DEDICATION TO A PROCESS

# ON JUDICIAL REVIEW AND DEMOCRATIC AUTHORITY:

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ABSTRACT: Dedication to a Process argues that while judicial review is a justified decision-making procedure in a democratic scheme of government on instrumentalist grounds, it will always come at a politico-moral cost.

Chapter One surveys Thomas Christiano's egalitarian conception of democracy to establish a scheme of democracy upon which to ground this analysis. This chapter argues that under Christiano's account of the normative grounds of democracy, which is rooted in the fundamental social justice principle of public equality, there are necessary limits to democratic authority. When these limits are exceeded, there is a results-based argument available that can justify the use of judicial review from a Razian perspective, however, this manner of decision-making comes at the concession of a significant politico-moral value that is bound up with democratic authority: intrinsic justice.

Chapter Two analyzes Ronald Dworkin's constitutional conception of democracy to determine if there is a way to pay down the cost of judicial review. This chapter will argue that a purely content-based analysis like the one Dworkin is suggesting with his holistic scheme of democratic authority may be able to avoid the loss of intrinsic justice. However, if we are more concerned not with content but with who the authoritative voice is on constitutional matters, as is the case with Christiano's modular scheme of democratic authority, then we must revert to the conclusion reached in Chapter One.

Chapter Three considers Wil Waluchow's theory of Community Constitutional Morality to rule out the possibility that judges appealing to a community's positive normative commitments as a kind of customary constitutional law can be grounded in public equality, thereby retaining democratic authority and avoiding the politico-moral cost established in Chapter One. This chapter will argue, however, that despite passing the Public Equality Test mechanically, there is an important value argument to be made that locates intrinsic justice within characteristically democratic institutions such as the legislature and that any compromise of the democratic process must result in a politico-moral loss if we are indeed dedicated to the process.

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"Make a world where everyone knows that […] peace and love are our only hope."

— Elisabeth Steel Reurink

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## INTRODUCTION

Judicial review is the idea that a democratic society ought to have a written constitution that spells out the fundamental rights that each person possesses which is adjudicated by an independent court with the power to strike down any legislation that violates constitutional law.[1] This is an idea embraced in both Canada and the United States, embodied by codified documents such as the *Canadian Charter of Rights and Freedoms* and the *American Bill of Rights* as well as landmark constitutional cases including *R. v. Morgentaler* and *Brown v. Board of Education*. It is also an idea that has long been at the centre of discourse in the province of constitutional jurisprudence. Notable philosophers like Ronald Dworkin, Jeremy Waldron and Wil Waluchow for example have been at the forefront of this discourse, debating the democratic legitimacy of this practice. How can it be that in a democracy, where the fundamental principle of governance is "government by the people," a small group of unelected officials have the power to expunge a piece of popularly-voted legislation from the law books because they decide that it it is not in keeping with the Constitution? This is one of the main challenges

[1] Thomas Christiano, *The Constitution of Equality: Democratic Authority and its Limits* (Oxford: Oxford University Press, 2011): 278. There are generally two classifications of judicial review. There is *weak judicial review* wherein courts may scrutinize legislation for its conformity to liberal rights whereas, in a system of *strong judicial review,* the courts have the authority to either decline to apply a statute, modify its effect to make it conform to liberal rights, or strike down a piece of legislation entirely out of the statute book. This thesis will be primarily concerned with strong judicial review which is practiced in the United States and Canada (although the Canadian system could be more accurately described as a *hybrid* with the provision of a legislative override courtesy of s. 33 of the *Charter* which protects certain sections of the constitution from judicial review). See Jeremy Waldron, "The Core of the Case Against Judicial Review," *The Yale Law Journal* 115, no. 6 (2006): 1353-59.

that beset the standard case for judicial review put forward by advocates such as Dworkin and Waluchow.[2]

The task I have chosen to undertake in this thesis is to consider this debate through a fresh lens by finding a nexus between the authors previously mentioned and another author who can perhaps offer a new piece to this puzzle: Thomas Christiano. Thus, the goal of this thesis is twofold. In the first place, I aim to reconcile the democratic legitimacy of judicial review as a justified decision-making procedure in a free and democratic society by showing that the democratic limits defined in Chapter 7 of Thomas Christiano's *The Constitution of Equality* provide a basis for such legitimacy. This will be the subject of my first chapter. While I believe the legitimacy of judicial review can be adequately established on this account, the punchline of Christiano's argument is that despite being justified in some cases (at least where the court gets the decision correct), judicial review comes at a politico-moral cost. Judicial review under this scheme is thus viewed as a "second best" to the democratic process since intervention by the court constitutes a loss of intrinsic justice which is unique to the authority of democratic institutions. By intrinsic justice I mean the inherent fairness and equity of certain social and political institutions (in our case democratic institutions like the legislative assembly) when making decisions that affect the well-being of persons and the common good.

