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Compared to What? Judicial Review and Other Veto Points in
Contemporary Democratic Theory

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ABSTRACT:

Many democratic and jurisprudential theorists have too often uncritically accepted Alexander Bickel's notion of "the countermajoritarian difficulty" when considering the relationship between judicial review and democracy; this is the case for arguments both for and against judicial review. This framework is both theoretically and empirically unsustainable. Democracy is not wholly synonymous with majoritarianism, and judicial review is not inherently countermajoritarian in the first place. In modern democratic political systems, judicial review is one of many potential veto points. Since all modern democratic political systems contain veto points, the relevant and unexplored question is what qualities might make a veto point relatively democratic. Proceeding on the assumption that democracy's primary normative value is found in its opposition to domination by both state and private actors, we make a preliminary effort to delineate what qualities a democratic veto point might have, identifying five criteria, and evaluate judicial review using these criteria. We conclude that judicial review's performance against these criteria is decidedly mixed, but in the final balance is likely to be a modest net positive for democracy, particularly when compared to other veto points commonly found in contemporary democratic political systems.

Introduction

For half a century, following the publication of Alexander Bickel's landmark study *The Least Dangerous Branch*, defenders and critics of judicial review have shared the view that judicial review presents a particular challenge for democratic theory. On this account, the countermajoritarian character of constitutional judicial review marks it as "deviant" within democratic political systems, requiring extra scrutiny and justification.¹ This approach, known as the "countermajoritarian difficulty," is becoming

increasingly untenable.² Courts are not reliably countermajoritarian, nor are legislatures reliably majoritarian.³ The establishment and exercise of judicial review frequently entails collaboration between the judicial and elected political branches, as opposed to a zero-sum struggle for power.⁴ Furthermore, democracy (in theory and practice) has always consisted of a good deal more than simple majoritarianism.⁵ And, indeed, few scholars who evaluate judicial review from the standpoint of the countermajoritarian difficulty would seriously argue otherwise. A more sophisticated assessment of judicial review's role in a democratic state requires a more viable conception of what sort of institutional arrangements might be considered democratic. Some scholars have attempted to analyze judicial review from the standpoint of deliberative democracy.⁶ Others have argued that the "democracy-against-domination" approach seen in the works of Ian Shapiro, Phillip Pettit, and others is a useful approach for evaluating the democratic valence of judicial review.⁷ We will consider judicial review from the latter perspective, but depart from previous efforts by focusing on judicial review's non-exceptional character.

Both a key distorting effect of the countermajoritarian difficulty framework and a more promising way forward are identified in Barry Friedman's history of the importance of the countermajoritarian difficulty within legal scholarship:

[T]here is an interesting question of political theory concerning how judicial review fits into the fabric of majoritarian democracy, but . . . this is not what most constitutional theorists address either. The theorist truly devoted to problems of democratic theory would want to examine each and every institution of democratic governance on this basis, from the least representative - such as the Federal Reserve Board, or independent administrative agencies, or the Senate for that matter - to the seemingly most representative, such as the House of Representatives. Constitutional theorists rarely address these institutions or devote any sustained attention to the real questions of political theory they present . . . the academic tradition examined here is court-obsessed.⁸

Friedman is right to emphasize that assessments of judicial review's democratic legitimacy are meaningful only in the proper *comparative* institutional context. All liberal democracies diffuse power among numerous institutions and scores of actors, and (since all of these institutions have some measure of autonomy from public control and none of these institutions operate without constraint) these institutions in practice cannot easily be sorted into "majoritarian" and "countermajoritarian" categories. Judicial review's status as a veto point tells us little about its democratic legitimacy.

Assessing judicial review as practiced from a democratic perspective will not be easy. The judicial power to nullify acts of elected branches cannot be assumed to have the same democratic effects operating within a highly centralized Westminster system that it has in a decentralized, veto point-laden Madisonian system. Nor will judges applying an eighteenth-century constitutional text within nineteenth-century constitutional norms have the same political effects as judges applying twentieth-century texts within twenty-first-century constitutional norms. Of course, this is true of other veto points in democratic systems as well—their function within the overall democratic system varies substantially, depending on numerous features of that system's institutional structure and prevailing norms.

In other words, determining the democratic status of all veto points as a general matter is doomed to fail. But asserting that nothing can be said about the democratic properties of a particular veto point without access to all the particulars of a given context is unsatisfying as well. Therefore, we adopt a middle-ground strategy here—we will consider the veto point of judicial review in an explicitly comparative context. More specifically, we will examine how a democracy-against-domination approach might

evaluate courts as one of many veto points. We proceed as follows: First, we examine the arguments of those who critique judicial review on the terms of the countermajoritarian difficulty, identifying ways in which they are led astray by their treatment of judicial review as a unique veto point. We then identify five criteria on which the democratic value of veto points might be measured, from a democracy-against-domination perspective, and briefly consider the relative likely value of judicial review on these grounds. Judicial review seems to hold up relatively well compared to other common veto points in contemporary democratic systems—whatever its democratic shortcomings, they are no greater, and possibly less worrisome, than other veto points, such as the filibuster and bicameralism.

Judicial Review in Contemporary Democratic Theory

Judicial review's democratic standing has been the subject of sustained theoretical attention in recent years, and Jeremy Waldron is one of judicial review's most important democratic critics. His approach to democratic theory is broadly consistent with the countermajoritarian difficulty hypothesis. His recent work contains both a sustained defense of the democratic content of legislative processes and outcomes as well as a sustained critique of judicial review on both countermajoritarian and consequentialist grounds. Waldron's appreciation for the 'majority-procedure' feature of legislative action is based on what he takes to be the normative point of democracy—which is to give equal respect to persons under conditions of persistent disagreement.⁹ While Waldron concedes that equal respect doesn't logically or necessarily require majority-procedure, he does suggest that such a procedure is warranted given that "the problems we face pose

themselves urgently for us *in the circumstances of politics*, and in particular in the circumstance of disagreement about what would be just, a moral or at any rate an appropriate solution.”¹⁰ He is skeptical that any substantive requirement of political equality can be removed from the procedural requirements of majority rule, as even if political equality is a widely shared goal, disagreement will quickly reemerge when we try to determine the substantive meaning of political equality.

