

DEMOCRACY AND JUDICIAL REVIEW I. OSOWSKI

DEMOCRACY AND JUDICIAL REVIEW: PLAYING  
WALDRON'S GAME

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## Abstract

The decision to adopt a formalized charter of rights is a momentous expression of a nations commitment to according and protection certain rights for its citizens. They usually contain complex and ambiguous moral concepts about which people have good faith disagreements. This thesis examines and ultimately rejects the belief put forward by Jeremy Waldron that judicial review is only democratically justifiable if the power of the last word in the interpretation of statutes and charter rights belongs to the democratically appointed legislature instead of the appointed judiciary. This thesis argues that a procedural conception of democracy is too limited and we would do better to base a justification of judicial review using a constitutional conception of democracy. It matters less which party has the authority of the final say with respects to rights-determining decisions and more on whether or not the democratic principle of equal concern for all is satisfied. This thesis introduces the concepts of deference, constitutional conventions, and principles and argues that these, among other things, will inform the constitutional theorists about which powers are actually present in a practice of judicial review. Once the contours of the practice are filled out one can then begin to deliberate about whether a particular conception of judicial review has democratic justification.

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## Chapter 1

### Introduction

The adoption of a formalized charter or bill of rights<sup>1</sup> is a momentous expression of a nation's commitment to according and protecting certain rights for its citizens. It represents a commitment to give legal standing to the various beliefs and values that we as citizens cherish. In liberal democracies, it is vital that citizens know what rights and freedoms are allotted to them as well as where they should go if they are uncertain. Stephen Gardbaum notes that this "rights revolution"<sup>2</sup> is a fairly recent phenomenon where nations, in an effort to avoid totalitarian type violations of rights as present in World War II, opted to shift away from a model of legislative supremacy. The model saw no codified bill of rights; instead, "rights were created and changed by the legislature through ordinary statutes on an ad hoc basis".<sup>3</sup> States that take rights seriously were looking for a way to avoid egregious rights violations as well as the simple flaws that are inherent in legislation. Many states, like Canada, chose to entrench formalized charters which enumerate the various rights and freedoms manifested as limitations to be placed on legislative and executive branches of government. With the charter comes the question of which political institution will be allotted the duty of interpreting the complex document.

Philosophers critical of charters, like Jeremy Waldron, strongly oppose the practice of judicial review whereby the judicial branch of the government plays an active role in

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<sup>1</sup> Throughout this paper I will be using both 'bills of rights' and 'charters' interchangeably in order to remain true to the authors' language I am citing as the preferred wording changes depending when one is speaking of the American or Canadian Constitution respectively.

<sup>2</sup> Stephen Gardbaum *The New Commonwealth Model of Constitutionalism* 2

<sup>3</sup> Ibid 1

determining the validity of certain statutes. A common criticism is that we ought not to have unelected judges interpret highly ambiguous moral concepts like; equality, freedom, and due process, in place of legislators, for there is a concern that this takes away from the democratic nature of our political system. A popular defense to this criticism is to say that Waldron's true target is strong form judicial review- by strong form I mean an arrangement where the judicial branch has the final say when it comes to rights disputes and the judicial interpretation of the constitution is authoritative- and to maintain that countries like Britain and Canada practice weak form judicial review, a kind not susceptible to Waldron's criticisms. By weak form I mean an arrangement where the judicial branch is trusted to interpret the Canadian Charter or American Bill of Rights, yet the legislature has the option to have the final say on which interpretation will have legal authority. The first section of this thesis will be devoted to explicating Waldron's notion that "our respect for such democratic rights is called seriously into question when proposals are made to shift decisions about the conception and revision of basic rights from the legislature to the courtroom", and in doing so, his argument against judicial review.<sup>4</sup> Waldron is quite right to remind us that given the facts of reasonable pluralism, we as a society will inevitably disagree about rights. Some form of decision procedure will have to be implemented and Waldron suggests that legislative reasoning is superior to judicial reasoning,<sup>5</sup> and we ought not to have unelected judges enforcing their own moral opinions about rights when we have access to the moral opinions of the legislators and their constituents. The second section of the paper will suggest however that Waldron's characterization of judges as legislating is grossly misleading in the instance where judicial review is in its weaker form. If it is the case

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<sup>4</sup> Jeremy Waldron "A Rights Based Critique of Constitutional Rights" 20

<sup>5</sup> Jeremy Waldron "Do Judges Reason Morally" 60 in *Expounding The Constitution*



that a state practices weak form judicial review then they can answer the criticisms of Waldron. Constitutional theorists provide different arguments for why countries like Canada and Britain are weak form states. After briefly explaining a few of the approaches, I will explain the argument that Stephen Gardbaum gives in his book *The New Commonwealth Model of Constitutionalism*. He suggests commonwealth countries embody a distinct structure that grants legislatures certain powers which solidifies their membership as weak form countries. I will however argue that the powers that Gardbaum believes identifies Canada and Britain as weak form judicial review states, are illusory in practice and fail to be determinate markers of weak form judicial review. The final section of the thesis will suggest that Waldron unnecessarily limits the construction of a theory of judicial review by talking about weak form and strong form judicial review. Instead I seek to discuss concepts like democracy, deference, and constitutional principles, which I argue are necessary to consider when one is developing a complete theory of judicial review. The difference between the kinds of judicial review is not strictly a dichotomy between weak and strong as Waldron suggests, but something closer to a spectrum. It may be possible that a particular conception of weak review is unjustifiable based on other substantive considerations, while a strong form is democratically justifiable. I argue that democratic justification hinges less on who has the final say in decision-making, and more on other substantive concepts like constitutional principles, deference, and conventions. We must move away from trying to justify judicial review by the narrow understanding of democracy that Waldron employs and be open to differing conceptions of democracy. There may not be simply one way to justify and explain the complex political process of judicial review. I argue that a detailed examination of the concepts of democracy and the moving parts of judicial review are required in order to come up with a complete theory of judicial review. Judicial review may be

justifiable in many different forms depending on the context that it finds itself. What follows is a list of the kinds of things worthy of consideration when we are determining the appropriateness of judicial review

### **Preliminaries**

It is important to set out the underlying assumptions I am starting out with for this section. This section is not in itself an overall defence of the practice of entrenching rights in a charter though I do feel that it is a worthwhile activity. I will be starting from the premise that we do in fact have rights codified into law through a charter, about which there are disagreements. I will then be focusing primarily on arguments that criticize the practice of judicial review as a decision-making procedure for when difficult cases of potential rights violations come before the courts. Since, as Waldron points out in his work *Law and Disagreement*, we consistently disagree about what rights we have as citizens, we require a theory of authority describing who will have the power to make decisions when we disagree.

## Chapter 2 Case Against Judicial Review

### i The Case against Judges

Disagreement about rights is a kind of moral disagreement. If there is an objective truth about what equality means it has not presented itself to us in any convincing way, and we as rights bearers can reasonably and in good faith disagree about what certain moral terms mean.<sup>6</sup> One of Waldron's main arguments against judicial review is to state that since we have no reason to believe that judges are better at the moral reasoning required to deliberate about rights, we have no reason to defer to their interpretation of rights and give them the authority to strike down, invalidate, or alter the statutes that the legislation passed through a democratic process. For Waldron, the right of rights<sup>7</sup> is that we as citizens of a state ought to have a say in the political structures that organize our behaviour, and the role of judges should not be to decide what rights we have. Waldron states that:

“People owe each other certain fundamental duties of respect and mutual aid which are better fulfilled when orchestrated by some central agency like the state than when they are left to the whims of individuals . . . [b]ut since it is *my* duties (among others') whose performance the state is orchestrating, I have a right to a say in the decision-mechanisms which control their orchestration.”<sup>8</sup>

Because the rights and corresponding duties we are disagreeing about will impact the citizens of a state by shaping their actions, the citizens themselves ought to have a voice in any debates over the meaning and implications of those rights and duties. Waldron appears that the voice of the citizens be as determinate as possible.

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<sup>6</sup> Jeremy Waldron “Do Judges Reason Morally”<sup>40</sup>

<sup>7</sup> “Participation : The Right of Rights” Is an essay written by Waldron published in *Proceedings of the Aristotelian Society* Vol 98 (1998) 307-337

<sup>8</sup> Jeremy Waldron *Law and Disagreement* 234

## ii Judicial Moral Reasoning

What is it about judicial reasoning that makes it inferior to legislative reasoning? For Joseph Raz, “moral reasons are just reasons, and we reason morally whenever we reason practically.”<sup>9</sup> However, judges are not making decisions for themselves about whether or not physician assisted suicide ought to be legal or not. Instead Waldron reminds us that they are making political decisions, in the contexts of institutions where their decisions may at times affect policies nationally.<sup>10</sup> Their decisions have a political dimension to them as opposed to a straightforward ethical or moral one. By this I mean that decisions made often have political implications in other areas, where straightforward moral deliberation may sometimes be done in a vacuum, and not directly affect policies. Waldron states that the question that judges were asked to consider in 1997 in the case *Washington v Glucksberg* was whether the current statutes banning physician assisted suicide were unconstitutional, in other words “should this issue be taken out of the hands of state legislatures and entrusted to the federal judiciary?”<sup>11</sup>

Is it possible for judges to reason morally in the appropriate sense in order to justify taking the issue of such a controversial nature out of the hands of the legislature? Waldron wonders for a moment whether judges ought to even reason morally. Judges are trained lawyers; they are supposed to identify and apply positive law whether they agree with it morally or not. Inclusive legal positivists<sup>12</sup> suggest however that sometimes judges are instructed through positive law to engage in moral reasoning. This means that sometimes judges are required to deliberate about how certain moral concepts are to be understood under a particular context. Waldron cites that

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<sup>9</sup> Jeremy Waldron “Do Judges Reason Morally” 43

<sup>10</sup> Ibid

<sup>11</sup> Ibid 46

<sup>12</sup> See Wil Waluchow *Inclusive Legal Positivism*

the Eighth amendment of the US Constitution requires judges to make judgements about the “excessiveness of bail and the cruelty of punishments,”<sup>13</sup> and they have no choice but to obey. In hard cases before the court, many times the rights of equality, due process, and security of the person require the use of standards instead of clear rules. Standards found in common law, developed out of instances where moral decision-making took place without clear cut rules are used to protect minority rights by limiting the government in their actions. Seemingly however, the legislature is able to pay attention to these standards in their formation of statutes, and the question of judicial review during hard cases now comes to the forefront. What happens when the legislature, whom we hope has paid attention to these standards-what it means to use excessive force - clashes in its interpretation with the justices’ interpretation? Waldron states that “[t]he final say about the constitutionality of legislation should be assigned to that institution which is better at doing the moral reasoning that determinations of constitutionality often involve.”<sup>14</sup>

For Waldron, this question is not answered simply by looking to determine who is better at moral reasoning with respect to the vague standards set out in the charter. His fear is that the task of moral reasoning -by judges- in the application of constitutional standards is “contaminated by applying rules, deferring to texts, and following precedents.”<sup>15</sup> Waldron sees two aspects of judicial reasoning; the deliberation of moral standards, as well as the identifying of valid law in the form of precedents and being deferential to the appropriate texts. Waldron is suggesting that the later will inevitably impede one’s ability to do the former and that these aspects are not easily separable. Judges are bound by law in many ways and could not simply ignore a clear and

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<sup>13</sup> Jeremy Waldron “Do Judges Reason Morally” 50

<sup>14</sup> Ibid

<sup>15</sup> Ibid

unambiguous legal requirement to X as enumerated in a statute, and choose to not X, based on what they felt was morally required. At best, at the end of the day we are faced with a “*melange* of reasoning-across the board- which in its richness and texture, differs considerably from pure moral reasoning.”<sup>16</sup>

Waldron seems to be suggesting that judges are limited in their ability to reason morally because they have to approach these constitutional questions from a legalistic point of view. While this does not mean that their decision must come directly from the text of some positive law, it must originate from some sort of moral principle that has found legal embodiment in a past precedent or underlying purpose of a statute or constitution. Judges then ought not to engage in moral deliberation outright without being reminded that their job is first and foremost to apply existing law. In the instance of hard cases with few precedents or where adequate legal guidance appears to run out, Waldron is critical of judges attempting to extrapolate what the law requires them to do and entering the realm of creating law. Instead the legislature which has the ability to “reason about moral issues directly, on the merits”<sup>17</sup> ought to be the institution which provides the legally authoritative interpretation.

### iii Why is the Legislature Better?

What grounds this conclusion? For Waldron it circles back to the right of rights. He cites William Cobbett who states that “the right of rights is the right of having a share in the making of the laws to which the good of the whole makes it his duty to submit.”<sup>18</sup> Waldron is quick to distinguish that the importance of this right to participation is not to be expressed in its primacy

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<sup>16</sup> Ibid 51

<sup>17</sup> Ibid 60

<sup>18</sup> Jeremy Waldron *Law and Disagreement* 232

over rights like the right to freely practice ones religion, or a potential right to bear arms. Instead he believes that it is “peculiarly appropriate in situations where reasonable rights-bearers disagree about what rights they have.”<sup>19</sup> The right to participate in government is not simply a negative right. That is, the right to participate is not simply that we have a right not to be interfered with by the government in any unreasonable way. It is more than our right not to be kept from participating in debates, voting for representatives, or other forms of participation.

The right of participation for Waldron is noticeably different from the structure of many economic or social rights; like freedom of religion. The practice of one’s religion is not to be interfered with so long as this practice does not negatively impact the balance of the rights of your neighbours. The state does not have the duty however to build you appropriate structures of worship wherever you choose to settle or provide you with material required for your practice. Government is simply restrained from limiting your access to such buildings and materials. The right to participate then, also has a positive element to it, meaning, not only are we not to be prevented from participation in the governance of society, the state must set up a system where the input of citizens will be the driving force for decisions made to govern them. That the state must take measures to respect and take seriously the opinions of the citizens is the positive element.

The right to participation is fundamental says Waldron; “to deny people the opportunity for such participation is to deny part of their essence.”<sup>20</sup> Participation is valued as a form of protection because one is able to provide input and affect the structure of the government around them to suit their needs. As autonomous rights bearers we have interests which we wish to

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<sup>19</sup> Ibid

<sup>20</sup> Jeremy Waldron “A Rights Based Critique of Constitutional Rights” 37

protect. Waldron states that the rights theorist ought to be uneasy about any theory which fails to adequately respect that as rights bearers we ought to have a say in the structures that we ultimately develop in order to suit our needs.<sup>21</sup> A modern conception of democracy encompasses people not as thoughtless pursuers of interests, but as active autonomous creators of goals, as well as ones having the ability to engage in meaningful dialogue about how best to organize society so that everyone can pursue their interests. Waldron reminds us that this idea of democracy can be linked to a basic theory of rights, where “each person’s rights are matched by duties that she bears correlative to the rights of others: the rights that I have are universalizable. . .”<sup>22</sup> The universality is partly determinate of their content since what we will have a right to do will depend on what we wish all others to have the right to do. Any right I have must belong to another individual as well, so my right to free expression cannot limit the right of another individual’s free expression. Every autonomous agent capable of reasoned deliberation is capable of moral reasoning about rights, at least the kind described above. In our setting of goals and deliberations about rights, we will undoubtedly come to disagreements about which interests are worthwhile or which interests and rights are capable of coexisting. Part of the value of equal participation is that if we are to give our consent to be governed by the rules of a society, we must be free to deliberate amongst ourselves and come up with a method of solving these disagreements.

