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# Majoritarianism

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**Abstract**
Extract:

All constitutional arrangements ultimately resort to some form of procedurally-based decision-making. In its broadest sense, 'majoritarianism' can refer to any component of a constitutional system in which those with final decision-making power have an equal say or vote in resolving disputes. Accordingly, the term describes not a substantive good but rather a type of procedure for making decisions — every person in some defined group counts the same and then to determine what to do or who wins or whom to elect or whether an amendment passes or fails you simply let the numbers count. More beats fewer. Take that as a working definition of 'majoritarianism'.

**Keywords**
constitutional, system, populism, decision-making

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# Comment: Majoritarianism

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## I Introduction

The year 2016 will go down as a Black Swan year in terms of how many seemingly unlikely events actually came to pass. Leicester City, as 5,000–1 underdogs, won the English Premier League football (or for North Americans soccer) competition — perhaps the biggest sporting upset anywhere, ever. Then there was the Brexit referendum where UK voters, against what almost all the polls were predicting, opted for 'Leave' in a comparatively decisive fashion. If anything the polls were even more out of kilter in telling anyone listening that Hillary Clinton was a shoe-in to win the November US Presidential election. The received wisdom, and virtually all of the media class, exclaimed that Donald Trump did not have a hope of winning. Except that he did win, to the astonishment of those same supposed experts. Even the 2016 American National Football League season (which leaks into 2017 for its Super Bowl) finished in unbelievable fashion when the New England Patriots came back from 25 points down to win. (In the previous 50 Super Bowls no team had ever come back from more than 10 points behind and certainly not from 19 down entering the final quarter.)

This Comment bears indirectly on those two middle events — the political ones not the sporting ones. My claim is that once you understand majoritarianism as a description of how decisions are made (or how they ought to be made), then pejorative terms such as 'populism' lose almost all of their force. You can agree with some decisions made by the majority of your fellow citizens and you can disagree with others. But labelling some outcomes as 'populist' really amounts to little more than 'I don't like what was decided', or more specifically 'I don't like what many of my fellow citizens have decided'. Having lost under the procedural rules agreed to beforehand, you seek to undermine a substantive choice you do not like. Something similar is usually in play when people allege some decision amounts to the 'tyranny of the majority'.

In the rest of this Comment I am first going to explain the idea or concept of 'majoritarianism' and then, at the very end, I am going to come back to these sort of charges of 'populism' and 'tyranny of the majority' to argue that they almost always miss their mark. They certainly do when directed at the Brexit vote to 'Leave' and the Trump presidential win.

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## II What is Majoritarianism?

### A *Majoritarianism in its Broad Sense*

All constitutional arrangements ultimately resort to some form of procedurally-based decision-making. In its broadest sense, 'majoritarianism' can refer to any component of a constitutional system in which those with final decision-making power have an equal say or vote in resolving disputes. Accordingly, the term describes not a substantive good but rather a type of procedure for making decisions — every person in some defined group counts the same and then to determine what to do or who wins or whom to elect or whether an amendment passes or fails you simply let the numbers count. More beats fewer. Take that as a working definition of 'majoritarianism'.

#### 1 *Judiciaries*

In this broad sense, the top judges on the High Court of Australia or on the Supreme Court of the United States or on the Supreme Court of Canada or on the German Constitutional Court or on the Indian Supreme Court and myriad others resolve their disputes over the meaning and proper scope of, say, some rights-related provision by counting each judge as equal to the others and letting the numbers count. There is no substantive Spike Lee-like 'Do the Right Thing' basis for resolving their disagreements, whereby the 'right' or 'most moral' or 'best' interpretation prevails, for the simple reason that the top judges disagree amongst themselves over which answer is best, right or most moral. So they count heads, with the opinion of each equal to that of all others. What most outside observers would consider to be five insipid, unconvincing and implausible judicial judgments can and will prevail against four that are seen as profound, insightful and morally compelling. Top courts in democracies have a decision-making rule, a procedure for resolving disagreements amongst the judges themselves, that amounts to 'majority rules'.[1]

Of course how these top judges resolve their disputes is rarely seen in such majoritarian or counting-of-heads terms. After all, the top judges generally give reasons for their positions; they hear arguments; they weigh up the competing positions. Still, when they disagree, the method for resolving what can be very deeply felt disagreements over highly charged issues such as euthanasia or same-sex marriage — issues that can split a top court 5-4 — is to count each judge equally and go with the majority.

