

Philosophical Foundations of Judicial Review

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Introduction

Most philosophical debates concerning judicial review stem from the problem of indeterminacy—and the disagreements it generates. Even written constitutions contain abstract and open-textured provisions that require further specification when applied to specific cases and in the face of societal changes. The inherent indeterminacy of many constitutional provisions makes *constitutional review both unavoidable and problematic*. In a democratic society the practice of constitutional review raises questions about who should conduct such a review while also tacitly acknowledging the difficulty of justifying any such delegation by bestowing final authority upon a specific actor or institution at the expense of others. Philosophical debates on judicial review therefore cannot simply focus upon narrow issues of jurisprudential methodology (e.g. the correct theory of constitutional interpretation). Instead they must address two more fundamental questions. First, what is the proper understanding of constitutional review? Here the main issue is how to reconcile constitutionalism with the democratic ideal of self-government. Answers to this question vary widely depending on one's conception of democracy.¹ This variation gives rise to sharply different answers to the second fundamental question, namely, whether it is legitimate to delegate the task of constitutional review to the judicial branch of government in particular, i.e. to the courts. Here the

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¹ For a good overview see C. Zurn, "Deliberative Democracy and Constitutional Review", *Law and Philosophy* 21 (2002), 467-542, and *Deliberative Democracy and the Institutions of Judicial Review*, Cambridge: Cambridge University Press, 2007.

main divide is between those who question the legitimacy of judicial review (e.g. Waldron, Kramer, Bellamy, Tushnet)² and those who endorse it (e.g. Ely, Dworkin, Eisgruber, Rawls, Habermas, Sunstein).³ However, within both camps there are also important differences among the positive proposals that each author makes regarding the specific form that constitutional review should take in order to be legitimate.

In spite of such disagreement most critics of the legitimacy of judicial review and even many of its defenders agree that it is an undemocratic practice. They see judicial review as the result of a compromise between two potentially incompatible normative goals: protection of minority rights and democratic self-government.⁴ This is what Bickel famously referred to as “the counter-majoritarian difficulty.” He explains this difficulty as follows: “judicial review is a counter-majoritarian force in our system...When *the Supreme Court* declares unconstitutional a legislative act... it thwarts the will of representatives *of the actual people* of the here and now...”⁵ From this perspective, the question is whether or not judicial review is necessary for the

² See e.g. J. Waldron, “The Core of the Case Against Judicial Review,” 115 *Yale L. J.* (2005), 1346-1406, also “Constitutionalism: A Skeptical View,” *Georgetown Law Library*, available at <http://scholarship.law.georgetown.edu/hartlecture/4>, and *Law and Disagreement*, Oxford: Oxford University Press, 1999; L. D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, Oxford: Oxford University Press, 2004; R. Bellamy, *Political Constitutionalism*, Cambridge: Cambridge University Press, 2007; M. Tushnet, *Taking the Constitution Away from the Courts*, Princeton, NJ: Princeton University Press, 1999, and *Weak Courts, Strong Rights. Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, Princeton, NJ: Princeton University Press, 2008.

³ See e.g. J. H. Ely, *Democracy and Distrust. A Theory of Judicial Review*, Cambridge, Mass.: Harvard University Press, 1981; R. Dworkin, *A Matter of Principle*, Cambridge, Mass.: Harvard University Press, 1985, *Law's Empire*, Cambridge, Mass.: Harvard University Press, 1986, and *Freedom's Law. The Moral Reading of the Constitution*, Cambridge, Mass.: Harvard University Press, 1996; C. L. Eisgruber, *Constitutional Self-Government*, Cambridge, Mass.: Harvard University Press, 2001; J. Rawls, *A Theory of Justice*, Cambridge, Mass.: Harvard University Press, *Political Liberalism*, Cambridge, Mass.: Harvard University Press, 1993; J. Habermas, *Between Facts and Norms*, Cambridge, Mass.: MIT Press, 1998; C. Sunstein, *One Case at a Time. Judicial Minimalism on the Supreme Court*, Cambridge, Mass.: Harvard University Press, 2001.

⁴ For defenses of judicial review that challenge the claim that it is an inherently undemocratic practice see, e.g. Dworkin 1996, Eisgruber 2001, L. Sager, *Justice in Plainclothes. A Theory of American Constitutional Practice*, New Haven: Yale University Press, 2004; W. J. Waluchow, “Judicial Review,” *Philosophy Compass* 2/2 (2007), 258-266. Although I agree with their criticism of Waldron’s purely majoritarian conception of democracy, their defenses of the legitimacy of judicial review fail to highlight the role of citizens in the practice and its democratic significance. This is what I aim to explore here.

⁵ Bickel, A., *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, New Haven: Yale University Press 1986, 16-17, my italics.

protection of rights. What is unquestioned is the tacit assumption that a loss in democratic self-government is simply the price we have to pay for the institutions of judicial review. For those who think democratic procedures possess merely instrumental value the price is not high at all, so long as judicial review delivers the expected outcome of improved rights protections.⁶ By contrast, those who ascribe intrinsic value to democratic procedures tend to see this price as prohibitively high, especially since there is no guarantee that the courts will always deliver the right decisions. Waldron's staunch opposition to judicial review exemplifies the latter position.⁷ On his view, the effectiveness of judicial review at protecting rights is at best mixed, so the outcome-related reasons in favor of it are rather weak. However, since the loss in democratic self-government is an inevitable part of judicial review, so the argument goes, this gives us very strong process-related reasons against the practice.⁸ Therefore, from a normative perspective, there is a compelling argument against the practice and, consequently, its introduction in a particular society should be considered only in light of the presence of specific institutional pathologies.⁹

I would like to question that view. In my opinion, judicial review fulfills some key democratic functions and, to the extent that it does, it should be considered democratically legitimate.¹⁰ My aim is to articulate a compelling normative argument in favor of the practice that is based on democratic considerations. However, I do not defend the view that strong judicial review is preferable to weaker forms or that, from a democratic perspective, no other institutional solution could be superior to such weaker forms.¹¹ The answer to that question depends in

⁶ See e.g. J. Raz, *Disagreement in Politics*, *American J. Juris* 43 (1998), 45.