Unlike certain fields of philosophy where the need to solve disagreements is not a pressing concern- we have, e.g., as a species thrived so far without deciding upon a particular definition of what counts as knowledge, in politics we have timelines and decisions need to be made. Our

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<sup>21</sup> Ibid 37

<sup>22</sup> Ibid 38



ability to pursue goals and lead meaningful lives often depends on what rights we decide we will all enjoy. We also need to come up with a decision procedure which will be authoritative notwithstanding the specific content of the decision arrived at. That means that the decision procedure ought to be in place and agreed upon before it is used to answer a difficult question such as whether doctors have the right to aid a patient in committing suicide. Waldron is correct to suggest that the authoritative rule of “choosing the best procedure” is a non starter<sup>23</sup> as it leads us back into the very predicament we began with. He states that we ought to choose between “[v]esting the decisional power with a small group of judges ... [and] vesting it in the ordinary legislative process...”<sup>24</sup>

So the clear forerunner for who should settle disputes about rights, at least according to Waldron, is the legislature. For Waldron, the democratic legislature is to decide difficult questions like whether we have a right to physician assisted suicide. However a second more fundamental question is, how do we decide on a decision procedure? If he answers that we decide democratically, then he appears to be begging the question.<sup>25</sup> He believes that in order for a democratic justification of the law, - (which recall, is required if we value participation as a society) is to be realized- we need to minimize the amount that judges are able to revise the constitution since they themselves are not a placeholder for the views of the society as a whole. By revision Waldron means “any substantial change in the official understanding of rights, whether or not it involves a change in constitutional wording.”<sup>26</sup> I take the thrust of Waldron’s democratic challenge to be that given the desire for democratic justification of law, which

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<sup>23</sup> Ibid 39

<sup>24</sup> Ibid 39

<sup>25</sup> He answers this objection on pgs 40-41 of “A Rights Based Critique of Constitutional Rights”

<sup>26</sup> Ibid 42

citizens value, there is something fundamentally undemocratic about allowing unelected judges-who do not represent society, to make revisions to our understanding of rights.

A further prong of the democratic challenge is that any change or revision desired by the citizens, proposed in the form of amendments, is made nearly impossible by arduous amending formulas requiring super majorities among other criteria.<sup>27</sup> Judicial interpretation is an unavoidable truth when it comes to enforcing law since justices find themselves having to understand the law before they can apply it. Unfortunately, thinks Waldron, “[t]hey find themselves routinely having to think afresh about the rights that people have, and having to choose between rival conceptions of those rights, in just the way that traditional arguments for making amendments difficult are supposed to preclude.”<sup>28</sup> If judges are at liberty to change or amend the constitution through ordinary instances of judicial interpretation then they are able to circumvent the amendment rules which are designed to entrench the constitution and protect it from easy change. This has the effect of un-entrenching the constitution in direct opposition to the decision to entrench it in the first place. A fundamental aspect to a constitution is that it cannot be changed easily. This component is in place so that it cannot become a tool used by those currently in power to suit their needs while at the same time placing the general public at risk of having rights violated. If judges have the ability to circumvent this protection by changing the constitution through judicial interpretation this may weaken the security offered.

Another problem with allowing justices to interpret and modify the rights in a charter while severely limiting the legislature’s ability to formally amend the words of the charter provisions is

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<sup>27</sup> Amending formulas differ within different states but often include the need for considerable approval, often more than simply 51% of a popular vote of Congress or Parliament.. See Section 38-41 of Canadian Charter of Rights and Freedoms 1982.

<sup>28</sup> Ibid 43

that it represents a fundamental distrust in your fellow society members' abilities to take seriously the concerns that one might have. Waldron states that this distrust "is something we should recoil from, on the same rights-based ground as we recoil from any attempt to exclude people from the governance of the society in which they live."<sup>29</sup> If we take participation as seriously as Waldron hopes we do then we ought to have faith in everyone's ability to reason morally and deliberate in good faith about what changes they wish to see represented in law. There is nothing wrong with taking seriously the advice of the judiciary in an effort to respect the beliefs and attitudes of all citizens, since justices are members of the community that find themselves subject to the same law as everyone else. Waldron's worry appears to be that when we defer solely to the judges through the institution of judicial review, we do a disservice to our fellow moral agents by distrusting them to make the required revisions in our understanding of constitutional rights. When a judiciary then strikes down or fails to apply a democratically enacted statute because their interpretation of the statute and relevant constitutional text renders the two incompatible with one another, it represents an instance of the judiciary modifying the scope of constitutional rights without the explicit consent of fellow rights bearers. In short the people should be making the laws, the judiciary is for interpreting and enforcing them.

Interpretation is a necessary part of the adjudicative process since many of the provisions can be vague or indeterminate. According to Waldron however, when judges are interpreting, they appear to be doing something similar to the legislature who vote against a proposal to introduce a new law. So when a difficult case comes before the court, judges must do their best to interpret the relevant charter rights knowing that they may be in fact making law, by way of a legal

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<sup>29</sup> Jeremy Waldron "A Rights Based Critique of Constitutional Rights" 43

precedent. Legal positivists do acknowledge that judges do make law in the form of precedents; much of civil law is in fact common law that recognizes well established principles of negligence not enumerated in positive law.

I suggest that the reason Waldron does not worry about judges legislating in tort cases is because there exists the possibility that legislative efforts can properly guide jurisprudence by enacting positive law. There is a difference for Waldron, between allowing judges to develop tort law and having judges invalidate a piece of legislation. Any instance of the former allows for the legislature to introduce a law which will supersede any judicial decision, while the legislature has no ability to do something similar under the institution of strong form judicial review. The legislature cannot step in and effectively reverse the decision of a judge. However with weak form judicial review, this is a possibility, making the former like the latter in so far as any legislative action is able to take precedent over a judicial decision, making judicial review more like what goes on with tort law and its development.

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Wil Waluchow  
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## Chapter 3 Responding to Waldron

### i Weak Form Vs Strong Form Judicial Review

The above picture presented by Waldron paints the relationship between the judiciary and legislature as oppositional in the quest for an authoritative decision-making procedure. Waldron is absolutely correct to point out that people in good faith disagree about how rights should appropriately limit the legislative and executive branches of government. However if we step back and remember why it is that democratic states often divide their governments into the three branches of legislative, executive, and judicial, we might begin to get a different picture of how they can as a whole approach the issue of this disagreement. This section of the paper will suggest that Waldron's characterization of the judicial branch as having the intention to legislate is grossly misleading. I will introduce a few ways in which theorists argue that Waldron's issue is with strong form judicial review; the kind practiced in the United States where it appears as though judges do in fact have the final say in rights disputes. Some theorists suggest, however, that weak form judicial review does not necessarily have to realize the fear of judges intentionally donning a legislative cap with the aim of subverting the democratic process and enforcing their own personal moral beliefs through the arm of the law. Canada and Britain exercise weak form judicial review where it is the case that the respective legislatures enjoy the power of the last word when they disagree with a judicial interpretation of the charter right. The following section will briefly explain some approaches to arguing for the above conclusion of weak form judicial review before focusing on the most plausible argument found in Gardbaum.

### ii The Other Option

Stephen Gardbaum, in his recent book *The New Commonwealth Model of Constitutionalism* suggests that, previously, the debate surrounding how best to respect rights has been between

legislative supremacy- that checks and balances are held within the ordinary workings of the government, and judicial supremacy- where rights ought to be considered legal in nature and enforceable through courts, first adopted by the United States.<sup>30</sup> Should we entrust the legislature to debate rights or should we leave it up to the judiciary? This looks to me like the question that Waldron was tackling in his work. However, theorists like Gardbaum, Kent Roach<sup>31</sup>, and Wil Waluchow<sup>32</sup>, believe there is an option distinct from the strong judicial review practiced in America where the judges are left with what appears to be the authority to legislate on rights, which I take to be the proper target of Waldron's criticism. Fueled by the desire that our laws reflect the actual moral beliefs of citizens, we have good reason to resist deferring completely to a judicial supremacy. A system where we defer completely to the judiciary is one where we may find ourselves circumventing the moral opinions of the citizens, something that Waldron has argued is problematic.

### iii Dialogic Judicial Review

The one approach that is gaining popularity in Canada is the concept of dialogic judicial review. Simply put, it represents the view that the branches of government operate in a dialogue with one another in order to address rights disagreements properly. What do we mean when we say dialogue between the branches and what role does the dialogue play? To start, Kent Roach describes how dialogue theory “is not a theory of judicial review that will tell judges how to decide hard cases.”<sup>33</sup> Some other theory will have to enumerate that process. Instead he suggests that dialogue theory has been used in cases of “judicial activism in Canada on issues such as gay

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<sup>30</sup> Stephen Gardbaum *The New Commonwealth Model of Constitutionalism* 22

<sup>31</sup> See Kent Roach “Dialogic Judicial Review and its Critics”

<sup>32</sup> See Wil Waluchow *A Common Law Theory of Judicial Review*

<sup>33</sup> Kent Roach “Dialogic Judicial Review and its Critics” 591

marriage and decriminalization of marijuana... [for] slowly shifting focus from criticisms of the Court for doing its job to criticisms of Parliament for failing to do its job.”<sup>34</sup> This theory encourages courts to go about their job of interpreting and applying the charter and relevant statutes without the pressure to under or over enforce the law for fear that their interpretation may alter the course of jurisprudence in a way where they do not leave room for legislative replies.<sup>35</sup> Parliament in Canada has the ability to address the judicial ruling through legislation by use of section 33 of the Canadian Charter<sup>36</sup> or through ordinary legislative sequels. A legislative sequel may consist in the re wording or reshaping of a statute that the judiciary has deemed in serious conflict with a charter protected right, to the extent that the violation no longer presents itself or is reduced to a reasonable level and where the main objective of the statute is not compromised. This back and forth between judicial interpretation and legislative response is what forms the dialogue. The argument provided by Roach is that Canada has weak form judicial review because the legislature can- in engaging in a dialogue with the judiciary, introduce sequels to the statutes that the judiciary has struck down or rendered a notice of incompatibility between it and the charter. This is to be thought of as distinct from the American/strong form judicial review where it is believed to be up the judiciary to have the final word. Roach highlights three distinct features that create the dialogue. The first is section 33 of the Canadian Charter. This section allows Parliament as well as provincial Legislatures to enact a statute notwithstanding a judicial ruling of invalidity. The section reads;

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<sup>34</sup> Ibid

<sup>35</sup> Ibid

<sup>36</sup> This section is highly controversial as it allows Parliament or provincial Legislature in Canada to enact a provision notwithstanding a ruling of incompatibility with the Charter of Right and Freedoms by the Judiciary following some restrictions

“(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).”<sup>37</sup>

This feature appears at first blush to be critical in allowing for responses to judicial decisions. The dialogue would go as follows: the judicial branch makes a ruling declaring that a statute is in conflict with a charter-protected right making it of no force and effect. The parliament then re-enacts the statute, citing that it shall be valid notwithstanding the decision of the judiciary, engaging section 33 of the charter. As I will show later on, this feature is not as straightforward as it appears. The second feature is the first section of the Canadian Charter, also called the reasonable limits clause. This clause states that “the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject to only such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>38</sup> What this means is that when Parliament or a provincial legislature enacts statutes that limit the rights of citizens they may do so only if the limitations are reasonable under a certain set of criteria. Judicial decisions declaring a statute of no force and effect often explain exactly where the unreasonable infringement of a person’s right took place. This information is useful to Parliament or a legislature in that it can modify the content or scope of the statute such as to

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<sup>37</sup> Canadian Charter of Rights and Freedoms Part 1 of the Constitution Act 1982

<sup>38</sup> Canadian Charter of Rights and Freedoms Part 1 of the Constitution Act 1982



bring about the desired effect, while minimizing the breaching of a right. In this sense the courts and law makers are engaging in a kind of negotiation.

The last feature is the ability for the courts to suspend their declaration of invalidity to give the law makers time to address the concerns and modify the statute that appears to violate protected charter rights. What happens is that the law that is deemed to conflict with a particular charter right remains in effect for a term-usually one year- until it becomes invalidated, giving the legislature time to address the social goal that the statute was aimed at. This occurred in Canada in the judgements concerning prostitution and assisted suicide which will both be discussed later. This practice is often cited as evidence that the judiciary is interested in a dialogue with the legislature because it results in the judiciary being able to explain its thoughts on the particular statute without enforcing its opinion before the legislature has had a chance to respond.

If we are able to identify an ongoing dialogue between the branches of government then we ought to be less willing to state that one of them, namely the judiciary, is overstepping its role and actively legislating. Instead it could be said that the judiciary is simply doing its job, taking up its side of the dialogue, and not subverting the democratic will by striking down legislation.

#### iv What Judge Say They Are Doing

Another closely related attempt at uncovering support for the claim that a state is practicing weak form judicial review is to closely examine what the courts are doing. A word of caution first. I concede that it is possible that what judges say or believe they are doing can be something completely different from what they are in fact doing. It may also be possible that judges do not know what they are doing is hiding the truth, or may not appreciate the philosophical issues

**Comment [3]:**

I'm not sure why your comment is here. But an example might be useful. For example, the prostitution judgment, or the assisted suicide judgment, might be good to cite. (Later comment: I notice that you do use this example on p.20 ff. You might here just briefly mention the case and indicate that you will be later discussing this point in more detail.)

sufficiently to recognize that that is exactly what they are doing.<sup>39</sup> I will be however, trying to base what follows on the good faith assumption that judges, like our legislators, do make a good effort to stay within ethical boundaries and accord themselves appropriately to the duties of their respective offices.

I now turn to a recent example of the kind of dialogue that theorists have in mind with the help of a Canadian case. In *Charkaoui v Canada*,<sup>40</sup> we saw the justices strike down the Immigration and Refugee Protection Act 2001 (IRPA) when it was deemed to violate Adil Charkaoui's section 7 rights. Section 7 reads "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."<sup>41</sup> The Court offered potential advice to the legislature as to how to alleviate the perceived rights violation without making any moral claim about the goal or purpose of the statute, so as not to dissuade the legislature from responding to its decision. The judges also left it open for the legislature to make any other changes they saw fit to the statute in order to make it a legally valid statute that complies with the charter. The legislature did in fact make changes and in 2008 the new modified IRPA took effect. The facts of the case very briefly are that the claimant, Mr. Charkaoui, held that when he was issued a security certificate which made him eligible to deportation and detention indefinitely, his section 7 rights of life, liberty, and security of the person under principles of fundamental justice were violated. Chief Justice McLachlin, who wrote the majority opinion, stated that "[t]he overarching principle of fundamental justice that applies here is this: before the state can detain people for significant

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<sup>39</sup> Wil Waluchow personal correspondence

<sup>40</sup> 2007 SCC 0 [2007] 1 S.C.R

<sup>41</sup> Canadian Charter of Rights and Freedoms 1982

periods of time, it must accord them fair judicial process. . .”<sup>42</sup> The IRPA failed to sufficiently satisfy the requirement that a decision to detain be based both in facts and in law as well as the right to know the case presented against ones self as well as have the ability to respond.<sup>43</sup> Since the purpose of the statute was to protect Canada from any perceived threat of national security, part of the statute meant that the state could request the hearing be held in camera without the presence of the accused. Furthermore, in the interest of national security, any evidence of a sensitive nature which might pose a risk if made public could be held from the accused and their legal representatives. In her decision Chief Justice McLachlin concluded that:

“the IRPA’s procedures...cannot be justified as minimal impairment of the individual’s [sec.7] right[s]...Mechanisms developed in Canada and abroad illustrate that the government can do more to protect the individual while keeping critical information confidential than it has done in the IRPA. Precisely what more should be done is a matter for Parliament to decide. But it is clear that more must be done to meet the requirements of a free and democratic society.”<sup>44</sup>

Opinions like these-of which there are many - ought to at the very least have those theorists who are following Waldron and shaking their fists at over-active legislative judging pause for a moment. The Chief Justice of the Supreme Court publicly acknowledges that it is not for the courts to decide on how to write policy or positive law. Instead, it is up to the court to ensure that whatever is written passes legal scrutiny as enumerated by the Charter of Rights and Freedoms. The Chief Justice did not take it upon herself to opine on the morality of the purpose of the statute, but simply to ensure that the deep rooted commitment to life, liberty, and security of the person that all citizens value, is not violated. Equally as important was her observation that there were similar cases where the rights were not as badly impaired. The state had found a way to

**Comment [4]:**

You should track down the original case and cite it, not my lecture.