What does this all mean for judicial review? It begins at a democratic disadvantage for Waldron because courts do not, like legislatures, “internalize those disagreements [about social justice in society] by building them into the institutional structure of our assembly (with arrangements like government benches and opposition benches, majority and minority parties, debates, rules of order, whips, and roll-calls), indeed by making them part of our law-making.”¹¹ But here Waldron incorporates some potentially countermajoritarian features of legislatures into his democratic theory by suggesting that they represent the importation of the specific nature of a particular society’s disagreements about social justice.¹² The crux of his critique of judicial review is that the liberal fears commonly associated with majority rule without judicial review—specifically, fears about a Madisonian “tyranny of the majority”—are not unique to legislative supremacy. A form of tyranny is possible regardless of the details of the final moment in decision-making.¹³ Therefore, legislative supremacy is superior to a system of constitutional judicial review for two reasons, one philosophical and one pragmatic. The philosophical reason is that it is the decision-rule most clearly consistent with equal respect.¹⁴ The pragmatic reason is that Waldron suspects that judicial review will do no better at protecting the rights of minorities than legislative supremacy.¹⁵

The latter claim is, of course, highly contingent. Waldron correctly and appropriately notes many moments in American constitutional history when the Supreme Court has notably failed to protect minority rights. We agree with Waldron that judicial review isn't inherently *necessary* for liberal democracy,¹⁶ nor is it a universally reliable and effective protector of vulnerable and unpopular minorities. Furthermore, we agree that judicial review would likely be an ineffective barrier against emergent tyranny.¹⁷ But contingent empirical examples cut both ways. The structure and rules of legislatures cannot be counted on to efficiently and effectively translate majority political preferences into legislative outcomes, and courts may at times do a better job of doing exactly that. So barring a more systematic approach to empirical matters, the empirical/consequentialist element of this dispute cannot be resolved in a satisfying manner.

What of Waldron's philosophical account of the normative desirability of legislative supremacy? Waldron contends that the normative point of democracy is equal respect. But as Christopher Eisgruber notes, "majority rule" is but one possible interpretation of the procedural manifestation of equal respect.¹⁸ Furthermore, some of the reasons Waldron gives for preferring majoritarian decision-making (in particular, May's theorem) do not appear to justify ceding power to *representative* institutions.¹⁹ The core problem here is that Waldron conflates ordinary legislative procedure and majoritarian decision-making.²⁰ Waldron asserts that "the people are entitled to govern themselves by their own judgments,"²¹ an entitlement that is extrapolated from the core right to political participation, which is inexorably linked to our reliance on our own judgments. Political participation, according to Waldron, occupies a special ontological

status amongst existing recognized human rights due not to any normative priority but because “participation is a right whose exercise seems peculiarly appropriate in situations where reasonable rights-bearers disagree about what rights they have.”²² But here the epistemic move from “the people” to legislative bodies and legislative supremacy in particular is made far too easily. For precisely the reasons Waldron wants to embrace majority rule, we must question fully conflating majority rule with democracy. Unsurprisingly, Waldron fails to make the case that majority rule is neutral, and later he backs off this claim altogether.²³ Here Waldron’s insistence on taking disagreement seriously undermines his conclusions—reasonable disagreement about which dispersal of political powers best promotes equal respect for citizens is not hard to imagine.

Waldron does not fully consider how judicial review functions within contemporary democracies, and in so doing both overestimates the autonomy of courts and underestimates the many ways in which the other branches are able to diffuse democratic responsibility. Waldron assumes that liberal democracies include “safeguards” such as “bicameralism, robust committee scrutiny, and multiple levels of consideration, debate and voting.”²⁴ All of these features—in addition to other common features of modern democratic states, such as independent agencies in charge of monetary policy—frustrate majority will and dilute accountability. In the American political system, for example, the committee system and the structure and rules of the US Senate were much more important in preventing reforms to Jim Crow laws than the Supreme Court.²⁵ Another example of the way in which his assumptions about relations between courts and legislatures is insufficiently complex can be seen in his discussion of Canada’s “notwithstanding clause,” which allows federal and provincial legislatures to

override judicial review by announcing their intention to deviate from the demands of the charter.²⁶ Waldron correctly points out that “[in] practice, however, the notwithstanding clause is rarely invoked” and for that reason considers Canada’s regime of judicial review a form of “strong” review, like the US, for the purposes of his argument.²⁷ The fact that legislatures who could override substantive constitutional rulings with a simple majority in a centralized Parliamentary system virtually never do so raises serious questions about Waldron’s assumptions that judicial review operates in a presumptively countermajoritarian and “undemocratic” fashion. The legislature must, according to Waldron, “misrepresent its position on rights” to use the notwithstanding clause, and is impaired by “the legislature is always somewhat at the mercy of the courts’ public declarations about the meaning of the society’s Bill or Charter of Rights.”²⁸ But this is an empirical claim, and a strange one for someone with Waldron’s belief in the democratic legitimacy of legislatures to assume, unquestioningly, to be accurate. Why would the citizenry automatically side with an unelected court over an elected legislature in a conflict over the nature of rights? The fact that Canadian legislators disdain the use of powerful weapons to oppose the exercise of judicial review (as do American legislators, who rarely use the powerful tools given to them in Article III—including jurisdiction-stripping and court packing) powerfully suggests that judicial review is both more normatively legitimate and more consistent with the general preferences of elected legislators than Waldron’s assumptions imply.²⁹ And while the possibility that judicial review allows legislators to diffuse responsibility for difficult policy choices presents a serious challenge for democratic legitimacy, these problems are indistinguishable from the problems created by many other veto points.

Waldron fails to properly evaluate judicial review as one of many veto points in a democratic system. This error is a common one, dating back at least to Alexander Bickel's influential formulation of judicial review as a "deviant" institution in American politics over fifty years ago.³⁰ But legislative majorities may be thwarted at various points in the process, ranging from formal to informal.³¹ Waldron, when arguing against judicial review on behalf of "majority decision," implies that veto points are never justifiable.³² However, when arguing on behalf of "ordinary legislative procedure," the various veto points embedded in both that procedure (as well as the enactment of legislative outcomes) are not directly discussed but seem to be assumed.³³

Waldron's core error—his failure to evaluate judicial review in an institutional comparative context—it replicated by many other recent democratic critics of judicial review. Richard Bellamy's republican case for political rather than legal constitutionalism contains an even stronger version of Waldron's critique of judicial review, relying on a similar argument from the fact of disagreement as a central feature of the circumstances of politics.³⁴ Throughout, he distinguishes between two kinds of decision-making procedures: democratic and legal. The former are associated with majoritarianism; the latter, with countermajoritarianism. Because the latter elevate the views of some above others, they are not consistent with the value of political equality, and open the door for potential domination. The potential for veto points associated with legislative processes are not entirely ignored by Bellamy, but are downplayed relative to judicial veto points in large part because they are closer to the act of voting, which contains the requirements for a non-dominating procedure: "Giving each and every citizen one (and only one) vote in a general election offers a rough and ready and easy

way to verify form of ensuring all citizens views *carry the same weight* in collective decision-making.”³⁵

This approach makes the same fundamental error as Waldron’s: a number of veto points, particularly those found in the organization of the legislature, suggest the democratic side of political decision-making fails to live up to the standard suggested here. Beyond that, even at the moment of a democratic election, the standard of equality suggested here is rarely met. Bellamy correctly takes some of judicial review’s defenders to task for contrasting idealized exercises of judicial review with the flawed realities of legislative politics. But here he is guilty of a similar idealization of elections. Virtually all contemporary democracies feature some degree of malapportionment in one or more legislative bodies, which is persistent and generally favors some categories of voters (often rural voters) over others.³⁶ As Adam Przeworski recently noted, “no rule of collective decision-making other than unanimity can render causal efficacy to equal individual participation.”³⁷ So even at the procedural level, democratic elections as practiced don’t live up the standard Bellamy holds out for them, even before we consider the legislative veto points that will frustrate strong political equality after the election. There is no configuration of democratic politics that fully meets the procedural demands of political equality.