As such, the second aim of my thesis is to explore this line of thought—judicial review being a justified cost—in more depth and consider the implications that this has

[2] In the domain of constitutional jurisprudence, this challenge is commonly referred to as "the Democratic Argument" or "the Democratic Challenge."

for institutional design. This second prong of my thesis makes up the fulcrum of my overall argument and hinges on the question of whether the cost of judicial review can be paid down. This is where a potential nexus between Dworkin, Waluchow, and Christiano's ideas will be explored. If there is something in the aggregate of these accounts that can pay down the cost of judicial review, then perhaps we can avoid any concerns about a politico-moral cost to judicial review, creating a positive case in favour of it. While I will attempt to provide my answer to this puzzle and argue for its validity as a position to be taken seriously, my general hope with this thesis is to: (1) bring the discussion of judicial review down from the purely conceptual plane to a more useful and pragmatic one by framing things in terms of institutional design; (2) reignite interest in the judicial review debate by providing a fresh lens through which to consider the present discourse; and (3) generate constructive and fruitful discussion about the place of judicial review in the Canadian legal system specifically.

In what follows, I will unpack my argument in three chapters. In the first chapter, I will provide a general overview of Christiano's argument and consider the implications of his reasoning at length. Beginning first with his idea of what he takes to be the fundamental principle of justice, I will build his account from the ground up to better understand why he believes that democracy is necessarily limited, what grounds he has for those limits and why judicial review is a justified cost of that limited authority. I will reconstruct his argument for why public equality is the most basic principle of justice and how this lays the groundwork for Christiano's fundamental Principle of Public Equality

(PPE). I will also consider his reasoning for democracy as the theory of government which best realizes the equal status of citizens publicly, how this attributes the legislature with a special kind of authority in the form of a right to rule, and how this authority is limited by liberal rights. Once I have reconstructed his argument for limits to democratic authority, I will be better positioned to discuss what I take to be the cost of judicial review on Christiano's account.

The argument from Christiano here is that in cases where it violates public equality, the legislature undercuts its authority and suffers a loss; the intrinsic justice that was bound up with democratic authority is compromised and leaves an authority gap. While judicial review can justifiably (in an instrumental, Razian sense) correct the decision by striking down the problematic law, the concession for this remedy is that we experience a loss of intrinsic justice since democratic authority was undermined. Therefore, even though it is not necessarily ruled out there is always a politico-moral cost to judicial review.

The question from here is whether anything is missing from Christiano's scheme that can perhaps pay down the cost of judicial review. That leads to my second chapter which considers an argument in favour of judicial review put forward by Ronald Dworkin. The argument from Dworkin is that there are different conceptions of democracy in play and depending on which one we accept, we can perhaps avoid a cost. Dworkin is mainly challenging the majoritarian view that decisions should always reflect what the majority of citizens would prefer. In other words, the majority should get its way

in every case. The alternative theory on offer says that there are cases when the majority should not get its way and that, if we take the democratic system holistically rather than modularly (like with Christiano), judicial review is part of a more complete scheme of democracy. Therefore, if judicial review is part of a holistic scheme then we can circumvent the argument that there is a loss to judicial review. Whether we accept that democracy should be holistic or modular, however, depends on whether we ought to be more concerned with *who* should be deciding the contours of our constitutional rights or what the *content* of those rights actually are.

The third and last chapter builds off of the questions we ended with in Chapter 3. I begin this chapter under the assumption that we are accepting Dworkin's holistic conception of democracy and that we are concerned with the content of rights and not the authoritative voice. From here, the goal is to determine whether Wil Waluchow can give us an appealing theory of adjudication with his idea of Community Constitutional Morality (CCM) that can perhaps locate democratic authority in the positive, customary law from which judges draw when deciding constitutional cases. Waluchow is mainly defending against the charge that judges only draw upon elusive, Platonic moral truths or their own moral opinions when deciding legal cases. The CCM is meant to show that judges rely on positive normative commitments, a kind of customary law, rather than abstract or personal moral truths. However, the question then arises of whether the CCM could satisfy public equality. If so, then there is a definite case on the table for paying down the cost of judicial review. While the CCM might satisfy public equality

mechanically, I argue that there are important values bound up with democratic authority which cannot be shared with CCM norms. Further, another look at this argument reveals that the case against judicial review merely says that judicial review is justified in the service that it does but it is not itself fully responsible for the cost we bear for its service. But it is incompatible with our first choice of government and political decision-making.