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<sup>42</sup> Ibid 28

<sup>43</sup> Ibid 31

<sup>44</sup> Charkaoui v. Canada (Citizenship and Immigration), [2007] 1 S.C.R. 350, 2007 SCC 9

achieve its objective of reducing the threat to national security by choosing less invasive options and it was open to parliament to pursue one of these options again.

A morally divisive issue facing Canadian politics today is prostitution. Recently, in 2013 the Supreme Court of Canada issued its decision on the Bedford case which had a philosophically interesting conclusion.<sup>45</sup> It was interesting because though it was in their right to invalidate the three statutes prohibiting certain behaviours surrounding prostitution, the Supreme Court Justices instead suspended invalidation for a period of one year in an effort to give Parliament time to address the issue.<sup>46</sup> Chief Justice McLachlin states that “[t]hese appeals and the cross appeal are not about whether prostitution should be legal or not. They are about whether the laws Parliament has enacted on how prostitution may be carried out pass constitutional muster.”<sup>47</sup> To be clear, the morality surrounding the practice of prostitution was not at issue. Moral arguments about whether prostitution is wrong were not the deciding factor in a decision at least if we continue assuming that the judges behaved appropriately and acted in a good faith effort to uphold the law. The courts recognized that this is a highly politicized and divisive issue, and did not invalidate the statutes immediately. They recognized that the machinery of legislation is slow at times and requires lengthy deliberation and strategy especially on a topic where society is so divided. What they did do however was deliberate in good faith about the requirements that the state has in providing security of the person as enumerated by the charter and decided that according to the law, the statute fell short in protecting the lives of prostitutes.

The content of these decisions aside, what I really wish to highlight is the intent of the judiciary. After coming across decisions like these and others including, the decision on

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<sup>45</sup> Canada (Attorney General) v. Bedford 2013 SCC 72

<sup>46</sup> Ibid

<sup>47</sup> Ibid Sect 2

physician assisted suicide<sup>48</sup> we can begin to view, as grossly misleading, the representation of judges as actively pursuing their own moral beliefs in an effort to legislate and subvert the democratic process. Gardbaum states that “judicial rights review should be respectful but unapologetic.”<sup>49</sup> The reason for this is not because judges should feel entitled that their view of morality is correct and their conception of rights ought to be authoritative. Instead it is because they should be confident that their interpretation of the statute may bring “rights concerns from a legal perspective”<sup>50</sup> not previously recognized by Parliament.

Comment [5]:  
Find reference

The most accurate theory of what happens in a state under the practice of weak form judicial review includes judges often times finding themselves deliberating morally from the point of view of the society in an effort to work with the legislature to better provide and protect the rights and freedoms enumerated in a charter or bill of rights. So instead of making a decision *for* the community, the judiciary should be making a decision *with* the community.

#### v Stephen Gardbaum's New Commonwealth Model

As we have seen, weak form judicial review does not place sole responsibility for protecting rights squarely in the hands of the judicial branch in the same way that American style review appears to. Gardbaum, in describing his new commonwealth model, states that weak form judicial review is an important component of his overall theory of constitutional protection. The vital difference between weak form judicial review and an American style judicial supremacy is that “although courts have powers of constitutional review, they do not necessarily or

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<sup>48</sup> In *Carter v Canada (Attorney General)* 2015 SCC 5 the courts decided that the statute was invalid, but also that their declaration of invalidity would be suspended for one year giving the parliament enough time to come up with alternative legislation that does not violate the constitution. As of this date (September 2015) the Canadian Parliament has yet to act.

<sup>49</sup> Stephen Gardbaum *The New Commonwealth Model of Constitutionalism* 85

<sup>50</sup> Ibid

automatically have final authority on what the law of the land is.”<sup>51</sup> The decisions made by the court are not unreviewable by a regular legislative majority. A defining characteristic for Gardbaum is that “it grants the legal power-but not the legal duty, of the last word to the legislature.”<sup>52</sup> Unlike both options for Waldron, where the group awarded the last word in a dispute is bound to use it, a theory which takes seriously rights-based concerns from both branches of government will see fewer instances of toes that are stepped on and allow each branch to be fully engulfed in their respective roles-the legislature for legislating and the judiciary for adjudicating.

Gardbaum aims to identify certain structural feature, found in Commonwealth countries, in the organization of powers, obligations, and duties of the various government bodies that indicate whether or not they are practicing weak form judicial review. His model, the Commonwealth model, has certain key structural features that, if satisfied, lead us to the conclusion that the state is practicing weak form judicial review. Gardbaum states that “the critical, and distinctive, hybrid feature of the new model is the legislative power to override the exercise of constitutional review of legislation by the courts.”<sup>53</sup> So the new model is said to have the benefits of parliamentary sovereignty while supporting the judicial role in rights issues.<sup>54</sup> For Gardbaum, it is important that Parliament has the ability to express the final word with respect to a rights issue if one is to properly answer Waldron’s concerns. We want to avoid the circumstance where courts “become the primary expositors of rights in society [and in doing

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<sup>51</sup> Stephen Gardbaum *The New Commonwealth Model of Constitutional Review* 26-7

<sup>52</sup> Ibid 27

<sup>53</sup> Stephen Gardbaum *The New Commonwealth Model of Constitutionalism* 45

<sup>54</sup> Ibid 53

so] . . . speak for, and in the name of, society as a whole.”<sup>55</sup> His approach is structuralist in that he labels various commonwealth countries as embodying this new model by virtue of the structure and organization of the various institutions responsible for rights deliberation. A state fits the model if, among other things, we can identify certain structural features that allocate powers and duties to the appropriate institutions at the appropriate times. If a state organizes its institutions such that the power of the final say with respect to rights disputes falls to the Parliament, then they are most likely practicing weak form judicial review.

An example of this power in the Canadian context is section 33 of the Canadian Charter which states: “[p]arliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.”<sup>56</sup> What this power supports is the ability of the legislature to review the decision of the Justices of the Supreme Court of Canada who had invalidated a statute, and to declare that the statute shall operate notwithstanding the relevant provision of the charter. In so exercising this power, the legislature has the final word on the rights disagreement. Importantly “section 33 expresses the *empowerment* of the legislature, it has the discretionary legal power and right to insist on its position, whereas absent the use of section 33 the SCC has the final word on whether it chooses to defer...”<sup>57</sup> It is important to emphasise that section 33 does not apply to every charter right. Its scope is limited to section 2 and sections 7 through 15, which tend to be the ones that generate the most moral controversy.

**Comment [6]:**

It is probably important to mention here the fact that Sec 33 applies to only some charter rights. They are the ones that tend to generate the most moral controversy. And you do discuss this point later. But it's still important to mention this point that sec 33 doesn't apply to all charter rights.

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<sup>55</sup> Ibid 59

<sup>56</sup> Canadian Charter of Rights and Freedoms 1982

<sup>57</sup> Ibid 125 emphasis original

For Gardbaum it is fundamental to his new model that Parliament be free to disagree with judicial interpretation at any time. It is not difficult to see, however, that one is not truly free to disagree with another person if one's opinion is never authoritative or there is no requirement to listen to one's opinion on a controversial matter. You can imagine a disagreement between a parent and a child about which school the child will attend. If a parent were inclined to sit down with the child and listen to the child's reasons for not wanting to attend a private school -- perhaps the uniforms are itchy, they miss their friends etc. -- we might doubt that the child's reasons will ever be taken seriously by the parent. If the parent had already made up their mind, and the child has no mechanism by which to dissent or effect the decision in their favour, more significantly than stomping their feet in protest, it is not clear how the child is actually free to disagree past any kind of symbolic gesture of discontent. When I say not free to disagree, I do not maintain that the child is unable to cry or otherwise express him or herself. What I mean is that if the parent is not forced in some way take seriously the requests of the child, merely to entertain the reasons, then the child is not free to meaningfully disagree. This means that the airing of their disagreement is unlikely to effect the ultimate decision. The child's opinion must have at least some meaningful impact on the decision of the parent in order for a meaningful disagreement to have resulted.

For Parliament to be able to disagree with the judiciary on interpretations of rights and to ultimately solve the disputes themselves they need appropriate mechanisms for such disagreements, "and under the Charter version the authorized and distinctive mechanism for such disagreements and resolutions is section 33."<sup>58</sup> On one reading, Section 33 of the Canadian Charter empowers the legislature to insist that its reading of the rights or duties in question shall

<sup>58</sup> Stephen Gardbaum *The New Commonwealth Model of Constitutionalism* 125

**Comment [7]:**

There are, as you know, two possible readings of s 33. On the one reading, the legislature declares that its legislation will stand despite its conflict with a charter right. On the other, the legislature declares its disagreement with the judges on whether rights have indeed been unjustifiably infringed. It might be a good idea, here, to mention this and work it into your discussion. Here you talk about a disagreement about a reading of rights, not a disagreement about whether rights should trump the legislation. But the latter is reading of s. 33 you seem to suggest in earlier comments on it. I know that you discuss all this later. But it should be flagged here as an important issue and one you'll discuss in more detail later.



be authoritative where, absent such a power, it would be up to the Supreme Court of Canada (SCC) to defer. On another reading of section 33, the legislature declares that its legislation will stand despite its conflict with a charter right. This distinction will be explored in greater detail later, but for now Gardbaum appears to be dealing with the former reading. Gardbaum points out that while legislative sequels do express disagreement, what his new model represents is that legislatures ought to be empowered to solve their disagreement on their own, relying on a legislative power and not judicial self-restraint and deference.<sup>59</sup> It allows the decision to be taken into the hands of the elected officials and allows the legislature to be the cause that affects the authoritative action, e.g., the particular interpretations of rights duties.

Another feature that section 33 provides in the instance of disagreement is greater transparency about what is actually going on between the judiciary and the legislature. It allows the legislature to be clearer in its intentions when it chooses to act by allowing for two distinct modes of action where there would otherwise have been one. Which action the legislature takes has implications about what its intentions are, thus increasing accountability and transparency. In the instance that the judiciary invalidates a particular statute that the legislature wishes to be reintroduced, without the ability to use section 33, the legislature can write a legislative sequel. The sequel can take two forms: first, the statute can be rewritten identical to the one that the judiciary had invalidated previously, or second, the legislature can take into account the majority opinion of the courts and try to change the bill such that its original aim is realized but its limitations on individual rights and liberties is reduced to a level would that satisfies the judiciary. Let us assume that the legislature in fact believes that the original drafting of the bill was appropriate and disagree with the judicial interpretation of the statute and the charter and

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<sup>59</sup> Ibid 126

thus disagrees with the conclusion that it is not valid legislation. Given that the ruling did occur, and that option one would most likely not be efficacious at fulfilling its intended goal since it will probably be struck down and invalidated again, the legislature reluctantly may opt for option two, since it believes that the goal of the statute is worthwhile and for the greater good of the community. However, it will not be clear, in all instances where the legislature reworks the statute and modifies it slightly in a legislative sequel, when in fact the legislature agrees or disagrees with the interpretation provided by the courts. What is discernible from the existence of the legislative sequel, is only that the legislature believes the goal to be worthwhile. It could be the case that the legislature truly had overlooked some instance where the statute does impose an unreasonable burden to some party's rights and wishes to rectify their mistake. It could also be the case that members of the legislature genuinely and in good faith disagree with the judiciary about the reasonableness of the imposition of the rights in question. It is then unclear what the exact intentions of the legislature are when it proposes a legislative sequel.

With the power of section 33 however it provides the opportunity to differentiate between the two intentions by providing a corresponding differentiating action. In the event that the legislature agrees with the judiciary interpretation of the statute and the relevant charter provisions, yet believes the goal of the statute is worthwhile and worth pursuing, it can modify the statute to accommodate the concerns raised by the courts. In the case where the legislature disagrees with the interpretation provided by the judiciary and wishes that the goal continue to be pursued, it can use section 33 to re-enact the statute in its original wording. This signals that the legislature intends the original methods of the statute to be authoritative because it believes that the statute never was invalid under its interpretation. The first option admits that the legislature agrees that the previous statute was invalid at the time that the judiciary struck it

down, while the second option reinforces that the legislature reasonably disagrees that the statute ever lacked legal validity and never conflicted with the rights and values of the charter to the extent that the judiciary believed it did. This allows the public to better understand the intentions and beliefs of those whom they elect into power. Greater transparency allows us, the average citizen, to better participate in their civic responsibility as the actions of the legislature cannot be masked or hidden. The power of section 33 allows the legislature to act and not have its intentions masked or ambiguous.

An example of the power in the British context is found in the Human Rights Act (HRA) which is a “statute enacted through ordinary legislative process to give further effect to the rights and freedoms guaranteed under the European Convention on Human Rights. . .”<sup>60</sup> In an effort to curb judicial activism the courts are not empowered to render a statute invalid like they are in Canada. The courts have two sections of the HRA devoted to rights review. The first is section 3 which reads:

“(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.”<sup>61</sup>

This means that when hearing a rights claim, the court is required to read the statute that is in question in such a way that would see it compatible with the rights enumerated in the HRA. We

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<sup>60</sup> Ibid 157

<sup>61</sup> Human Rights Act 1998

can imagine a situation where there is considerable ambiguity in how the statute is to be read. In the instance where there are at least two reasonable readings, if it is the case that one reading results in an apparent violation of a right protected under the HRA and the other reading avoids this violation, the second is to be enforced so long as it is a reasonable and plausible interpretation. However, once the courts run into a statute where there appears to be no reasonable interpretation of the statute that makes it compatible with the Rights Convention then section 4 is triggered. “Section 4 empowers but does not require, the higher courts to make a declaration of incompatibility with respect to such legislation, repeating in section 4(6) that such a declaration has no effect on the validity or continuing operation of the provision...”<sup>62</sup> So when it is the case that there appears to be no plausible reading of the statute that renders it compatible with rights, then the court has the ability to make this known, without affecting the actual practice of the piece of legislation. There is then a section 10 which allows but does not require the “relevant minister to amend legislation subject to a declaration of incompatibility by a fast-track remedial order as an alternative to the ordinary legislative process...”<sup>63</sup>

So the courts in the UK, under the wording of the HRA, do not have the power to invalidate or significantly change a statute during a rights dispute. The aim of this provision is to limit judicial activism and the courts’ ability to interfere with the legislation and rights debates among the democratically elected legislators. According to Gardbaum, if the UK is to reply to Waldron’s concerns, then they must ensure that the final say when it comes to rights disputes belongs to the elected members of the legislature, as opposed to unelected members of the judiciary. If the courts are reading a statute in a way that is compatible with the rights

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<sup>62</sup> Ibid 158

<sup>63</sup> Ibid

enumerated then the courts are said to be respecting the authority of the legislature. If they are issuing a statement of incompatibility then their statement does not have legal ramifications on the functioning of the statute or relevant provision. The legislature is free to respond to the statement if they so choose, or ignore it, leaving the statute fully valid and authoritative. This ensures that during difficult cases and rights disputes, it is the voice of the elected representatives that will be final and authoritative, again guaranteeing that the citizens are participating.

#### **vi Is the New Commonwealth Model Misguided?**

Gardbaum has then identified features present in the constitutions of Canada and the UK which appear to satisfy the democratic challenge. He has identified a structure which grants the constitutional power of the last word to the legislators in each state. This supports his conclusion that each state is practicing weak form judicial review. I am however, very hesitant to believe that one can determine accurately whether a nation is practicing weak or strong judicial review by looking solely at the formal structure of a constitution. David Dyzenhaus, in his paper “The Incoherence of Constitutional Positivism” suggests that Waldron’s commitments result in an incoherent position. Here Dyzenhaus states that Goldsworthy must be right that “[i]f the distinction between weak and strong form judicial review depends not on constitutional form... but on how seriously the public takes what the judges say, then Waldron’s focus on strong form judicial review is misconceived.”<sup>64</sup> The question I wish to explore next is whether we can look to the above structural features alone in determining the type of judicial review practiced in these countries. If they inaccurately track what I consider to be the actual practices, we have reason to

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<sup>64</sup> David Dyzenhaus “The Incoherence of Constitutional Positivism” 142

believe that Gardbaum's approach will miss important features of the practices surrounding judicial review.