#### 2 *Legislatures*

Much the same can be said about elected legislatures. Yes, they give reasons to the voters for their positions; yes, they weigh competing policies; yes, they are keenly aware of what those who elected them seem

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[1] See generally Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999).

to think. But ultimately, within any elected legislative chamber or House, no new measures will be passed into law unless a majority of the legislators is in favour of such changes. In that sense majoritarianism is the ultimate basis for making decisions in the United Kingdom's House of Commons, the French National Assembly, the Australian or United States House of Representatives, the Indian Lok Sabha and likewise around the democratic world. Of course, some legislative bodies may build in a super-majoritarian requirement to give a minority of elected legislators a blocking power over new laws. The United States Senate is the best known example of this. Senators may filibuster a proposed law (which amounts to not letting it come to a vote) and this blocking mechanism can only be over-ridden by a vote of 60 of the 100 Senators in favour of cloture. In other words, 41 Senators — considerably fewer than half — can block the passage of proposed laws in favour of the *status quo*, though a minority can never over-ride the majority to enact new laws that the minority of legislators wishes to see on the statute book. (Similarly, for any treaty to be ratified in the United States it must obtain two-thirds of the votes, or more, in the Senate.) The point is that democratic legislatures are majoritarian institutions, albeit ones where some chambers or Houses build in super-majoritarian hurdles to the passing of new laws.

## 3 *Constitutional Amendment Procedures*

Likewise most, if not all, constitutional amendment procedures across the democratic world require the achieving of some super-majoritarian threshold. For instance, for most constitutional amendments two-thirds of the provinces' legislatures must agree in Canada, with the additional requirement that the population of the assenting provinces must contain over half the country's population; in the United States, constitutional amendments need the assent of three-quarters of the State legislatures; in Australia, there is a nation-wide referendum that requires just one person over half of the voters nationwide to vote in favour of a constitutional amendment — a very straightforward majoritarian threshold — but also requires this number to include over half the voters in over half the States, which is a super-majoritarian requirement, albeit a comparatively weak one.

## 4 *Bicameralism*

Further, those countries with real bicameralism — with elected upper Houses that can and do block proposed laws from being enacted — have opted for another form or version of super-majoritarianism. You find this in Australia and the United States with their Senates; you find it in Germany with its Bundesrat; you find it in South Africa with its National Council of Provinces; you find it in India's Council of States. By contrast, bicameralism in the United Kingdom and Canada — with their *wholly unelected* upper House of Lords and Senate respectively — does not deliver a full-blooded super-majoritarian constraint. Such Upper Houses

exceptionally rarely block the passage of legislation desired by the Lower House. In practical terms they merely have a delaying power, and given their lack of democratic legitimacy it is a difficult power to use at that.

## III Majoritarianism from the Citizen's Vantage

### A *Majoritarianism in the Narrow Sense*

Of course there is a less broad, more circumscribed and indeed more common understanding of 'majoritarianism'. Rather than ask the extent to which top courts or the legislative branch or the machinery of constitutional amendment can be understood in majoritarian terms, this more bracketed concept looks at constitutional arrangements through the eyes of voters — where all citizens over a certain age and not significantly mentally impaired, or possibly in prison (prisoner voting being a controversial issue around the democratic world),[2] can vote. From the voters' vantage, strong judicial review is clearly *not* a majoritarian set-up or institution. Nor are the constitutional amendment procedures of the vast preponderance of countries. Nor is the 'give each State two (or twelve) Senators regardless of the State's population' basis for choosing the United States Senate (and the Australian one which copied the American model) a clearly majoritarian one, given that the value of some electors' votes can be over 70 times higher than others. The same non-majoritarian criticism can be made of the Australian Senate and the South African National Council of Provinces, to name but two. No, from the voters' vantage the equal input into decision-making that matters is theirs. From that same vantage there is a clear connection or link between the perceived attraction (or dislike) of majoritarianism and the perceived attraction (or dislike) of democracy.