Another important critique of judicial review has been developed by constitutional populists such as Larry Kramer³⁸ and Mark Tushnet.³⁹ Kramer’s popular constitutionalism can be placed in the context of progressive scholars using the tools of originalism to challenge the conclusions of conservative originalists.⁴⁰ Kramer attempts to demonstrate with voluminous historical data that as generally understood at the time of

the framing, constitutional limits on the government were enforced through popular will, not by the courts. Certain limited forms of judicial review can be consistent with this understanding, but contemporary judicial supremacy is not. Ultimately, evaluations of judicial review must rest on pragmatic and consequentialist grounds rather than historical ones, and like Waldron, Kramer does not explain why judicial review (as opposed to other countermajoritarian veto points intended to impose limits on the state) is uniquely problematic. However, his point that “the people themselves” cannot be presumed to be incompetent to interpret the Constitution is an important one that should inform any evaluation of judicial review.

Tushnet’s populist case against judicial review—even the relatively modest forms Kramer finds acceptable—is of significant potential interest in the context of comparing judicial review to other veto points. Tushnet advocates a populist constitutionalism that privileges the “thin constitution” (most notably, the broad abstractions of the preamble and the Declaration of Independence) over the “thick constitution” (the detailed distribution of power and establishment of procedures that dominates the first three Articles of the Constitution).⁴¹ Tushnet’s version of populist constitutionalism would seem to imply serious democratic problems with *any* veto points that interfere with popular sovereignty, since veto points are quintessentially “thick constitutional” devices. Given his focus on judicial review, however, Tushnet does not pursue a comparative analysis of thick constitutional veto points.

One recent critic of judicial review, importantly, does not treat it as a uniquely problematic or deviant institution. In an important new book Melissa Schwartzberg considers (with particular attention to the process of constitutional amendment but

general democratic decision-making as well) the status of different veto points and procedural hurdles in both historical and analytic terms.⁴² She argues that veto points and procedural hurdles can be grouped into two categories: those that straightforwardly and clearly lead to supermajority rules, and create the opportunity for minority veto power, and those that don't appear to be in conflict with legislative majoritarianism. The latter don't violate majoritarian rule but create "complex majoritarianism."⁴³ Examples of complex majoritarianism rules include popular referendums, requiring a second affirmative vote following the next election, and deliberative citizen assemblies of the sort used in British Columbia's electoral reforms.⁴⁴ Schwartzberg argues that a democratic system could plausibly be designed in such a way that the veto points of complex majoritarianism could replace supermajoritarian veto points, including judicial review, accomplishing whatever legitimate aims such rules might have with significantly fewer democratic costs. We have few substantive quarrels with this argument, and indeed find the constitutional vision she offers potentially attractive under the right conditions. Our differences with Schwartzberg primarily revolve around the level of analysis: we wish to consider the democratic value of different veto points in the context of actually existing democratic institutions, which, without exception, contain countermajoritarian veto points, whereas Schwartzberg's approach is more broadly systemic. In embracing the assumption that countermajoritarian veto points appear to be inevitable under the current conditions for democratic governance, we are not making a claim that they are conceptually or normatively necessary for democracy in a greater sense. Insofar as countermajoritarian veto points remain common, an analysis of their comparative value is useful even if there exists a strong independent case for complex majoritarianism.

While we have focused our attention on judicial review's critics here, we wish to briefly comment on a common strategy for defending judicial review that we reject, and explain why. The most common democratic defense of judicial review takes the form of what Peter Railton calls a "bulwark theory" of judicial review.⁴⁵ What judicial review is said to provide a bulwark against varies, but the structure of such theories remains the same: Majoritarian democracy is associated with a threat, and judicial review empowers judges to protect against that danger. The harm prevented by avoiding this danger outweighs whatever harm (if any) is done to democratic procedure by the exercise of a judicial veto point. Perhaps the most common form of bulwark theory concerns the possibility of democratically authorized rights violations against unpopular minorities or individuals.⁴⁶ Other bulwark theories focus on the protection of democratic procedural rights,⁴⁷ the proper boundaries of public reason for political discourse,⁴⁸ and the proper balance between honoring democratic procedures and ensuring democratic outcomes.⁴⁹

The differences between bulwark theories are less important to us than their similar structure. As a justification for the granting of a specific institutionalized form of political power, they fall short. In our assessment of bulwark defenses of judicial review, we find ourselves in partial agreement with judicial review's critics: insofar as judicial review functions as a defense of minorities against majorities, it will often be the case that the minorities whose interests are protected will be those who need it least.⁵⁰ This isn't, however, in itself a reason to reject judicial review, but rather a reason to appreciate the dangers and flaws we must recognize in any institutional arrangement. Institutions cannot be justified solely by an account of how the persons who occupy them ought to ideally wield power. Any non-ideal defense of judicial review must start with the likely

effects of that particular institutionalization of power, recognizing that it may be occupied by flawed and untrustworthy characters. Judicial review can and will be exploited for undemocratic or illiberal purposes. No veto point or institutional arrangement can avoid this possibility, and all of them could avoid such outcomes if we could stipulate ideal behavior on the part of the relevant actors.

Veto Points and Democratic Theory

What would a consideration of judicial review's democratic status look like if we treated it as one possible veto point amongst many, rather than a uniquely deviant institution? This is the question to which we now turn. The literature on veto points in political systems has largely emerged from social and public choice theory, not normative democratic or legal theory.⁵¹ Before we can begin to consider judicial review's democratic status, we must first consider what a democratic approach to veto points in general might look like. We will assume that some veto points are inevitable, even in the most majoritarian of democratic political systems, due largely to the size, scope, and complexity of modern politics. So what might render a veto point more or less democratic? How one answers this question will turn on the question of what one holds to be the normative point of democracy. As indicated earlier, we align our analysis here with an emerging school of thought propounding that democracy's purpose is to avoid, prevent, lessen, or eradicate domination.⁵² This position holds that preventing domination by government officials through the threat of removal via election is a normatively valuable feature of democracy. But democracy-against-domination must also consider other sources of potential domination. Domination is not solely the purview of the state,

as private domination in various forms remains a routine feature of modern life even in liberal societies.