I will conclude this thesis with the argument that, as it stands, judicial review is justified instrumentally in a democratic society but on the understanding that it will always come at a politico-moral cost. The upshot of this conclusion is that we should be dedicated to the democratic process and need not rule out other possibilities of decision-making when the legislature gets the decision wrong, but we must acknowledge that a loss has been suffered; our first choice of collective decision-making failed to uphold the conditions of its authority and so we cannot rule out a decision-making procedure that would otherwise satisfy those conditions. However, this does not constitute a positive case in favour of that procedure. Of course, should that procedure also fail to make the correct decision, then we find ourselves in a condition of what Christiano calls “double loss.” Perhaps to avoid this sort of condition, we ought to impose a system of weak judicial review with parliamentary deference for those special cases where egregious violations of rights require rendering a piece of legislation a dead letter. In this way, the courts may scrutinize problematic laws but in order to preserve our democracy and maintain it like a healthy garden, we are better suited to a system like the one I have modestly proposed.

## CHAPTER ONE: The Politico-Moral Cost of Judicial Review

A proper account of the grounds for judicial review as a legitimate, justified decision-making practice in a democratic society will need to begin with an extensive investigation into the grounds of democracy and liberal rights themselves. To determine whether we can confidently say that judicial review is or is not a viable and justified option to correct for legislative overreach, we must first unpack an account of the relationship between democracy and liberal rights to specify what their normative grounds mean for the authority of constitutional courts. Thankfully, for my sake, much of the legwork of this investigation has already been conducted (rather scrupulously I might add) by Thomas Christiano in his work *The Constitution of Equality*.[3]

The bulk of this chapter will unpack Christiano's account of the grounds of liberal and democratic rights. My hope is to demonstrate why *The Constitution of Equality* will serve our purposes by providing a plausible and thorough conception of the underlying values of democracy to use as a tool for assessing the existing arguments in favour of judicial review. I begin building up Christiano's account with an explanation of his basis of democratic authority. This section will reformulate the linchpin of Christiano's entire account: the *Principle of Public Equality* (PPE). The next task will be to weigh up Christiano's argument for why the democratic process most effectively satisfies the

[3] It goes without saying that the argument offered in this thesis is a qualified critique of Christiano's view. If Christiano is right, then the conclusions and implications reached in this thesis may hold true. But it ought to be stressed that I am simply adopting Christiano because it is a plausible and careful analysis of the underlying value of democracy, but I am not intending to marshal a full defense of it (save perhaps some defense vis-a-vis Dworkin's alternative view which I unpack later). So, all of my conclusions are *qualified*; that is, they are conditional on the success of Christiano's argument.

principle. A parallel discussion of liberal rights will need to be had following this while further explicating the relationship between democracy and liberal rights. This is important because, in systems of judicial review, the courts are tasked with protecting liberal rights which sometimes puts it at odds with the democratic process. Once I have done this, it will be necessary to discuss the concept of authority, specifically democratic authority. There is much to dissect with this loaded term, so with this in mind, I will endeavour to keep the discussion of authority reasonably constrained.[4]

The discussion of authority establishes a good jumping-off point for the next major section of this chapter which will examine the limits of democratic authority. The legislature's right to rule is not absolute, so under what circumstances or in what cases does it lose its authority? In addition to democratic limits, I will consider the different remedies available to us in cases of legislative overreach which is where judicial review will factor into the discussion. To end this chapter, I will speak to the nature of judicial justification by considering cases when (a) democracy exercises authority *within* its limits and (b) when democracy exercises authority *outside* of its limits, and what these conditions mean for the authority or legitimacy of the courts when deciding constitutional questions.

[4] There are a number of philosophical issues that arise in the context of justifying political authority in addition to defining the very nature of political authority itself. Even in answering these questions, there are many distinctions to be made between, for example, political *authority* and political *power*; morally legitimate political authority versus more descriptive ideas of authority; authority in the sense of "morally justified coercion" versus authority in the sense of a "capacity to impose duties on others," and authority as a "right to rule." These last three distinctions will be covered later in this chapter.

This chapter will argue that the democratic limits defined in Christiano's *The Constitutional of Equality* provide a basis for the justification of judicial review. What I hope to demonstrate with this argument is that (a) judicial review is legitimate (contra critics who are taken with the democratic argument against judicial review), just not in an obvious way; (b) judicial review, while defensible, is simply one option among many available to us that can help correct for violations of public equality by the democratic assembly; and (c) the exercise of judicial review in such cases comes at politico-moral cost, namely the loss of intrinsic justice.

