

Proceduralism and Popular Threats to Democracy

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Abstract:

Do pure procedural theories of democracy forbid the active defense of democratic regimes? Pure proceduralists take all democratic decisions, regardless of their content, to be authoritative. Accordingly, most political theorists argue that proceduralism requires individuals to comply with the outcome of a democratic procedure, even if that outcome is substantively undemocratic. In this essay, I challenge this contention. Proceduralists can defensibly disobey authoritative democratic decisions. By reflecting on the example of a procedural democrat in an undemocratic regime, we can see that for the proceduralist, democracy is not merely a method for making decisions—it is also a highly valuable end. Though representative institutions are not created democratically, the proceduralist has good reasons to participate in the establishment of a democratic regime. The same reasons give the proceduralist grounds to disobey authoritative decisions that threaten representative institutions. As I show, proceduralism provides a distinctive framework for thinking about the strategies democrats should employ to defend democracy.¹

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The Nazi propagandist Joseph Goebbels once observed that “[i]t will always be one of the best jokes of democracy that it gives its deadly enemies the means to destroy it.”² When antidemocratic groups immobilize or capture democratic institutions, they pose a distinctive threat to democracies.³ In these situations, the preservation of democracy depends on the willingness of democrats to take it upon themselves to defend their regime. Goebbels’s commentary presumes that democrats must meet antidemocratic challenges with a weak, procedural forbearance.

After the fall of the Weimar Republic, it became a theoretical commonplace to assume that Goebbels had been correct. The pure procedural theories of democracy prevalent during the Weimar era seemed to offer no support for the defense of the republic.⁴ The apparent impotence of procedural democracy led numerous scholars and political actors to conclude that purely procedural principles should not guide the institutional development of modern representative regimes; a well-fortified system would depend on an external set of liberal and constitutional norms to both ground and limit the practice of democracy.⁵ As the German Constitutional Court explained when it banned the Socialist Reich Party in 1952, the Federal Republic’s founding fathers specifically repudiated proceduralist theories and embraced *streitbare*, or militant democracy.⁶

Recently, works like Jeremy Waldron’s *Law and Disagreement* have rekindled the debate over pure proceduralism.⁷ Waldron’s proceduralism, like all purely proceduralist theories, has two defining features. First, he argues that legitimate political authority can only be generated through democratic procedures. Second, the authority of a democratic decision does not depend on that decision’s substance or content. Not surprisingly, the dominant challenges to Waldron’s proceduralism sound familiar notes. As one critic, Joshua Kassner, contends, “if it is clear that unfettered adherence to a decision-making process (or its directives) is likely to undermine or violate the values of democracy, then the process ought to be constrained or the outcomes overridden. If democratic legitimacy and the authority of law require that such violations be allowed, then democratic legitimacy and the authority of law might not be worthy objectives after all.”⁸

In this essay, I challenge the widely accepted claim that proceduralism implies acquiescence. I do so by demonstrating that procedural norms provide meaningful support for the defense of democracy. I employ an unorthodox strategy for defending this militant interpretation of proceduralism. Instead of approaching the problem from an abstract perspective and puzzling out the proper relation between democratic means and ends, I build up from the example of a procedural democrat, a democratic rebel, in an undemocratic regime.⁹ Democratic institutions are not established democratically. Yet the committed proceduralist has good reason to participate in the founding of a democracy.¹⁰ Establishing representative institutions is a clear case in which democracy as an end outweighs the normative cost of procedurally illegitimate action.

The founding of a democracy transforms what it means to act as a procedural democrat. *Before* democrats fought to build authoritative institutions; *now* they respect those institutions' decisions.¹¹ Yet democracies confront serious challenges that cannot be managed within the boundaries of authoritative procedure. In extreme situations, the commitments that provide proceduralists with coherent reasons to establish democratic regimes provide them with reasons to safeguard those regimes. Despite the dicta of the German Constitutional Court, proceduralism allows for, and even commends, active resistance against threats to democracy.

This essay maps a conceptual space in which pure procedural democrats might defensibly act in ways they regard as illegitimate. In other situations in which individuals find it necessary to take morally objectionable measures—when individuals engage in certain forms of civil disobedience or politicians dirty their hands—they are normatively required to exhibit caution before acting and to make amends after acting.¹² Proceduralists are also obligated to acknowledge the cost of illegitimate projects. This recognition should be reflected in the strategies they employ to secure their regime.

In the remainder of this essay, I (a) define the challenge raised by threats to democracy, (b) develop the example of the democratic rebel and show why a proceduralist can take illegitimate action in the name of democracy, and (c) respond to a series of concerns and thereby highlight proceduralism's distinctive approach to threats to democracy.

Section 1: Defining the Problem

A group poses a popular threat to democracy when that group credibly intends to use democratic procedures to win power, stymie democratic institutions, and undermine democracy itself. The Nazi Party is certainly the most famous example of a popular threat, but it is by no means unique.

To fix intuitions, I will develop a stylized example to which I will return throughout this essay. In the late 1990s many Turkish citizens believed that the Welfare Party (Refah Partisi) threatened Turkey's secular and democratic political system. By 1997, the Welfare Party was the largest member of Turkey's governing coalition, and its leader, Necmettin Erbakan, occupied the post of prime minister. Holding 158 of 450 seats in the Turkish Parliament, the party could stymie any attempt to unseat it or to pass general legislation restricting antidemocratic activities.¹³ As a result, those who thought the party posed an imminent danger to democracy could rely on neither the executive nor the legislative branch to shield the regime.

Erbakan and the other members of the Welfare Party were eventually forced out of the government by the military. The Constitutional Court subsequently banned the party.¹⁴ For the purposes of this paper, I assume that the leader of the Turkish military, General Ismail Hakkı Karadayı, was a democrat (an assumption that has no firm basis in reality).¹⁵ I also take for granted that Karadayı viewed the Welfare Party as an imminent and credible threat to democracy. Safeguarding democracy required General Karadayı and other members of the military to take it upon themselves to intervene in the democratic process, to forcefully substitute their judgment for the judgment of their fellow citizens.

Given this context, most critics of proceduralism would support the military's intervention. Their logic would be clear enough. If the value of democracy is independent of procedures, individuals may reject substantively undemocratic decisions. Moreover, citizens may legitimately guard representative institutions without working through the democratic process. The critics' approach to democracy gains intuitive credibility because it allows individuals to defend actively their regime.

By contrast, it is widely assumed that a proceduralist general would allow the Welfare Party to undermine democracy.¹⁶ If following procedures generates outcomes that threaten a democracy, proceduralists must, according to this view, simply accept that this is so much the worse for democracy. The persuasiveness of that argument hinges on two long-standing beliefs about proceduralism: (a) that proceduralists insist that legitimate political decisions can be made only democratically, even decisions about democracy itself and (b) that procedural norms do not give grounds for procedurally illegitimate action. Only the first of these beliefs is sound.