⁷ See Waldron 1999, 2005, and 2010.

⁸ Waldron 2005, 1375-76.

⁹ Waldron 2005, 1386.

¹⁰ This is a normative claim. It is therefore compatible with a variety of empirical circumstances that may make the institution of judicial review democratically illegitimate in the context of a given country. The same, of course, holds for institutions within other branches of government. The normative argument aims to answer the question of whether a specific institution serves some key democratic functions and is therefore required for democratic reasons. Once it is determined that an institution (e.g. judicial review, democratic parliament, etc.) is indeed so needed, this opens up the empirical question regarding how we can ensure that the institution works as it is intended, how to best avoid its potential anti-democratic drawbacks, and so on.

¹¹ For an overview of stronger and weaker forms of judicial review that are adopted in different countries see Waldron 2005, 1354-57; see also M. Tushnet, "Alternative Forms of Judicial Review,"

large measure on empirical aspects of specific societies and their historical circumstances. Consequently, it makes little sense to assume that there is a single right answer. Rather, my more modest task in articulating the democratic case in favor of judicial review is to question the assumptions behind the framework within which the question of the legitimacy of judicial review is usually debated and which fuel the impression that, other things being equal, the democratic default speaks against judicial review, as its critics claim.¹²

Framing the Philosophical Debate on the Legitimacy of Judicial Review

As indicated above, philosophical debate on the legitimacy of judicial review is structured by several framing assumptions, which create the impression that, all other things being equal, constitutional democracies with judicial review of legislation are less democratic *for that reason alone*. Participants in this debate often adopt a narrow *juricentric* perspective that exclusively focuses on the internal workings of courts without paying sufficient attention to the political system within which the courts operate and where they play their specific institutional role.¹³ Moreover, this narrowness is not only institutional but temporal as well: participants often adopt a *synchronic* perspective that exclusively focuses on how the courts can uphold or strike down a piece of legislation as unconstitutional at a particular point in time. This perspective is too shortsighted. The full significance

Michigan Law Review 101/8 (2003), 2781-2802. In my view, it would be wrong to claim that strong judicial review is always preferable over its alternatives. But the reason this claim is wrong is not because strong judicial review is democratically illegitimate, as critics like Waldron would have it. Rather, this claim is wrong for the simple reason that constitutional democracies with weak judicial review (e.g. Canada) or without judicial review (e.g. the UK, at least before the adoption of the Human Rights Act 1998) may also be democratically legitimate. Whether weaker or stronger forms of judicial review should be preferable from a democratic perspective is an empirical question that can be answered in different ways depending on the historical, social, and political circumstances of each specific country.

¹² Given this aim, the analysis that follows will focus on judicial review of democratic legislation and will not address issues concerning judicial review of executive action or administrative decision-making.

¹³ For a complaint along these lines see R. Post and R. Siegel, "Roe Rage: Democratic Constitutionalism and Backlash," 42 *Harvard C. R.- C. L. L. Rev* (2007), 373-433.

and implications of judicial review can only be appreciated from a *diachronic* perspective. For, when institutional and temporal narrowness are combined, *the role of citizens* in the process of constitutional review drops out of the picture entirely. The only choice citizens are left with is to delegate the task of constitutional review to either the judiciary or the legislature. Either way, the citizenry plays a rather marginal role in the process of constitutional review of legislation. Even defenders of popular constitutionalism who oppose the marginalization of the citizenry within processes of constitutional review seem to share these framing assumptions.¹⁴ For they assume that the practice of judicial review is incompatible with citizens taking ownership over their constitution.¹⁵

Now, regardless of the particular conception of democracy that one endorses, a central element of the democratic ideal of self-government is that citizens must be able to see themselves as not only subject to the law but also as authors of the laws that they are bound by. They must be able to take ownership over the law and see that it tracks their interests and ideas.¹⁶ This core feature of the democratic ideal suggests that constitutional review cannot be permanently delegated. Rather, it must be a process in which all sources of legitimate power, including the constituent power of citizens, can be genuinely engaged. However, there is no reason to accept the widespread assumption that citizens cannot take ownership over constitutional review such that once it is set up they can only become passive recipients who play no relevant role in the process. In order to frame the question of the legitimacy of judicial review in the right way we need to ask a broader question, namely, which set of institutional arrangements give us the best assurance that the citizenry as a whole can be actively engaged in developing the meaning of their own constitution over time?

¹⁴ See Kramer 2004, Bellamy 2007, Tushnet 1999.

¹⁵ For an interesting exception to this trend see Post and Siegel's defense of "democratic constitutionalism" in Post and Siegel 2007, also "Popular Constitutionalism, Departmentalism and Judicial Supremacy," *Faculty Scholarship Series*. Paper 178, available at http://digitalcommons.law.yale.edu/fss_papers/178.

¹⁶ I take this expression from P. Pettit, *Republicanism. A Theory of Freedom and Government*, Oxford: Oxford University Press, 1997, 185.