While a full defense of this approach is beyond our scope here, a few points can be made. First, while only a handful of theorists have defined democracy in this way, opposition to domination is close to the heart of a number of different approaches to democracy, although they approach it in a variety of ways. For deliberativists, the rules, context, and requirements of proper deliberation are important in part because they prevent some democratic actors from dominating others in democratic decision-making. For agonists, a key task of democratic theories is to make sense of or discover possibilities for democratic action and agency for actors who are dominated, oppressed, or otherwise excluded. For liberal democrats, the limits of democracy (and, in some versions, institutional limits on it) are designed to prevent the majority from dominating the minority, whereas the practice of democracy more broadly is a tool to prevent domination of the citizens by the state. This approach should have broad appeal to many of those who adhere to other schools of democratic thought.

Second, democracy-against-domination provides a distinctively valuable way of evaluating state action and institutions. Domination captures the fundamental danger of state power (that it can easily come to dominate the citizenry) while at the same time motivating the creation of a sufficiently powerful state to prevent citizens from dominating each other. A democracy-against-domination theory of the state thus becomes a balancing act—the state must be powerful enough to effectively thwart *dominium* when possible, but not so powerful that it evades the control of its citizens and risks slipping into *imperium*. In applying this democracy-against-domination theory to veto points as a

way of analyzing judicial review, we are following Michael Saward's call to move democratic theory away from too great a focus on democratic principles and their precise application and toward identifying democratic devices which have the potential to activate and advance democratic principles.⁵³ A veto point becomes a potential democratic device when it makes a contribution to either *dominium* prevention or *imperium* prevention, without heightening the danger of the other to an equal or greater degree. This democratic theory presents a clear picture of what we should want from democratic institutional arrangements above and beyond merely being representative or majoritarian.

How can democracy-against-domination generate heuristics for comparative veto point evaluation? Pettit argues that democracy requires two dimensions: authorial and editorial. The overall goal of both is to match policy with the common good (or, in Pettit's terminology, "common avowable interests"), which should guide non-dominating governance. The authorial dimension of democratic politics is idea generation, and runs the risk of what Pettit calls "false positives"—ill-advised ideas that do not serve the public good or reduce domination.⁵⁴ The editorial dimension of democracy, when functioning properly, eliminates these false positives through "scrutinize-and-disallow" mechanisms. Pettit's conception of democracy is appealing, although it exaggerates the separation between these two parts of the democratic process. To the extent that veto points serve this editorial democratic function, they occur at many different stages of the process, sometimes early in the authorial stage. To the extent that democratic politics can be understood in terms of these two dimensions, they cannot be sorted out as cleanly and clearly as he suggests.⁵⁵

Nevertheless, we can hope that, in the best case, Pettit's image of the editorial function is a good way to think of what veto points in democratic systems might, provide. At their worst, veto points thwart democratic majorities through the capricious whims or craven self-interest of powerful veto players—and no veto point is immune from potentially being used for this purpose. If we assume that veto points are inevitable, we should focus not on how to prevent them but on how to evaluate, shape, and reform them to serve democratic goals as well as possible. What characterizes veto points better suited to help prevent domination? We suggest five criteria for evaluating democratic veto points. This list is not intended to be exhaustive, and does not deny the existence of additional important criteria unrelated to the normative ends of democracy. (The complexity of the modern state, for example, inevitably includes committee systems where legislators can acquire and deploy at least some expertise over some areas of policy, whether or not committee systems tend to reduce domination.) Nonetheless, these categories can provide a useful guide to considering the democratic impact of various veto points.

Criteria for Evaluating the Democratic Value of Veto Points

First, *requirements that veto players and their vetoes are public and justified to a public audience increase their legitimacy*. Two closely related and central features of functional democratic systems are accountability and transparency. These are important values in both democracy's majoritarian and non-majoritarian procedures. This is why, for example, most legislative bodies have rules that permit a minority of members to force a public, recorded vote count; in the United States, this is one of the few procedural rules written into the Constitution: the "journal clause" of Article 1, sec. 5 empowers a

one-fifth minority to demand a publicly recorded vote.⁵⁶ If the exercise of vetoes are effectively hidden from the public, some of the goals of democracy are less likely to be well served.⁵⁷ The use of veto points to promote domination, rather than prevent it, are less likely to be effectively hidden from the citizenry, increasing their capacity to respond negatively to such efforts. If we are to authorize and allow a veto power, we should also demand justification and accountability from that exercise. This is consistent with the notion that majoritarianism is the default guiding principle of democratic decision-making, and deviations from it should be done in a way that recognizes that status. The exercisers of veto point power will inevitably have wide discretion over its use, but that discretion should not be a cover to avoid the demand for public justification. A veto player should not be able to avoid criticism and public responsibility for an unpopular or controversial exercise of veto power. This is especially important given the iterated nature of political conflict. If the justification for the exercise of a veto is poor, there are numerous ways in which that veto player might conceivably be removed, or engaged to behave differently in a future situation. Under this criterion, the modern “stealth filibuster” (in which single senators can privately put “holds” on legislation or supermajority requirements are simply assumed) in the United States Senate would be more problematic than filibusters that at least require identifiable legislators or groups of legislators to delay the passage of legislation with majority support.⁵⁸

Secondly, *veto points should, to the extent it is reasonably possible to do so, be separated from the direct, personal private interests of veto players.*⁵⁹ The goal of avoiding domination is not well-served when public institutions are easily subverted to private ends. This criteria should not be construed too broadly; we are not suggesting that

veto players (or any democratic actors) should be prohibited from legitimate political action on behalf of any cause where there might be an overlapping interest or goal—indeed, to do so might be consistent with a particularly high-minded version of deliberative democracy, but would not at all be consistent with democracy-against-domination. This criterion is meant narrowly and regards direct private gain accruing to the individual veto player or her immediate associates, not to a political or social movement or demographic group to which she might belong; the limitations on the latter cases are better covered by the previous criteria as well as criteria five. When such a separation is not possible, those private interests should be disclosed and justified. This is a particularly difficult goal when considering legislative committees as veto points, as legislators are likely to gain and maintain access to veto powers through committee membership on issues of particular interest to them. Nevertheless, limiting and exposing this connection is crucial to the separation of public and private interest. Limiting the extent to which narrow, private interests can hijack public processes is necessary for preventing democratic processes from becoming complicit in private domination. Whatever benefits veto points might attain for democracy, they are also opportunities for private interests to assert themselves in the democratic process. This should be lessened or prevented, to the extent that it can.

Third, *veto points should function not only to disallow “false positives” but should provide a forum for weighing priorities in a context of limited resources.* Here the most important veto points in question are the committees in legislative bodies that control the budget, and the federal agencies that inevitably wield considerable power over which laws receive resources for enforcing. Priority-setting is a form of veto politics. A

good deal of legislation is irrelevant without authorized funding (authorized by budget legislation) and the will to enforce (by federal agencies and local governments). On the one hand, this is a banal fact of political life. Nevertheless, the organization of authority to exercise these powers can be done in more or less democratic ways. Domination exists to various degrees throughout the political, economic and social realm and democracy-against-domination is not a perfectionist political theory. Weighing the importance of action based on the relative severity of instances of domination is central to this approach to democracy, and if veto points can be directed toward this crucial political task, it is to their credit.