## **vii The Powers May Not Exist**

Putting it bluntly, I do not see the Parliament and Legislature of Canada exercising the power of Section 33, and there are strong reasons to believe that they may not have it much longer, if they even have it now. James Allen views the notwithstanding clause, as it is has come to be known, as highly flawed since it only refers to a select number of rights and only operates for a five-year period. He also maintains that it is flawed in its wording since “it implies, incorrectly and inaccurately, that the purpose of the notwithstanding clause is to override the Charter itself...[instead of having] the power to override disputed and debatable judicial interpretations of the Charter.”<sup>65</sup> He also states that Parliament has not once ever invoked the notwithstanding clause while the Legislature of Quebec, who had never signed on to the repatriation of the constitution, has used it only a handful of times, and never in response to a judicial challenge.<sup>66</sup> In fact Prime Ministers Chrétien and Martin, each declared publically that they would never use the notwithstanding clause when they were in office. Why does there appear to be considerable political pressure not to invoke this power that appears to be so important for Gardbaum?

Allen rightly believes that it has a lot to do with its wording. It states that an enactment shall operate notwithstanding a provision in specified charter passages. This incorrectly implies that the purpose of this clause is to override the charter itself. The purpose as presented by Gardbaum suggests that it be used in response to a judicial interpretation, where the legislatures disagree

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<sup>65</sup> James Allen “The Travails of Justice Waldron” 177

<sup>66</sup> Ibid, The province of Saskatchewan has used it once, but again not in response to a judicial decision. The province of Alberta had also aimed to invoke the provision at one point regarding back to work legislation, however the final drafting of the legislation was lacking the notwithstanding clause when it was enacted.

with the interpretation and decision provided by the courts and wish to enforce its own interpretation. The wording however suggests that the purpose is to suggest that the judicial decision is the correct interpretation, but the statute that violates a particular right shall operate notwithstanding the charter right. Allen states that “Canada’s section 33 notwithstanding clause makes a legislative response extremely unlikely by making it seem as though legislators, when invoking this section, are against the *charter* and against rights.”<sup>67</sup> This is problematic for the prospect of its use. If legislators feel political pressure to refrain from its use then there is a disconnection from the powers that are illuminated in the constitution and the ones that are in practice.

The British case appears just as problematic. Just as it was the case with section 33 in Canada, the actual practices of judicial review in the UK, and the intended practices as outlined by the HRA, fail to match up. Again, it is not the case that the words or intentions of the HRA have no longer become authoritative. I argue that the words are not the only source of constitutional power that is being considered. Gardbaum himself introduces Mark Tushnet’s criticism that “the formal restraints on the judiciary have become largely illusory.”<sup>68</sup> It appears as though the formal distinction between weak and strong form judicial review has dissolved and what remains is a court that appears in practice to have the final say.

Gardbaum points out that the evidence for this comes from two sources. The first being that “all final declarations of incompatibility have either already been remedied by the government, or are expected to be.”<sup>69</sup> Of course they would be. Challenging the courts and upholding the provision is probably as politically dangerous as it would be in Canada. Let us remember what

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<sup>67</sup> Ibid 177 emphasis original

<sup>68</sup> Ibid 181

<sup>69</sup> Ibid 182

**Comment [8]:**

Should I separate the Canadian and british parts in Sub sections ?  
Answer: NO.

the declaration means. It means that the courts believe they have given every reasonable attempt to read the provision in accordance with the rights enumerated in the HRA and are unable to do so. They declare that the two are incompatible. Imagine how irresponsible the legislators would appear if they intended to state, that although the courts have given every effort to read the two documents as compatible and failed, the provision shall stand none the less. Such a decision would be politically dangerous because it would appear as though the legislators were intending to violate the rights in the HRA. So the legislators have been willing to invalidate the particular provision on recommendation from the judiciary. How ironic is it that the HRA expressly states that the courts lack the power to invalidate a particular provision, yet in practice, nearly all of the instances of judicial declarations of incompatibility lead to an invalidation or alteration of the provision under dispute? This power of declaration has, in practice, become the functional equivalent of a strike down power

Secondly, Gardbaum points out that

as a result of treating the section 3 interpretive duty as a very strong one and the primary remedy for rights violations under HRA, courts have (1) not relied on section 4 declarations. . . (2) effectively subjected Parliament to the Convention rights despite the express wording of section 6; and (3) used section 3 in a way that goes beyond interpretation to the rewriting of statutes.<sup>70</sup>

The HRA requires first that the relevant provision be given a reading that makes it compatible with the rights protected by the HRA wherever possible. Only if this is exhausted, can the courts issue a declaration of incompatibility. However, in reading the provision in such a way to make it compatible with the relevant rights, it will inevitably be the case that sometimes it is read in a way that noticeably departs from the intentions of Parliament. If what the courts believe to be the best interpretation of the relevant provision is one which the Parliament had not intended, then

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<sup>70</sup> Ibid 183



that reading will nevertheless shape future use of the provision and become the one established in common law. In this way, judges are shaping the use of the provision by giving legal validity to the interpretations which they are required under law to use. To be sure, it is a regular practice in common law that any statute or act of Parliament is superior over and nullifies common law. But the majority of cases heard by the courts do not make it past this section 3 reading phase and thus it is up to the Parliament to respond on the readings that the courts have used. That they do not often do so suggests that in practice the court is exerting the most force with respect to the shaping of HRA rights, even if the formal power lies with the Parliament.

#### **viii Distinction Between Formal and Actual Powers**

As we have seen, there is need to distinguish between the formal powers outlined in a constitution and the actual powers operating within the relevant state. Is it true that what matters in assessing whether a state is practicing weak or strong form judicial review is only the formal powers when there is a clear and observable departure from those formal rules? There seems to be immense political pressure preventing the use of these constitutional power-conferring rules, a factor with which Gardbaum needs to be concerned more. If these powers are, in actual practice, limited in a way that severely decreases the likelihood that they will be invoked, then I do not see how we are justified in turning to them the way Gardbaum did in hopes of making observations about the democratic nature of the process of judicial review. This distinction between formal power and actual power is what is problematic for Gardbaum. Recall that his response to the problem posed to him by Waldron revolves around the power of the last word. He states that Canadian and UK style judicial review of legislation is democratically justified insofar as they allow the Legislature to have the final say in rights disputes. The legislatures speak for the people, allowing the idea of participation to be realized, and therefore realizing the

ideals of democracy, which we as liberal democracies value so highly. Thus the people have the final say on rights disputes in the country. Yet the formal power of section 33 in Canada, and sections 3 and 4 in the UK cannot be enough to ensure the democratic justification of judicial review in these states. The fact that the letter of the law states that legislatures have this tool at their disposal, cannot alone adequately perform this justification function. The power needs to be actualized; the legislatures need to invoke the notwithstanding clause and the UK parliament must respond to judicial actions. The formal legal power of the legislature to have the final decision on rights disputes is not enough to satisfy Waldron's concerns. It needs to be true that this power is actualized. It is a dubious move to base one's conclusion that a state is practicing weak form judicial review on a potential power that cannot currently be invoked for reasons that are political in nature.

There are at least two conclusions that could be potentially drawn from the above observations. The first is that Canada and UK are not practicing weak form judicial review and therefore the rights decisions made by the judiciary in these two states lack the democratic justification that Waldron takes to be so important. I resist this conclusion because it is simply not the case that the uses of these override powers is the only way to satisfy the democratic condition. There is reason to make a distinction between the way things ought to be and the way things are in practice. Simply because things are not the way Gardbaum believes they ought to be to ensure democratic justification, it does not follow that the way things are in practice fails to lead us to this justification. Even if it were the case that on paper the judiciary had the ability to strike down legislation, like in the US, or that Parliament had the formal power to overrule judicial actions, but never chose in fact to use it, we might yet have a case for democratic

legitimacy. This might be so if, e.g., Congress or Parliament enjoyed a relationship of deference whereby the courts seldom invoked their formal powers. In such a case, we might wish to conclude that the state in question was in fact practicing a weaker type of review.

The main conclusion that I wish to draw from the distinction between the way things ought to be and the way they actually are, is, that if we wish to accurately determine whether we have weak form judicial review, we ought not to concern ourselves solely with the formal powers set out in a constitution. We ought also to examine the actual constitutional practices of the branches of government involved. I believe that Gardeau is mistaken in his attempt to find proof of weak form review solely in the formal powers found in the letter of the law. Instead, if we wish to find out whether any system of judicial review meets certain standards such as democratic legitimacy, we need to examine the process, much like Hart did, as an anthropologist aiming to identify the source and kinds of actual constitutional powers. In other words, we must be open to things other than positive law as expressed in the form of written rules alone. While such rules undoubtedly make up a large part of the constitutional process they do not tell us everything we need to know. Instead we must look towards the actual practices of the judiciary in order to determine which kind of judicial review we have.

## Chapter 4 Developing A Theory of Judicial Review

### i Democratic Justification

Before we begin to discuss what sorts of things a proper theory of judicial review would have to include we must go back to this issue of democratic justification. Perhaps the original assumption of Waldron's must be done away with in order to create a theory which identifies what value if any can be found in various forms of judicial review. Recall the assumption that Waldron has regarding democratic justification: that a particular rights-based decision is justified so long as the correct party has the final say on which interpretation of the relevant rights is authoritative, the correct party being the democratically elected legislature. If this is the only way of attaining democratic legitimacy then I do not fault Gardbaum for attempting to find it by pointing out that this indeed is the case in the Commonwealth countries. However I argue that this is not the only way to attain democratic justification. It matters not simply who has the final say, but whether the rights interpretation more accurately tracks established values that the state has committed itself to in the constitution. We can imagine a society that has lost trust in its parliament to accurately reflect their beliefs and values. At the same time the society might well believe that their judiciary is particularly perceptive to the legal and moral commitments that the society has expressed. Some say that such a culture is prominent in Canada, with the recent judicial decisions on physician assisted suicide and prostitution serving as prime examples. So it is possible that the judiciary is more closely connected to the values of the society, though they are not elected, than the elected representatives that are struggling to juggle the needs of the community with other self-interested goals. In this case, it matters not whose interpretation of

rights ought to be authoritative in theory, what matters is whether the party with the final say is adequately connected in the correct way to democratic values.

## ii Re-evaluating Democracy

Waldron's argument, if taken to its logical conclusion, would warrant direct democracy as the only legitimate means of ensuring full democratic legitimacy. This is simply too high of a threshold since it is impractical. Wil Waluchow, in his book *A Common Law Theory of Judicial Review* discusses democracies and states that they “come in a wide variety of forms, most of which include institutional mechanisms that in some way distance the people from law-determining decisions.”<sup>71</sup> He describes how in Canada and the UK we find an unelected second house which is part of Parliament, yet it would be too hasty to dismiss both states as not being functioning democracies. He also reminds us that often the elected members of parliament delegate law-determining decisions to administrative bodies; examples of this are the Canadian Radio-television and Telecommunications Commissions or the United States Food and Drug Administration.<sup>72</sup> Constitutional democracies have varying mechanisms which place considerable distance between the citizens of a state and law-determining decisions, and this seldom seems to threaten the democratic legitimacy of such states. While I do not purport to have the perfect and practical formula for democracy, I find Waldron's idea of democratic justification unclear and confused. The idea that law determining actions must all come from the legislature because that ensures the participation of the citizenry is highly flawed. Waluchow tackles this very question in his third chapter when he tries to unpack the problems associated with what it means to

**Comment [WW9]:** I think this is far too strong. I think the way to put the point is that Waldron's argument, if taken to its logical conclusion, would warrant direct democracy as the only legitimate means of ensuring full democratic legitimacy.

**Comment [WW10]:** You will, of course, have to provide proper referencing here.

<sup>71</sup> Wil Waluchow *A Common Law Theory of Judicial Review* 30

<sup>72</sup> Wil Waluchow *A Common Law Theory of Judicial Review* see 15-17

represent the best wishes of citizens.<sup>73</sup> In a contemporary democracy, law determining decisions are never made by direct democracy.<sup>74</sup> Instead we elect representatives to make decisions for us. It is problematic to believe that democracy by definition entails input from all citizens at all levels of law determining decisions. If by participation Waldron means this robust direct input in every decision then I doubt whether regular legislative actions meet this criteria. If this is the case then how reasonable is it to hold rights disputes at the level of judicial review to this standard?

Waluchow asks why exactly the transition from Regas to Demos is considered an improvement, that is, a transition from a non-elected legislator, one who was accepted as the authoritative person to exercise legislative, executive, and judicial powers, to a group of elected individuals. He says at first blush it appears obvious that Demos is an improvement because it is more democratic, meaning that the citizens have more input into the legal decisions. He states however, that “in actual fact. . . it is not at all clear why, from the point of view of democracy, Demos is an improvement over Regas.”<sup>75</sup> The issue that creates the majority of the appeal to

**Comment [WW11]:** I don't describe Regina as appointed, do I? Rather she is accepted as the authoritative person to exercise legislative, executive and judicial powers. She then accepts removal of her legislative powers. Appointment suggests power-conferring rules in a legal system.

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<sup>73</sup> See Chapter 3 of *A Common Law Theory of Judicial Review*

Here he describes the transition from Regas to Demos. Regas is a system with Regina at the helm who represents the Legislative, Judicial and Executive body respectively. She is not a tyrant but acts ‘at the pleasure of her people.’ She does her best to make law determining decisions for the best interests of her citizens. Suppose however that she begins to have difficulty with knowing what exactly are in the best interests of her citizens. She has placed certain restrictions on herself; which are meant to represent constitutional norms, like the inability to legislate on Wednesdays and on religious matters. Suppose that she adds a further norm and requires that before legislating she must agree to consult with a group of citizens, in order to get a pulse for the wishes and desires of her citizens. There is still no guarantee that she will take seriously the concerns of the citizenry and will just ignore whatever results from the consultation. Suppose she truly is trying to understand the needs of her citizens, however, and continues to be unsuccessful. She cannot possibly meet with the entire population and Regina is but one person, a mortal one at that and not herculean. The citizenry decide, then, to elect representatives who will address their concerns. Regina then allows this elected body to perform the Legislative function and she is required to administer only those laws that were determined by the elected assembly. With these changes it appears as though the system which Waluchow calls ‘Demos’ has formed a rudimentary form of democracy.

<sup>74</sup> With the exception of legal referendums where the citizens’ vote do have an authoritative effect on law, like the Quebec referendum on whether to succeed from Canada.

<sup>75</sup> Wil Waluchow *A Common Law Theory Of Judicial Review* 79

democracy, and the issues associated with it, is the idea of representation. Waluchow expresses his concerns using the analogy of a patient advocate. One who is said to represent a patient and is allowed to make decisions for them in a time where direct consent is impractical or impossible. The statement that causes us concern is the following: “Y serves as X’s representative when Y is empowered to make decisions and/or take actions that stand for X’s decisions and/or actions.”<sup>76</sup> Waluchow goes on to raise various scenarios in medicine revolving around patient advocacy that add increasing levels of ambiguity to what exactly it means to represent someone’s actions. He says that “among the most difficult questions are those having to do with the kinds of reasons to which a representative may properly appeal in reaching her decisions.”<sup>77</sup> Does a surrogate properly fulfill her role when she appeals to the previous expressed motivating beliefs surrounding certain treatment, or does representation grant one the licence to use one’s own judgement on what the appropriate motivations are?

Waluchow describes a scenario where a patient is presented into emergency care but is unable to make life saving decisions for herself. Let us suppose that in her possession is proof that she belongs to a particular religious group which believes that one ought never to undergo blood transfusions. It is not in dispute that the patient has expressed her acceptance of this belief and yet she is not able to make decisions about current procedures at the time of admittance. A representative is to decide whether she should undergo the life-saving blood transfusion procedure, knowing that to refuse treatment will mean very likely death. The representative of the patient makes no allegiances to the religious group that forbids blood transfusions and is thus not swayed by their beliefs. It is not at all clear on what grounds the patient advocate is to make

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<sup>76</sup> Ibid 82

<sup>77</sup> Ibid 82

her decision. Is the advocate to act solely on the wishes previously expressed by the patient, perhaps months prior to the circumstances that led to her being rushed to the hospital? Or is the advocate to decide for herself, perhaps somewhat paternalistically, what is in the best interests of the patient, given that the patient ought to be motivated by what the advocate considers ‘right’ reasons?

