'S LAW, *supra* note 1, at 17.

<sup>74</sup> There seems to be a parallel here with Dworkin's early treatment of utilitarianism in *Why Bakke has no Case*, NEW YORK REVIEW OF BOOKS, October 11, 1977, at 11: despite criticizing utilitarianism

I find this feature of Dworkin's theory curious: Dworkin seems not to follow through with his own 'interpretive' methodology. While appreciating that a normative study of democracy must take the form of an interpretation of a practice, he takes an overly narrow view of what that practice consists of. In his discussion of the 'symbolic' value of democracy, Dworkin focuses his attention on elections; indeed, he goes as far as to equate the symbolic value with the assertion of equality inherent in a one-person-one-vote electoral system. After identifying this positive symbolic value of elections, Dworkin then treats the symbolic significance of all departures from majoritarianism in purely negative terms, asking only whether they detract from the equality that equal voting rights establish. By focusing so squarely on the symbolic value of *elections*, Dworkin fails to consider whether other parts of the democratic process have a positive symbolic significance.<sup>75</sup> The benefits secured by departures from plebiscitarianism – representative government, judicial review, and so on – are treated as merely instrumental. He fails to entertain the possibility that non-plebiscitary forms of government might noninstrumentally express respect for citizens' moral agency. Dworkin's attempt at a constructive interpretation of democracy in fact only constructively interprets the practice of voting.

The narrow scope of Dworkin's interpretation leads him to adopt a 'vote-centric'<sup>76</sup> view of democratic politics which seems better suited to aggregative theories of democracy than to his own 'partnership conception'. Dworkin presents legislatures as 'the battleground of power politics,'<sup>77</sup> with the primary function of aggregating private interests so that decisions on 'choice-sensitive' issues are made in a manner roughly corresponding to the

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for ignoring individual rights, Dworkin seemed to rely on a background utilitarian conception of the common good. For criticism, see MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 135-47 (1982).

<sup>75</sup> In places Dworkin has suggested a positive noninstrumental expressive value for judicial review. For example:

'[Judicial review] calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice. I do not call that religion or prophesy. I call it law.'

Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 518 (1981) (footnotes omitted). Claims like this, however, dropped out of his later work, perhaps following accusations that he was presenting a 'rosy' picture of courts not matched by his 'cynical' picture of legislatures. See, e.g., JEREMY WALDRON, *LAW AND DISAGREEMENT* 31-2 (1999). In any event, Dworkin fails to consider whether representative government may have any positive noninstrumental significance.

<sup>76</sup> Here I use the terminology of Kymlicka, who contrasts 'vote-centric' theories of democracy with 'talk-centric' theories. See WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY* 290-1.

<sup>77</sup> *The Forum of Principle*, *supra* note 71, at 518.

preferences of the majority<sup>78</sup> and a secondary, negative function of guarding against 'dangerous swings in public opinion.'<sup>79</sup> This model of the legislature is familiar from those 'interest group' theorists who have viewed democratic politics as consisting mainly of a clash between competing self-interested groups.<sup>80</sup> But the interest group model fails on both interpretative dimensions: As an account of modern democracy it is neither descriptively realistic nor normatively desirable.

Descriptively speaking, as Waldron has pointed out, the supposed inability of elected representatives to engage responsibly with matters of principle has been exaggerated. Waldron gives the example of the UK Parliament in the 1960s debating controversial moral issues such as abortion, homosexuality, capital punishment, obscenity and prostitution.<sup>81</sup> The Parliament passed a raft of liberalizing legislation, often against the wishes of the majority of the public, following reasoned (and reasonable) debates on the matters of moral and political principle involved (without, Waldron adds, the distraction of 'issues about interpretive technique, or issues about precedent or jurisdiction or other legalisms'<sup>82</sup>). Although legislatures clearly do not always act in such a responsible way, such examples show that they are *capable* of acting as fora of principle, at least some of the time.

Waldron's anecdotal observations gain support from the findings of more systematic studies showing that interest group theory has underappreciated the level of interaction between legislative debate and individual political beliefs: far from merely giving expression to pre-existing public views, the reasons given by legislators in support of (or against) government policy help shape the political principles that are held by ordinary voters.<sup>83</sup> Here legislatures are aided by their distinctive institutional features: their large numbers of members and non-specialized function allow them to provide a forum for nonexpert deliberation involving inputs from a wide variety of perspectives. Unlike court proceedings, legislative debates are not detached from pre-existing public opinion, but nor do they merely reflect it mimetically. Legislative debate provides an opportunity for public opinion to be *refined*, to be given more specific

<sup>78</sup> *What is Equality?*, *supra* note 1, at 23-28.