With respect to legitimate authority, Waldron, for instance, argues that members of political communities face problems which require a collective decision about what, if any, action should be taken. The definition of these common problems, as well as their solutions, are inevitably subjects about which there is good-faith disagreement.¹⁷ He contends that the key question a democratic theory must answer is “Why . . . should the mere fact of someone’s saying ‘Do this!’ provide any sort of reason for taking ‘this’ as a standard of right and wrong?”¹⁸ Respect for other individuals as “separate moral agent[s] with [their] own sense of justice” supplies the answer to that question.¹⁹ Making legitimate collective decisions requires a procedure to assess many individuals’ judgment. Democracy is that procedure.²⁰ Democratic procedures, therefore, embody our collective respect for the judgment of individuals about the issues that affect their lives.²¹

When decisions are made via those procedures, our mutual respect gives each of us a weighty moral reason to obey a democratic decision regardless of whether the decision is correct or whether we agree with it. In other words, reasonably democratic procedures generate democratic authority. Defining democratic authority in this way has two important implications. First, democratic authority is a content-independent reason to obey—even if a decision were substantively undemocratic, if the right procedures were followed, the decision would command our respect.²² Second, the respect owed a democratic decision does not exclude consideration of one’s other duties or commitments. Rational consistency, therefore, does not require one to wholly foreclose consideration of the effect of a decision on a regime’s prospects.²³

One might question whether this conception of proceduralism is actually proceduralist. *Real* proceduralists, it might be argued, are committed to assessing a decision solely on the basis of how the decision was reached.²⁴ For a *real* proceduralist even what counts as democracy can only be identified by democratic procedures. These descriptions of proceduralism, however, are faulty. A purely procedural theory of democratic authority hinges on the claim that if a decision is made democratically, then we are obligated to obey that decision regardless of the decision's content. The proceduralist takes the question of authority to be distinct from the question of substance. The proceduralist does not contend that there is no question of substance at all. By implication, proceduralism does not require individuals to remain agnostic about a decision's democratic content. Duly elected legislators might, for example, pass unfair laws tilting the electoral playing field in their own direction. A procedural democrat can oppose this decision as undemocratic and still acknowledge that one has a duty to obey it.

Critically, democratic procedures not only generate legitimate authority; they also resolve the problem of who has the right to decide. After an election, for example, the winner can legitimately make decisions or represent voters.²⁵ Imagine an election between Erbakan and General Karadayi. If Erbakan wins, he has the right to represent us and we have an obligation to comply. Our duty is not to Erbakan, but to our fellow citizens. By contrast, General Karadayi has no right to make a collectively binding decision. Even if he insists that Erbakan's policies endanger our republic, we need not accede to the general's judgment.

Yet if General Karadayi believes in the normative value of proceduralism, why isn't it legitimate to defend proceduralism through imposition? Because good-faith disagreement extends even to questions about democracy; questions such as: does the Welfare Party credibly threaten democracy? Given the existence of disagreement, if the general imposes his decision, he effectively excludes his fellow citizens. The right to equal participation is the normative core of proceduralism. The respect owed any political decision or decision maker directly depends on the ability of the relevant set of individuals to participate.²⁶ If the general excludes potential participants, he treats them as inferiors, and they have no reason to regard his decisions as authoritative. If he forces

them to obey his decisions, he wrongs them. Thus, even when democracy is threatened, a proceduralist can act legitimately only in accordance with democratic procedures.

We can now reformulate the critique of proceduralism in the following simple terms: If General Karadayi were a committed proceduralist, he would recognize the normative costs of imposing. If Karadayi recognized those costs, fidelity to his principles would keep him from intervening. This syllogism, however, depends on the assumption that a proceduralist cannot coherently impose an illegitimate decision. In the next section of this essay I use the example of the democratic rebel to challenge this intuitive belief.

Section 2: Procedural Ends and Democratic Authority

Section (2:1) Democrats in Nondemocratic Regimes

In nondemocratic regimes the institutions necessary to make authoritative decisions do not exist or cannot be used.²⁷ Despite this reality, some individuals still regard themselves as democrats; they are democratic rebels. The ideal type I develop is informed by the writings and actions of one democratic rebel—the Polish journalist, intellectual, and former dissident Adam Michnik.²⁸

Democratic rebels reject the government that exercises power over them. Yet just like their democratic counterparts in legitimate regimes, the rebels respect systems based on “pluralism and authentic self-government.”²⁹ As *democratic* rebels they deny the authority of *all* nondemocratic regimes. Michnik was once asked whether he would have preferred to live under the Chilean dictator Augusto Pinochet instead of the Polish Communist Party leader General Jaruzelski. Expressing his commitment to democracy per se, he replied: “If forced to choose between General Jaruzelski and General Pinochet, I would choose Marlene Dietrich. The alternative is absurd and irrational. It offers me the choice, as I fight for democracy in a dictatorial system, of sitting in prison either as a Communist or as an anti-Communist.”³⁰

Not only do some individuals consider themselves democrats when participation in a democratic process is impossible; often enough they recognize and even take pleasure in this romantic element of their identity. In a 1987 interview with Daniel Cohn-

Bendit, Michnik noted that “[a]ll the people in the know told us we were dreaming: ‘You are doing something that is impossible. There is no opposition in communism.’ We answered that this opposition existed despite its impossibility.”³¹ Michnik’s claim powerfully captures the democratic rebel’s idealistic position. The intricacies of that position requires further unpacking.

Section (2:2) Democratic Action in Authoritarian Regimes: Proceduralism as an End

Being a democrat is not merely a state of mind. In authoritarian systems, democratic partisans actualize a belief in self-government by struggling for democracy. Challenging an autocratic system, of course, requires democrats to conceal their activities and work within hierarchical organizations.³² Yet they can still shape their efforts in recognizably democratic ways.

For instance, a democrat can establish institutions that are independent of the state. She might publicize her objections and protest the authorities.³³ Nondemocrats also attempt to overthrow authoritarian governments, yet they fight to ensure that only their organization will have access to the apparatus of the state. Democratic organizations will be marked by relatively open attitudes about the work of rival opposition groups.³⁴ Accepting incipient forms of political pluralism and rivalry, even at the cost of political effectiveness, demonstrates an exceptionally strong commitment to democratic principles.

Finally, democratic rebels can be identified by their limited aim: to establish a pluralist order. Intellectuals and political theorists have distinguished this restrained approach to revolution from its more radical relatives.³⁵ The Polish intellectual Jacek Kuron formulated the concept of a “self-limiting revolution” to describe the ambitions of the Polish opposition.³⁶ Michnik concurred: “pluralist democracy necessitates compromise in the face of complex realities. The philosophy of compromise is a philosophy which recognizes quandaries. The philosophy of radicalism, revolution, demagoguery, and violence, by contrast, takes an easier path, although, as I’ve explained, it produces the guillotine and not democracy.”³⁷

I have provided only a few examples of how a rebel can act in ways that are consistent with democratic principles. Yet the diverse elements of democratic rebellion share a common characteristic: what the rebel aims to achieve is not a new society, but a more democratic one. Pure procedural theories of democracy are distinguished by their strict emphasis on democracy as a means, as *the* method of legitimate decision making. Democrats in authoritarian societies do not act in accordance with democratic procedures; they pursue democracy as an end. Their example raises the following question: can a proceduralist pursue democracy as an end? The answer is yes.