These questions closely mimic the questions that elected representatives are faced with when making law-determining decisions. Sometimes representatives have good reasons not to follow the expressed wishes of their constituents. If this is true then we must again question to what extent the ideal of participation must continually be viewed from atop a shimmering pedestal. Waluchow correctly points out that if X is to represent the views of constituents Y, there are surely moral limits to the duties of X with respect to the wishes of Y. “A representative cannot be required to check his other moral duties at the door when he assumes that role.”<sup>78</sup> X’s decisions will, after all, still be his. If the expressed wishes of Y are to perform an act that is morally reprehensible according to the belief of X, X must not relinquish his other moral duties and responsibilities. It would be unreasonable to expect that a representative be required to ignore their own conscience and in all instances follow the wishes of their constituents blindly. Another reason that might require the representative to not bind themselves to the whims of the represented is that sometimes they are in a better position to understand the intricacies of a complex decision. Waluchow writes that this might happen because “matters coming before the legislature are often highly complex, requiring a background knowledge that the average citizen simply does not have, and an attention to detailed facts and argument that he has little interest in

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<sup>78</sup> Ibid 94



displaying.”<sup>79</sup> If representatives are aware of difficulties with the expressed wishes and desires of the citizens of which the latter are not themselves aware, then perhaps the representatives would better represent their constituents by making a decision based on other grounds. What representatives ought to do is not always clear. What is becoming clear however is that the idea of representation often requires a separation between the expressed wishes and desires of citizens and the actual law determining decisions that are made on their behalf.

Comment [WW12]: P. 94, not 194.

Democracies where there is a very real separation between the expressed wishes and desires of citizens, and the actual law determining actions, are commonplace. The democracies of Canada, and the UK have unelected bodies that are incorporated into the regular legislative process. The elected members are, arguably, often required to make their decisions on something other than the expressed wishes of whom they represent. It is not clear to me exactly, why from the point of view of democracy, the transition from Regas to Demos, as discussed by Waluchow is such an improvement. If it was an improvement because the wishes of the citizens get their input into the law determining decisions, then that is clearly not as obvious as it was at first blush. If it is true for some reason other than participation then I do not know what that could be. Now of course the transition from Regas to Demos is not necessarily made any worse simply in virtue of creating an elected assembly. It is not the case necessarily that less participation is available or there are seemingly worse law-determining decisions being made. However that democratic participation is not worse than a good faith attempt at ruling well by Regina is not in itself a good reason to adopt such a standard. The thought, then, that only the legislative branch can be justified in making authoritative legal rights determining claims is arbitrary. It is unclear exactly why Waldron believes that only the legislature brings with it the ability to justify

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<sup>79</sup> Ibid 94

democratically rights determining decisions. It is then unclear why he thinks that democracy is somehow better respected if we take rights-determining decisions out of the hands of the judiciary, and place it in the hands of the legislature. It is not entirely clear to me what he thinks we gain from this given the fact that it does not guarantee much more participation. The judges are representatives just like the legislators, having to search for a balance between individual best wishes and adequate respect for moral values.

Gardbaum was then mistaken in his attempt to satisfy Waldron's criticisms. It appears as though his idealistic notions of democracy would discount any instance where there is a considerable separation between the expressed wishes and desires of the population, on the one hand, and law determining decisions, on the other. I am not here arguing that Waldron is wrong in suggesting that more participation would be better. However the conclusion that he draws, namely that more participation is ensured when we leave the final decision in the hands of the legislature simply does not follow. It is not necessarily true that the legislature ensures more of the moral value of participation than if the decision had been left to the judges. While yes, under ideal circumstances, one would expect to find more citizenry input in the determinations of rights by the legislature, the above evidence suggests that there can also be quite considerable separation between the citizens and the determination of legal norms. Waldron's high threshold of justification would render many bills that were voted on by unelected officials or administrative bodies unjustifiable, or undemocratic. His criticism against judicial review requires that the reader be hesitant to call Canada, the USA, and the U.K democracies. Which though not problematic in and of itself, does leave us no better at determining which body should have the final say when it comes to rights disputes.

Waldron's favouring of democracy also reveals a large flaw in the idea of representation. Waluchow points out that minority groups often struggle to find avenues to participate when representatives are elected by majorities. Waluchow imagines a responsible representative named Atticus, who would not go out of his way to ignore the wishes and concerns of a minority group. However, "this may not be enough to lead him to give those concerns adequate airing and support in legislative debates and votes."<sup>80</sup> Atticus will be "*the majority's* representative, elected by *them* to serve *their* interests and honour *their* expressed wishes."<sup>81</sup> Supposing that Atticus is asked to vote on a potential action that would place a considerable burden on a minority group while benefitting the majority, he is put in a precarious position. It is not at all clear how exactly he is to decide. To make either decision he has to ignore the expressed wishes of one group. In the event that he ignores majority wishes by casting his vote to dismiss the proposed abusive action, he is doing a disservice to the majority of the constituents that elected him. If he casts his vote in favour of the majority, he will be contributing to a kind of systemic abuse of the minority groups in his society. It is not all that clear which option is favourable, nor whether setting up the representative system in Demos actually averted a worse situation in the first place.

### iii Two Conceptions of Democracy

Waldron seems to focus on a procedural conception of democracy which was summarized by Samuel Freeman as follows:

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<sup>80</sup> Ibid 98

<sup>81</sup> Ibid emphasis original

By a procedural conception I mean the identification of democracy with a form of government decision-making where each is guaranteed equal rights of participation and influence in procedures that determine laws and social policies, and where decisions are reached in accordance with the principle of majority rule. A procedural conception of democracy involves no substantive restrictions on outcome reached by legislative determinations, other than those rights necessary to sustain legislative procedures themselves.<sup>82</sup>

Valuing democracy in this way leads us to all the unpleasant circumstances we explored above. Waluchow however suggests that if we take up a constitutional conception of democracy, then things are viewed quite differently. We would “ [view] democracy as fundamentally not about which decision making procedures are followed but about whether, and to what extent, the particular procedures chosen, and the particular decisions made using them, respect what Dworkin calls, the democratic conditions.”<sup>83</sup> These democratic conditions are not necessarily fixed and can vary. One such example is that all positions in offices are open and available to all equally. Conditions like these, whichever ones is picked out, will all derive their value from their ability to contribute to “democracy’s animating idea: the principle of equal status.”<sup>84</sup> This means that Democracy as a concept contains certain substantive content that is missed when we view it in only procedural terms.

I argue that the concept of democracy has less to do with the decision-making procedure than with an organization that realizes the equal status of all. Recall the above example of Atticus and his constituents. It is surely one thing to organize the decision-making procedure such that everyone gets a vote. However, if the society fails to take seriously the instances of systematic abuse of a minority group because they are unable to garner support in repeated instances, then it

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<sup>82</sup> Ibid 106-7

<sup>83</sup> Ibid 107

<sup>84</sup> Ibid 107-8

is unclear in what way exactly the minority group can be said to be given equal status. Now this does not require that the majority must bend to the will of the minority in order to rectify this perceived injustice. But it does require us to revisit the question of whether this one-vote decision-making procedure is truly upholding the democratic value of ensuring equal status of all its citizens. If the minority group is failing to even get consideration in the legislative body because they are unable to even elect one representative, then they do not in fact have a voice and do not have the equal status so desired by democracy.

Waluchow writes that according to Dworkin, a constitutional conception

...denies that it is a defining goal of democracy that collective decisions always or normally be those that a majority or plurality of citizens would favor [even] if fully informed and rational. It takes the defining aim of democracy to be a different one: that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal respect...Democracy means government subject to conditions- we might call these the “democratic conditions”- of equal status for all citizens.<sup>85</sup>

**Comment [WW13]:** Be absolutely sure to quote 100% accurately.

On this conception, then, the decision procedures and the results they bring are only justified in so far as they respect the equal status of the citizens. The belief then that majoritarian decision-making procedures ensure democratic justification is simply misguided. It is not even clear that it is necessary that all decisions be made by a majoritarian procedure. Recall that in Canada the legislature defers to administrative bodies to regulate what content is broadcasted over radio and television, and an unelected but expensive senate reviews and approves bills before they are passed into law.

A potential criticism of Waldron's is that deliberation regarding rights is not of the same kind as the deliberation that goes into the regulation of broadcasting content. The latter is more often than not a coordination issue, much like decisions about which side of the road we ought to drive

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<sup>85</sup> Ibid 108

on. A decision about which side of the road we drive on can rightly be made without requiring the input of the citizens and still ensure that their equal status is respected. If an administrative body is responsible for coordination problems it can surely be forgiven by the citizens that their input is not taken under consideration. However a rights-determining decision is surely a different beast. A decision about which constitutional rights citizens are to enjoy would surely be undermined without a majoritarian-type decision-making procedure.

This view, while perhaps reasonable on its own, is simply incompatible with the decision to enact a constitutional charter in the first place. A charter, by definition limits majoritarian decision-making procedures. A charter is a limitation on the kinds of laws that may be enacted by the legislature in order to ensure adherence to certain moral values like freedom, equality and security of the person. If we were to include, in the task of limiting the ill effects of majoritarian rule, a purely majoritarian decision making procedure, we will be left with the fox guarding the henhouse.

The commitment in a constitutional charter to certain substantive moral rights like equality, liberty, and autonomy, means that we wish to guarantee them against the value of majoritarian decision making. It presupposes that majoritarian decision making procedures need to be curbed in the event that they lead to results that put in jeopardy the rights enumerated in a charter. This requires that one who believes that these rights are worthy of protection is also committed to a decision-making procedure which will not undermine these rights. At times this may require that the whims of a majority need to be in balance with the desires of a minority group in the event that certain rights are being infringed in a way that fails to accord with the principles of a free and democratic nation. The reason for the adoption of a charter in the first place is largely based on the belief that majoritarian-rule alone leads to injustices, and a series of checks and balances

would do justice to the groups who experience systematic discrimination. Guaranteeing all peoples' rights in the form of a charter commits us to the belief that preserving the equal status of all individuals is an attractive state of affairs. Since a pure majoritarian decision-making procedure fails to ensure that all citizens are given equal status, it follows that in the event that a state has a constitutional charter, the reigning conception of democracy must be the constitutional conception of democracy. We are committed to the conception which places substantive constraints on the state of affairs that can result from particular institutions. That is after all, what a constitution is intended to do.

#### **iv Democracy and Judicial Review, Weak/Strong Form**

We can now shift our focus back to judicial review. That we adopt a conception of democracy which recognizes constraint on majoritarian decision-making does not necessarily lead us to the conclusion that the judiciary should be the sole expositors of rights. It does not, in other words, follow that judges are to be the only ones making laws because legislators often ignore the vital interests of minority groups. A constitutional conception of democracy will most likely require that its institutions are structured much the same way as they are in the US, the UK and in Canada. The only thing that may change is our methods of evaluation of those institutions. Knowing that we are committed to a kind of judicial review of legislative action does not in and of itself tell us how we are to evaluate the actions and decisions of judges. But it does give us some clues. We can see now that if it matters less what particular decision making procedure is used, and more that the results conform to substantive moral criteria- the democratic principles- then the debate between weak form and strong form judicial review loses significant semantic meaning. Remember, as previously described, the difference between weak

form and strong form has primarily to do with who has the ability to perform rights-determining actions. It is weak form if the legislators have the final say and strong form if the judiciary has the authoritative opinion. This distinction is based on the presupposition that it matters who has the final say. Both Waldron and Gardbaum would have us believe that weak form is desirable because it ensures that the legislators have the final say, supporting the value of participation. Now that we see that the value of participation must be balanced against other moral values and considerations it matters less who has the final say and more which and how the relevant other moral values are protected and promoted. Gardbaum's approach of discovering which kind of review is practiced in the commonwealth countries by looking at whether or not majoritarian decision making is employed is misguided and does not accurately reflect the values of a constitutional democracy. I believe that it is not who has the final decision that justifies a particular kind of judicial review, but how well the institutions uphold the democratic conditions which support the equal status of individuals. Now I do not purport to have a final answer to the question of how we ought to justify judicial review. However, I argue that Gardbaum was wrong to limit his exploration of judicial review and constitutional powers to the formal procedures outlined in the text of the constitution. One must look to what develops in practice and what limits in fact exist on the actual practices of judicial review. Judicial review is not only legal, but political in nature. In addition, judicial review is subject to political pressure from many different stakeholders and groups. So what sorts of things should we consider?

Comment [WW14]:

## v Constitutional Conventions in a Theory of Judicial Review

In addition to the formal text, what goes into consideration during constitutional decision-making are constitutional conventions. Constitutional conventions are extra-legal, political norms that exert pressure which are constitutionally binding. They represent non legal forms of

Comment [WW15]: What does this mean? And why the first thing?



limitations. Waluchow states that these features “are part of a nation’s constitution, and yet are not part of its constitutional *law*.”<sup>86</sup> These are norms that although may not be written down explicitly in a canonical text, are none the less binding on the parties about whose powers they are concerned. However, a court may not legally apply coercion to see that these conventions are adhered to since they are not legal norms. Conventions develop over time in instances where the law is often silent on an issue but there is a coordinated belief that there ought to exist some sort of limitation on certain parties, and such a limitation ought to be able to regulate behaviour. A constitutional convention, if violated, represents a constitutional wrongdoing even if the actor was within their legal right to perform said action. Waluchow states that “in short, what law makes legitimate, may yet be wrong- not just morally or politically, but *constitutionally*.”<sup>87</sup> An example of a convention in the British case is the norm that the Queen, or her representative, may not refuse to give royal assent to a bill passed by both houses of the UK parliament. A second is that the government must resign if it loses confidence in the house. These conventions are not enforceable in court and there are no legal remedies or punishments available to impose on parties that violate these norms. However there is considerable political pressure to conform, and if one were to deviate from these norms they would face considerable political backlash. In Canada, constitutional conventions played a prominent role in the Patriation case.<sup>88</sup> In this case, then Prime Minister Pierre Elliot Trudeau sought the opinion of the Supreme Court of Canada on his ability to unilaterally patriate the constitution. Up until then, the Canadian constitution was largely contained within the British North America Act, 1867. The constitution could not be changed by any Canadian action. Instead change required a regular legislative action of the

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<sup>86</sup> Ibid 28 emphasis original

<sup>87</sup> Ibid 47 emphasis original

<sup>88</sup> see *Reference Re Amendment of the Constitution of Canada* [1981] 1 S.C.R

British Parliament, a vestigial tail of our colonial past. Trudeau wanted to ask the British to allow Canada to replace the constitution with their own *Constitution Act 1982* which would include a charter of rights and freedoms. The question was whether Trudeau could do this without getting the expressed approval of the provinces. The Court expressed the view that

(a) provincial assent was not required as a matter of constitutional law; (b) it was required as a matter of constitutional convention- that is, an informal convention existed among the various branches of the Canadian political system requiring provincial assent for any action by the federal government that impinged upon provincial powers; and (c) in some cases- this one included- constitutional conventions are at least as important, if not more important than, constitutional laws.<sup>89</sup>

So Trudeau would have been violating an important constitutional convention, one that states that the provinces of Canada should have input when the federal government is making a decision that will have a substantial impact on states of affairs under their jurisdiction. Even though he was well within his legal right to patriate the constitution, there was considerable political pressure to refrain from doing so. Conventions played, and continue to play, an important role, then, in regulating constitutional powers.