On this understanding, to qualify as a majoritarian institution or decision-making process all the voters need to be counted as equals and given an equal say in resolving the various social policy disagreements that come up, even those that are articulated in the language of rights. Count each voter's choice as equal to any other's and then go with the majority. This is what lies at the heart of the common understanding of majoritarianism, namely any constitutional arrangement under which the choices, judgements, preferences and views of all voters are treated as being of equal worth and weight and value and so disagreements over social policies are resolved by letting the numbers count. Accordingly, to give just one example, the way the issue of same-sex marriage was resolved by Parliament in Ireland[3] qualifies as majoritarian, whereas the way in

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2 See, eg, *Sauve v Canada (Chief Electoral Officer)* [2002] 3 SCR 519; *Hirst v United Kingdom (No 2)* [2005] ECHR 155; *McHugh v The United Kingdom* [2015] ECHR 155; *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Taylor v Attorney-General* [2015] NZHC 1706 (24 July 2015).

3 *Thirty Fourth Amendment of the Constitution (Marriage Equality) Act 2015* (Ireland).

which it was resolved through the courts in the United States[4] and Canada[5] does not. The fact that the decision-making rules within those courts are majoritarian in nature, in that a conclusion is reached by counting judicial heads, does not alter this conclusion.

It is plain, in considering comparative constitutional arrangements around the democratic world, that majoritarianism of this more circumscribed and more common variety (that takes up the voters' vantage) is a minority taste. It lies at the heart of direct democracy and so too of all systems with binding referenda, be they frequent or sporadic. It lies, too, at the heart of the ultimate test of legal validity in countries with parliamentary sovereignty as the core of their Rule of Recognition.[6] This Comment will now consider constitutional majoritarianism in both of those forms or instantiations, though in reverse order.

## 1 *Parliamentary Sovereignty*

New Zealand is the pre-eminent parliamentary sovereignty-driven, unwritten constitutional jurisdiction in the world today. There is no over-arching single constitutional document from which other laws obtain their legitimacy. Majoritarianism plays a bigger role in this constitutional structure than in that of any other across the democratic world. There is no bicameralism. The elected Parliament — chosen since the 1996 election using a German-style Mixed-Member-Proportional ('MMP') voting system — is legally and constitutionally unconstrained (though of course it is morally and politically constrained). Any existing laws can be repealed and any desired future laws can be enacted by a simple majority of the legislators in Parliament, who themselves are chosen by the voters where each vote is worth virtually the same as any other. There is no malapportionment of districts/constituencies.

This unwritten constitutional structure with parliamentary sovereignty and majoritarianism at its core was inherited from the United Kingdom ('UK'), which itself still lacks a written constitution. Indeed, at the end of the Second World War it was the UK that was the world's pre-eminent exemplar of parliamentary sovereignty and majoritarianism. But then came the passage of the *European Communities Act 1972* (UK) and entry into what is today known as the European Union ('EU'). And after that was the *R v Secretary of State for Transport; Ex parte Factortame Ltd (No 2)* decision from the House of Lords,[7] which decided that any inconsistency between European law that had been incorporated into Britain's domestic

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4 *Obergefell v Hodges*, 576 US ___ (2015).

5 *Halpern v Canada* (Attorney General) (2003) 65 OR (3d) 161, cited by *Reference Re Same-Sex Marriage* [2004] 3 SCR 698.

6 H L A Hart coined this term in *The Concept of Law* (Oxford University Press, 1961). It refers to any jurisdiction's ultimate test of legal validity; of how legal rules are identified and distinguished from the many other types of social rules, including moral rules, etiquette rules, those regulating sports and games, etcetera.