The end of democracy plays an important, if underappreciated role in procedural theory. The procedural ideal will be outlined in reference to proceduralists' underlying respect for individuals' capacity for moral judgment. This ideal will be defined independently of the outcome of political procedures. If proceduralists are inspired by a fixed ideal, we should observe them demanding the fulfillment of the conditions and preconditions of fully legitimate decision-making even when these demands have not yet been ratified by democratic procedures. Waldron, for example, frequently derides the democratic bonafides of judicial review of legislation.³⁸ His broadsides aim not simply to describe a normative state of affairs, but to encourage individuals, in his words, to "think procedurally."³⁹

Imagine a United States Supreme Court justice persuaded by a proceduralist's entreaties. This proceduralist justice would recognize the illegitimacy of overturning legislation and would accede to the legislature even when she believed a piece of legislation was wrongheaded. Because proceduralism is primarily defined by a set of actions, the judge's decision would not just track procedural norms, but actualize a political system in which legislative decisions are respected. Along the same lines, a proceduralist participant in a constitutional convention would argue against the establishment of judicial review. These examples illustrate that procedural theories don't conjure just an ideal to consider, but an ideal to be reached.⁴⁰

In more prosaic terms, to be a procedural democrat is to highly value a state of affairs in which legitimate decision making is possible. By definition, a proceduralist will be persuaded that a system defined by the practice of procedural democracy is preferable

to a system that is not. A proceduralist can engage in democratic rebellion because her actions would be reasonably aimed at achieving a goal she values.

Still, most democratic action in authoritarian societies has the same relation to procedural authority as more familiar efforts to democratize civil societies, workplaces, or personal relationships.⁴¹ These activities extend beyond mere decision making and help construct a democratic society. Yet by taking such action one does not engage in a democratic form of coercion, and democratic coercion is what this article is about. More work is necessary to show that it would be acceptable for a rebel to impose representative institutions or for a Turkish general to militantly defend democracy.

Before taking up that work, we should note that by exploring what it means to be a proceduralist in a non-democratic regime, we have moved beyond the domain of Waldron's defense of proceduralism. The societies Waldron considers while defending proceduralism are fully consolidated democracies. These regimes are characterized by well-functioning representative and judicial institutions, vigorous good faith debates about moral issues, and a widespread commitment to the rights of members of the community.⁴² Under these conditions, Waldron contends, assigning judges decisive power to overturn legislation conveys a lack of respect for citizens' ability to make judgments about the rights to which they are, by definition, committed. This disrespect is fundamentally inconsistent with the deference owed to those who are capable of personal and political self-rule. Waldron devotes minimal attention to what it would mean to take proceduralism seriously in a situation in which one or more of his conditions were not met.⁴³ His relative silence does not mean there is nothing to say about the predicament of a democrat living in a non-democracy; it does mean that if our investigation of the democratic rebel affects the weight we place on proceduralism as an ideal, then our conception of pure proceduralism may differ from Waldron's own.

Section (2:3) Democratic Imposition without Legitimate Authority

Imagine that our rebel succeeds in building a plausibly democratic opposition organization and weakens an authoritarian government. In moments of political transition, the leaders of the opposition frequently negotiate and make pacts with representatives of the outgoing government. These agreements outline the new rules of the game or structure the processes, such as constitutional conventions, that define the emergent system. Elite pacts are ubiquitous elements of political transitions; they are the concrete evidence of our inability to use democratic procedures to establish a new regime. This inability has both practical and logical sources.

Practically, limitations of time, political opportunity, and collective action combine to ensure that the rebels will not introduce new institutions democratically. Representative institutions will not naturally arise through joint action because they are a public good.⁴⁴ They are joint in supply (making them available to some means making them generally available) and nonexcludable (they allow more people to participate in the political process). Accordingly, individual supporters of a transition will have an incentive to free ride. A spontaneous, democratic decision is therefore an unlikely source of a democratic institutions. Creating democracy requires a smaller, focused group of individuals to take it upon themselves to found the regime. Defending the work of the American constitutional convention, James Madison reflected on this very problem: “[I]t is impossible for the people spontaneously and universally, to move in concert towards their object [a new constitution]; and it is therefore essential, that such changes be instituted by some *informal and unauthorized propositions*, made by some patriotic and respectable citizens or number of citizens.”⁴⁵

Logically, the proceduralist faces the problem of regress. To make a legitimate decision requires that we establish a set of constitutive rules—for example, how we will aggregate votes. There are a variety of rules for aggregating votes which are reasonably democratic.⁴⁶ Yet we cannot select these constitutive rules democratically. To do so would require us to have already determined how to decide about the constitutive rules.⁴⁷

Thus, even in an scenario in which the ancien régime simply crumbles, the leaders of the democratic opposition must impose a set of rules.

Charles Tilly once wrote that “democracy is a lake.”⁴⁸ The metaphor refers to the multiple causal sources of democracy. If I am correct, none of those sources are procedurally legitimate. Rebel leaders might be appropriately regarded as moral or political authorities. These leaders might take steps to build democratic legitimacy, broadly defined, by establishing a constitutional convention and creating mechanisms for popular participation in the ratification of the constitution. But the rebel leaders cannot answer why they, above all others, should decide the new rules of the game. Affected individuals do not have a democratic, content-independent reason to respect the rebels’ choice. When democrats establish democracy, they engage in a significant and procedurally illegitimate imposition.

Section (2:4) Democratic Reasons to Act Illegitimately

An inability to account for the original legitimacy of democratic institutions is thought to be a major embarrassment for procedural theory.⁴⁹ If a proceduralist cannot participate in the establishment of democracy, then perhaps proceduralism is self-defeating. It is true that proceduralism cannot shroud inaugural acts of imposition in legitimacy. Yet this feature of proceduralism should not keep proceduralists from founding a democracy.

First, the normative cost of founding a democracy is relatively low. When a rebel imposes representative institutions, she does not ignore the expressed judgment of her fellow citizens. By definition, the preceding regime is illegitimate. The only cost of establishing new institutions is the fact that most individuals have not had the opportunity to participate in their design.

Second, the value of illegitimately imposing is relatively high. For proceduralists, democratic institutions are a distinctly valuable end because of the way they instantiate respect for individual judgment. By imposing democratic institutions, proceduralists not only achieve their end, they also drastically reduce the need for further acts of imposition.