Juricentric vs. Holistic Perspective

As already mentioned, most participants in the debate on the legitimacy of judicial review adopt a *juricentric* perspective. Their analysis focuses on the internal workings of the court, the role that judges' beliefs play in their decisions, and the pros and cons of judicial versus legislative supremacy. When this last issue is addressed the perspective typically gets broadened so as to include the different branches of government. Nevertheless, the perspective of the citizenry is largely missing. This absence is striking since, for the most part, judicial review is a process that is triggered by citizens' right to legal contestation. Thus, when evaluating the legitimacy of judicial review it seems important to consider the rationale and the justification for this practice *as understood by the citizens who are supposed to make use of it*. From that perspective, judicial review can be seen as an institution of democratic control to the extent that its justification partly derives from the right of affected citizens to effectively contest the political decisions to which they are subject. As Pettit puts it, it is essential to democracy that citizens "are able to contest decisions at will and, if the contestation establishes a mismatch with their relevant interests or opinions to force an amendment."¹⁷ The fact that judicial review can be justified in this way does not mean that it is the only institution that could satisfy such a right. Other types of institutions may do so as well and perhaps even more effectively. The point is not to claim that judicial review is uniquely legitimate, but simply that whether or not it is should be judged from the perspective of whether it is one of the institutions needed to secure a right of citizens that essentially amounts to a form of democratic control. If it can be shown that judicial review is necessary for securing such a right, then the claim that it is an anti-democratic institution becomes doubtful. As we saw in Bickel's influential characterization of "the counter-majoritarian difficulty" noted above, the "difficulty" is portrayed as a disagreement between the court's belief in the unconstitutionality of a given statute, on the one

¹⁷ Pettit 1997, 186. I agree with Pettit's emphasis on the importance of the right to legal contestation in democratic societies, but I disagree with many aspects of his interpretation. I discuss some of the differences in what follows.

side, and the beliefs of the democratically elected legislature that enacted it, on the other. Seen from this perspective a question immediately arises: why should the beliefs of a few judges have any more moral authority than those of the people?

However, this way of looking at the issue disregards the relevant fact that *citizens* who bring cases to the court are the initiators of the process. This means that these citizens *believe* that a certain contested statute is unconstitutional. Since these citizens certainly belong to the people, it is quite misleading to portray the issue as one that concerns a disagreement between a few judges, on the one hand, and “the people” on the other. Granted, the observation that the disagreement about the constitutionality of a statute is a disagreement among citizens does not justify judicial review as the best way to (temporarily) settle the disagreement. Additional arguments would be needed. However, this shift in perspective reveals the inadequacy of approaches that start by framing judicial review as a disagreement between the courts and the people and then, without further argument, go on to claim that it is a democratically illegitimate practice. Judicial review does indeed harbor “a counter-majoritarian difficulty”, but it is important to keep in mind that this difficulty concerns a disagreement *among the people*. So, Bickel is right to claim the Supreme Court thwarts the will of representatives of the people when it declares a legislative act unconstitutional, but this is not the same as claiming that it thwarts the will of the people—unless, for some incomprehensible reason, the citizens the Court agrees with are not supposed to be part of “the people”.¹⁸

However, even authors like Pettit who interpret and justify legal contestation as a form of democratic control still conceptualize this contestation as an apolitical affair, as a depoliticized venue that removes the issue from political debate among citizens.¹⁹ Legal contestation is portrayed as an apolitical mechanism that individuals have at their disposal in order to counteract the tyranny of the majority.

¹⁸ In the present context, it would be embarrassingly circular to claim that only the acts of the legislature express the will of the people even when they are in tension with those of other political venues (e.g. the executive, the judiciary, citizen initiatives, referenda, etc.). Even Waldron acknowledges that commitment to the validity of majority rule is compatible with believing that “minorities are entitled to a degree of support, recognition and insulation that is not necessarily guaranteed by their numbers or by their political weight.” (Waldron 2006, 1364)

¹⁹ See Pettit 1997, and “Depoliticizing Democracy,” in Besson and Martí 2006, 93-106.

This is precisely what justifies judicial review over legislative supremacy, according to this view. As Pettit notes, the legal complaints of individuals “should be heard away from the tumult of popular discussion and away, even, from the theater of parliamentary debate.”²⁰ In this same vein, Dworkin characterizes judicial review as an apolitical process and ties the legitimacy of the institution to the fact that it enables reasoned debate on issues of principle that are “removed from ordinary politics.”²¹ Unsurprisingly, this picture of judicial review immediately raises the anti-democratic objection. Indeed, if the purpose of judicial review were to successfully isolate the revision of democratic legislation from public political debate it would jeopardize the equal political rights *of the rest of the citizenry* to engage and shape the process of constitutional review.²² If this picture were accurate, then Waldron would be right to characterize such a legal practice as “a mode of citizen involvement that is undisciplined by the principles of political equality.”²³

Judicial Review as Conversation Initiator

There is no obvious reason why individuals or groups who make use of the right to legal contestation should merely be taken in their role as private persons subject to the law, and not *also* in their role as citizens who are co-authors of the law.²⁴ On such a limited perspective the act of questioning the constitutionality of

²⁰ Pettit 1997 explains: “There are a variety of contestations where popular debate would give the worst possible sort of hearing to the complaints involved. In these cases, the requirement of contestatory democracy is that the complaints should be depolitized and should be heard away from the tumult of popular discussion and away, even, from the theater of parliamentary debate. In such instances, democracy requires recourse to the relative quiet of the parliamentary, cross-party committee, or the standing appeals board or the quasi-judicial tribunal, or the autonomous, professionalized body. It is only in that sort of quiet... that the contestations in question can receive a decent hearing.” 196.

²¹ Dworkin 1996, 30.

²² The democratic antidote for the illicit politicization of constitutional questions is not *isolation from political debate* but rather the *constitutionalization of political debate*. As I argue in what follows, judicial review plays a key role in facilitating this process and, to the extent that it does, it serves a genuinely democratic function.

²³ Waldron 2005, 1395.