### 1.1 Understanding Democratic Authority

Christiano's main goal in this project is to sketch out a systematic account of democracy—something that he believes is lacking in much of the discourse on democratic theory. Jeremy Waldron, for instance, is a fervent champion of majoritarian rule as the preferred theory of authority to guide society's decision-making amid radical disagreement in pluralistic society and as such ascribes significant value to the democratic process.[5] However, our sense of democracy's value on such accounts is perhaps so strong that it precludes any meaningful reflection on the basis of its value.[6] Therefore, it is necessary to find some appreciation for the normative grounds of democracy and the

[5] Jeremy Waldron, "A Rights-Based Critique of Constitutional Rights," *Oxford Journal of Legal Studies* 13, no. 1 (1993): 32-33.

[6] Christiano, *The Constitution of Equality* (2011): 1.

basis of its authority, especially if we are to properly grasp the role of other institutions such as judicial review. This is precisely what Christiano sets out to do.

To ground any theory of democracy, it is not enough to simply call an equal stake in decision-making the fundamental principle of democracy and use that as the justification for its authority alone. The widespread conscientious disagreement that characterizes modern, pluralistic societies negates that by the sheer reality that people are going to disagree on what exactly the basis of democracy is as well as its legitimacy. Democracy thus requires a deeper ground that will allow us to restrict the recursive application of the principle of equal say, otherwise, we might find ourselves in a state of infinite regress when trying to justify the grounds of democracy. Grounding a right to an equal say in collective decision-making in the facts of ubiquitous disagreement and the moral demand for respect for one's judgment fails to account for the fact that, if disagreement goes as deep as we think it does, giving everyone an equal say does not discourage or rule out disagreement about the legitimacy of the collective decision-making process itself.[7] Therefore, any such deeper ground is going to have implications

[7] Thomas Christiano, "Waldron on Law and Disagreement," *Law and Philosophy* 19, no. 4 (July 2000): 519-22.

for the limits of the principle of equal say in general; limitations like liberal rights and an economic minimum for example.[8]

### *1.1.1 The Principle of (Public) Equality*

Christiano begins constructing his account with what he takes to be the core principle of social justice which will act as the moral foundation of democracy and the basis of liberal rights. He calls it the *Principle of Public Equality*. Fundamental to this principle is the idea that social institutions must be structured so that all people are treated as equals and can see themselves as being treated equally.[9] It is upon this idea that Christiano grounds the authority of democratic decision-making while also providing a just basis for constitutional limits on democracy. But let us look at the PPE more closely to see how we arrive there.[10]

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[8] Christiano explains in *The Constitution of Equality* (2011): pp. 273-274 that the assurance of an economic minimum is essential to treating persons publicly as equals because it is necessary for advancing the interests secured by democratic and liberal rights. Without a basic minimum, a person cannot successfully exercise their liberal and democratic rights; they would lack the means to associate with others, engage in private pursuits, or present arguments in the public forum. An economic minimum acts as a limit or condition on democratic authority: securing less than a minimum would fail to take interests that ground liberal rights seriously, but more than a minimum would fail to take the interests behind democracy seriously.

[9] Ibid, 2.

[10] It should be noted that what I am about to explain is Christiano's scheme for the *Principle of Equality*. The full form of this principle will take shape as the formerly-promised Principle of *Public* Equality once the importance of publicity factors into the discussion in the following section. For now, Christiano is solely concerned with grounding the Principle of Equality as the most fundamental principle of justice with the help of three main principles and one auxiliary premise. So as not to confuse these terms, the abridged breakdown of this argument can be understood as follows: (1) Social institutions are charged with advancing the interests of all members of society and as such must follow and uphold the most fundamental principle(s) of justice; (2) Christiano defends the Principle of Equality—the idea that well-being ought to be distributed equally by the basic institutions of society—as the most fundamental principle of justice; (3) But what grounds do we have for accepting the Principle of Equality as the most fundamental principle of justice? For Christiano, it is the grounds of equal status, well-being, and the generic principle of justice with the additional premise of no relevant differences; (4) Once we add our interests in publicity to the mix, the Principle of Equality transforms into the more nuanced Principle of Public Equality.

What Christiano is defending with the Principle of Equality, generally speaking, is the equal advancement of well-being as the most fundamental principle of justice upon which equality is based. This principle is grounded on three component principles and one supplemental premise. In the first place is the *Principle of Equal Status*. The equal status of persons suggests that individuals have equal moral status by virtue of their humanity. To put this in slightly more abstract terms, people's equal moral status comes from their authority in the "realm of value."[11] Christiano's idea of the realm of value works like so: humans possess the ability to engage with value and our well-being is bound up with that ability. My enjoyment of some form of art like the progressive rock music of Rush, having Sunday dinner with my family, or maybe performing a random act of kindness or good deed for a stranger; all of this enhances my well-being. It is the happy exercise of my subjective appreciation of an objective good. So one's humanity broadly consists in the capacity to recognize, appreciate, produce, engage and harmonize with intrinsic goods and it is this relation of persons to value that is distinctive, thus conferring special status to humans.