Finally, no one can be expected to found a regime democratically. In the general case, the mere fact that a proceduralist lacks the right to decide for others should stop her from acting. This situation differs because imposition is the only path to democracy. Taken together, the high value of representative institutions and the inability of rebels to resort to democratic procedures permit an exceptional course. Democratic foundings are instances in which actions that are derived from proceduralist principles can be illegitimate.

One might be concerned that institutions which are imposed cannot facilitate legitimate decision making. This concern would not sway the proceduralist. Recall that procedural theories describe the procedures to be followed in order for someone to recognize a decision as authoritative. Following the right procedures allows us to respect a decision as authoritative regardless of how those procedures are institutionalized.

Section (2:5) Defending Democracy without Democratic Authority

To defend proceduralism's militant bonafides, I have argued that (a) democrats exist in authoritarian regimes, (b) democracy constitutes an end for proceduralists, (c) democracy cannot be established democratically and (d) illegitimate action to *establish* a democracy is consistent with a commitment to proceduralism. Demonstrating that a proceduralist cannot take illegitimate action to *defend* democracy would require a skeptic to construct a conceptual firewall between the normative worlds of authoritarian and democratic regimes. That skeptic would surely argue that if individuals can act through democratic institutions, a proceduralist must demand that they do so. In contrast to establishing democracy, defending it requires one to actively intervene in the democratic process; one displaces the authoritative decision of others and neglects an obligation to obey. Whereas, before, no authoritative collective action was procedurally legitimate, now all such action must be.

To be sure, transitions to democracy are normatively significant events. The everyday politics of democracy should not be confused with the politics of creating a democracy. Still, we have two reasons to reject the skeptic's Manichean worldview.

First, the establishment of democratic institutions does not revolutionize a proceduralist's principles. In authoritarian regimes, proceduralists treat democracy as both a means and an end. The same is true of democrats in a democracy. What democratic institutions affect is how a proceduralist *manifests* a commitment to democracy. If a person is persuaded that the political process, though legitimate, is in some way lacking, she might take steps to improve the system. She might commit her time and money to struggle for increased election oversight or for a more democratic system of judicial review. Indeed, she might even take actions that prioritize democracy over other valued ends. Once representative institutions have been created, a democrat remains committed to democracy above other forms of government. She treats the development of democratic institutions and the survival of those institutions as reasons for action. She remains, in other words, "a partisan for democracy."⁵⁰

The second reason we should reject the skeptic's challenge is because transitions to democracy are never realistically complete. The political institutions, parties, laws, economic systems, and power structures inherited from the preceding order frequently define new regimes.⁵¹ These elements of nondemocratic politics are not simply remnants or artifacts of some predemocratic past. They are intimate, common components of democratic politics. Transitions to democracy are also limited by our technology of democracy. A political procedure that perfectly aggregates or assesses individual judgments may exist. Still, we have yet to light on that ideal procedure. Our technical limitations ensure the stubborn persistence of opportunities to make democracies more democratic.

In real democracies, especially those that have recently transitioned from authoritarianism, the status of democracy itself is often the subject of political debate and struggle. All democratic regimes include members who prefer other forms of government. In rare cases, those who oppose democracy may stymie representative institutions or disenfranchise minorities. In Michnik's words, "[r]adical movements—whether under red or black banners—gladly use the procedures and institutions of democracy to obliterate it."⁵² The persistence of nondemocratic politics not only implies that individuals have the opportunity to make their regime more democratic; it implies

that rare situations will arise in which one's commitment to democracy as an end will radically conflict with one's commitment to democracy as a means.

To return to our earlier example, the rise of the Welfare Party presents General Karadayi with a dilemma. He believes the party will undermine democracy. He can abide by the outcome of a procedure he regards as authoritative; that is, he can stand aside while a popularly supported group overthrows a legitimate regime. Or he can attempt to override the outcome of a democratic election.

Exploring the choice faced by a democratic rebel, we have outlined a set of conditions in which, paradoxically, the procedural thing to do is to act illegitimately. One strategy for identifying when these conditions arise is to focus on the life cycle of a democracy—that is, we can ask whether an intervention will inaugurate a new regime. A less ad hoc strategy would require us to consider why founding moments are appropriate sites of illegitimate action. The first factor that stands out is the value of the end that can be achieved: the de facto authority of legitimate institutions. Periods when parties credibly threaten those institutions, when democracy itself is at stake, share this condition. The second factor is necessity. The rebel defensibly imposes because democratic action is not possible.

By implication, if Karadayi can respond to a popular challenge without intervening, he must do so. Yet if he believes that the Welfare Party will undermine democracy before a legitimate response is possible, he can recognize the authority of the elected government and coherently take it upon himself to change the state's policy. When democracy is threatened, therefore, proceduralism urges democrats to judge for themselves whether following an authoritative decision or intervening best reflects fidelity to procedural principles. A proceduralist may coherently set aside democratic procedures to secure democratic ends

Section (3) The Procedural Approach to Threats to Democracy

Section (3.1) The Prospect of Unlimited Intervention

The claim that proceduralists can coherently overturn the outcome of a democratic procedure is bound to raise several concerns. First, one might be concerned that *this* proceduralism rationalizes the wholesale reversal of democratic decisions. The opposite is true. Though I defend the claim that proceduralists view democracy as an end, they will nonetheless recognize that intervening and thereby excluding those with a claim to participate carries a serious moral cost. Given that cost, only a few cases will warrant imposition. Unlike theories that view the imposition of substantively democratic decisions as morally costless, this approach confronts the difficult question of why a person should obey a decision she fundamentally disagrees with. This proceduralism grapples with the reality that when one presses democracy on a society, those who are subject to the decision have been imposed upon.

Section (3.2) Why Aren't there Substantive Limits on Democratic Authority?

At the beginning of this essay I stipulated that proceduralism is defined by two ideas: 1) that legitimate political authority can be generated only through democratic procedures; 2) that the authority of a decision is fully content independent—i.e. that there are no substantive limits on democratic authority. I have also held that procedurally independent values ground the proceduralist's approach to authority, as well as her endorsement of democracy as an end. Does the proceduralist's commitment to these substantive values imply that she cannot reasonably regard an anti-democratic decision as authoritative, that she must accept that there are substantive limits to procedural authority?

Before responding in full, it is important to understand the limits of this question's practical import. Proceduralists maintain that collective decisions about which there is good faith disagreement are authoritative—even decisions about democracy itself. But

imagine that a proceduralist, let's call him Hans, conceded that good-faith disagreement did not extend to the question of whether we should live in a democracy.⁵³ Hans would not regard a decision to undermine democracy as authoritative. Yet in the vast majority of cases in which a popular group is thought to threaten representative institutions, the decision to intervene will be preemptive. Individuals will decide to halt the democratic process before a group has produced legislation explicitly upsetting democratic institutions. The Turkish case I have discussed in this essay reflects that reality. The logic behind preemption is clear enough. It is likely too late to preserve a regime once antidemocrats are in a position to pass deeply antidemocratic legislation. When preemptive interventions do occur, we can expect there to be a substantial good-faith disagreement about whether democracy is truly at risk. Again, the Turkish case is apposite. General Karadayi believes the Welfare Party will endanger democracy, but the party has not already undermined the regime. In light of the disagreement about whether the Welfare Party actually poses a threat, it is difficult to see why Hans would regard their election as unauthoritative—even though it is an electoral outcome he might think should be disobeyed. Whether a proceduralist recognizes limits to democratic authority will have little impact on the normative calculus she employs when deciding whether to actually defend democracy.