²⁴ I do not mean to deny the standing that litigants have before the court, which makes them subject to the law, or the possibility that litigants might pursue purely private goals. Instead, my point is

legislation is not politically significant. Even Waldron questions the view (although with a different argumentative aim) that citizens who utilize their right to legal contestation are simply exercising a private right as individual persons and not a political right as citizens. As he notes, “plaintiffs or petitioners are selected by advocacy groups precisely in order to embody the abstract characteristics that the groups want to emphasize as part of a general public policy argument. The particular idiosyncrasies of the individual litigants have usually dropped out of sight by the time the U.S. Supreme Court addresses the issue, and the Court almost always addresses the issue in general terms.”²⁵ Given that the aim of the process is to review the constitutionality of a piece of legislation, it is hardly surprising that litigants see the process as one that concerns not just their specific private interests—as in other forms of litigation—but one that is essentially about the appropriateness of some general public policy. This observation can only be seen as an objection to judicial review or an embarrassment for its defenders if we assume, as authors across both camps commonly do, that initiating the legal process of constitutional review is not a task to be undertaken by *citizens* with political aims, but rather a task to be delegated to the courts that is triggered by private subjects pursuing exclusively personal aims. However, once legal contestation is seen as a political form of citizen involvement, Waldron’s characterization of the process as “a mode of citizen involvement that is undisciplined by the principles of political equality”²⁶ doesn’t seem quite right. Waldron portrays citizens’ use of legal contestation as an attempt to obtain an unfair advantage over other citizens who limit their participation to the normal political process. The idea is that citizens are political equals to the extent that they have an equal right to vote, and that those who look to judicial review after having been outvoted in the political process are simply trying to get “greater weight for their opinions than electoral politics will

simply to question the view that it is democratically illegitimate for litigants to pursue judicial review with genuinely political aims. This remains the case for litigants who are not citizens. But, since I will not focus on the specifics of this particular case, I speak of citizens throughout for the sake of simplicity.

²⁵ Waldron 2005, 1380.

²⁶ Waldron 2005, 1395.

give them.” Therefore, “the attitudes towards one’s fellow citizens that judicial review conveys are not respectable.”²⁷

There are several problems with this picture.²⁸ First of all, citizens have equal rights to legal contestation. From a purely process-related perspective, exercising the right to legal contestation is not obviously “undisciplined by the principles of political equality.” The path to legal contestation is in principle open to all citizens.²⁹ The mere fact that certain citizens initiate a legal process to contest a piece of legislation does not preclude other citizens from litigating their cases, presenting their own legal arguments, picking their preferred venues, and so forth. Even after the process has reached a final verdict in the Supreme Court, nothing prevents citizens from mobilizing for a referendum on an amendment proposal or similar political measures. More to the point, the reference to political equality in Waldron’s characterization of judicial review suggests a misleading analogy between the right to legal contestation and the right to vote. Whereas the latter gives citizens decision-making authority, the former does not give citizens any such right. The right to legal contestation does not give citizens any right whatsoever to *decide* a case. What it gives them is the power to request a fair review of a case on the basis of reasoned arguments. The right to legal contestation is a right to a fair hearing of arguments and objections against a statute that purportedly violates the constitution. It gives citizens the opportunity to try to convince the court and other citizens of the merits of their case. But precisely because the process is driven by the merits, there is no sense in which the litigants are getting some extra or unfair political influence.³⁰ By

²⁷ Ibid.

²⁸ Here I am focusing only on the difficulties of Waldron’s conception of political equality as it bears on the question of judicial review. For insightful criticisms of Waldron’s conception of political equality in general see T. Christiano, “Waldron on Law and Disagreement,” *Law and Philosophy* 19 (2000), 513-543, and D. Estlund, “Jeremy Waldron on Law and Disagreement,” *Philosophical Studies* 99 (2000), 111-128.

²⁹ But see next note.

³⁰ Just in case some readers may get impatient at this point, let me note that we cannot address the issue of whether the judges are getting an unfair political influence without begging the question. Whether or not the judges’ influence is unfair depends in part on whether citizens should have a right to legal contestation in the first place, which is what we are trying to figure out. Other readers may worry that wealthier citizens are likely to get an unfair political advantage due to the easier access to the courts that wealth provides. This is indeed worrisome. However, as an empirical matter, the worry equally extends to the easier access that wealth provides to all branches of government and

using the legal venue, litigants do not acquire any power to make their views and arguments any more or less convincing than they actually are. The right to legal contestation is more modest. It gives citizens a right to be listened to, to open or reopen a conversation based on arguments about the constitutionality of a statute, so that explicit and reasoned justifications for and against the statute in question become available for public deliberation.

Granted, the political process also allows for that kind of reasoned deliberation in both the legislature and the public sphere. However, it cannot guarantee it. Even with minimally complex pieces of legislation it is not possible to anticipate all the repercussions and differential impacts that they may have on the fundamental rights of different citizens and groups as a result of their application under changing social and historical circumstances. Statutes and policies often do not wear their potential unconstitutionality on their sleeves, so to speak. Consequently, there is no way to guarantee that, for each piece of legislation, the political process will reliably identify all potential collisions with the fundamental rights of different citizens and groups, such that they can be preemptively subjected to proper political deliberation and ruled out with convincing arguments. Indeed, as Waldron himself recognizes, those citizens directly affected by the contested statutes or policies are more likely to detect the specific ways in which they infringe upon their rights than other citizens or politicians. Moreover, since there are bound to be disagreements among citizens regarding whether or not the statute in question violates rights, it is unlikely that those who fail to see any merits in the case will engage in a reasoned revision of their own accord, since, from their perspective, there is nothing in particular to deliberate about or revise.³¹

not just to the courts. These empirical questions fall outside the scope of a normative analysis of the legitimacy of the institutions in question, since the latter must operate under the assumption that these institutions are equally able of doing what they are set up to do if it is to avoid begging the question.