Once we establish equal status based on Christiano's concept of the person, the second ground for the Principle of Equality comes into focus: the *Principle of Well-Being*. The Principle of Well-Being demands plainly that a person ought to have their well-being advanced—where "well-being" is understood as the quality of a person's life involving an

[11] Christiano, *The Constitution of* Equality (2011): 25-27.

appreciative and active engagement with intrinsic goods.[12] Simply put, well-being amounts to a person's flourishing. On the one hand, it is a good that is beneficial for the person and on the other, it is a special kind of intrinsic value that contributes to the good of the world more generally. The appreciation of an intrinsic good is itself valuable, so the more a person has well-being, the better. We thus have good reason to weigh our interests with the interests of others. It is then left to the other features of the Principle of Equality that help determine exactly how much individuals' well-being ought to be advanced.

The third and final component principle is what Christiano calls the *Generic Principle of Justice.* Propriety demands that each person in society ought to "receive their due," so to speak. If we are to give each person their due fairly within an egalitarian framework (from which Christiano constructs his account), what it is that each person is due must then be determined by the General Principle of Justice which says, "treat like cases alike and unlike cases unlike."[13] So, if a professor is marking her students' essays and two students followed the assignment instructions exactly as they were supposed to and executed the assignment well, she should then give them a similar grade. However, when Abbott comes across a student who only followed part of the instructions and did not execute the assignment well, that student should receive a different grade.

While those three principles are in place to provide the grounds for the Principle of Equality as the most fundamental principle of justice, there is one final piece to add.

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[12] Ibid, 18-19.

[13] Ibid, 20-24.

The Principle of Well-Being is an indeterminate principle as we have seen, meaning there is no defined measuring stick to specify exactly how much the well-being of persons ought to be advanced or how much they ought to receive. We may have equal status, but this should not imply that every person ought to receive the same treatment. That is where the generic principle has a substantive impact by requiring a distribution of well-being in proportion to the relevant differences in persons which warrants differential treatment. This is where the additional premise of *No Relevant Differences* becomes relevant. According to this rule, people under the "age of maturity" (approximately ages 12-18) are not deserving of greater fundamental goods than others based on traditional bases of differential treatment (e.g., desert, reciprocity, productivity, and need), nor does the nature of their relative productivities entitle them to greater shares of fundamental goods.[14]

To review, the Principle of Equality demands that well-being ought to be advanced and distributed equally by social institutions. The necessary premises to defend equality as the most fundamental principle of justice is equal status, well-being, and the generic principle of justice coupled with the thesis of no relevant differences. These make up the grounds of equality. So, we ought to advance the well-being of all persons, and should there be reason to bring any person to a certain level of well-being, then the same holds for every person to be brought to that level of well-being (by virtue of equality). Once we have ruled out relevant differences after applying the generic principle, only the equal

[14] Christiano, *The Constitution of* Equality (2011): 24-25. This aspect of the Principle, or at least its necessity and application in the overall argument, is admittedly puzzling and unclear. If given the chance, I would gladly ask Professor Christiano why he decided to include this premise. However, since its inclusion does presently pose a threat to the argument on offer, that inquiry can be set aside for another day.

status of persons comes in to determine how much well-being each individual ought to have. All that is left to do is show how our interests in publicity, specifically in the context of social justice, transform the principle that has been formulated above into the more robust Principle of Public Equality and how this forms the basis for democracy as the most acceptable option for the realization of justice.

### *1.1.2 Characterizing Pluralistic Society: Know the Facts!*

Social justice refers to the fairness of the institutions that make up the social world as well as the interactions and relationships among persons. The topic of social justice arises when people attempt to establish justice amongst themselves through norms, social rules, and institutions. To achieve this kind of fairness, social justice requires not simply equality but *public* equality. In other words, it is not enough that people's well-being is advanced equally but it is necessary for social justice that people can actually see for themselves that their well-being is being advanced equally; principles of social justice, generally speaking, must be public. The breed of publicity we are concerned with here is distinct from legal publicity which we are typically more accustomed to in jurisprudential discourse.[15] But why public equality? And how do we best achieve public equality when we try to establish justice amongst ourselves?

[15] The kind of publicity defended in legal traditions relates to the administration of criminal justice. This includes: that charges and proceedings be open to all; that laws be properly promulgated (for an extensive account of the importance of promulgation see Lon L. Fuller, *The Morality of Law, Revised Edition* (New Haven: Yale University Press, 1969): pp. 33-51); and lastly, the transparency of procedure.