Still the question nags. Is it unreasonable for the proceduralist to deny the existence of limits to democratic authority? The answer is no. Imagine that a society took up the question of whether to live in a democracy. Questions about democracy are a) subject to reasoned consideration and b) open to good-faith disagreement. Assuming that all possible conditions of legitimate decision-making are met, the use of a legitimate procedure allows everyone to fairly participate in a collective decision about democracy. Proceduralists regard democratic decisions as authoritative because of their respect for individuals' judgment about the issues that affect their lives. A decision about democracy is no different. A proceduralist would regard a decision to end democracy as authoritative.

Questions concerning the limits of democratic authority are often confused with a more basic question; namely, is it reasonable to abide by a radically undemocratic decision? Critics of proceduralism have propagated the mistaken claim that a

proceduralist must obey such a decision. The confusion partly stems from the lack of an agreed-upon conception of democratic authority. Most of proceduralism's critics treat democratic authority as a peremptory reason, a reason which excludes consideration of the substance of a decision which a decision maker has authority to make. If one regards authority as unlimited and peremptory, then reason would dictate that one must obey a democratic decision which is fundamentally inconsistent with one's reasons for valuing democracy. To avoid this fairly unreasonable outcome, many argue that democratic authority is limited. Yet proceduralists need not define authority in this fashion.⁵⁴ They can regard democratic authority as a form of respect, as a weighty moral reason to obey. On this definition, we need not assume that one must always obey a decision one regards as morally authoritative. By implication, we need not assume that democratic authority must be limited by the reasons which make democratic procedures valuable. One can both recognize the authority of a substantively undemocratic decision and reasonably decide to disobey it.

Section (3.3) Is Proceduralism Dualism in Disguise?

One might suspect that the variant of proceduralism I have defended cannot be distinguished from dualism. By dualism, I mean theories that attempt to give more or less equal weight to the value of procedure and substance when describing what democrats should do. The two approaches do share certain core features, yet they are distinct. My aim in what follows is not to arbitrate between the two theories, but to reveal proceduralism's distinctive answers to two questions: 1) how should democrats approach the decision to intervene in the democratic process?; 2) how they should behave in the aftermath of that imposition?

Corey Brettschneider has recently offered a nuanced account of dualism. In his view, it is always costly to overturn a democratic decision, even if the decision is substantively undemocratic. Yet it is also costly to let stand a decision that is inconsistent with our reasons for valuing democracy. "[T]here will be a loss for democracy," Brettschneider observes, "whenever democratic procedures produce nondemocratic outcomes."⁵⁵ Faced with a nondemocratic outcome, a dualist must decide which course

of action—allowing the decision to stand or intervening—will minimize the overall loss to democracy. A dualist approach to the Turkish case would put great weight on the fact that the Welfare party was freely and fairly elected. But if the party posed a serious enough threat to democracy, the dualist might nonetheless intervene. The version of proceduralism I defend in this essay mimics Brettschneider’s dualism in two ways. First, by arguing that one must balance the weight of democratic procedures against the substantive content of the decisions which those procedures produce. Second, by recommending intervention if members of a legislature credibly threaten to undermine a democratic regime.

To get at what distinguishes proceduralism from Brettschneider’s dualism we have to dig deeper into how the two theories treat the conflict between democratic means and ends. The dualist recognizes that all things being equal it would be better for democracy if a popular decision were not overruled. Nonetheless, the dualist claims that if someone (generally a judge) believes that intervening will minimize the loss to democracy, than he is *justified* in taking that action. Those who disagree with the decision cannot claim to be mistreated. For the dualist, therefore, disagreement about what constitutes the most democratic course does not pose a major conceptual stumbling block. Nor does the question of why a judge should be empowered to determine the most democratic course of action. This perspective is exemplified by the method Brettschneider proposes for evaluating a democratic decision that implicates or infringes on core democratic values. In such cases, a dualist judge will begin with a presumption that he should invalidate the decision. To stop the intervention, members of the majority must demonstrate, to the judge’s satisfaction, that their collective decision achieves a “compelling interest.”⁵⁶

In contrast, the proceduralist will hold that legitimate action in the face of disagreement is a privilege reserved for participants in a democratic process. Before intervening, the proceduralist will presume that a democratic decision should be obeyed and she will exhibit a concerted reluctance to impose her judgment on her fellow citizens. In part, this reluctance reflects the unavoidable possibility that her aims might be achieved through comparatively pedestrian forms of democratic opposition and mobilization. One might call this the opportunity cost of intervention. With respect to

popular threats to democracy, establishing whether a group poses a credible threat will often prove challenging. We can have better or worse heuristics for determining whether to act. But even the best heuristics do not foreclose the possibility that by intervening one undermines rather than strengthens one's democratic regime. The proceduralist will be alive to this possibility.

Even if no uncertainty attended a decision to intervene, preserving the regime would require the proceduralist to tread on political rights that she regards as indefeasible.⁵⁷ When a proceduralist intervenes she excludes others. She understands herself to have wronged them. The proceduralist can *explain* or *excuse* her efforts to defend democracy, but because she lacks the right to decide for others, her intervention cannot be justified.⁵⁸ The proceduralist will therefore regard interventions in the name of democracy to be substantially more costly than the dualist.

By implication, the proceduralist judge or general will not seriously consider intervening whenever she believes a democratic decision infringes on democratic rights or moves her regime farther away from the procedural ideal. A proceduralist will only take it upon herself to decide for the community when doing so appears to be the only way to avoid morally disastrous outcomes, outcomes which are deeply inconsistent with the respect owed individuals as "separate moral agent[s] with [their] own sense of justice."⁵⁹ The central aim of this paper has been to identify one such exception; an exception that is implicit in procedural theories of democracy. Using the example of the democratic rebel, I argued that a proceduralist might intervene when she judges the basic democratic identity of a regime to be credibly threatened.