³¹ It is noticeable that Waldron's argument relies on examples of issues that have already become constitutional issues, such as abortion, affirmative action or capital punishment. However, such examples are not particularly helpful for the question under discussion, since what we are asking is what set of institutions would be most conducive to ensure that questions of fundamental rights are reliably *identified* as such in spite of deep moral and political disagreements among citizens. In order

While Waldron recognizes this point, he treats it as a purely outcome-related consideration. He conceptualizes the instrumental value of judicial review from an epistemic perspective that sees those affected as more reliable at identifying potential rights violations, and he recognizes that “it is useful to have a mechanism that allows citizens to bring these issues to everyone’s attention as they arise.”³² However, he argues that there are other mechanisms that can fulfill this same epistemic function such as charging the general attorney with a “duty to scrutinize legislative proposals and publically identify any issues of rights as they arise.”³³ From a purely epistemic perspective, such an alternative procedure has major weaknesses: rights issues may become visible only after the subsequent application of the law, and they may only be “visible” to the affected individuals while the rest of the citizenry continues to be blind to them. However, leaving these weaknesses aside, the main problem with assessing the right to legal contestation from a purely instrumental perspective is that it fails to recognize the right’s intrinsic political value.

Perhaps the best way to highlight this intrinsic political value is by thinking of a case where *per hypothesis* we can rule out any instrumental value. Let’s imagine a small group of citizens is convinced that a particular statute violates some of their fundamental rights, but that the rest of the citizenry cannot see any merit in the case at all. Since the constitutionality of statutes is often difficult to discern and disagreements are pervasive in politics, chances are that a contested statute is constitutional if an overwhelming majority of citizens think that it is. In such an imagined scenario, the citizenry is very unlikely to engage in a thorough and reasoned debate where all the necessary evidence and arguments are provided so as to convincingly rebut the opinion of the dissenting group of citizens. But this does not have to be an indication that they do not care about rights or that they are acting in bad faith. After all, there are only so many wrong views that citizens can devote time and energy towards trying to disprove by collecting the needed evidence,

to assess the relative contribution that different institutions may make to *that* task we need to adopt a *prospective* perspective that does not assume the task in question has already been accomplished.

³² Waldron 2005, 1370.

³³ *Ibid.*

providing suitable reasons and justifications, responding to all kinds of counterarguments, and so on. Surely it cannot be the obligation of citizens or the legislature to address every complaint that citizens might have regardless of how plausible they appear. But this is precisely the kind of obligation that the courts are well suited to discharge.

What the political process cannot possibly *guarantee*, the legal process typically does: the individual right to a fair hearing in which explicit, reasoned justifications for and against a contested statute become publicly available for political deliberation. In the hypothetical situation just considered, the right to legal contestation did not have any instrumental value from an outcome-related perspective. It was not useful at all since *per hypothesis* the statute did not violate the rights of the litigants and, consequently, their political equality had in fact been preserved alongside the political equality of the rest of the citizenry. But even if the litigants lost their case, exercising their right to legal contestation had the intrinsic, expressive value of reinforcing the political community's commitment to treating all citizens as free and equal. Given the ubiquity of political disagreement in democratic societies, it is not enough that a political community does not in fact violate the fundamental rights of its citizens. It must also be willing to show that it respects them when challenged by citizens' objections to the contrary. The right to legal contestation guarantees that all citizens can, on their own initiative, open or reopen a deliberative process in which reasons and justifications in support of the contested statute are made publically available, such that they can be inspected and challenged with counterarguments that may eventually lead to a change in public opinion. If citizens owe one another justifications for the laws they collectively impose on one another,³⁴ then it seems to be a necessary component of legislative legitimacy that citizens have the ability to initiate the process of public reasoned

³⁴ I take this formulation from A. Gutmann and D. Thompson, *Why Deliberative Democracy*, Princeton, NJ: Princeton University Press, 2004, 133. For similar defenses of mutual justifiability as a criterion of democratic legitimacy see e.g. Rawls 1993, 217-220; Habermas 1998, 107-111; J. Cohen, "Reflections on Deliberative Democracy," in *Philosophy, Politics, Democracy*, Cambridge, Mass.: Harvard University Press, 330; I offer a specific interpretation and defense of this criterion of democratic legitimacy in C. Lafont, "Is the Ideal of Deliberative Democracy Coherent?" in S. Besson and J. L. Martí, eds., *Deliberative Democracy and its Discontents*, Aldershot: Ashgate 2006, 3-26.

justification when they believe their fundamental rights are violated by some statute or policy.

From this perspective, the right to legal contestation guarantees all citizens that their communicative power, their ability to trigger political deliberation on issues of fundamental rights, won't fall below some unacceptable minimum regardless of how implausible, unpopular or idiosyncratic their beliefs may happen to be.³⁵ If citizens are strongly convinced that their rights are violated, then they have the power to make themselves heard, to reignite the conversation, and to receive upon request proper answers to their argumentative challenges independently of the epistemic merits of their views *as judged by other citizens*. As indicated above, the political process cannot guarantee such a communicative minimum in the same way that legal venues can, but this has nothing to do with *pathological* circumstances that may afflict the legislature and impede its proper functioning. It simply follows from the "circumstances of politics" that Waldron himself highlights.³⁶

The fact of disagreement and its predictable consequences

Given the majoritarian mechanism of political decision-making and the enduring presence of disagreement it is inevitable that majoritarian decisions on particular statutes or policies will align with the views of some citizens but not with those of others. Electoral politics will predictably give citizens "greater weight for their opinions" if their views happen to align with those of the decisional majority. Indeed, the more unpopular the views the less weight they will have in the electoral process. Thus, when it comes to highly idiosyncratic views, it is perfectly possible that the weight of these opinions falls below some minimal threshold within the electoral process. Again, this predictable circumstance has nothing to do with a

³⁵ On the notion of communicative power see Habermas 1998, 151-167.