7 [1991] 1 AC 603.

laws by way of that 1972 Act, and some other post-1972 English statute, would be resolved in favour of European law. It was made plain, in other words, that EU law trumped domestic UK law. However, that will presumably soon change to some extent or other given the 23 June 2016 'Brexit' referendum,[8] in which 52 percent of voters (on a 72 percent turnout) voted to 'Leave' the EU. Indeed, putting the very issue of whether to stay or go to the voters in the UK was itself a majoritarian exercise, the result of which no elected UK government will be able to ignore.

As for the majoritarian credentials of the EU itself — and here we are admittedly talking of a supranational institution rather than a national one — those EU credentials are without doubt circumscribed or enervated. The EU is best thought of as a sort of club for democracies, and as democracies these member states clearly have a commitment to some level of majoritarianism domestically. But at the supranational level, the EU's internal decision-making procedures are patently deficient in majoritarian terms (and that is putting things as kindly as I can). The EU parliament cannot initiate legislation — that is the job of bureaucrats in the European Commission; the EU parliament cannot in any realistic sense bring down a government either (though it does now have a veto over the package of Commissioners and President presented to it and in theory can pass a motion of censure against the Commission, which requires a two-thirds majority of votes to pass); and the *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*[9] is a written constitution in all but name, reinforcing the point above about the UK's enervated status as an unwritten constitution jurisdiction.

At a stretch, Israel might also be classed as an unwritten constitution jurisdiction, though they have a set of *Basic Laws* and an extremely activist top court interpreting them.[10] Hence, however it is classified, Israel does not have New Zealand levels of full-blooded majoritarianism.

## 2 *Direct Democracy*

Let us turn now to majoritarianism in the form of direct democracy. This, rather than parliamentary sovereignty, is much more commonly found in the constitutions of the world's democracies. Elected legislatures are a form of representative democracy: voters choose legislators who pass laws; the preferences of the majority of voters are percolated and strained through elected institutions such that the ultimate choices of which laws to enact or repeal are made by elected legislators, not directly by the voters; this filtering process is in turn affected by political parties and the

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8 Held under the *European Union Referendum Act 2015* (UK).

9 Opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009) ('*Lisbon Treaty*').

10 The Israeli judge who most obviously fits into this category is the Hon Aharon Barak. An example of his Honour's activist approach to the interpreting of a Basic Law is *Bank Mizrahi v Migdal Cooperative Village* (Supreme Court of Israel, 9 November 1995). See also Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2007).

constraints those parties happen to impose on 'their' elected legislators. It should be noted that issues arise with respect the extent to which elected legislators are free to vote their own conscience or judgment vis-à-vis how their constituents would wish them to vote. In the English-speaking world this debate indubitably begins by referring to Edmund Burke and his speech to the electors of Bristol as well as to John Stuart Mill. Both these men advocated a good deal of independence for elected legislators to vote their own conscience and judgment. What is rarely also mentioned is that Burke and Mill lost their re-election bids.

### (a) *Voting Systems*

A democracy's chosen voting system will also affect or influence the extent to which legislators are in practice free to ignore their electors and the voters more generally. To generalise, with proportional voting systems, such as MMP (in New Zealand) or Single Transferable Voting (in Australian Commonwealth Senate elections, for example), no single political party is ever likely to gain a majority of the legislature which means that forming a legislative majority takes place in coalition negotiations *after* elections. With more majoritarian voting methods, such as First-Past-the Post systems (in Canada, the United Kingdom, the United States, India, Singapore and Lebanon), or preferential ones (in Australia, Nauru and Papua New Guinea), the political parties are big tent or broad church affairs where the compromising and negotiating within the centre left 'team' and the centre-right 'team' takes place *before* elections and the resulting compromises are then presented to the voters. One of those 'teams' almost always then wins a majority in the legislature. In my opinion, proportional voting systems give legislators more scope to ignore the preferences and judgements of the voters, as a broad generalisation, because everyone knows policy positions will be bargained away after elections. In majoritarian voting systems voters expect winning parties to live by their manifestoes, barring unexpected circumstances or unforeseen financial constraints.