Christiano believes that democracy, more than any other theory of political authority, offers us the most acceptable parameters for collective decision-making toward realizing the kind of equality and social justice described above. I think that many would agree with Christiano that democracy is an acceptable method of collective decision-making to help us advance the interests and well-being of individuals equally. However, it is important to understand precisely why and on what grounds.[16] Christiano constructs an intricate argument to support his belief which I will now attempt to unpack as systematically and concisely as I can, beginning with a discussion of the interests in publicity that arise amongst persons in pluralistic society. Again, establishing these interests and the context in which they arise will help us understand the importance of publicity and in turn why democracy best helps us achieve public equality.

The requirement of publicity—that people not only be recognized as equal (as prescribed by the Principle of Equality) but can *see* themselves as being recognized as equal—is based on the equal moral status of persons and their underlying interests as members of society. When we attempt to establish justice amongst ourselves in practice, three fundamental interests become salient owing to the background facts that characterize the experience of living in a complex, pluralistic society. These three interests are: correcting cognitive bias, being at home in the world, and being recognized and affirmed as an equal in society. For Christiano, all of these interests support the idea

[16] What is worth noting here is that Christiano defends democracy as being *intrinsically* just. To that end, the argument is that democracy is good not for the outcomes it produces but because of the inherent fairness of the process itself.

that only *public* principles of social justice are consistent with treating persons as equals.[17] We have these fundamental interests in being able to see that we are treated as equals in a society where there is considerable diversity among persons, disagreement about justice, and where individuals are inherently fallible and cognitively biased in their capacities for thinking about theirs and others' interests. I will take each of these background facts in turn to see how exactly they bring about these salient interests.

In the first place, Christiano acknowledges that society is made up of individuals from diverse backgrounds and as such, the interests of persons are naturally going to be very different from one another. There are differences in talents and handicaps, family life, labour experience, social standing, cultures and worldviews, and abilities and sensibilities to name a few. Consider an example of two individuals living in the same imaginary, Canadian community of Hartford. The first person, let us call him Luke, is a white man of Italian descent who grew up in a Catholic household, holds a university degree, and is a small business owner. Luke's interests are likely to be very different from our second individual, let us call her Lorelai, who is a single mother who immigrated to Hartford from Mexico, working full-time as an interpreter with a limited educational background and is agnostic. Despite us living in the same community, their lives (and by extension their interests) are probably going to differ significantly in many areas and

[17] Christiano, *The Constitution of* Equality (2011): 101.

meaningful ways. The fact that people differ in a multitude of ways guarantees that the well-being of each person is likely to be different from others.[18]

We also know that individuals are deeply fallible in their attempts to understand their own interests, the interests of others and the common good. Even with the parameters set by the principle of equality (i.e., that we ought to weigh others' interests with our own), one is likely to compare others' interests to their own—no doubt mistaking what others' interests are as well as how to compare them with their interests—which results in an understanding of other people's interests that is much more error-prone and subject to arbitrary influences.

In a similar light, we can acknowledge that our conceptions of others' interests and the common good often reflect the limited conditions we have experienced and thus tend to be cognitively biased toward our own well-being.[19] Going back to our previous example, Luke will probably find it difficult to put himself in Lorelai's shoes and understand her interests. As a result, his understanding of her well-being will be quite misconstrued; it will be fallible and biased toward his own understanding and life experiences. Perhaps when thinking about how to weigh his interests with those of his neighbour, Lorelai, Luke might accidentally replace her religious values, for example,

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[18] It should be noted (albeit tangentially) that the dynamism of society and the diversity of well-being does not presuppose a subjectivist account of well-being. Christiano argues in *The Constitution of Equality* (2011): p. 57 that it instead implies that people's capacities to achieve objectively valuable states are quite diverse and so their abilities to appreciate and enjoy these states are likely going to be extremely diverse as well. Of course, to the extent that there is a subjective element to well-being, consisting of the appreciation and enjoyment of intrinsic goods, there will be a great deal of diversity in capacities for well-being.

[19] Ibid, 4; 57-59.

with his own. He might also inadvertently invent his own facts about Lorelai's well-being based on his limited knowledge and experience, again lacking a proper understanding of Lorelai's culture, lifestyle and traditions.[20]

Where there is diversity, fallibility and cognitive bias there are bound to be scores of sincere, good-faith disagreements about the interests of society, the common good, and what justice requires. Therefore, an account of how to treat people as equals must include a way of how to best do this against a background of pervasive, conscientious disagreement.[21] Our understandings of various principles of justice and their applications are likely to lead to serious conscientious disagreement and are likely to be highly fallible in a way that is important to how we structure political institutions. Due to their limited knowledge and experience of each other's backgrounds, and possibly conflicting values, Luke and Lorelai will likely disagree about, say, which public health, housing and/or food security policies should be put in place. Again, this is likely to take the form of genuine, good-faith disagreements. Both are trying to make a decision that is best for the common good, but the diversity of persons can guarantee that these decisions will naturally be fallible and cognitively biased toward their own interests when they try to weigh them against the interests of others.