Section (3.4) Proceduralists in the Aftermath of Intervention

Because a proceduralist will regard an intervention as illegitimate, she must make good on the costs of imposition. The proceduralist's approach to the defense of democracy will not only be distinguished by the moral calculus she applies to the question of *whether* to intervene, but by the duty she incurs to make amends for the democratic shortcomings of that effort. Bonnie Honig captures the meaning of this form

of political responsibility in an aphorism: “[a]cting for the best in a tragic situation includes remaining around for the cleanup.”⁶⁰

The proceduralist’s recognition of the cost of imposing must extend beyond inner anguish (as this paper is not directly concerned with questions of legality or constitutionality, I leave aside questions related to the appropriate legal status of democracy’s defenders).⁶¹ Individuals who participate in efforts to secure democracy frequently attempt to cloak the undemocratic features of their intervention behind post hoc claims to legal authority. In Turkey, the Constitutional Court provided legal cover to the military after the generals had forced the Welfare Party from power.⁶² Democrats, however, should not seek political absolution for militant action. Taking public responsibility and explaining one’s actions facilitates democratic accountability, but even public acknowledgment is not enough. If individuals do not conduct defensive projects in democratic ways, their regime may not remain particularly democratic. In conception, states of emergency have brief time horizons. Efforts to defend democracy are by their nature long-term political projects that influence the underlying identity of democratic regimes. Because of the impact of militant projects, acknowledgment of the procedural illegitimacy of intervention should pervade the shape of an effort to defend democracy.

The following comparison buttresses the claim that a proceduralist’s sense of responsibility will determine the form of her efforts to defend democracy.⁶³ From one perspective, the proceduralist’s position bears a strong similarity to the position of a political dissenter who engages in civil disobedience. Both defy valued norms (the rule of law, in one case, and democratic obligations, in the other) to achieve other valued ends; both ought to publicly recognize their violation. The political dissenter is punished for violating the law. We recognize his commitment to the norms he is violating by the fact that he accepts, indeed invites, a legal penalty in the name of another principle. Unlike the dissenter, one who can intervene effectively in the democratic process will probably hold a position of political power. She might be a leading member of the executive branch, the military, the judiciary, or another institution. If successful, she may face no political or social sanction for her imposition and she will probably have the clout to shape efforts to defend democracy. By developing a political and organizational expression of the costs of intervention, she can achieve a degree of normative coherence.

How might a proceduralist make amends? After a democrat has intervened, after a party has been banned, or after an election has been canceled, the proceduralist's chief obligation is to fight for policies consistent with the principle that the excluded retain a full claim to participate in the political process. A democrat may rightly drive an antidemocratic party out of parliament. But as the Turkish prime minister Erbakan argued on the day he was forced from his post, defenders of democracy "cannot order a large part of the people not to exist."⁶⁴ Even if those who are excluded oppose democracy, their inability to participate will quickly sap legitimacy from representative institutions. Moreover, the proceduralist will oppose the permanent institutionalization of a democratic guardian with legal authority to overturn democratic decisions, such as a constitutional court or security council. Viewing interventions into the democratic process as not merely distasteful, but illegitimate, the consistent proceduralist will work against the entrenchment of a democratic vanguard. In sum, proceduralist policies will convey a distinctive ambivalence—not an ambivalence about the value of democracy, but about the value of intervention.

Conclusion

In his essay "Notes of a Native Son," James Baldwin employs the metaphor of gangrene to represent the debilitating but unavoidable feelings of hate that racism inspires. Baldwin dramatizes the fateful stakes of deciding whether to amputate a limb threatened by a creeping death: "One is always in the position of having to decide between amputation and gangrene. Amputation is swift but time may prove that amputation was not necessary—or one may delay the amputation too long. Gangrene is slow, but it is impossible to be sure that one is reading one's symptoms right. The idea of going through life as a cripple is more than one can bear, and equally unbearable is the risk of swelling up slowly, in agony, with poison."⁶⁵ Like Baldwin, the procedural democrat faces a tragic dilemma. She must either limit the arena of democratic politics—she must perform an amputation—or tolerate the expansion of some kind of gangrenous threat to democracy. Like Baldwin, the democrat confronts the question of whether a potential threat, minor now, will spread so that preventive action is impossible in the

future. To wait risks allowing the dissolution of democracy; to act precipitously risks a McCarthyite mutilation of one's own regime.

I have argued that a democrat can recognize this dilemma without shedding her proceduralist principles. A procedural democrat can coherently intervene to defend democracy when this appears to be the only way to preserve representative institutions. Yet the toughest theoretical question about popular threats is not when we should defend democracy (when it is necessary to do so), but how we should do so and what we will define as success. From the proceduralist's perspective, a democrat's efforts will be worthwhile only if the sum and the substance of her project reflect her recognition of the illegitimacy of democratic vanguardism.

¹ I would like to thank Bruce Ackerman, Omri Boehm, Bryan Garsten, Hélène Landemore, Andrea Pozas-Loyo, Ian Shapiro, and the two anonymous reviewers for their very helpful comments on drafts of this paper. The paper has also benefited from the comments and critique of participants at the Yale Political Theory Workshop, the Midwest Political Science Association, and the New England Political Science Association.

² Quoted in Gregory H. Fox and Georg Nolte, 'Intolerant Democracies'. *Harvard Int. Law Journal*, 36 (1995), pp. 1-70, 1.

³ Many examples attest to this empirical claim. Recently, representatives of the Shiite political and military movement Hezbollah (Party of God) boycotted the Lebanese Parliament. As a result, the Parliament was unable to maintain a quorum to elect a new president. For further examples see Giovanni Capoccia, *Defending democracy: reactions to extremism in interwar Europe*, (Baltimore: Johns Hopkins University Press, 2005); and Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I'. *The American Political Science Review*, 31 (1937), pp. 417-432. There is a growing body of literature on bans on parties and militant democracy. See, for example, Samuel Issacharoff, 'Fragile Democracies'. *Harvard Law Review*, 120 (2007), pp. 1405-1467, Nancy L. Rosenblum, *On the Side of the Angels: An Appreciation of Parties and Partisanship*, (Princeton: Princeton University Press, 2008), esp. ch. 9.

⁴ Hans Kelsen offers a well-known defense of proceduralist democracy in his *Vom Wesen und Wert der Demokratie*. For a partial English translation, see Hans Kelsen, 'On the Essence and Value of Democracy'. *Weimar: A Jurisprudence of Crisis*, Jacobson and Schlink, Eds.(Berkeley, University of California Press, 2000), pp. 84-109.

⁵ See Melissa Ann Schwartzberg, *Democracy and Legal Change*, (Cambridge: Cambridge University Press, 2007), 153-192. Schwartzberg emphasizes that the perceived theoretical deficiencies of the Weimar Constitution were not the only motivations for constitutional entrenchment.

⁶ Socialist Reich Party Case (1952) 2 BVerfGE 1 Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, (Durham N.C.: Duke University Press, 1989), 223-224.