Fourth, *veto points should facilitate public contestation of government decision and government action*. Too often, the goal of public participation and influence is understood as valuable only at the level of idea generation. But, as Scheppele has argued, democracy takes place not merely during elections but between them as well.⁶⁰ Veto points can be an avenue for public participation and input, especially in cases where ordinary legislative action has failed to reflect the priorities, needs, and will of the public for various reasons. More veto points can mean more agenda-setting loci that lessen the chances of particular groups being shut out of the process.⁶¹ This is particularly necessary from a democracy-against-domination standpoint, which recognizes the extent to which domination can arise in unintentional and unexpected ways. In Shapiro's terms, just hierarchies have an unfortunate tendency to atrophy into relationships of domination.⁶² Democratic veto points should create avenues for effective contestation for minority populations subject to domination to the extent they can, whether that domination is due

to malicious disregard in a part of the political process, indifference, or unintended consequence.

And fifth, *veto points are most valuable when they empower underrepresented minorities as opposed to minorities already well- or over- represented within the political system.* While any democratic system will contain some countermajoritarian aspects, both majority rule and the desirability of responsibility and accountability mean that redundancy among multiple veto points is, all things being equal, problematic. If veto points reliably over-represent interests that already enjoy strong representation, their potential and actual democratic value is lessened considerably, as they become more likely to serve as a tool of domination rather than provide protection against it. If an increase in the diffusion of power within state institutions does not represent a more diffuse array of social forces, such veto points are likely to reinforce patterns of social domination rather than alleviating them. Evidently, this is a difficult standard: virtually any institution is more likely than not to over-represent powerful interests. But the comparative effects of veto points in this respect are especially important in determining their democratic value. If veto points fail to substantially broaden representation and involvement in political decision-making, Waldron's normative vision becomes much more attractive.

To illustrate, let us return to the filibuster in the United States Senate, an institutional feature that is very difficult to defend from a democracy-against-domination perspective. In practice, the filibuster has tended to exacerbate social domination, and played a particularly dismal role in reinforcing white supremacy in the post-Civil War South, starting with the successful filibuster of legislation seeking to maintain black

access to the ballot in the late nineteenth century: “Beginning during Reconstruction and continuing for nearly a century, anti-civil rights filibusters played a major role in blocking measures to prohibit lynching, poll taxes, and race discrimination in employment, housing, public accommodations, and voting.”⁶³ The rule has never been used in a similarly systematic way to protect the interests of underrepresented groups. The filibuster can be expected to protect the interests of small, rural states—a potentially legitimate goal, common in large, diverse democracies.⁶⁴ However, given that such groups are already greatly overrepresented in the composition of the Senate (which exercises a veto over executive and federal judicial appointments) and somewhat overrepresented in the House of Representatives and the Electoral College, it is difficult to argue that the filibuster is democratically legitimate. “The filibuster,” Binder and Smith conclude, “is used in ways that are hardly relevant to the nation’s welfare, in ways that undermine Senate effectiveness on legislative matters unrelated to the targeted measures.”⁶⁵ On this criteria, the filibuster appears to be a particularly undemocratic veto point.

But the filibuster, while it retains some defenders,⁶⁶ is one of the most derided and least defended contemporary veto points from a democratic perspective. To consider a less obvious case: bicameralism also functions as a veto point. Can it be democratically justified? While disavowing some examples of bicameralism, such as the profoundly unrepresentative US Senate, Waldron thinks so. The democratic value of bicameralism, for Waldron, comes from the potential value of difference, as long as the two legislative bodies are both generally majoritarian. Arguing against Bentham’s critique of bicameralism, Waldron suggests it may have added democratic value compared to a

unicameral system, assuming it is properly designed.⁶⁷ No system of representation is perfect:

No matter how good we make the scheme of representation in a given chamber, no matter how many of our good thoughts about election, representation, and deliberation we have already taken on board, it is always possible to improve things by complementing that scheme of representation with another.⁶⁸

Different schemes of representation, on Waldron's logic here, can capture different shades of majoritarian representation, which might complement each other in important ways. It is easy to imagine how this might work: if a particular minority is spread out across districts evenly in a legislative body comprised of single-member districts and first-past-the-post elections, they might have little to no voice or power; if the second chamber were elected via proportional representation, that could enhance their political power and give them an important tool to resist domination. We agree with Waldron that a bicameral system could plausibly be designed to accomplish such an end, but the democratic benefits of such a proliferation of veto points must be weighed against the democratic costs. A second co-equal chamber doubles the intra-legislative veto points associated with committee hierarchies and procedural rules, doubling the opportunities for status quo bias. It doubles the chances of an electoral majority finding itself unable to create a legislative majority due to the configuration of districts or the particulars of a scheme of representation. Whatever advantages bicameralism might have must be weighed against the costs that come with it, which is a significant enhancement of status-quo bias, inhibiting government's potential to enact policies that respond to private domination.⁶⁹ While Waldron does identify some potential democratic benefits from bicameralism as a veto point, its status as a legislative veto point does not eradicate its democratic dangers. While the case for bicameralism as a democratic veto point is easier

to imagine than the filibuster, it is far from clear that its status as legislative and majoritarian is sufficient to declare it more democratic than judicial review on our criteria.

Two final notes before we turn to evaluation of judicial review on the criteria presented here. First, we do not give much consideration to different models of judicial review: strong vs. weak, review of legislative vs. executive action, standing rules for bringing a case to the court, and so on. In the real world, there is a great deal of variation in the organization of judicial review in different democratic systems, and this very likely matters when evaluating its democratic value.⁷⁰ This issue is further complicated by context: judicial review might also vary considerably in its democratic value depending on the institutional context in which it is embedded, as well as the political, legal, and cultural environment in which it is found. The best tools against domination are likely to vary considerably, depending on the nature of the most prominent local threats to non-domination. So strong conclusions about judicial review's democratic value in a particular democratic system are likely to be contingent both on the organization of the court and its powers and the larger institutional context in which it is embedded. The criteria here are the beginning, not the end, of the evaluation of judicial review as embedded in different political systems.