[20] Ibid, 57.

[21] Ibid, 4; 76-77.

### *1.1.3 Three Fundamental Interests in Publicity*

Turning now to the question of how each of these facts brings about our three fundamental interests, I think it is important to focus more intently on cognitive bias and disagreement as I find these two facts to be the most prominent in raising our interests in publicity. When we combine these two background facts with our understanding of humans as persons whose well-being is bound up with appreciating and interacting with in value that *they* understand, it becomes easier to see how interests in correcting for cognitive bias, being at home in the world, and being affirmed and recognized as an equal in society become important for the realization equality.

Starting with the first of these fundamental interests, every person is interested in correcting for the cognitive biases of others given the natural biases and prevalent disagreements among people about matters of justice. To be treated in accordance with someone else's conceptions of justice and equality is likely to set back my interests. Having to live in a world shaped entirely by another person's judgements is essentially to submit entirely to the judgements and interests of another, and to concede one's interests as being subordinate; they are being treated as unequal to the extent that their interests matter less than those of others. Publicity ensures that members of society are protected from the inevitable tendencies of agents to make judgments that are biased toward their own interests. If Luke, for example, can see for himself that a process of political decision-making is reflecting his interests just as fairly and equally as the interests of his

neighbours, like Lorelai, then he will have more reason to accept the justice of this procedure with greater credence.

Building off of this idea, our second fundamental interest in publicity emerges. When we recognize that individuals' judgments often reflect the modes of life to which they are accustomed, we see that we are also interested in being at home in the world. "At-homeness" is fundamental because the feeling of being at home is at the heart of one's well-being. Consider the difference between sitting in your living room compared to sitting in a friend's home or a hotel. There is a meaningful difference in the level of comfort and freedom one feels when they are at home compared to a space that makes someone else feel at home. When I feel at home, it enables me to more easily experience the world and appreciate the valuable qualities around me. As such, this interest is socially necessary for well-being; it is the condition in which one feels a sense of fit, connection, and meaning. Living in a world that corresponds more apparently or solely to the interests of others can not only make one's judgement and appreciation of value opaque but it can even be hostile to their interests. Put yourself in the shoes of an immigrant like our Hartford citizen Lorelai. Living in a community that is foreign and unfamiliar to you can leave you feeling vulnerable, alienated, and even antagonized.

Of course, this feeling is not limited to the immigrant experience; someone coming from *outside* of the community, that is. This can very well be felt by individuals from *within* the community as well, and some in much more profound ways than others. Consider the African American experience for instance. W.E.B. Du Bois famously

conceived of the notion of Double Consciousness or "second sight" such that as a black person living in white society, one can never have a truly complete sense of self. We could further imply that one never feels a sense of at-homeness by living in someone else's world (like "the white world") and always seeing oneself in two ways simultaneously; through one's own lens as a black person with a distinct history and culture attached to their identity and through the lens of white society with certain expectations, attitudes, and prejudgments attached to black people.[22]

Consider further the social hierarchy that institutionalizes male dominance and characterizes patriarchal society, facilitating the oppression of women as somehow subordinate or inferior to men. The experience of oppressive "double binds" that characterize the experience where options for women are reduced to a mere few and all expose them to penalty, censure, or deprivation of some kind.[23] This is not an exhaustive set by any measure. The sense of feeling "alien" in or living in someone else's world is an unfortunately pervasive experience for marginalized groups, but these realities reinforce the importance of feeling at home in the society you live in.

There is one caveat to acknowledge here. Returning to our little imaginary town of Hartford, let us assume there is another resident by the name of Mr. Baciagaloop. What if Mr. Baciagaloop has a rather perverse sense of at-homeness? What if he feels at home in a

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[22] W.E.B. Du Bois, "Of Our Spiritual Strivings" in *The Souls of Black Folk* (Chicago: A. C. McClurg and Co., 1903): 8-9.

[23] Sukaina Hirji, "Oppressive Double Binds," *Ethics* 131, no. 4 (2021): 646-647. One notable instance where a double bind has received legal recognition is in the case of R. *v.* Lavallee, [1990] 1 S.C.R. 852 which officially acknowledged the condition of battered wife syndrome in Canadian law books.

world where everyone is subordinate to him? Does he still have a claim to have his interests realized? To this, Christiano says that we cannot invoke those interests which are incompatible with the Principle of Equality. So, Mr. Baciagaloop does not have a valid claim to see the world conform to his judgment of inequality since having a sense of being at home in an unjust or unequal world cannot contribute to well-being. While he has *some* claim to see the world conform to equality given their cognitive limitations, his belief that others ought to be subordinate to himself does not generate an acceptable claim to have the world correspond to such judgement.