It is now worth exploring whether there is a constitutional convention that limits the use of section 33 of the Canadian Charter. Recall that there exists considerable political pressure to refrain from the use of section 33. Politicians have denounced its use and the public is generally wary of any governmental actions which put their liberties at risk. On the other hand, the section has been used by Quebec without substantial political outrage. Granted, Quebec never officially signed on to the Canadian Charter, as it was added to the constitution without the approval of the defiant province. However, it is important to recall the circumstance of its use. It was used with respect to a Quebec language law which required that all signs in the province, including those

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<sup>89</sup> Ibid 29

of private businesses be solely in French. The English speaking business owners were outraged that they could not advertise in their native tongue and the Quebec government used section 33 to support the language law despite the widespread belief in the rest of Canada that it violated the freedom of expression of English speaking residents. The law stood for some time until the Quebec legislature finally removed the override clause and rewrote the law so as to loosen the restriction of languages other than French. The signs now had to be predominantly in French; this change appears to satisfy the charter and the override was not used again in this case. Recall that the override can only operate for 5 years until it must be passed again by the legislature. It is clear then that the prolonged use of the override would have created political tension in the province had it gone on longer. So Quebec had experienced political pressure to cease the use of the override and make their interpretation of the rights align with an interpretation used more predominantly by the rest of Canada. It is important to note that it was not *legally* forced to remove the override and amend the statute.

Another reason for believing that a constitutional convention is forming and preventing the use of section 33 in Canada has to do with the provision's wording. A constitutional convention makes it so that an action can be simultaneously legally permissible yet unconstitutional. While it would be legally permissible for the legislature to enact a provision using the override clause there is growing reason to believe that it may be unconstitutional. Recall what Allen said about the wording of section 33. He believes that the wording supports the inference that the section is used not to respond to a judicial interpretation of charter rights, but instead, is used to subvert the charter completely. If we believe that what the legislature is doing when they enact a piece of legislature invoking this clause, is really ignoring the charter, and by extension ignoring the

**Comment [WW16]:** What makes you think that the change was in response to conform to what the courts had said? Why might the change not have been for pure political reasons?

**Comment [WW17]:** Too biographical. As a rule, try to avoid references to oneself.

constitution, then they are acting unconstitutionally. If this is what Allen believes, then it seems to be a little too strong. What is being trumped when section 33 is invoked, is at most, a particular right, and at least, a particular interpretation of a right, not the charter itself. The message that is being conveyed may be that in this particular case, pressing societal concerns take precedence over an individual right. None the less, this allows for that action to simultaneously appear legally valid, yet unconstitutional. If the culture in Canada is such that the judiciary is the primary interpreters of rights, and the legislature appears to be subverting the constitution and thus acting unconstitutionally, they are not politically free to invoke the clause for fear of political backlash. Of course this can be a descriptively accurate account of current political realities without it following that it represents an optimal state of affairs. The point of this inquiry is to highlight that if one were to be looking to discover the realities of judicial review in a state, one should first seek to explore the actual states of affairs. Only then would one be in the best position to make prescriptive recommendations.

Something similar can be said for the British case. Recall that if the legislature responds to the judiciary's statement of incompatibility by disagreeing, and if there is a convention requiring Parliament to act on a declaration of incompatibility, it would appear as though the legislature were ignoring the constitution by stating that the provision shall continue to operate, thus giving the impression that they were disregarding the constitution, and again acting unconstitutionally-though legally. While in actual fact, they Parliament is disagreeing with the judiciary and their interpretation of particular provisions. If the public come to trust the judiciary and believe that they tend to get things right and best represent their rights, to ignore the judiciary could give the citizens the impressions that the Parliament is ignoring their rights altogether. Constitutional

**Comment [WW18]:** I'm not so sure of this. I think the point needs to be more subtly expressed. What is being trumped when 33 is used is the right in question, not the charter itself. The message that is being conveyed may be that, in this particular case, pressing societal concerns take precedence over an individual right. The Charter is not being ignored, but a Charter right is being overridden. This is different from the alternative reading on which what is being overridden is not a right, but the judiciary's interpretation of it and its resultant view about whether the right is in fact trumped by societal concerns that justify its giving way. Of course, none of this contradicts your point that the legislature would be acting legally but, in virtue of the convention, unconstitutionally.

conventions are powerful though non legal limitations on government power. If the Canadian and UK parliament are limited by constitutional conventions that give authority to the judiciary to interpret the relevant rights documents and statutes in the adjudication of charter rights disputes, then it appears as though the powers that Gardbaum relies on in his defence of judicial review cannot be actualized in practice.

Were matters only this simple. It is far from obvious; however, that the political pressures associated with the two formal powers I have been discussing can rightly be elevated to the level of constitutional convention. For one, the charter in Canada is young (1982), and the HRA was only officially adopted as the UK's charter around the same time. Conventions take time to develop. Perhaps there is a certain minimum amount of time before a rule can have the same level of bindingness as a convention. Perhaps there is a threshold of political force or recourse available which encourages adherence to the norm. These are all interesting ideas. Perhaps the norm limiting the successful use of these formal powers has not yet reached these thresholds enough to sit next to the other constitutional conventions that have been recognized by legal officials. One thing is clear, however, which is that some kind of norm exists in each case, and it appears to be limiting the powers upon which Gardbaum relies so heavily. These norms at the very least bear a kind of kinship relation to a constitutional convention. They are at least the same kind of thing. It is more than simply conceivable that if we continue forwards on a similar trajectory of acknowledging considerable political pressure against the use of these powers, that one day a constitutional convention against their use will be recognizable to the majority of legal officials. I submit that it is probable that if the attitude surrounding these legislative override

powers does not change then we will be left with a convention prohibiting its use.<sup>90</sup> So if we are hesitant to grant that currently there is a constitutional convention surrounding the prevention of the realization of these powers, we might agree that it appears as though one is being created.

## vi Deference in a Theory of Judicial Review

Another feature that is important to keep in mind when assessing judicial review accurately is the concept of deference. Discussed at length by Aileen Kavanagh in her article “Deference or Defiance?: The limits of the Judicial Role in Constitutional Adjudication”, this relationship of respect between parties is based on no formal written rules, yet it often regulates what institutions are willing to do quite considerably. Kavanagh explores whether deference by the judicial branch to the wishes of the legislative is a detriment or a virtue. She specifically takes a look at what makes it appropriate for the judiciary in the U.K to defer to Parliament on cases involving the HRA.

**Comment [WW19]:** Check reference.

By deference Kavanagh means the situation of “assigning weight to the judgement of another, either where it is at variance with one’s own assessment, or where one is uncertain what the correct assessment should be.”<sup>91</sup> She expresses two distinct but connected reasons why one party would defer to another when a decision needs to be made. The first is that it is reasonable to defer to someone who has superior knowledge about matters relevant to the decision, in hopes of better acting on the correct reasons. It is prudent after all, to defer to a doctor or financial

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<sup>90</sup> I admit that here I am speculating. But if we take seriously the belief that laws come out of social rules that are not necessarily themselves legal in nature, then it is reasonable to assume that when there is a convergence of action by a society then eventually the norm created will be binding, as long as the norm is a social rule and not merely a habit.

<sup>91</sup> Aileen Kavanagh “Deference or Defiance?: The limits of the Judicial Role in Constitutional Adjudication” 185

planner when one is not in the position to know more than them about healthcare or the economy. Kavanagh argues that this is out of respect for the judgement of another.<sup>92</sup>

But we may also defer to someone's judgement even when we do not respect it however. A second instance where we may defer is when we are trying to create or manifest respect; we defer out of courtesy.<sup>93</sup> The example used by Kavanagh is one where two friends are going to see a movie. The first knows that the second has poor taste in films, yet chooses to allow her to decide on the movie in an effort to "show or manifest respect for her,"<sup>94</sup> and to demonstrate how valuable the friendship is to her. So both reasons to defer are closely connected to respect, argues Kavanagh. In judicial adjudication, it is not the case that the courts need to defer completely to the will of the legislature. However, they do need to express some sort of respect for the decisions and judgments made by Parliament. They are expected to ascribe varying degrees of additional weight to those judgements out of respect. Kavanagh says that "[e]ven when judges disagree with a decision made by the elected branches, they must, nonetheless, do so respectfully- that is, in a way that does not belittle or ridicule those decisions or de-legitimize them."<sup>95</sup> This is to foster and uphold the requirements of comity- "the requirement of mutual respect between branches of government."<sup>96</sup> To put it plainly, the legislative and judicial branches are respective *parts* of the *whole* government, the purpose of which, in part, is the efficient functioning of the legal system. Little is to be gained when they act as adversaries. Instead, if they act as allies with that common goal in mind, that goal is likely to be reached much sooner. It makes sense that a convention of comity would result between two groups

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<sup>92</sup> Ibid 187

<sup>93</sup> Ibid 188

<sup>94</sup> Ibid

<sup>95</sup> Ibid 189

<sup>96</sup> Ibid 188

whose purpose is to come together and ensure equal rights and opportunities for the same population.<sup>97</sup>

Judicial review in the way we have been discussing it, should not be viewed as the pitting of differing interpretations of rights against each other, only to find that the branch with the final say will see their interpretation realized and authoritative. Any theory that seeks to explain the intricacies of judicial review needs to incorporate how the branches communicate with one another. Kavanagh points out that the judiciary and the legislative branches of government have differing roles. It is not the case that both are equals at the same table with respect to norm creation. Legislators are for legislating and the judiciary is for adjudicating. She suggests that “[w]hilst ordinary citizens can view legislative or executive actions in a skeptical way (presuming them to be erroneous or misguided unless proven otherwise) this is an inappropriate attitude for the judiciary to adopt.”<sup>98</sup> While judges do not necessarily have to agree with every decision the legislature makes, they must display respect for and “give weight to, the fact that this is the solution chosen by the legislature or the executive and cannot therefore dismiss it without good reason.”<sup>99</sup> This for Kavanagh is called minimal deference. This means that the judiciary is “to attribute some presumptive weight to the decision taken by the elected body.”<sup>100</sup> What this means in practice is that judges ought not invalidate or criticise a legislative provision *merely* because they disagree with it or because they could have come up with a better solution to the particular problem the legislature was addressing. There are at times many reasonable

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<sup>97</sup> The relationship of comity is expected to include the executive branch of government as well. Kavanagh believes that the judiciary owes the executive respect as well but for the purpose of my writing, I am only concerned with the overlap of the legislative and judicial branches, since these are the primary expositors of interpretations of legislation and individual rights and liberties.

<sup>98</sup> Ibid 191

<sup>99</sup> Ibid

<sup>100</sup> Ibid



solutions to a particular problem with which the elected body is faced. We as citizens often express our approval in different ways. Political parties often find themselves trying to fix the same problems year after year: rising unemployment rates, soaring healthcare and education costs, immigration reform, and many others. Yet they disagree on ways to address these concerns; some advocate for austerity measures while others pump and prime the economy. Often the solutions offered are reasonable while dividing citizens. We as citizens are encouraged to criticize the solutions offered. However, the judiciary is not in the same position. Once a decision has been made, the judiciary is not free to act as though they could have come up with a better solution.

Kavanagh states that this is because judges have a secondary responsibility in political decision-making not a primary one.<sup>101</sup> This means that it is not the judiciary's responsibility to ensure the correct decision is reached based on some sort of substantive evaluation. Their role is secondary in that they are to ensure that the primary maker acts in accordance with the requirements of legality. "If it violates those requirements, then this must be substantial in order to outweigh the systematic bias in favour of the legislation."<sup>102</sup> This is because instead of a correctness standard, the judges are to adopt a reasonableness standard when assessing political decisions in judicial review. "An option is reasonable if it is supported by reasons and is open to justification."<sup>103</sup> On the other hand, the correctness test would require the courts to identify whether the legislative or executive decision is the best one, which would essentially mean that the courts had injected themselves into the process as the primary decision-maker.

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<sup>101</sup> Ibid 192

<sup>102</sup> Ibid

<sup>103</sup> Ibid

According to Kavanagh, the courts are not willing to use a correctness standard unless they conclude that they are in a better position to deal with the complex issue in question and they are convinced they have the right answer. Recall that rights-determining decisions are very much political, in that they must balance many different kinds of consideration from different interest groups. Many of these considerations are well out of the realm of the expertise that most judges possess. Often decisions about policies will have economic, social, political, as well as legal ramifications. Elected representatives work closely with experts who advise them on the many ways that potential legislation will impact the citizenry. When there is a particular problem that needs addressing, e.g., whether inmates should be allowed to vote, whether to legalize certain recreational drugs, or whether to enhance or reduce access of certain medical services to a certain population, elected members can come up with at least a few reasonable answers. While it is possible that all of those answers are legally permissible from the point of view of the constitution or some other relevant measure, we do need to agree on one answer. Elected members often invoke social and systemic consequences of choosing one answer over another in order to eliminate some of the options. Things like minimal societal impact, efficiency, and economic investment often sway officials in one direction or another, even though each answer would again, be legally permissible. Judges are hesitant to make themselves the primary decision-maker in situations like these because they simply do not have the time or the tools at their disposal to address all of these concerns.

It makes sense to assume that judges are honest with themselves and the public about what their role is. I agree that judges should distance themselves from using arguments of policy when making law-determining decisions. A policy-based consideration is one where we attempt to decide what would be best for the community. This is where we consider the kinds of things

discussed above: economic investment, efficiency, and social organization. “Policy is defined as a kind of standard that sets out a goal to be reached. . .”<sup>104</sup> Arguments of principle focus more on which types of decisions the citizens have a right to at this moment. They focus on individual rights which are, after all, what the courts are designed to identify and support. Disputes happen when one individual’s rights interfere with another person’s rights.

So Kavanagh believes that minimal deference applies across the board and in all cases, but any more substantial deference “has to be earned by the elected branches and is only warranted when the courts judge themselves to suffer from particular institutional shortcomings with regard to the issue at hand.”<sup>105</sup> These are times when the legislature is believed to have more expertise, resources, or competence with respect to a particular issue.

It is not hard to see the impact that the concept of deference has on the practice of judicial review in a state. If it is true that the judges are bound by political convention, to show a level of constraint as per the requirements of comity, then this will have an impact on the kind of judicial review practiced. Showing respect for the legislature in a state suggests that the judiciary is sensitive, at least in theory, to the ideas and wishes of constituents. If, as I have argued, it matters less who has the final say in making rights-determining legal actions, and more whether the democratic ideal of equal concern for the ideas of citizens is present, then it is important that this relationship of comity is in place. However I do not purport to know the complete contours of the relationship. There is no doubt that it is very complex. The courts must believe themselves to be experts in at least one field, namely the law, and as such, must believe themselves the primary decision-makers in all things legal. I believe that any evaluative theory of judicial

**Comment [WW20]:** What is the nature of this constraint? Legal? Constitutional? Conventional? Political?

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<sup>104</sup> Ibid 195

<sup>105</sup> Ibid

review must include information about the kind of relationship that exists between the judiciary and the legislature in order to be accurate and informative.

Recall earlier when we were looking at the Charkaoui decision written by Chief Justice McLachlin. She wrote that it is not the job of the courts to make laws or determine how the legislature ought to act. It is their job to adjudicate and determine when the laws created by the legislators conflict with the charter. We get a glimpse here at the kind of relationship that exists between the courts and the legislature. In Canada we see an increasing number of instances where the courts are choosing to wait a period of time before they invalidate a statute, even though it is within their power to invalidate any statute that they deem inconsistent with the charter. In both recent high profile decisions in Canada involving prostitution<sup>106</sup> and physician assisted suicide<sup>107</sup> the courts chose not to invalidate immediately the relevant criminal provisions, despite believing them to violate the charter. Curiously enough, both cases saw unanimous agreement with no dissenting opinion. This gives the appearance that the court is united in believing that the criminal provision violates the charter in a way that requires remedy. However, the courts also were sensitive to the political issues surrounding their decision. They recognized that they themselves ought not to play legislator on issues as hotly debated in the public realm as prostitution and physician assisted suicide. The courts gave one year to the legislature to amend the criminal provisions to make them more responsive to the relevant limitations of the charter. Whether this was out of respect for the legislature, or fear of public backlash need not concern us here. What is clear is that the Supreme Court of Canada does not see itself as the primary decision-maker in situations where there clearly is a requirement for

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<sup>106</sup> See *Canada (Attorney General) v Bedford* 2013 SCC 72

<sup>107</sup> See *Carter v Canada (Attorney General)* 2015 SCC 5

public input. Therefore the courts believe that the legislature ought to be the primary decision-maker on issues like prostitution and physician assisted suicide, despite being unanimous in their judgement of unconstitutionality. So despite being sure about what needs to be done, the courts will sometimes stay their invalidation for a year, this giving the legislature enough time to modify the laws on their own terms.