Second, we focus on the comparative evaluation of veto points in isolation. But how might their combination and volume matter? On the one hand, whatever the merits of judicial review or any other veto point, they may diminish should a political system become overloaded with excessive veto points. This issue has been a point of disagreement amongst democracy-against-domination theorists. Ian Shapiro has taken

Pettit to task for embracing an “exceedingly long list” that weights outcomes toward “the status quo and those who have the resources to wait out opponents.”⁷¹ On the other hand, veto points may operate together to produce an effect that is more democratic than the sum of their parts. An optimistic take on the democratic effects of the veto point-laden American political system can be found in the recent work of Adrian Vermuele, in which he urges readers to consider the possibility that the various countermajoritarian features of the American constitutional order might lead to what he calls “emergent democracy” via “offsetting failures of democracy” and the democratic distribution of undemocratic powers.⁷²

Both Shapiro’s and Vermuele’s warnings about interactive effects are worth keeping in mind as we evaluate veto points in isolation. Existing scholarship on veto points, however, suggests that Shapiro’s pessimism is more plausible than Vermuele’s optimism. While the various veto points in the American political system are distributed across different actors and interests, they are not distributed via a particularly democratic pattern. The sheer volume of veto points has empowered economic elites to effectively resist changes to the laws that would threaten their interests or curb their power, leading to what Hacker and Pierson call legislative drift: powerful actors accommodating themselves to the legislative status quo while thwarting legislative change to match such innovations.⁷³ In addition to this substantive worry, recent research suggests political systems with excessive veto points might erode democratic cultural values as well, as public opinion research shows that countries with veto point-laden systems tend to have a much higher degree of authoritarian attitudes about politics.⁷⁴ So even if certain veto points have some democratic value, their cumulative effect may negate it.

Evaluating Judicial Review

A thorough analysis of existing veto points' democratic value is beyond our scope here, but we will offer a preliminary assessment of judicial review by our identified criteria. On the first criteria, judicial review would seem to stand up reasonably well. Unlike a legislator quietly killing a bill in committee, or placing a 'hold' on legislation, or a bureaucrat quietly issuing a directive to 'de-prioritize' the enforcement of a particular law, Supreme Court decisions are overtly and formally public, and subject to at least a modicum of popular scrutiny and debate. And even in comparison to other particularly public veto points, such as the presidential veto, the need to offer justification is formalized through legal decisions. However, this is not to suggest that judicial review perfectly meets these criteria. For one thing, there is nothing to prevent disingenuous or dishonest justifications.⁷⁵ Jeremy Waldron has argued that defenders of judicial review often, and incorrectly, hold up judicial reasoning as fundamentally superior in quality compared to the low standards of public political debate.⁷⁶ We agree with Waldron that the quality of judicial reasoning is often overstated. However, the relevant comparison here is not to idealized exercises of public reasoning but to other veto points, many of which contain no public justification requirement. The justificatory requirements built into judicial review are still a net positive compared to other veto points on this criterion.⁷⁷

On the second criteria, judicial review seems to have one distinct advantage over legislative veto points. Specifically, the constant need of funding for re-election campaigns, as well as ties to interests groups representing private industry, provide the

possibility of private interests influencing the exercise of veto power. Consider, for example, the case of Congressman Billy Tauzin. Upon his retirement from Congress in 2005 he immediately began a new job as a lobbyist for the Pharmaceutical Research and Manufacturers of America. PhRMA outbid another major lobby, The Motion Picture Association of America, paying him an annual salary of approximately \$2.5 million. While in Congress, Tauzin had occupied key positions on committees with a direct relevance to the interests of both these lobbies.⁷⁸ The relative insulation from the channels of influence suggested by this story are much greater for judges than for legislators. The example of Tauzin demonstrates a common and widespread concern about private and powerful interests and the legislative process. Because judges need not stand for re-election and rarely have significant post-Court careers, the pathways through which their control of a key veto point could be used to advance private interests are limited compared to members of congress. This requires two caveats, however. First, there is no necessary link between direct financial gain and private interest. Judges, as Waldron reminds us, are people too. They have identities, irrational biases, and allegiances to groups both political and personal that could lead to undue private influence. Second, for politicians the threat of private influence is widely understood, and has resulted in a panoply of measures (such as ethics rules and campaign finance laws) to track and limit it. Judges may be subject to less scrutiny on this front.

The third criteria might seem to have little bearing on the democratic quality of judicial review as a veto point. Constitutional courts are generally not tasked with prioritizing various laws, but with sorting them into three broad categories: constitutionally mandatory, constitutionally optional, and unconstitutional. Moreover, the

opportunity costs that might be associated with abandoning a particular path on constitutional grounds are frequently often outside of the purview of courts. But courts may exercise a great deal of discretion in the cases they decide to consider. The choice of cases that courts may choose to review reveals a great deal of discretion in whether to intervene in any particular constitutional controversy. Finally, it is possible that judicial review as a veto point has the potential to provide a forum for considering whether a particular “costly” form of rights protection is in fact fundamental and constitutional. For example, *Brown v. Prata* recently forced the state of California to make choices about the costs of rights protection with respect to rights violations associated with the overcrowding of California’s prison system.⁷⁹ Courts can potentially elevate and identify a claim that a particular constitutional priority has been de-prioritized to the point that a rights violation can be identified, even if they are not in a position to offer a precise remedy to this problem. Previous scholars who emphasize judicial review’s deliberative value have demonstrated its potential on this criteria.⁸⁰

The fourth criteria invites contrasts between different systems of organizing and empowering courts to engage in judicial review. An important democratic function of veto points is to provide avenues for contestation beyond and between elections. While not sufficient to meet the demand for contestatory institutional arrangements, judicial review can provide this possibility in a limited set of cases. Some regimes of judicial review (for example, in Hungary and India) allow for direct petition of the constitutional court on behalf of citizens, without first proceeding through a series of lower courts. In the Hungarian case in particular this has enhanced democratic participation.⁸¹ Nevertheless, despite the high barriers, this remains an avenue for contestation of some

forms of domination. So, at a general level, judicial review appears to have the potential to serve as a relatively democratic veto point on this criteria. A number of previous scholars have emphasized judicial review's positive democratic valence on participatory grounds.⁸²

The fifth democratic criteria for veto points require they must be comparatively likely to empower generally disempowered minorities. Obviously, judicial review's likelihood to empower underrepresented and disempowered minorities will vary considerably, and it is difficult to reach general conclusions at a high level of abstraction. For Ran Hirschl, the case against judicial review hinges on the case that judicial review tends to further empower economic elites, who are over-represented among both judges and those who create and design systems of judicial review.⁸³ However, in reply to some of his critics,⁸⁴ Hirschl concedes that despite the further empowerment of economic elites, "women, ethnic minorities, gays and lesbians, and indigenous populations are likely to be far better off in the constitutionalization era."⁸⁵ Furthermore, Kim Scheppelle's research on constitutional courts in Hungary demonstrates that courts can and do intervene on behalf of the economically vulnerable in some cases.⁸⁶ It would obviously be a mistake to view judicial review as a tool that reliably empowers disempowered minorities, of course, but there seems to be evidence that it may, at times, serve as a veto point for those who are unlikely to have access to other veto points—particularly those groups who fall into a category comparable to Justice Stone's "discrete and insular minorities." Still, as a contestatory rather than legislative veto point, judicial review appears to have advantages on this point compared to veto points such as the filibuster.