³⁶ Adapting Rawls's discussion of the 'circumstances of justice,' Waldron defines the 'circumstances of politics' as "the felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be." (Waldron 1999, 102)

majority that either does not care about rights or is acting in bad faith. It is simply a consequence of the fact that (1) ordinary citizens as well as politicians have strong moral and political disagreements, (2) they are supposed to judge the appropriateness of legislation strictly on its merits, and (3) they cannot have the obligation to properly address and debunk every idiosyncratic belief that each individual citizen or group may have. Given these predictable circumstances, the right to legal contestation helps ensure the fair value of the right to political equality for all citizens.³⁷ It makes sure that their communicative power won't fall below an acceptable minimum—as it might, if it were made to exclusively depend upon the substantive merits of their opinions *as judged by other citizens*. Judges have a legal obligation to examine the complaints of litigants, to listen to their arguments, and to provide a reasoned answer even if they ultimately find that the opinion in question has little merit and they therefore rule against the litigants. Citizens cannot know in advance whether decisional majorities will tend to agree with their views about fundamental rights or whether their views will be seen as marginal and idiosyncratic. They therefore have good *prospective* reasons to insist upon an equal right to legal contestation that assures each citizen will have a minimum level of communicative power whenever questions of fundamental rights are at stake. Such a right provides the power to make oneself heard and to influence public opinion, to have the opposing majority listen to one's counterarguments and to have them addressed. Even if they lose, the process of reasoned debate allows litigants to examine the specific reasoning behind the decision, so that if they continue to disagree they can look for counterarguments and gather factual evidence that might lead to a change of public opinion in the future.³⁸ Granted, the argument for a right to legal contestation does not address the question of whether we should prefer weaker or stronger forms of judicial review. But it should cast some serious doubt upon the view that democratic concerns about political equality speak against any form of judicial review. If we broaden the perspective from the individual citizen to

³⁷ On the notion of securing the fair value of political rights and liberties see Rawls 1993, 5.

³⁸ See the text surrounding note 48 below.

the political system as a whole we can identify additional reasons to doubt such a view.

The democratic significance of the forum of principle

When I surveyed the arguments in favor of judicial review offered by authors such as Dworkin and Pettit I rejected their characterization of the process as being non-political. I did so from the perspective of citizens who make use of the institution. However, these authors highlight an important difference between the legal and the political processes that needs to be taken into consideration. In his defense of the legitimacy of judicial review Dworkin draws an important distinction between the judicial and the political process. Whereas the former takes place in the “forum of principle” the latter is a majoritarian process that “encourages compromises that may subordinate important issues of principle.”³⁹ Waldron criticizes this contrast by arguing that it presupposes pathological circumstances and that it therefore has no place in a normative theory about the normal functioning of the judicial and legislative branches of government within democratic societies. The legitimacy of judicial review must be judged under the normative assumption that all branches of government are equally capable of doing what they are set up to do. Since the legislature is supposed to take the constitutionality of the legislation it passes into account, it should be as concerned about protecting rights as any other branch of government. Therefore, it would beg the question to characterize the judiciary as the only branch of government that is properly sensitive to principle and to dismiss the legislature as incapable of meeting its own obligations. A legislature in a society under particularly pathological circumstances might be unable to meet these obligations and therefore setting up special institutions to compensate for such pathologies might be an appropriate step. But this hypothetical scenario is not a normative argument in favor of judicial review that would apply to societies without such pathologies or in societies attempting to set up new democracies.

³⁹ Dworkin 1985, 30.

Waldron's argument suggests that, based on what they are ideally set up to do, the judiciary and the legislature are both equally 'forums of principle'. However, this assumption seems to give no consideration to the obvious fact that each of these institutions is set up to do very different things. It is hard to deny that the political process encourages compromises as part of what it is set up to do, namely, to reach agreements among different parties in order to achieve specific political goals. Passing legislation requires a good faith effort to reach fair compromises across different political parties, interests, and views. Now, if statutes and policies do not wear their potential unconstitutionality "on their sleeves", so to speak, then it won't always be clear in advance whether the outcomes of political compromises are problematic. It is always possible that some of these compromises may have subordinated important issues of principle. This is so, not because legislatures are more susceptible to pathologies than other institutions, but rather because they are in charge of making all kinds of political decisions—most of which are not matters of principle. Indeed, if political compromises among different parties are needed in order to achieve important political goals for a community, then it would be quite harmful if parties treated every political decision as a matter of principle. The legislature should not be the forum of principle because *per design* it should be a genuinely political forum. Similarly, the public sphere should not simply be a forum of principle, since a great deal of political deliberation is not about matters of principle, but rather about the various kinds of political goals that the political community would like to achieve, the most efficient ways to reach them, etc. And, since it is often not obvious which political decisions may have constitutional implications, political deliberation *in general* should not be conceived of on the model of a forum of principle.⁴⁰ By contrast, an institution in charge of checking the constitutionality of statutes is *per design* a forum of principle. But this is only possible precisely because *per design* it is not an institution in charge of making political decisions of all kinds like legislatures. This has nothing to do with the moral

⁴⁰ This is not to deny that the public sphere ought to become a forum of principle when political deliberation focuses on policies or statutes that touch upon fundamental rights and issues of basic justice. I discuss this issue in the next section.

character of their respective members, but with an institutional division of labor. From this perspective, Dworkin's observation that "the majoritarian process encourages compromises that may subordinate important issues of principle"⁴¹ should not be read as commentary on the pathological character of politicians, but instead as an obvious consequence of the fact that there is no way to know in advance all the potential issues of principle (e.g. the infringement of some fundamental right) that any piece of legislation may bring about. However, this fact does not undermine the legitimacy of a democratic political system, so long as citizens in that system have the right to legal contestation, that is, the right to receive a fair examination of their claim that a specific statute or policy infringes upon their fundamental rights. As long as citizens may question the constitutionality of any statute by initiating a legal challenge, they can *structure* public debate on the statute in question as a debate about fundamental rights, and therefore a debate in which the priority of public reasons (to use Rawlsian terms) must be respected.⁴² From this perspective the political significance of the process of judicial review is that it functions as a *conversation initiator* on the constitutionality of any specific policy or statute. In so doing, it facilitates the constitutionalization of political debate in the public sphere.