⁷ Jeremy Waldron, *Law and Disagreement*, (Oxford: Oxford University Press, 1999); Jeremy Waldron, 'The Core of the Case Against Judicial Review'. *Yale Law Journal*, 115 (2006), pp. 1346-1406. For a similar critique see Aileen Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron'. *Law and Philosophy*, 22 (2003), pp. 451-486; Thomas Christiano, 'Waldron on Law and Disagreement'. *Law and Philosophy*, 19 (2002), pp. 513-543; Corey Brettschneider, *Democratic Rights: The Substance of Self-Government*, (Princeton: Princeton University Press, 2007); and Corey Brettschneider, 'Balancing Procedures and Outcomes Within Democratic Theory: Core Values and Judicial Review'. *Political Studies*, 53 (2005), pp. 423-441. David Estlund has offered a different critique of proceduralism: that it does not reflect the importance of the epistemic quality of democratic outcomes. As my focus is on the problem of threats to democracy, I will not address Estlund's theory of epistemic proceduralism in this essay. David Estlund, *Democratic Authority: a philosophical framework*, (Princeton: Princeton University Press, 2008). See also a recent debate: David Estlund, 'Debate: On

Christiano's 'The Constitution of Equality'. *Journal of Political Philosophy*, 17 (2009), pp. 241-252; and Thomas Christiano, 'Debate: Estlund on Democratic Authority'. *Journal of Political Philosophy*, 17 (2009), pp. 228-240.

⁸ Joshua Kassner, 'Debate: Is Everything Really Up for Grabs? The Relationship between Democratic Values and a Democratic Process'. *Journal of Political Philosophy*, 14 (2006), pp. 482-494, at p. 494.

⁹ This essay draws methodological and conceptual insight from Bruce Ackerman, *We the people: foundations*, (Cambridge, MA.: Belknap Press of Harvard University Press, 1991), Christine Korsgaard, 'Kant on the Right to Revolution'. *Reclaiming the History of Ethics: Essays for John Rawls*, Reath, Herman and Korsgaard, Eds.(Cambridge, Cambridge University Press, 1997), pp. 297-328.

¹⁰ To avoid distracting repetition, I use "representative" as synonym for "democratic" in this paper.

¹¹ On this binary perspective on revolution, see Bruce Ackerman, *The Future of Liberal Revolution*, (New Haven, C.T.: Yale University Press, 1992).

¹² I do not mean to imply that all civil disobedience requires morally objectionable action, only that some defensible civil disobedience will.

¹³ It is frequently the case that political actors ban parties before legislatures have passed legislation allowing such action. In 1933, the Czechoslovakian government banned the Sudeten German Nationalist Party and the Nazi Party before they were able to pass legislation. Only later were the bans legislatively validated. In 1991, after an unsuccessful coup, the Russian president took it upon himself to ban the Communist Party and seize its assets. Eventually, the Russian Supreme Court held that the president's unilateral actions were constitutional. Capoccia, *Defending democracy: reactions to extremism in interwar Europe*, 94; Issacharoff, 'Fragile Democracies'. p. 1456.

¹⁴ Umit Cizre, 'Ideology, context and interest: the Turkish Military'. *The Cambridge History of Turkey*, Kasaba, Ed.(Cambridge, Cambridge University Press, 2008), pp. 301-332. See also Refah Partisi (Welfare Party) v. Turkey, 35 Eur. H.R. Rep. 56, 74 (2002).

¹⁵ In reality, the General does not fit the description of a democrat. He is suspected of playing a role in at least three military interventions into politics and has repeatedly asserted that the military should judge whether a political party represented an unacceptable "form of backwardness or fanaticism." Stephen Kinzer. (January 1, 1996). "Ankara Journal: Islamic Victor Has Faith, Too, in Peaceful Politics." New York Times, from <http://www.nytimes.com/1996/01/01/world/ankara-journal-islamic-victor-has-faith-too-in-peaceful-politics.html?scp=6&sq=%20Karadayi&st=cse>. accessed 7/1/09.

¹⁶ My frames of reference throughout this essay are individuals who identify themselves as procedural democrats (in the remainder of the paper I frequently refer to procedural democrats as democrats). Though I discuss whether actions are consistent with procedural norms, my aim is not to smuggle extraneous ethical considerations, such as the value of personal integrity, into our consideration of the problem of proceduralism and threats to democracy.

¹⁷ Waldron, *Law and Disagreement*, at pp. 101-106.

¹⁸ Waldron, *Law and Disagreement*, at p. 94.

¹⁹ Waldron, *Law and Disagreement*, at p. 304.

²⁰ See esp. ch. 5, "Legislation, Authority, and Voting," in Waldron, *Law and Disagreement*, at pp. 88-118.

²¹ Waldron, *Law and Disagreement*, at p.14.

²² On content-independent reasons see also Leslie Green, *The Authority of the State*, (Oxford: Clarendon Press, 1988).

²³ I will not treat democratic authority as a peremptory or exclusionary reason. In Joseph Raz's canonical interpretation of instrumental authority, authoritative reasons for action not only are content independent, but also exclude other important reasons for action. Joseph Raz, *The Morality of Freedom*, (Oxford: Oxford University Press, 1986), at p. 59.

²⁴ Brettschneider, *Democratic Rights: The Substance of Self-Government*, at p. 12.

²⁵ I am following Buchanan in distinguishing between democratic authority and legitimacy. An authoritative decision, on Buchanan's account, implies an obligation to obey. Legitimacy implies the right to coerce individuals whether or not those individuals have an obligation to obey. Though distinct, the two concepts are not mutually exclusive. Allen Buchanan, 'Political Legitimacy and Democracy'. *Ethics*, 112 (2002), pp. 689-719

²⁶ Waldron, *Law and Disagreement*, at pp. 232-254.

²⁷ There is a burgeoning literature on representative institutions in nondemocracies. See, for example, Jennifer Gandhi, *Political Institutions under Dictatorship*, (Cambridge: Cambridge University Press, 2008)

²⁸ I am not suggesting that Michnik defined himself in the narrow terms of proceduralism. Rather, I aim to show that it would be meaningful to refer to a rebel as a proceduralist. The literature on the Solidarity movement, in which Michnik played a crucial role, and on the Polish struggle for democracy is extensive. I have relied on a small selection of that literature, including Timothy Garton Ash, *The Polish Revolution: Solidarity*, (London: Granta Books, 1991), Francis Millard, *The Anatomy of the New Poland*, (Aldershot, UK: Edward Elgar, 1994); and Wiktor Osiatynski, 'The Roundtable Talks in Poland'. *The Roundtable Talks and the Breakdown of Communism*, Elster, Ed.(Chicago, University of Chicago Press, 1996),

²⁹ Adam Michnik, 'A New Evolutionism'. *Letters from Prison and other essays*, (Berkeley, University of California Press, 1985), pp. 135-148, at p. 146.

³⁰ Adam Michnik, 'Towards a Civil Society: Hopes for Polish Democracy-Interview with Erica Blair (John Keane)'. *Letters from Freedom: Post-Cold War Realities and Perspectives*, Gross, Ed.(Berkeley, University of California Press, 1988), pp. 96-116, at p. 99.