Conclusion: Towards an Institutional, Contextual, and Comparative Democratic Theory

We have argued that any democratic theory needs a general comparative theory of democratic veto points before we can meaningfully assess particular veto points like judicial review, and we have attempted a preliminary effort in this regard from the perspective of democracy-against-domination. The line of argument we pursue here effectively rules out a simple theoretical resolution to the question of judicial review's democratic status. While this frustrates any effort to bring our analysis to a tidy conclusion, we can safely conclude that it is theoretically and empirically unsound to dismiss judicial review as anti-democratic solely on anti-majoritarian grounds, and that it appears it may have greater democratic value than many other common veto points. Beyond that, we conclude with a review of what we take to be the most important lessons for democratic theorists in light of this analysis.

First, democratic theory must be institutional and contextual in orientation. We cannot assess the democratic value of different veto points and institutional arrangements generally as a purely formal matter. We must rely to no small degree on the important work of scholars of institutions and regime politics. While it has begun to unravel, the longstanding consensus view amongst legal and democratic theorists that judicial review presented a uniquely countermajoritarian difficulty stood for far too long, even as our empirical colleagues painted a very different and far more complicated picture, in which legislatures and judges are as likely to work together as to be at odds, and judicial review rarely strayed much further from majoritarian positions than legislatures. The real-life

consequences of institutional political arrangements are as important as their formal structure, and the former cannot be simply derived from the latter. Perhaps the greatest democratic threat associated with judicial review comes not from unelected judges thwarting legislative majorities, but from the diffusion of power and responsibility through legislative deferrals, as Lovell amongst others have shown.⁸⁷ But without attention to historical and institutional empirical scholarship on courts, the nature of the democratic challenge that judicial review presents would not have been noticed.

Attention to this scholarship gives some reason to doubt the wisdom of attempting to sort institutional arrangements and decision-making strategies into two discrete categories, majoritarian and nonmajoritarian. Once we recognize that any scheme of representation removes us from straightforward majoritarian decision-making as applied to citizens, two things become clear. First, the majoritarian nature of any particular decision-making strategy must be measured substantively as well as procedurally, as the latter does not directly determine the former. This makes determinative assessments of comparative majoritarianism a bit difficult to make. Second, since democracy has other associated values and demands beyond majoritarianism, it becomes one axis on which the democratic valence of the institutional arrangement can be measured, alongside the others identified here.

Second, democratic theory's reflections and assessments of institutional arrangements requires a substantial comparative dimension. Such an approach further illustrates the difficulty of saying anything too definitive about judicial review's (or other veto points') democratic value in the abstract. In addition to the potentially different values of different forms of review, the way it interacts with the rest of the democratic

system may shape its democratic value. For example, the circumstances that surround judicial review's creation may matter: if it is created, as Ran Hirschl argues it was in Israel, New Zealand and elsewhere, to extend the political influence of the current ruling coalition well into the future, after they would have otherwise lost power its democratic value may not be as great, at least initially.⁸⁸ Of course, once an institutional power such as judicial review is established, it can take on a life of its own beyond what its creators intended. The democratic value of judicial review may function differently in different political systems but also in different political cultures. Scheppele's research on the democratic value of judicial review in Hungary in the 1990s hinges on the contestatory role they played in the absence of a robust contestatory civil society, alongside the weaknesses of elections in holding officials accountable, suggesting the weaknesses and fragility of Hungary's democratic culture made judicial review all the more valuable.⁸⁹ The experience of judicial review in different institutional and cultural contexts will be crucial to understanding the circumstances and forms of review most (and least) likely to effectively promote democracy-against-domination.

In other words, a comparative context is absolutely crucial for making sense of the democratic value of judicial review and other veto points. The functioning of a particular veto point—whether its contestatory value turns out to be accessible only to elites or to groups at greater risk of domination, for example—cannot be determined in isolation, and may turn out to be idiosyncratic. In assessing the first few decades of the current renaissance in comparative law, Ran Hirschl laments the field's “near-exclusive focus on a dozen liberal democracies” from which inferences about the functioning of courts are drawn.⁹⁰ A similar worry surely could be expressed regarding democratic

theory's assessment of institutional arrangements. Why, for example, did judicial review seem to make a significant contribution to Hungary's democratization in the 1990s? Was there something about the context of post-communism that rendered it particularly valuable—and, given recent events, particularly fragile? Questions like this are unlikely to be answered by reflecting on only one, or a small group of democratic political systems. The growth and maturation of comparative constitutional studies as a field will be an ongoing valuable resource for democratic theory.

Despite judicial review's evident limitations and drawbacks, we conclude that it appears to have some modest advantages over other veto points commonly found in contemporary political systems. But we are less committed to this conclusion than we are to the approach to applied democratic theory by which we have arrived at it. If further analysis of the effects of judicial review relative to other democratic veto points suggests a net negative democratic value, or if judicial review fails on additional democratic criteria we have not identified here, a re-evaluation of our conclusion would be appropriate. The democracy-against-domination approach focuses our attention on those members and groups in society most vulnerable to domination. Judicial review will almost certainly fail to provide a consistent and reliable path to successful contestation of dominating practices and structures and full democratic representation. But a democratic theory that takes power and institutions seriously cannot place its hope in a simple, single institutional fix to the problem of inequitable power relations, as no such "bulwark" can reliably exist.

Notes

1 Bickel 1962.

2 Graber 1993; Friedman 2005; Peretti, 2005; Tushnet 2005; Lemieux and Watkins 2009.

3 Friedman 2010; Graber 2006; Lain 2012.

4 See, e.g., Crowe 2012; Gillman 2002; Graber 1993; Lemieux and Lovell 2010; Lovell 2003; Keck 2007; Sadurski 2008; Whittington 2009.

5 On the complexity of Athenian democracy's meanings, see Ober 2008. On the history of supermajority democratic practices, see Schwartzberg 2014.

6 See, for example, Zurn 2007.

7 On this approach in general Shapiro 2003; Shapiro 2012; Pettit 1997; Pettit 2012; Lovett and Pettit 2009. Considerations of judicial review's democratic value with a focus on reducing domination can be found in Pettit 2004; Honohan 2009; Dawood 2008; Bellamy 2009.

8 Friedman 2005, 158.

9 Waldron 1999a, 114-115.

10 Ibid., 118; emphasis original.

11 Ibid., 23.

12 An important critique of Waldron's assumptions here is made by Alon Harel. He argues that "the judicial process itself—the process of determining the scope of our rights and their content is not oblivious to social values and hence that courts are more 'democratic' than the opponents of judicial review believe." Harel argues that the structure and focus of legislative and judicial decision-making are both fundamentally

important in the process of the political approximation of the will of the people. See Harel 2003, 276. See also Lever 2009.