The immediate point, however, is that representative democracy is a sort of indirect majoritarianism. By contrast, direct democracy is just that, a form of comparatively unfiltered, unstrained majoritarianism.

### (b) *Referenda*

This sort of direct democracy manifests itself in referenda (the results of which are in some way binding) and in plebiscites (where the results are merely indicative and at least in theory can be ignored). Often these can be and are initiated by citizens. Switzerland is the best known jurisdiction (along with its 26 Cantons) to rely heavily on direct democracy of this variety, but it also plays an integral part in political life in Uruguay, Liechtenstein, Ireland and Bavaria (and less integrally in other Lander in Germany), as well as in California, Oregon, Colorado, Alaska, Nebraska

and to varying extents in nearly half of the States in the United States of America.[11]

Examples from these jurisdictions of this sort of direct majoritarian decision-making in recent times might include: the above-mentioned Irish referendum on same-sex marriage; the similarly focused referendum in California;[12] the minaret ban referendum in Switzerland;[13] the various State referenda in the United States on legalising marijuana;[14] one of the six state-wide referenda in Bavaria; a referendum to lower the age of criminal responsibility in Uruguay; and a Lichtenstein referendum concerning limitations on the veto powers of the Prince of Lichtenstein. Of course, resort to this sort of direct democracy also occurs in democratic jurisdictions that make use of these initiatives only rarely. Here examples include the recent referendum in the United Kingdom to leave the European Union, as mentioned above; the failed referenda in Canada's provinces of Ontario and British Columbia to change the voting systems; the failed binding referendum in New Zealand on whether to change the national flag;[15] or any proposed constitutional amendment in Australia. Less reputably — because who should be given a say was in question and because the usual procedural safeguards may also not have been wholly satisfied — there is the example of the Ukrainian/Crimean referendum that voted in favour of secession.

That is just a small sample of instances of majoritarianism (of the direct variety) at work in various jurisdictions. As was noted already, the extent to which this sort of majoritarianism plays a part in the relevant country's constitutional structures varies between jurisdictions.

## IV Back to the Charges of 'Populism' and 'Tyranny of the Majority'

It is more or less self-evident that to some extent majoritarianism lies at the heart of democracy — and more so for those who hold a 'thin', procedural understanding of democracy as opposed to a morally-laden 'thick' understanding.[16] The constitutional structures of all democracies, even those with generous helpings of Madisonian checks-and-balances and separations of powers, reserve a large space for majoritarianism. It can be indirect, and filtered through an elected legislature. It can be direct and take the form of referenda. You can see the most full-blooded version of the

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11 See generally Steven Spadijer, 'A Hardcore Case against (Strong) Judicial Review of Direct Democracy' (2012) 31 *University of Queensland Law Journal* 55.

12 *California Marriage Protection Act 2008* (California).

13 *Popular Initiative Against the Construction of Minarets 2009* (Switzerland).

14 See, eg, *Initiative Measure No. 502* (Washington); *Act to Tax and Regulate the Production, Sale, and Use of Marijuana 2014* (Alaska); *Amendment 64: Use and Regulation of Marijuana 2012* (Colorado); *Ballot Measure 91 2014* (Oregon).

15 See *New Zealand Flag Referendums Act 2015* (NZ).

16 I elaborate upon this distinction in James Allan, 'Thin Beats Fat Yet Again — Conceptions of Democracy' (2006) 25 *Law & Philosophy* 533, where I argue that the thin understanding is more persuasive.

former sort of majoritarianism in New Zealand. You can see the most full-blooded version of the latter sort in Switzerland.