Citizens in Robes: The Public Sphere as a Forum of Principle

The right to legal contestation allows citizens to structure the public debate on a particular statute or policy as one about fundamental rights—even if other citizens or the legislature had not framed the debate in those terms or had failed to foresee the impact of the statute on the fundamental rights of certain citizens. This in turn has important implications for the question of political equality. Given the fact of pluralism, citizens are bound to disagree about the right way to frame a political debate. However, other things being equal, democratic societies should err

⁴¹ Dworkin 1985, 30.

⁴² See J. Rawls, "The Idea of Public Reason" in Rawls 1993, 212-254, and "The Idea of Public Reason Revisited," in *The Law of Peoples*, Cambridge, Mass.: Harvard University Press, 1999, 129-180.

on the side of making sure that fundamental rights are not violated. But how can this be achieved? How can political debate be bent in such a way without giving preferential treatment or superior authority to anyone's views or beliefs? If participants in political debate are supposed to judge the issues on their merits, that is, on the basis of their own convictions, there is no particular reason to assume that unfettered political debate would allow citizens with unpopular or idiosyncratic beliefs to structure the debate in a way that goes against what the majority of citizens genuinely find persuasive. If this analysis is correct, then an extra device would be needed in order to *err* on the side of making sure that those who believe that some fundamental rights are violated have their claims properly scrutinized and appropriately answered, even if most people are convinced that such claims are wrong on their merits. The right to legal contestation allows citizens to structure the public political debate in such a way that priority is given to the question of whether or not a contested statute violates some fundamental right, even if such structuring does not seem antecedently plausible to the rest of the citizenry. In that sense, we can say with Waldron that these citizens are trying to get "greater weight for their opinions than electoral politics will give them." However, we need to be more specific about the *aspect* of their opinions that is getting greater weight by virtue of their right to legal contestation. The "greater weight" in question is not about *getting the outcome* that they think is right. If we assume that a democratic system is functioning normally, then there is nothing they can do to force judges to rule in their favor. Rather, the 'greater weight' they are seeking is about *receiving the kind of scrutiny* that they think is appropriate and we all agree they deserve, as free and equal citizens, even if we think that they are plainly wrong about the particular case.⁴³ Indeed, the claim that the contested statute violates a fundamental right may turn out to be wrong, and litigants may not be able to change public opinion. But even in such a case they still have the right to receive an explicit reasoned

⁴³ This argument points to a tension between Waldron's assumption that, in the ideal normative case under consideration, there is a strong and general commitment to *protecting rights* in society (Waldron 2005, 1364) and that political equality requires *giving equal weight to all opinions* (Waldron 2005, 1346). It is not clear how the first assumption could find practical or institutional expression without any deviation from the second assumption.

justification about why the statute does not in fact violate their rights and is therefore compatible with treating them as free and equal.

Moreover, for those who continue to disagree, this reasoned justification in turn highlights the reasons, arguments, and evidence that they would need to more effectively undermine in order to change public opinion on the matter. Although examples are always problematic, the debate on same-sex marriage in the US offers a good illustration here. For decades the issue was treated in public debate as turning on the meaning of marriage. On that question, there was widespread agreement that marriage is between a man and a woman.⁴⁴ However, once political initiatives for state constitutional amendments to ban same-sex marriage became part of the political agenda, and citizens legally contested such initiatives in the courts, the focus of public deliberation switched from an ethical and religious debate on the meaning of marriage to a constitutional debate on equal treatment and fundamental rights.⁴⁵ Judicial review on the constitutionality of state bans on same-sex marriage led public debate to treat the issue as a matter of principle or, to use Rawls's expression, as a matter of constitutional essentials. Quite surprisingly, once the debate became structured in that way, an astonishing switch in public opinion took place in favor of same-sex marriage.⁴⁶

Although this development is a complex empirical issue, it is hard to avoid the impression that once the debate became a constitutional debate, many of the citizens who were against same-sex marriage on the basis of their religious or ethical views about the meaning of marriage could not find convincing reasons to

⁴⁴ Indeed, in 1996 the United States Congress passed the Defense of Marriage Act (DOMA), which President Bill Clinton subsequently signed. For federal purposes, Section 3 of DOMA defines marriage as the union of a man and a woman. Needless to say, the "widespread agreement" on the meaning of marriage was not shared among members of the LGTB minority. See note 48.

⁴⁵ In 1998 Hawaii and Alaska became the first US states to pass constitutional amendments against same-sex marriage. Other U.S. states followed suit and passed similar amendments in the following years, reaching a peak of 31 in 2012. In January of 2015 the US Supreme Court agreed to decide whether the U.S. Constitution guarantees all citizens the right to enter into same-sex marriages. The ruling is expected in June of 2015.