<sup>79</sup> JUSTICE FOR HEDGEHOGS, *supra* note 1, at 394.

<sup>80</sup> For an overview, see Andrew McFarland, *Interest Group Theory*, in THE OXFORD HANDBOOK OF AMERICAN POLITICAL PARTIES AND INTEREST GROUPS (Louis Sandy Maisel et al eds., 2010).

<sup>81</sup> Jeremy Waldron, *Legislating with Integrity*, 72 FORDHAM L. REV. 373, 388-94 (2003).

<sup>82</sup> *Id.*, at 393.

<sup>83</sup> See, e.g., ARTHUR MAAS, CONGRESS AND THE COMMON GOOD (1983) (in the US); and PHILIP NORTON, PARLIAMENT IN BRITISH POLITICS (2d ed., 2013) (in the UK).

content and to be brought to bear on detailed issues which require more time and attention than ordinary citizens are able to give.

To best understand the normative shortcomings of interest group theory, it is important to note a distinction between merely widespread or general opinion, on one hand, and a truly *public opinion*, on the other.<sup>84</sup> While general opinion may simply be inherited from preceding generations or passively absorbed by the recipients of propaganda, public opinion is the product of active reflection and discussion. Public opinion can only arise where there exists a common space of discussion that allows people to share thoughts, beliefs and arguments without ever meeting in person or even communicating with one another directly. This requires citizens to have a certain self-conception: They must understand themselves as taking part in a discursive process that is oriented towards a common resolution. This is qualitatively different to a group of people who just happen to be talking and forming opinions about the same thing. Public opinion is irreducibly shared, rather than merely convergent, opinion.

The ‘communal value’ of democracy—the idea that the laws are created by the collective agency of the people—relies entirely on the existence of a public opinion as opposed to merely general opinions. We can only view ourselves as a self-governing community if we see political power as answerable not simply to widely-held opinions about the general welfare but to a public opinion which is the common property of us all. The notion that our disagreements over particular issues take place within the context of a broader shared fabric prevents them from threatening our sense of common enterprise. As Warner has put it: ‘It silently transforms the ideal of a social order free from conflictual debate into an ideal of debate free of social conflict.’<sup>85</sup>

Had Dworkin taken seriously the task of constructively interpreting the practice of representative government, he would not have seen the value of the legislative assembly negatively) as an instrumentally valuable reflection of/brake on *majority* opinion, but rather (positively) as reflecting a commitment to the idea that government ought to be steered by *public* opinion. Public opinion cannot be equated with the opinions that happen to be held by the majority of citizens and its content cannot be ascertained simply by empirical inquiry, opinion polls, or referendums. It is the opinion that arises when people, understanding themselves as a community that shares some common purposes, engage in a reflective and critical debate. It does not take the form of a list of principles or policy preferences, but rather

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<sup>84</sup> CHARLES TAYLOR, *Liberal Politics and the Public Sphere*, in PHILOSOPHICAL ARGUMENTS at 260-5.

<sup>85</sup> MICHAEL WARNER, THE LETTERS OF THE REPUBLIC: PUBLICATION AND THE PUBLIC SPHERE IN EIGHTEENTH CENTURY AMERICA 46 (1990).

of an ongoing argument and, as such, its content is a matter of interpretation over which citizens can be expected to disagree. While it manifests itself in newspaper articles, pressure group campaigns, barroom discussions and political protests, its content cannot be straightforwardly equated with any of its particular manifestations, since the nature of public opinion is such that any claim to speak in the name of the public is inherently open to challenge.

For public opinion to be *democratic*, every group and class of citizen must be given a genuine hearing so as to be able to have a real impact on the debate (we can contrast the eighteenth century 'republic of letters'). Such a debate is the ideal towards which legislative debates aspire, and is implicit both in the procedures for the composition and conduct of legislatures and in the role that legislatures play in the popular imagination.

By representing inclusive and reasoned elaboration of a public opinion that is oriented towards a common good, legislatures can promote the communal value of democracy, i.e. the idea that the political community is collectively self-governing. Legislatures can also promote the agency value, by serving as the target of participation that connects the politically active citizen with the procedure by which significant political decisions are made. Taken individually, each citizen has a representative (or group of representatives) to whom she may make political arguments and expect a considered response.<sup>86</sup> In its individualized nature, this mode of participation has something in common with participation as a 'citizen-claimant' in a judicial review action, though it does not require the petitioner to speak the language of law, or to assert an individual right. However, the legislature is also the focal point of political action of an irreducibly collective kind, namely demonstrations and protests. As Norton points out, the continued relevance of Parliament in UK politics is shown by the fact that demonstrations against particular measures are held, not outside a particular ministry, but outside Parliament.<sup>87</sup> This behavior cannot be explained in straightforwardly instrumental terms as trying to influence those who hold the levers of power, since, although Parliament of course has the power to make significant changes to government legislation, in practice it is extremely rare that it does so. The phenomena of protests

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<sup>86</sup> Here 'expect' carries a normative, not merely descriptive sense. It might be common, for example, for members of the public to say that they do not expect legislators to behave honestly. Here 'expect' is used descriptively. The fact that this is taken as such a biting criticism of politicians shows that members of the public do *normatively* expect honesty from legislators.