Yet many people, in response to 2016's Brexit decision and Trump election have put these results down to 'populism'. In my view this is a virtually empty criticism. If this pejorative term is meant basically to mean something much the same as letting-the-numbers-count majoritarianism, then to my mind it is not a criticism at all. For Churchillian defenders of democracy like me (meaning those who believe that the majoritarian method is the worst way to choose a government except for every other way of doing so ever tried), the track record of majoritarian democracy is clearly not perfect — far from it — but it is considerably better than any other options that may be available. I would have voted 'Leave' in the Brexit referendum solely on the basis of how enervating — no, emasculating — of majoritarian democracy the EU now is. And it is not as though the top-down decision-making within the EU that has given citizens the euro currency, 40 and 50 percent youth unemployment in many southern EU countries, mass migration, insipid growth, a Third World impoverishing Common Agricultural Policy, a 'brought in through the back door' *Lisbon Treaty* and more, fails to give one plenty of grounds for thinking majoritarian democracy at the nation state level would surely have done better.

Of course. if the charge of 'populism' is not an attack on how decisions have been made — namely an explicit or disguised attack on majoritarianism and the opinions of the majority of your fellow citizens who happened to have disagreed with you — then it simply collapses into a word to indicate you do not happen to like some substantive outcome or the platform on which some political party campaigned. But so what? No one living in a country of 24 or 65 or 320 million people can seriously expect to be on the winning side of each and every policy decision, and I include those enunciated in the language of rights. People disagree, even on the most hotly contested fundamental rights decisions, and both sides believe they are on the morally correct side. You need a procedural rule to break that disagreement, as noted above, and in my view as a consequentialist the track record of majoritarian democracy beats all others.

So you can now see why almost all attacks couched in terms of the 'tyranny of the majority' fail to stand up to scrutiny. Leave aside the empirical fact that majorities do not do tyranny nearly as well as the sort of minorities who were making decisions around Stalin, Hitler, Mao, Pol Pot — the list is nearly endless, alas; even on the purely conceptual plane it surely cannot be correct that every time you are on the losing side of some political debate — and again, I include those debates couched in the language of rights — that because you were outvoted you get to claim the majority are imposing a tyranny. On that basis you could never vote on anything as the losers could always clothe themselves in the garb of victimhood and scream 'tyranny'. When there is a vote run in a procedurally fair manner, and you lose — which is only to be expected on

a regular basis in countries of tens and hundreds of millions — that is not 'tyranny'. That is 'majoritarian democracy'. Your remedy, as a loser, is to go out and join a political party that aims to overturn the law you dislike, and spend a few Saturdays campaigning for that party.

Talk of a 'tyranny of the majority' only makes sense in those extremely rare situations in which some identifiable group loses on virtually all issues virtually all of the time. In well-functioning Western democracies one is hard-pressed to point to such instances, though the plight of blacks in the US south during segregation looks like a plausible instance of 'tyranny of the majority' — though as many have pointed out the majority of US whites at the time were against segregation, meaning that in effect the problem was with federalism because it was the whites in the south who were imposing tyranny.

In such situations, and only in such situations, is the label 'tyranny of the majority' plausible. Of course, in such situations where the majority is genuinely oppressing a minority it is extremely implausible to believe that seven or nine unelected top judges can ever fix the problem. It was really LBJ — President Johnson — and the political capital he used up to get the *Voting Rights Act of 1965*[17] and the *Civil Rights Act*[18] passed, not as some believe the Supreme Court of the United States' decision in *Brown v Board of Education*,[19] that started to make things better for blacks on the ground. And if we move to more extreme cases, well, the Mugabes of this world (if you treat those such as his as majoritarian governments) are not long restrained by seven or nine top judges. Only outside force or the majority itself are likely to defeat such governments.

So charges of 'populism' and 'tyranny of the majority' ring pretty hollow to this self-confessed fan of majoritarian democracy. Sure, there are all the various shades of majoritarianism I have outlined above. But readers should be thankful they live under such procedural arrangements because those who do not wish they did.

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17 Pub L No 89-110, 79 Stat 437.
18 Pub L No 88-352, 78 Stat 241.
19 347 US 483 (1954).