13 For the sake of argument we are granting Waldron's assumption that judicial review functionally means that constitutional court judges do, in fact, have the "last word." However, this is far too simplistic. First, it ignores the issue of complexities of court-legislature relations suggested by recent scholarly literature on legislative deferrals. See Lovell 2003. Second, it ignores an important part of political reality—that legislatures (not to mention executives) have multiple means of continuing to pursue desired ends that have been rejected as unconstitutional. See Hiebert 2002; Peretti 2005, 133-6.

14 Waldron 1999a, 299.

15 Ibid., 285-289.

16 To make the case that judicial review is in fact necessary for liberal democracy one would be forced to explain cases such as the United Kingdom, which by contemporary global standards certainly appears to be a functioning parliamentary liberal democracy without a court with the power of constitutional judicial review.

17 On this point, see Tushnet 1988.

18 Eisgruber 2002.

19 Doherty and Pevnick 2014. Waldron discusses May's theorem at Waldron 2006, 1388.

20 Waldron 1999b.

21 Waldron 1999a, 264.

22 Ibid., 232.

23 Eisgruber 2002, 38; Waldron 1999a, 299-300.

24 Waldron 2006, 1361.

25 Klarman 2004.

26 See, generally, Manfredi 2000.

27 Waldron 2006, 1356.

28 Waldron 2006, 1357,n.34. For arguments that legislative override provisions are important for democratic evaluation of judicial review, see Tushnet 2008; Hiebert 2006.

29 Lovell and Lemieux 2006.

30 Bickel 1962, 17.

31 For an extensive assessment of the democratic value of various legislative procedures and rules that empower minorities, see Vermuele 2007, 85-114.

32 We take this lesson from Waldron's defense of legislative supremacy, in which his defense of legislative supremacy and his defense of the principle of "majority decision" blend together. See Waldron 1999b, 124-166.

33 Doherty and Pevnick 2014.

34 Bellamy 2007.

35 Ibid., 223.

36 Samuels and Snyder 2001. For an argument that greater degrees of malapportionment are linked to higher levels of inequality, see Horiuchi 2004.

37 Przeworski 2010, 101.

38 Kramer 2004.

39 Tushnet 1999.

40 See especially Balkin 2011.

41 Tushnet 1999, 9-14.

42 Schwartzberg 2014.

43 Ibid., 184.

44 For further discussion of the latter see Lang 2007.

45 Railton 1983, 156-158.

46 See, for example, Kateb 1983, Harel 2003, and Dworkin 1996.

47 Ely 1980.

48 Den Otter 2009.

49 Brettschneider 2007, 136-159.

50 See, for example, Bellamy 2007, 42.

51 Tsebelis 2002. Veto points come not just from legislative procedure, but from other political institutions as well. Under some arrangements bureaucracies can function as a veto point.

52 See Pettit 1997, 2012; Shapiro 2003, 2012; Bellamy 2007; Keating 2011; Young 1990; 2000.

53 Saward 2003.

54 Pettit 2000, 115.

55 There is some controversy about the status of judicial review amongst democracy-against-domination theorists. Pettit is clearly in favor of it, as evidenced by his two dimensional democratic theory. He also characterizes the empowerment of courts and bureaucracies as a way of “depoliticizing” democracy; see Pettit 2004. Richard Bellamy, on the other hand, argues that such empowerments cannot escape the realm of power and abandon democracy-against-domination’s grounding in political equality; see Bellamy 2007, 2009. While we ultimately side with Pettit on the substance of the debate, we agree with Bellamy that Pettit’s dream of technocratic and apolitical judges and bureaucrats

who are somehow outside of politics isn't plausible, and is not a promising foundation for a defense of judicial review. On the problems of Pettit's "depoliticization" argument, see also Markell 2008; Urbinati, 2010; McCormick 2011, ch. 6; Shapiro 2012, 329-332.

56 See Vermuele 2007, 97-98.

57 Den Otter 2009.

58 See Fisk and Chemerinsky 1997; Binder and Smith 1997. It is worth noting that even analysts who see the filibuster as more consistent with democratic values than we do are generally unwilling to defend secret holds and similar forms of obstruction—see e.g., Arenberg and Dove 2012, 173-175.

59 For an argument that this is the primary criteria for evaluating and justifying collective decision-making procedures, see Elster 2013.

60 Scheppele 2005, 2009.

61 See, e.g., Baumgartner and Jones 1993; Kingdon 1995.

62 Shapiro 2003, 3.

63 Fisk and Chemerinsky 1997, 200.

64 Although, of course, this veto point is built into the very structure of the Senate in the first place. The filibuster merely allows an even smaller minority to exercise it.

65 Binder and Smith 1997, 159.

66 Arenberg and Dove 2012.

67 Waldron 2012.

68 Ibid., 8-9.

69 Vatter 2005.

70 Tushnet 2008 makes the case for the democratic superiority of weak review powers, as found in Canada, while Scheppele 2005 makes the case for the democratic superiority of the far more powerful Hungarian court.

71 Shapiro 2012, 328.

72 Vermuele 2011, 51-52.

73 Hacker and Pierson 2011.

74 Singh and Dunn 2013.

75 And even where legal reasoning is disingenuous or in bad faith, the need to give reasons can sometimes mean that dubious case outcomes can, because of the necessity of needing to use attractive principles, potentially contribute to more positive future consequences. See Tushnet 2001. Even though this is not likely to occur in most cases of bad faith reasoning, there is democratic value in exposing bad faith political action.

76 Waldron 1999a, 289-291.

77 Of course, especially at lower levels courts do not always justify case outcomes with public reasoning, and other aspects of the process (such as decisions to accept or deny appeals) are often secret. Still, it is clear that courts have a clear comparative advantage in this respect.

78 Fund 2004.

79 Bower 2012. This decision is noteworthy for another reason: it demonstrates a case in which the victims of rights violations who are denied participation in democracy's ordinary "democratic procedure" through felon disenfranchisement can still utilize this veto point to contest their own domination.

80 Eisgruber 2001.

81 Scheppele 2005. On India see Epp 1998, 86.

82 Peretti 1999; Kavanaugh 2003; Kyritsis 2006.

83 Hirschl 2004. Hirschl's analysis is limited to recently created systems of constitutional judicial review in South Africa, Canada, Israel, and New Zealand, although he identifies this as a broader global trend.

84 McCain and Fleming 2005.

85 Hirschl 2005, 895.

86 Scheppele 2005. In the so-called "Bokros package" cases, the Hungarian Constitutional Court required the legislature to not cut certain social welfare benefits on constitutional grounds. The Russian Constitutional Court also issued a series of rulings enhancing and protecting employment and housing rights in the early 1990s, during the Courts' relatively brief period of political power.

87 Lovell 2003.

88 Hirschl 2004.

89 Scheppele 2005.

90 Hirschl 2014, 16.

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