<sup>87</sup> NORTON, *supra* note 83, at 261. See also ROB BOGGATT, *PRESSURE GROUPS TODAY*, chap 7 (1995).

outside Parliament only make sense when we take a broader perspective. Parliament is understood to be the focus for political activity and thus the proper place for attempts to garner public attention to a political cause. The aim is not simply to get MPs to act in the way that the demonstrators want, but to ‘send a message’ both to government and to the wider public. Parliament thus provides a ‘dignified site’ for interaction between citizens and the state.<sup>88</sup> Even when it is perceived to be unjust, unrepresentative, even cynically self-serving, and even when its members are considered merely puppets of political parties and commercial interests, Parliament is seen as the proper venue for (attempts at) popular sovereignty. I do not believe the UK Parliament is idiosyncratic in this regard: The symbolic status of the legislature at the heart of democracy runs deep across western societies. If we view the legislature merely as an instrumental guardian against ‘dangerous swings in public opinion,’ we miss its true significance.

#### VI. WHY IDEALIZE LEGISLATURES?

The above does not, of course, describe how real-life legislatures always operate. Legislators do not tend to come from all sections of society: they are predominantly white,<sup>89</sup> male<sup>90</sup> and upper-middle class.<sup>91</sup> They do not generally spend their time debating a representative selection of viewpoints on their merits, and all too often devote their time debating only

<sup>88</sup> See JOHN PARKINSON, *DEMOCRACY AND PUBLIC SPACE: THE PHYSICAL SITES OF DEMOCRATIC PERFORMANCE*, at 94 (2012).

<sup>89</sup> The underrepresentation of ethnic minorities is a recurring trend in economically developed countries. Examples include Canada (19.1% of the population as a whole is non-white, 9.4% of legislators are non-white); France (12.6%, 1.56%); the Netherlands (11.1%, 5.3%); New Zealand (33.4%, 22.8%); Sweden (13.3%, 10.9%); the UK (12.9%, 4.2%); and the US (36.3%, 22.8%). See Didier Ruedin, *Ethnic Groups in National Legislatures*, Harvard Dataverse (2012), <http://hdl.handle.net/1902.1/17476>.

<sup>90</sup> Data collected by the Inter-Parliamentary Union shows that only 22.2% of parliamentarians worldwide are women. Inter-Parliamentary Union, *Women in National Parliaments* (2015), <http://www.ipu.org/wmn-e/world.htm>.

<sup>91</sup> In the UK, over a third of MPs have attended fee-paying schools, compared with 9% of the population as a whole; 27% of MPs have an Oxbridge background, compared with 0.8% of the population as a whole (House of Commons Library, *Social Background of MPs*, Briefing Paper SN1528 (2010); SOCIAL MOBILITY AND CHILD POVERTY COMMISSION, *ELITIST BRITAIN?* (2014)). In the US, the median net worth of members of Congress is \$1.5 million, roughly nineteen times the median net worth of Americans in general; the alumni of 13 prestigious universities constitute about 15% of the House of Representatives, but less than 1% of the population as a whole; and only 20% of legislators grew up in working-class homes, compared with 65% of the population as a whole. Nicholas Carnes, *Does the Numerical Underrepresentation of the Working Class in Congress Matter?*, XXXVII LEGIS. STUDIES Q. 5 (2012); and NICHOLAS CARNES, *WHITE COLLAR GOVERNMENT: THE HIDDEN ROLE OF CLASS IN ECONOMIC POLICY MAKING 4-8* (2013)). Across the EU fewer than 4% of legislators are drawn from the ranks of blue collar workers, a figure which has been in steady decline since the 1950s. Heinrich Best, *New Challenges, New Elites? Changes in the recruitment and career patterns of European representative elites*, in *ELITES: NEW COMPARATIVE PERSPECTIVES* (Masamichi Sasaki ed., 2008).



two positions—‘government policy good’ versus ‘government policy bad’—picking sides solely according to the party to which they belong. The demands of the common good are often out-trumped by the interests of a few swing voters in marginal constituencies. A convenient scapegoat can be worth a thousand convincing arguments. It can be difficult at times to see how any of this respects citizens as intelligent moral agents. Furthermore, the formation of public opinion is not an egalitarian, inclusive, deliberative process; it is distorted, right at its center, by powerful media interests who often quite deliberately oversimplify, trivialize and mislead with the aim not so much to persuade the public to agree with them as to dissuade them from thinking at all. In light of all of this, is there any point in constructing an idealized account of legislatures?