This relationship, however, cannot simply be one sided. When I argue that a theory of judicial review must explain the relationship between the court(s) and the legislature(s) I do not commit myself to a relationship even similar to the one I have suggested briefly in Canada. It is possible that the ideals of democracy require the courts to alter the course of law. The *Brown v Board of Education* decision comes to mind when pondering this point. In the Canadian example it may well be clear to society that the legislature will aim to address the concerns of those who are negatively affected by the criminal provision. However during the time in US history surrounding the separate but equal legislation it was not clear that the legislature was willing to address the concerns the way that the courts believed proper. In his book *The Living Constitution*, David Strauss outlines how the common law was altered in a specific direction by a series of judgments made by the courts that repeatedly struck down provisions that embodied the concept of 'separate but equal'. Prior to, and even after, the decision in *Brown*, it was not clear that the relevant federal and state legislatures appreciated the issues concerning equality raised by the notion of separate but equal, and thus had no real intention of recalling the laws invoking the concept. It is likely that the courts saw this, and knew that had they failed to invalidate the unconstitutional provisions, it would have taken much longer to address. If true, this would mean that the courts believed themselves to be properly qualified to make the decision which would see the end of the legal recognition of the separate but equal doctrine.

Whether they believed themselves to be acquainted with the relevant facts or simply believed that they had ‘the correct answer’ and that anything short of their answer would fail the reasonableness criteria, they chose not to defer to the legislature.

On the procedural conception of democracy we would likely see a stricter and simpler conception of deference behind the actions of the court. We would come to expect the judiciary to defer to the dictates of the legislature due to democratic concerns. If we put a premium on the procedures of democratic decision-making, we would require the courts to respect any decisions made by democratically elected officials. I suggest however, that our societies instead endorse a constitutional conception of democracy, and thus encourage a more complex conception of deference. In a reasonably well-functioning constitutional democracy, much like Kavanagh has stated, there must be a base level of respect; a kind of minimal deference found between the legislative branch, and the judicial and executive branches, respectively. A more substantial deference must be earned when the courts find themselves to suffer from some sort of institutional shortcomings that limit their ability to properly decide an issue.

When developing a theory of judicial review, where we are aiming to identify constitutional powers, we ought to look closely at the relationship of deference as it exists or could exist between the branches of government. It is an example of that political pressure that shapes the actual practices of the judiciary. The act of making a rights-determining decision is not a completely isolated event. The actions of the judicial and legislative branches can mirror the relationship found between different parties found in partisan politics.

The act of legislating requires a complex relationship between the various parties involved. Bills need to be voted on. Found more prominently, but not solely, in cases where there is a minority government formed, where the voting power of two or more other parties is greater

than the party which won the election, there tends to be a great deal of negotiation. The party in power finds itself having to compromise certain aspects of a bill or motion in order to see that the other members voted into office from other parties support its bill or motion. Often the members putting forward the bill will ask for support for their bill, by offering support for someone else's despite it not being something they would have put forward themselves. There is a great deal of 'I scratch your back, if you scratch mine.' It is a natural consequence of living in a state with others who have views or goals differing from your own. When we come to this situation, and both parties could benefit from a partnership, it makes sense to help the other person achieve their goals in order for them to help you achieve yours. The first draft of a bill is drastically different from the final product. It will be edited through compromises made to critics. The reason is partly due to the fact that politics is different than a simple contract negotiation in that it does not consist of isolated negotiations. When one has only to meet with a party until a certain deadline, it is much easier to try and assert one's own will in an effort to get the best possible conditions for the contract. However, knowing that one will have to meet with those same legislators for the next four years in order to debate all potential bills requires one to leave one's ego at the door. A legislator does not have the option of leaving after she is finished debating her point of view. It would harm any chances of garnering support for future proposals if one were to fail to look willing to engage with the opposition.

Like the other political parties that make up a government, the judicial branch is one of three branches which have the common goal of the well-being of a nation. The citizens of a state benefit greatly from a partnership between the legislative and judicial branches of government. Each has the ability to make the other party's job easier or extremely difficult. If those branches

have an antagonistic relationship, and take every chance to slow each other's progress with red tape and administrative headaches, then this will influence the kinds of law-determining actions that each branch can perform. The mutual goal of a smooth and well-functioning democracy requires that they compromise, and show respect for each other at the appropriate times. It explains why the judiciary ought, in most instances, to use a reasonableness instead of a correctness standard when assessing rights-determining decisions. Concessions need to be made even when both parties do not completely agree. This means that each branch will need to limit its power out of respect. This is another example of why the formal power that each branch has can differ from the actual constitutional powers that are in practice. While it may be legally permissible for the judiciary to strike down legislation, it may choose to limit this power out of respect. Similarly, while it is within the legal rights of the legislation to re-enact a piece of legislation that is very similar to one already previously struck down, they may be willing to see the judiciary as the appropriate legal expert and refrain from doing so. The type of relationship that exists between the various branches of the government will affect the actual constitutional powers practiced. In order for us to have a complete theory of judicial review, we must understand either the relationship that exists currently between the various branches of government, or describe how such a relationship ought to be structured.

## **vii A Theory of Judicial Interpretation**

An important aspect of a theory of judicial review is an explanation of what the judges are/ought to be doing exactly when they interpret a charter or rights and any legislation that might be thought to infringe it. In *Laws Empire*, Dworkin describes his theory of interpretation, calling it *law as integrity*. Some of Dworkin's conclusions ought to be taken very seriously when



constructing an accurate theory of judicial review. Dworkin endorsed the right answer thesis, which essentially means that for every legal question, there exists one correct answer which is required by law. This means that even in hard cases where there is no clear answer, the judges have the duty to search until they discover the legally required remedy.

This is largely because Dworkin believes that “Judges, however, are authors as well as critics. A Judge deciding *McLoughlin* or *Brown* adds to the tradition he interprets; future judges confront a new tradition that includes what he has done.”<sup>108</sup> His analogy of law as a chain novel,<sup>109</sup> works well when we remember that states like Canada, Britain, and the US are common law jurisdictions. This means, in short, that law is able to evolve through rulings in court cases. Case law can be as much a part of legal content as positive written law. When judges decide a case in a novel way, they add to the content of law, much like the author adds a chapter to the chain novel. Dworkin believes in a constructive interpretation of law; one that is interpretive all the way down. He believes that judges should be prepared to engage in moral philosophy

Comment [WW21]: Check quotation

### viii Legal and Moral Principles

According to Dworkin, the *Constitution* is not exhausted by the positive written law found in rule books, written constitutions, and judicial decisions. It also includes “the principles of political morality that provide the best explanation and moral justification — i.e., the best constructive interpretation — of whatever written instruments in which its requirements are

<sup>108</sup> Ronald Dworkin *Laws Empire* 229

<sup>109</sup> Ibid Here he suggests a situation where we take a novel to be written one chapter at a time. The goal is to write a coherent novel where each chapter is written by a different author. The authors aim to write one coherent story. In order to do so they must stay true to the major commitments of the authors previous or else risk the finished product lacking integrity throughout. They are free to be creative in their interpretation so long as their interpretations of what the previous authors wrote place the work in the best possible light.

explicitly expressed...”<sup>110</sup> Dworkin believes that there exist underlying moral principles that inform and justify written legal norms and it is often a judge’s job to navigate those moral principles and construct a theory that best explains those principles. This construction requires moral reasoning and informs the judge on how best to decide the case at hand.

Moral principles will have a large impact on what will end up being legally permissible. In Canada, constitutional principles played a pivotal role in the ruling that Quebec could not succeed from Canada unilaterally.<sup>111</sup> The Court, in deciding this case, made use of four principles that they felt underpin the written constitution of Canada: federalism, democracy, constitutionalism and the rule of law, and respect for minorities.<sup>112</sup> The court stated that “[t]hese principles inform and sustain the constitutional text: they are vital unstated assumptions upon which the text is based.”<sup>113</sup> Each of these must be understood as part of a whole constitution and at the same time they inform and define each other. The court described the Constitution as having an underlying structure where the “defining principles function in symbiosis” and “infuse our Constitution and breathe life into it.”<sup>114</sup> The court sought guidance from these principles that they expressed in great detail because the words of the Constitution did not provide a definitive answer to the question about whether the unilateral succession of Quebec was legally permissible. The Court wrote that “the preamble invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express

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<sup>110</sup> Wil Waluchow “Judicial Review and the Possibility of Detached Constructive Interpretation ” (Unpublished paper)

<sup>111</sup> See Reference re Succession of Quebec [1998] 2 SCR 217

<sup>112</sup> Reference re Succession of Quebec [1998] 2 SCR 217 sec 32

<sup>113</sup> Ibid section 49

<sup>114</sup> Ibid section 49-50

terms of the constitutional text.”<sup>115</sup> The right answer thesis means that judges are to act as if there is always an answer to be discovered somewhere in the law, one that it takes time to discover. This discovery, of course, requires moral deliberation about legal principles.

The succession of Quebec would be a political as well as legal action. Legal because it would require a substantial amendment to the Canadian Constitution and alter the governance of the territory. Though the Constitution is silent on a province’s ability to secede, it does have explicit conditions which must be met in order to amend the constitution, which a province’s leaving would demand. The reality was that, should Quebec leave, the alteration to the way the territory was governed would have resulted in drastic changes largely inconsistent with the current constitutional arrangements.<sup>116</sup>

## **ix Constructive Interpretations**

According to Dworkin, when dealing with difficult cases, judges are to construct the interpretation of principles that place the existing law in its best possible moral light. A constructive theory of judicial review is not an easy thing to develop. There is no mechanical process or simple test that can be applied in order to tell the judge what the best possible interpretation requires. However, as we saw earlier, this does not necessarily mean that there is no such best possible theory. If we take seriously the idea of a constitution as a living thing that needs to adapt and change to contemporary issues, then our theory of judicial review must be constructive. We must be open to the fact that we will have to make decisions about ever complex problems. Dworkin is right to support a constructive theory of judicial review. Recall

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<sup>115</sup> Ibid section 52

<sup>116</sup> Ibid section 84

that the legal norms expressed in a constitution in the form of legal rights, are first and foremost moral in nature. Though a legal right of equality was recognized it was very much a right of political morality. The idea of a constitutional charter is to bind the representatives to certain moral values, and limit their actions to ensure that they respect those moral values. Each individual state that adopts a charter of rights believes it has good reason to endorse and codify their particular set of moral values and to add a legal dimension to them.

To treat legal norms as static things that do not change from their original meaning is to forget this important fact. If we are not receptive to the idea that the constitution is a living thing, unpersuaded that its principles have given it breathe, then we will be committing ourselves to a purely legal document containing rules and regulations. But a constitution is not a finished product handed down from its framers containing only those rules and regulations they sought fit to include. On Dworkin's reading, constitutional meaning is an ongoing and interpretive task which requires construction. Judges are to find the best possible interpretation of the law at each particular time in history. That means that at any given time,  $t_1$ , the best possible interpretations of the principles may be different than at time  $t_2$ , resulting in differences in what is the correct outcome in a particular case. This is not a weakness but a strength since things will be added to the law with each decision. This means that constitutional law has the potential to be shaped by various contributors, making it flexible enough to adapt to growing issues that were previously unforeseen. Case law will add to the existing content of law and will shape the possible interpretations of law, perhaps eliminating ones while re/introducing different ones. Historically speaking, we did not run into issues of physician assisted suicide until more recently in our history. This has to do with the fact that previously, people did not tend to live long enough to see their mind deteriorate in the way that Alzheimer patients do. Advancements in technology

are leading to different kinds of suffering that many people never reached because people would not have had a chance to reach a certain age. New fertility technology requires new regulations and responses from the government. The moral principles found in constitutional law must allow for some elasticity.

I am not here advocating for judicial activism simply because legislation may take longer to adapt to changing circumstances. Nor, am I suggesting any form of common law constitutionalism that entails that judges are necessarily imposing their own moral values and altering the law to suit their own wishes and desires. Strauss, in his book *The Living Constitution*, discusses the necessity to understand the constitution as a living thing to be found in a common law system. Like any living thing however, it cannot grow past certain limits. Trees cannot grow too large, too fast, such that their roots are not able to supply the leaves with water. In one of the chapters Strauss defends the decision in *Brown*, to overturn a precedent that supported the segregation of African Americans in schools in the United States.<sup>117</sup> Many people believed at first that the US Supreme Court lacked sufficient legal support to overturn the precedent. Some worry that in a common law system which supports living tree constitutionalism, precedents no longer have force and can simply be overturned at the wishes of a particularly active group of judges. In response to this, Strauss writes:

The common law, as I have mentioned, does not treat precedents as untouchable; sometimes, precedents can be overruled. Exactly when they can be overruled is a complex matter, but there is at least one well-established pattern of overruling in the common law. And *Brown* conforms, to a remarkable degree, to that pattern. Once we understand that our Constitution is not just the text,

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<sup>117</sup> David Strauss *The Living Constitution* “Brown V. Board of Education and Innovation”

and not just the original understandings- but is a living constitution that evolves as the common law does-*Brown* begins to look, if not routine, unquestionably lawful.<sup>118</sup>

**Comment [WW22]:** There are lots of mistakes in this quotation. Check it and fix them.

Strauss goes on to describe that the growth and change often associated with common law is not as quick and disorganized as most people fear. A monumental case like *Brown* is not the result of one off judicial activism but the culmination of decades of small changes. It is very easy to fall into the trap of believing that, prior to *Brown*, segregation had judicial support, while post ruling, it did not. On this reading, *Brown* initiated a rather substantial shift. What we forget is that “[t]he cases leading up to *Brown*...had already left “separate but equal” in shambles. *Brown* was the completion of an evolutionary, common law process, not as isolated, pathbreaking (sic) act.”<sup>119</sup>

Throughout his chapter on *Brown*, Strauss traces the development of the concept of “separate but equal,” which was the underlying principle for segregation, through a series of cases, starting with *Plessy* in 1896. In the decades between *Plessy* and *Brown*, the courts were unable to find “a system of segregation that it believed satisfied the principle of separate but equal. In case after case the court had concluded that separate facilities were not equal.”<sup>120</sup> In deciding as they did in *Brown* then, it is clear that the judges were merely following the progression already expressed by decades of judicial decisions before them. The adoption of a theory of living constitutionalism does not commit us to the belief that it is the duty of judges to proactively change or modify the constitution the way they see fit. It merely suggests that precedents can be overturned if there is enough legal reason to do so. I am not a judge and do not purport to know how much legal support is needed to ignore past precedent. However, a theory of judicial review

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<sup>118</sup> Ibid 79-80

<sup>119</sup> Ibid 85

<sup>120</sup> Ibid 90

must require that we periodically re-examine the trajectory of our common law constitutions. At the time of the *Brown* decision, people had not taken the time to notice that decades of court cases were ruling out instances where separate facilities were resulting in treating people unequally. So it appeared as though there was no legal support for the decision, and it appeared as though the Supreme Court had engaged in unbridled judicial activism. However, the courts were aware, just as the rest of us are now, that decades of common law development of the US Bill of Rights meant that the principle of “separate but equal” was being filled out more. This filling out meant that the judiciary were in a sense required to rule the way they did. They had the expertise to notice what the legislature had not noticed yet; that there was no just way to enforce the principle of “separate but equal.”

There are two points worth stressing now. The first is that the moral character of something like a charter requires that we take a common law approach to its interpretation. These types of documents are not filled with rigid rules and regulations but with intentionally abstract moral language like: equality, freedom, liberty, and due process. We must then be open to judges interpreting these moral terms on an ongoing basis, perhaps as Dworkin thinks, engaging in moral philosophy.