⁴⁶ According to Pew Research data, "In Pew Research polling in 2001, Americans opposed same-sex marriage by a 57% to 35% margin. Since then, support for same-sex marriage has steadily grown. Today, a majority of Americans (54%) support same-sex marriage, compared with 39% who oppose it." Data available at <http://www.pewforum.org/2014/03/10/graphics-slideshow-changing-attitudes-on-gay-marriage>.

justify unequal treatment under the law, and that they therefore changed their minds about *whether it should be legal*.⁴⁷ Given the astonishingly short period of time within which that change in public opinion has taken place, there is no reason to assume that the majority of citizens who initially opposed same-sex marriage were all acting in bad faith or that they were unconcerned about rights and not attending to reasons. Under such an assumption it would be hard to explain why they changed their minds. However, there are good reasons to assume that, without the extra power that the right to legal contestation granted litigants such that they could *structure* the political debate as a constitutional debate about fundamental rights, the ‘unfettered’ political debate in the public sphere would have continued to turn on religious and ethical questions about which citizens strongly disagree.⁴⁸ As a consequence, the religious and ethical views of the majority about the meaning of marriage would have continued to dictate policy. By contrast, once the public debate became framed in constitutional terms the standards of scrutiny characteristic of judicial review (e.g. identifying the relevant government interests, investigating the proportionality of the means, weighting the empirical evidence, etc.) allowed litigants to get traction within and ultimately transform the views of the majority.

Indeed, whereas it is unclear what standard of scrutiny could be used to resolve debates over the meaning of marriage amongst citizens holding different religious and ethical views, it is quite clear that the standards of scrutiny appropriate for a constitutional debate about fundamental rights gives rise to forms of argumentative entanglement that allow citizens to call each other to account,

⁴⁷ Given the short period of time under consideration, the changes in attitude are only partly due to generational change. As the Pew Research Data shows, older generations have consistently become more supportive of same-sex marriage in recent years. It is also interesting to notice that the change in attitude concerns the narrow question of whether same-sex marriage should be legal and not necessarily the ethical or religious beliefs concerning homosexuality (e.g. 49% of Americans believe that engaging in homosexual behavior is a sin). See data available at <http://www.pewforum.org/2014/03/10/graphics-slideshow-changing-attitudes-on-gay-marriage>.

⁴⁸ *Baehr v. Lewin* (1993) was the first lawsuit seeking to have the ban on same-sex marriages declared unconstitutional that led to a positive ruling on the question. The Supreme Court of the U.S. state of Hawaii ruled that, under the state’s equal protection clause, denying marriage licenses to same-sex couples constituted discrimination based on sex that the state needed to justify under the standard known as strict scrutiny, that is, by demonstrating that it “furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights.” This finding prompted Congress to pass the Defense of Marriage Act (DOMA) and many states to pass constitutional amendments to ban same-sex marriages. See notes 44 and 45.

gather and weight factual evidence ‘for’ and ‘against’ proposals, and transform one another’s views over time as a consequence. In the example of the debate over same-sex marriage, the review process required its opponents to identify the specific government interests that justify the ban. Once such interests were publicly identified (e.g. protecting the health and welfare of children, fostering procreation within a marital setting, etc.) the debate began to turn on questions for which factual evidence could be decisive in settling the answer (e.g. statistical evidence about the welfare of children raised in same-sex couples households, the existence of married couples unable to procreate, etc.).

If we focus on the political empowerment that the right to legal contestation gives to citizens, we can see the politically significant sense in which the courts can play the institutional role of *conversation initiators*. As Bickel points out “virtually all important decisions of the Supreme Court are the beginnings of conversations between the Court and the people and their representatives.”⁴⁹ This is certainly true in many cases, but it is important to pay attention to the specific sense in which it is true. It is not that the courts begin the conversation on their own initiative or that they lead the debate because judges have superior moral insight or are more sensitive to principle. This juricentric perspective mischaracterizes the actual dynamics of political debate on important and highly contested issues. More often than not, conversations surrounding contested political issues have been present within the public sphere long before such issues are legally contested. But conversations that had been structured in a variety of disparate ways become *constitutional* conversations by (at the latest) the time they reach the Supreme Court precisely in virtue of citizens’ right to submit contested issues to the sluices of judicial review.⁵⁰

If this account is plausible, then the normative contribution of the institution of judicial review is not, as Dworkin and Pettit suggest, that it makes it possible to answer questions about the constitutionality of a contested statute or policy in

⁴⁹ A. M. Bickel, *The Supreme Court and the Idea of Progress*, Yale University Press, 1978, p. 91.

⁵⁰ Dworkin 1985 points at this idea when he claims that judicial review “forces political debate to include argument over principle, not only when a case comes to the Court but also long before and long after.” p. 70.

isolation from political debate. To the contrary, the important contribution of the courts—which are indeed ‘depoliticized’ in the sense of being a forum of principle (i.e. a forum that *per design* specifically focuses on the question of the constitutionality of statutes)—has nothing to do with isolating their decision from the political debate among all citizens in the public sphere. Indeed, the fact that relevant contributions to the debate from external parties can be included through filing of *amicus curiae* briefs speaks against this isolationist view. Most importantly, as Dworkin mentions in passing, if the issue under consideration is important enough “it can be expected to be elaborated, expanded, contracted or even reversed by future decisions, a sustained national debate begins, in newspapers and other media, in law schools and classrooms, in public meetings and around dinner tables.”⁵¹ From a holistic and diachronic perspective, the democratic contribution of judicial review is not that the courts undertake constitutional review in isolation from the political debate in the public sphere, as if justice needs to be in robes in order to properly attend to matters of principle.⁵² To the contrary, from a democratic perspective, the main contribution of the institution is that it empowers citizens to call the rest of the citizenry to put on their robes in order to publically debate rights-related constitutional issues as matters of principle.⁵³

⁵¹ Dworkin 1996, 345.

⁵² See R. Dworkin, *Justice in Robes*, Cambridge, Mass.: Harvard University Press, 2006.

⁵³ I offer a detailed articulation of this view in C. Lafont, “Religious Pluralism in a Deliberative Democracy,” in F. Requejo and C. Ungureanu, eds., *Democracy, Law and Religious Pluralism in Europe*, London: Routledge, 2014, 46-60.