With respect to a given legislature it may well be the case that, if its shortcomings are sufficiently acute, it will utterly fail to provide any noninstrumental good. The best we could say about it then would be that it serves as a compromise between the symbolic value of equal vote and the practical need for quality of outcome (assuming it achieved even that). We would then have little reason to suppose that its decisions necessarily had any greater democratic quality than the decisions of a constitutional court; they might even have less.

I would like to suggest, however, that, despite some rather acute flaws, the way in which legislative assemblies operate in modern western democracies is premised upon the idea that they are at least *supposed* to be arenas for reasoned deliberation, representative of society as a whole and firmly grounded in a reflective and critical public opinion. We overlook a vital aspect of politics—our interpretation of our practices is wanting—if we do not recognize these internal virtues of legislatures.

So I do not deny that a version of Dworkin’s argument might succeed as a piece of nonideal theory, intended for particular contingent circumstances. Dworkin, however, does not develop his argument in these terms. His defense of judicial review is presented as an ideal constitutional theory, an interpretation that portrays the practice of democracy in its best light. As such, it fails, since it overlooks much of the significance of the central democratic institution, the representative legislature. In a sense, Dworkin is guilty of not taking his own methodology far enough: He does not portray legislatures in their best light, and thus misses the distinctive role that they play in the democratic ideal. This failing has potentially more than merely theoretical consequences. As Dworkin himself says: ‘Interpretation folds back into the practice, altering its shape, and the new shape encourages further interpretation, so the practice changes

dramatically; though each step is interpretive of what the last achieved.<sup>92</sup> If so, then interpretations of democracy that, consciously or otherwise, do not require the legislature to function as a deliberative and representative assembly run the risk of becoming self-fulfilling prophecies.

### CONCLUSION

Although Dworkin talks of the ‘inputs’ and ‘outputs’ of a democratic system, he should not be taken to endorse the instrumentalist view that takes the value of democracy to be exogenous to democratic practice. By including ‘participatory consequences’ as part of his ‘dependent’ conception of democracy, Dworkin recognizes the noninstrumental role that political practice plays in expressing political value: what amounts to ‘insult’ or ‘respect’ depends upon shared understandings which afford significance to particular features of our practice. And with his ‘symbolic’, ‘agency’ and ‘communal’ values, Dworkin identifies important normative characteristics of democracy: it recognizes citizens as equals; it is inherently practical and social; and it enables members of the political community to view themselves as collectively self-governing. Democratic citizens thus share an irreducibly social good which cannot be reduced to mutual benefit.

When it comes to institutionalizing his theory, however, Dworkin adopts a curious starting-point: arithmetical equality of impact between voters. While this may be a reasonable starting-point for a theory of *elections*, it provides an overly ‘vote-centric’ perspective from which to examine democracy as a whole, better suited to aggregative theories of democracy than to his own ‘partnership conception’. It is as if, after expressly rejecting the majoritarian conception of democracy, Dworkin is unable to completely escape its grasp. The effect of this is that Dworkin ends up viewing any departures from plebiscitarianism as bearing instrumental value only. Yet representative assemblies, constitutional courts and so on are not merely practical expedients to improve the quality of our political decisions, they are institutions that occupy particular places in the popular imagination. As well as being decision-making mechanisms, they are cultural symbols that condense many references into a single affective field, with courts representing the panoply of meanings associated with ‘law’ and legislatures roughly representing ‘politics’. These shared background understandings frame not only the decision-processes, but also the very subject-matter and meaning of the decisions that fall to be made.

I have argued that the distinction between the ‘political’ and the ‘legal’ casts doubt on Dworkin’s claim that judicial review provides an arena of

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<sup>92</sup> LAW’S EMPIRE, *supra* note 1, at 48.

contestation that is 'directly connected to [citizens'] moral lives.'<sup>93</sup> Judicial review may dilute the link between decision and citizens' sense of moral agency, and threaten the ability of citizens to view themselves as a self-governing political community. Legislatures, on the other hand, are not merely majoritarian institutions, but provide a forum for nonexpert deliberation involving inputs from a wide variety of perspectives. When they function well, they symbolize a commitment to government in accordance with a critically-reflective public opinion. As it overlooks this aspect of our practice, Dworkin's interpretation of democracy remains incomplete.

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<sup>93</sup> *What is Equality?*, *supra* note 1, at 29.