³¹ Adam Michnik, 'Anti-Authoritarian Revolt: A Conversation with Daniel Cohn-Bendit'. *Letters from Freedom: Post-Cold War Realities and Perspectives*, Gross, Ed.(Berkeley, University of California Press, 1987), pp. 29-66, Adam Michnik, 'Anti-Authoritarian Revolt: A Conversation with Daniel Cohn-Bendit'. *Letters from Freedom: Post-Cold War Realities and Perspectives*, Gross, Ed.(Berkeley, University of California Press, 1998), pp. 29-66

³² Andrew Arato has argued that Solidarity's decision to organize around the goal of an independent union, rather than a democratic workers' council, reflected the members' concern that the communist state would penetrate and capture more open and more democratic organizations. Andrew Arato, 'The Democratic Theory of the Polish Opposition: Normative Intentions and Strategic Ambiguities'. *From Neo-Marxism to*

Democratic Theory: Essays on the Critical Theory of Soviet-Type Societies. (Armonk, NY, M.E. Sharp, 1993), pp. 243-254, at p. 247.

³³ Michnik, 'A New Evolutionism', at p. 147.

³⁴ Michnik, "A New Evolutionism," at p. 121

³⁵ See, for example, Bruce Ackerman, 'Revolution on Human Scale'. *The Yale Law Journal*, 108 (1999), pp. 2279-2349.

³⁶ Martin Malia. (1982, 2/3/09). "Poland: The Winter War." New York Review of Books Retrieved June 15, 09, from <http://www.nybooks.com/articles/6682>.

³⁷ Michnik, 'Towards a Civil Society: Hopes for Polish Democracy-Interview with Erica Blair (John Keane)', at p. 11.

³⁸ Waldron, *Law and Disagreement*, 211-312; Waldron, 'The Core of the Case Against Judicial Review'.

³⁹ "Thinking procedurally" is an activity that is frequently encouraged by Waldron. He argues that a popular concern for rights is as important for the health of democracies as their specific constitutional design. Waldron, *Law and Disagreement*, at p. 295 and 311. It should be noted that Waldron also argues that political philosophy is not synonymous with political advice-giving or advocacy. Jeremy Waldron, 'What Would Plato Allow'. *Nomos XXXVII: Theory and Practice*, Shapiro and Decew, Eds. (New York, New York University Press, 1995), pp. 138-178.

⁴⁰ In his recent work, Thomas Christiano goes even farther. He argues that "each citizen has a duty to bring about democratic institutions." Thomas Christiano, *The Constitution of Equality*, (Oxford: Oxford University Press, 2008) at p. 249.

⁴¹ Along these lines see Ian Shapiro, *Democratic Justice*, (New Haven, CT: Yale University Press, 1999).

⁴² See, Waldron, 'The Core of the Case Against Judicial Review'. at p. 1359.

⁴³ Waldron does question whether constitutional courts would be comparatively more legitimate or effective than legislatures when his conditions are not met. Waldron, 'The Core of the Case Against Judicial Review'. at p. 1402.

⁴⁴ Ian Shapiro, *Democratic Justice*, at pp. 55-56.

⁴⁵ Alexander Hamilton, James Madison and John Jay (writing as publius), 'Federalist 40'. *The Federalist with Letters of Brutus*, Ball, Ed. (Cambridge University, Cambridge University Press, 2003), at p. 193.

⁴⁶ See, generally, Gerry Mackie, *Democracy Defended*, (Cambridge: Cambridge University Press, 2003).

⁴⁷ We could not resolve this problem by assuming the existence of an acceptable and salient democratic decision rule. Even if we spontaneously agreed on a decision rule, determining which question to begin with (Should we establish a democracy? Should we elect Lech as our president?) could not be determined via democratic procedures.

⁴⁸ Charles Tilly, 'Democracy is a Lake'. *The Social Construction of Democracy*, Andrews and Chapman, Eds. (New York, New York University Press, 1995), pp. 365-387.

⁴⁹ Christiano, 'Waldron on Law and Disagreement'. at pp. 520-522.

⁵⁰ Bryan Garsten suggested this formulation to me during a conversation. Russell Muirhead describes J. S. Mill as a "partisan of democracy" in Russell Muirhead, 'A Defense of Party Spirit'. *Perspectives on Politics*, 4 (2006), pp. 713-727, at p. 721.

⁵¹ On Poland see, for example, Anna M. Grzymala-Busse, *Redeeming the Communist Past: The Regeneration of Communist Parties in East Central Europe*, (Cambridge: Cambridge University Press, 2002).

⁵² Adam Michnik, 'Gray is Beautiful: A Letter to Ira Katznelson'. *Letters from Freedom: Post-Cold War Realities and Perspectives*, Gross, Ed.(Berkeley, University of California Press, 1998), pp. 317-327, at 326.

⁵³ This is the position endorsed by Thomas Christiano. Christiano, *The Constitution of Equality*, at p. 268.

⁵⁴ Waldron's definition of authority as respect is not well-specified. In comparison to Raz's conception of authority, Waldron explicitly indicates that authority as respect "is woollier and less well defined." Waldron, *Law and Disagreement*, at p. 101.

⁵⁵ Brettschneider, *Democratic Rights: The Substance of Self-Government*, at p. 138.

⁵⁶ Brettschneider, *Democratic Rights: The Substance of Self-Government*, at p. 149.

⁵⁷ There is a large and fascinating literature on the justified restriction of inalienable rights. My account relies, in particular, on Joel Feinberg, 'Voluntary Euthanasia and the Inalienable Right to Life'. *Philosophy and Public Affairs*, 7 (1978), pp. 93-123. See also Judith Jarvis Thomson, 'Self-Defense'. *Philosophy and Public Affairs*, 20 (1991), pp. 283-310.

⁵⁸ I rely on the distinction between justification and excuse outlined by Walzer: "an excuse is typically an admission of fault; a justification is typically a denial of fault and an assertion of innocence." Michael Walzer, 'Political Action: The Problem of Dirty Hands'. *Philosophy and Public Affairs*, 2 (1973), pp. 160-180 at p. 170.

⁵⁹ Waldron, *Law and Disagreement*, at p. 304.

⁶⁰ Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy*, (Princeton: Princeton University Press, 2009) at p. 7.

⁶¹ On the ethic of responsibility from a legal perspective see Oren Gross, 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?' *Yale Law Journal*, 112 (2003), pp. 1011-1134.

⁶² The Turkish case is not unique. See note 12.

⁶³ The argument in this paragraph draws on Walzer's comparison between the just assassin and one who engages in civil disobedience. Walzer, 'Political Action: The Problem of Dirty Hands'. at 179.

⁶⁴ Quoted in Stephen Kinzer. (June 17, 1997). "Turkey's Prime Minister, About to Step Down, Defends Record." *The New York Times*, from <http://query.nytimes.com/gst/fullpage.html?res=9B05EFD61E3FF934A25755C0A961958260&sec=&spon=&pagewanted=all>. accessed 7/1/09.

⁶⁵ James Baldwin, 'Notes of a Native Son'. *Notes of a Native Son*.(Boston, Beacon Press, 1984), pp. 85-114 at p. 112.