The second point is that this interpretive act does not need to start afresh each time. Our greatest fears involving judges’ imposition of their own moral beliefs in each new case, do not necessarily need to be realized. It is possible that the common law has a way of restraining itself. Precedent cannot simply be overturned because the judges had interpreted the moral contents of the right to free expression differently than the precedent setting judge had. It is possible that change has to occur gradually over time. Enough time such that the content of the moral right to

freedom of expression changes among society. Each judge is required to explain their reasoning. This means that the relevant moral concepts, like freedom of expression, are not as much changed as they are filled out more, as with the case of Timmy<sup>121</sup> and his motor car. If the judge involved in deciding whether Timmy is to spend time in the slammer were to look to previous judge's decisions about skateboards, roller-skates and strollers, they might have been able to better carve out what the term 'vehicle' truly means for legal purposes. While it certainly is possible that judges are imposing their own moral views when they are deciding cases, there is no reason to believe that this is necessarily the case. That is, the conclusion that judges are imposing their own moral views needs to be argued for, and not imply assumed to be true because we are displeased with the decisions they are enforcing, or the trajectory of the common law. Wil Waluchow develops a constructive theory of judicial interpretation in his book *A Common Law Theory of Judicial Review: The Living Tree*, and in it he argues that judges are not enforcing their own moral opinions about rights, but are instead constructing a theory about what they believe the community's morality requires them to do.

#### x Waluchow's Theory of Moral Reasoning in Judicial Deliberation

What follows will not be a complete explanation of Waluchow's Living Tree theory for I do not have space. I do however wish to highlight the role moral reasoning plays in the process of interpretation to respond to some of Waldron's earlier mentioned criticisms. I have in mind here Waluchow's claim that judges should not enforce their own moral principles when they come to

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<sup>121</sup> An example first used by Hart in *Concept of Law* was one where Timmy was brought into court having said to have violated a provision barring vehicles in the park. The court was tasked with determining whether his motorized toy car constituted a vehicle. The example is used to illustrate how ambiguous language often leads to indeterminacies in the law. Ambiguous terms like 'vehicle' exist in the law as a strength, argues Hart, and thus get to be filled out when cases are tried in court.



rights disputes but should instead be making decisions from the point of view of their communities.

The first thing Waluchow does when describing which kinds of norms judges are referring to when they claim that a statute is constitutionally invalid is to say that we are not talking about Platonic norms. So it is not the case that judges claim to have access to some sort of objective understanding of the word ‘equal’ that they purport to be using when interpreting a case involving that notion. Instead they refer to “the norms of conventional or positive morality – the morality actually accepted by the relevant population....”<sup>122</sup> People in everyday situations hardly ever espouse to be devout kantians or utilitarians. We often use moral reasoning comprised of more conventional moral precepts. This means that judges are aiming at using the actual moral concept that is in practice in the relevant community. Plato posited that there is a perfect form of justice, one we do not have access to unless we are philosopher kings. Judges are not suggesting that they have access to this objectively correct form of justice, if only because we cannot all agree on what that is. Instead they are interpreting what the community as a whole generally believes as being contained in the concept of justice. That is, our best attempt at the concept, to be found in how we actually use it, and how it actually guides our behaviours is what judges are after when they decide charter cases. It can be notoriously difficult to identify the positive morality of a community for it may take many shapes. Waluchow suggests a few different difficulties. Given the vast pluralistic societies of Canada and America, we surely have many different and competing comprehensive doctrines<sup>123</sup> and we can’t simply pick out the majority

<sup>122</sup> Wil Waluchow “Constitutional Morality and Bills of Rights” 66

<sup>123</sup> Rawls in *Justice as Fairness: A Restatement* refers to a person’s body of moral beliefs as their comprehensive doctrine. Not all beliefs a person has are part of their comprehensive doctrine. On page 60 Rawls uses the concept to refer to all the beliefs that inform a complete conception of the good for that individual. These beliefs must be

**Comment [WW23]:** This needs more explanation. Only some beliefs are part of a comprehensive doctrine. For instance, my comprehensive doctrine does not include my belief that the Jays will win the World Series this year.

opinion since “by its very nature... a bill of rights is supposed to protect vulnerable minorities and individuals against the errors, prejudices, and excesses of powerful majorities.”<sup>124</sup>

Waluchow’s claim that judges should invoke a community’s constitutional morality when interpreting charter rights, “implies that there is a morality (or at the very least a set of moral beliefs) that can be ascribed to the community and which the judge’s decision replaces.”<sup>125</sup> It is doubtful that there may ever be complete consensus across a community with respect to the meaning and import of complex moral terms. But if we are going to be able to properly attribute norms to a community we must be able to identify at the very least some form of “overlapping consensus.”<sup>126</sup> Waluchow describes this notion as a situation where “we agree on a range of particular conclusions but disagree about the general premises required to yield them.”<sup>127</sup> Like Rawls before him, Waluchow believes that different people can have different motivations which direct them to similar conclusions and thus we can have what appears to be a significant overlap with respect to what ought to be done. But the overlap is not complete. It is only partial. Waluchow reminds us that “[e]veryone agrees that we should pursue equality- but there is considerable disagreement about whether, for example, this justifies affirmative action programs.”<sup>128</sup>

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consistent with one another and are informative about what that individual believes is part of the good and is worth pursuing. That being said, my professors belief that the Blue Jays will win the World Series is not part of his comprehensive doctrine.

<sup>124</sup> Wil Waluchow “Constitutional Morality and Bills of Rights” 66

<sup>125</sup> Ibid 67

<sup>126</sup> Waluchow quoting John Rawls Ibid 68

<sup>127</sup> Ibid 69

<sup>128</sup> Ibid 69

For Waluchow, whether we are talking about a community or an individual moral agent, the “requirement of reflective equilibrium”<sup>129</sup> is a necessary element of responsible moral decision-making. This requirement has to do with making sure that the beliefs and values within our individual moral comprehensive doctrines are internally consistent with one another, based on true beliefs, among other criteria.<sup>130</sup> For Waluchow then, it is only after this moment of careful reflection, and after one has discovered that her moral beliefs and opinions are consistent with one another and that she does not wish to relinquish them for a different set, that one can be said to have a set of true moral commitments as opposed to mere moral opinions.<sup>131</sup> The term ‘true moral commitments’ refers to the moral beliefs that one is truly committed to after reflection, as opposed to mere moral opinions which one has not reflected deeply about to see if they conflict with one’s deeper seeded commitments. Of important significance is that the possibility exists where people can differ in their moral opinions but upon careful reflection find out that they have very similar moral commitments.

Waluchow points out that the Requirement of Reflective Equilibrium (RRE) is an ongoing procedure and often goes forgotten when we bring moral deliberation back to the context of judicial decisions. “When bill of rights decisions are criticized for being out of sync with (and supplanting) the moral views of citizens, it always seems to be the case that the focus is on some widespread moral *opinions* that are at odds with the court’s ruling.”<sup>132</sup> Waluchow notes that then recent decisions surrounding gay marriage in Canada were criticized for being at odds with

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<sup>129</sup> Waluchow quoting John Rawls Ibid 72

<sup>130</sup> Ibid

<sup>131</sup> Ibid

<sup>132</sup> Ibid 73

mainstream Canadian moral views. These opinions however upon careful reflection quite clearly contradicted deep-seated moral commitments and values to equality that the community was prepared to uphold in other situations. Instead of basing decisions on the mere moral opinions of a community, Waluchow suggests, correctly I think, that judges should be using the true moral commitments of the community. It is not unreasonable to think that, since we expect individuals to engage in RRE when engaging in moral deliberation, so too should communities make moral decisions based on reflected upon commitments.

Waluchow goes on to argue that judges are in a better position to identify the reflected upon community's constitutional morality than legislators. By a community's constitutional morality he means "the set of moral norms and considered judgments, properly attributable to the community as a whole as representing its true moral commitments, but with the following additional property: they are in some way tied to its constitutional law and practices."<sup>133</sup> These norms are ones that the community has committed themselves to, and that have found some form of legal representation by the rule of recognition.<sup>134</sup> While it is true, as Waldron states, that we often disagree in good faith about what the law requires, there is:

"reason to believe that the constitutional morality imbedded in our shared social and legal practices... can include an overlapping consensus of true commitments on many issues, a consensus which may be incompletely theorized, but which can emerge, notwithstanding this fact, into explicit agreement once an attempt is made to fulfil RRE."<sup>135</sup>

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<sup>133</sup> Ibid 76

<sup>134</sup> Much more needs to be said about what exactly legal recognition means with respect to moral norms but unfortunately I do not have the space here to explore it.

<sup>135</sup> Ibid 78

So why are judges better suited? Returning to the criticisms that judges are imposing their own personal moral opinions on the community, with the above distinction we are now in a position to put the critic at ease. Waluchow argues that “[i]n ruling against a government action (for example, a statute or judicial ruling) that has the support of popular moral opinion, judges may not be acting undemocratically because they might, in fact, be *enforcing*, not *thwarting*, the community’s very own constitutional morality.”<sup>136</sup> This will especially be the case if the moral opinion has not been scrutinized under RRE. If the true moral commitments of a community find representation in law as being part of past legal precedents or established principles then the judge is required to uphold the law and deem a statute to be unconstitutional even if the surface moral opinions of the community support the statute. If the practice looks like this then it is far from undemocratic or an imposition of personal moral beliefs.<sup>137</sup>

One possible objection is that the judge will have no choice but to base her final decision regarding the community’s true moral commitments, on her own personal moral beliefs. The worry will be that the judge will end up imposing her own opinion about what the community *ought* to commit itself to. If they have to decide a case, and have trouble identifying the community’s actual moral commitments, they may have no other basis for their decision than their own personal moral opinions. In response, however, Waluchow points out that often we do rely on somebody’s controversial personal opinion about what the law requires, that person being a judge. The same is true in other areas of life as well. The analysis of scientific data is presented through a filter consisting of the judgement of individuals. We trust scientists to be able to, to the best of their abilities, remain impartial and objective about what they perceive to

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<sup>136</sup> Ibid 80

<sup>137</sup> Ibid

be occurring irrespective of what they might wish the results of their investigation to be. Is that completely removed from what we ask judges to be doing when we ask them to identify what the law requires them to do? Waluchow also rightly points out that charter deliberation under RRE “is not far removed from the more traditional task of common-law decision-making in, for example, tort and contract cases, where precedents and general principles must be reconciled with one another...”<sup>138</sup> The job of the judge is to identify to the best of their abilities what values and beliefs the community has committed itself to which find representation in law.

Furthermore, the community’s input in terms of its commitments ensures that citizens are able to participate in the legal process.<sup>139</sup> Judges have engaged in common law decision making for generations and have fine-tuned their skills at identifying principles imbedded in precedents. They are also not subject to the mere moral opinions as they recognize that they do not have to pander to the popular vote and are thus freer to pursue the deeper moral commitments which lie under the surface of those mere moral opinions.

I admit that what has been said so far concerning a theory of judicial review is barely a foundation and much more needs to be said to develop a fuller picture. However, the aim was to introduce the possibility of constructing a theory that addresses Waldron’s concern that judges in reviewing democratically enacted legislation routinely insert their own moral opinions into legal discourse and revise the law without concern for the participation of the rest of their community.

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<sup>138</sup> Ibid 81

<sup>139</sup> Whether this notion of political participation only pays lip service to the word is something that needs to be explored in great detail and I hope to do so in another work.

## Chapter 5

### i Conclusion

As we have seen, a large worry in the adoption of a formalized charter or bill of rights is who exactly will interpret the document. Without doubt, disagreements about what abstract words like ‘due process’ ‘equality’ and ‘in accordance with democratic principles’ refer to as well as who we should trust to make authoritative decisions are bound to come up. We need a decision-making procedure in place to settle disputes since we do in fact have a need to settle what rights and freedoms will be provided to citizens of a community. Jeremy Waldron gives us good reasons to hesitate in removing the power to interpret rights from the democratic decision-making procedure of the legislature since as rights bearers we feel entitled to the ability to deliberate and decide together which rules should govern our own society. However his tendency to label judicial interpretation as legislative in nature- making it difficult for the equal participation by the community in the political process of deliberation about rights-, is misleading. We have explored briefly a few attempts at appeasing Waldron by illustrating how a weak form judicial review could, if found, appease some of his fears about judicial activism. A state practicing weak form judicial review is one where the final say in rights-determining legal decisions lies with the legislative branch. Waldron believes that this is the only democratically justified form of judicial review.

Stephen Gardbaum describes his new Commonwealth model of Constitutionalism in his recent book. He argues that commonwealth countries like Canada and the UK are practicing weak form judicial review. He identifies features found in the constitution and in the structure of their respective government that supports the conclusion that their respective legislatures do have the final say in rights-determining legal decisions. I have argued that Gardbaum’s

approach is misguided and leads to inaccuracies. He focuses too narrowly on the structural features found in the respective states and he misses the fact that the actual practices of judicial review are much more complex. He underestimates key unwritten aspects of constitutionalism, like constitutional conventions, and political pressure, which when present, alter the power dynamics of the branches of governments. The constitutional powers he has identified, namely section 33 of the Canadian constitution, as well as section 3 and section 4 of the HRA, do not exist in the way that Gardbaum requires them to, in order for us to be convinced that the Legislators have the final say. Section 33 of the Canadian constitution almost never allows legislators to enforce their own interpretation of charter rights and legal provisions. Political pressure makes it extremely difficult for the British Legislature to disagree with judicial interpretations under sections 3 and 4. I do not necessarily argue that Canada and the U.K are not weak form judicial review because these particular constitutional powers are not in existence. I am however arguing that focusing on these powers the way in which Gardbaum does, is not determinative of the type of judicial review practiced in these two states.

I then shifted my focus in challenging the belief that judicial review must necessarily be weak form in order to be justified democratically. I argued that Waldron limits the contours of the discussion of judicial review by understanding democratic justification simply in terms of who has the final say. There exists more than one conception of democracy that has the potential to justify a system of judicial review. We do not necessarily have to, as Gardbaum attempted to do, propose a theory of judicial review that aims towards the justificatory threshold that Waldron suggests.

The final section of the thesis contains concepts or ideas that a complete theory of judicial review ought to include or address. This list may not be exhaustive. My aim was to bring



attention to areas of disagreement found in constitutional and legal theory that, if addressed, may lead to a particularly attractive theory of judicial review. A complete theory of judicial review ought to contain an account of constitutional conventions since they have impact on the kinds of constitutional powers available to the different branches. A theory must include how the branches work together and when if at all they defer to each other's judgements. It must address the fact that states like Canada, the UK, and the US exist as common law states where precedents create binding law. Interconnected with the idea of common law constitutionalism is that charters or bills of rights are often documents containing very abstract moral concepts. Case law discussing these moral concepts will be filled with refinements or Thomistic determinations of these abstract moral concepts which ought not to be ignored. When developing a theory of interpretation, it will inevitably need to be constructive such as to acknowledge the moral source of the legally recognized rights. Constitutions will need to be living, with the ability to grow and adapt such that rights like equality, due process, and freedom can be filled out by legal officials through legal decisions.

What I did not intend to do when I set out to write this thesis was to provide a complete theory of judicial review. Waldron offers very good arguments in favour of being cautious around constitutions. His arguments do in fact need to be addressed. I intended to show the way in which Gardbaum addressed the criticisms of Waldron results in inaccuracies and a misrepresentation of the actual states of affairs existing in the states he examines. However, in highlighting different discussions found through constitutional theory I intended to show that we may not have to respond to Waldron by playing his game, that is, by using his categories of weak form or strong form judicial review. While I have not here offered a complete theory of judicial review, I did argue that it is possible to construct one that addresses the appropriate

criticisms and concerns. Dworkin attempted to do this, and Wil Waluchow is currently developing a common law theory of judicial review that answers the critics of judicial review without bowing down to them. Waluchow's theory describes a community's constitutional morality (CCM) which represents the deep seeded moral commitments of a community that find some legal recognition. The judges in good faith seek to identify what the law requires of them on behalf of the charter by identifying the legal principles that embody the moral beliefs of the community as a whole. I am a supporter of constitutions and judicial review and I look forward to seeing bright philosophers develop complex and interesting theories of judicial review.

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