The final interest is that of being treated as a person whose judgement is taken seriously by others and thus recognized as a moral person. In other words, the interest in being recognized and affirmed as an equal.[24] To not have one's judgments taken seriously is to be denied recognition of their moral personality—indeed, those very capacities previously described which confer special status to persons. To use Christiano's words, it would lead to a disastrous loss of moral standing. Failure to recognize a person's capacity to appreciate justice expresses indifference to their moral status and ultimately sets back their interests. If the facts of cognitive bias and pervasive disagreement are taken into account, it is clear that some individuals may have their interests set back for the sake of the interests of dominant groups of like-minded people who share similar biases. If the majority of citizens in Hartford share attitudes about justice similar to Luke's and opt to make decisions based on those attitudes alone, someone like Lorelei is being told by the

[24] Christiano, *The Constitution of Equality* (2011): 60-63.

rest of the community that her interests are not worthy of equal or perhaps *any* consideration of justice.[25]

The upshot of the arguments above, as I take it, is that the requirement of publicity concerning principles of social justice amounts to the requirement that every person with ordinary cognitive abilities who understands their own and others' cognitive limitations, as well as the fundamental interests of judgment, should see they that they are being treated as equals when the principles of social justice are recognized. This is where the robust Principle of Public Equality replaces its counterpart, the Principle of Equality, as the most fundamental principle of social justice. The question then becomes, how do we publicly embody equality in collective decision-making under the circumstances of pervasive disagreement?

### *1.1.4 Democracy as the Public Realization of Equality*

When there is such deep and pervasive disagreement in society, there has to be a way to make decisions that treat all persons as equal while at the same time responding to this good-faith disagreement. If social justice consists in the public realization of equality through secure, informed and conscientious agreement from the egalitarian standpoint, then from this standpoint we begin to see that there is an agreement on the idea that each person ought to have an equal share in the process of establishing justice. This is particularly so when we acknowledge the background conditions of disagreement,

[25] Ibid, 46-63.

diversity, fallibility, and cognitive bias and the interest in having an equal say within this context.[26] Intuitively, only democracy—where everyone is given an equal say in the decision-making process—can adequately ensure that people are being treated as equals when making collective decisions against these background conditions. Of course, there is a bit more to it than that.

To understand exactly how democracy realizes public equality and advances our fundamental interests, we have to first understand that people have conflicting aspirations to shape the common world in which they live (by virtue of the facts of judgment previously discussed), so justice ought to apply to these conflicts of interest. The common world consists of a set of circumstances wherein the fundamental interests of each person are implicated in structuring the world and where the fulfillment of each person's interests is connected with the fulfillment of the interests of every other person. The common world is characterized by: (1) the many ways in which people's interests conflict and overlap with one another; (2) the opportunity to have a sense of overall justice given the overlap and connection of interests; and (3) the equal stakes shared by persons in how that world is structured. It is important to recognize the common social world as an enduring entity since we are concerned with establishing justice for society and thus need to bring about collective goods for society. The problem is that we have no clear or public way to measure our own or others' happiness, compare states of well-being, or differentiate the opportunities that people are given for well-being. We could turn to an

[26] Ibid, 102.

equal resources scheme to serve as the foundation of justice. However, in this context, these sorts of egalitarian principles fail to provide a publicly clear measure of equality because they rely on highly controversial conceptions of equality (i.e., that opportunities for or access to welfare, resources or capacities ought to be the main objects equally distributed rather than the interests and well-being of persons equally advanced).

We can, however, equally distribute resources for *participating* in the collective decision-making process which shapes the common world. Distributing votes, for example, can be distributed in clearly equal and uncontroversial ways. This is where democratic rights start to look very promising. Given the argument so far (i.e., the Principle of Equality, the facts of judgement, the three fundamental interests in publicity, and the nature of the common world), each person's judgement about how society ought to be organized must be taken seriously otherwise our interests will be set back. Anyone in this circumstance of being excluded from participating in the discussion can see their interests not being taken seriously and can legitimately infer that their moral standing is being treated as less than others. So justice, which requires public equality, demands an equal say in decision-making. Given that these interests are political since they arise when people make competing claims to shape the common world, there ought to be an *institutionalized* way where the judgments of persons are accorded the respect that is embodied in the right to an equal say in the process of collective decision-making.

Democracy can be seen as one institutionalized method of publicly advancing the fundamental interests that provide its normative basis. Given that our judgments are

cognitively biased towards our own interests, we can be sure that any attempt to offer a particular view of justice unilaterally will likely face the kind of disagreement previously discussed for failing to take into account and properly reflect the interests of others. A decision procedure that gives no or less weight to a person's judgment than those of others, or withholds the votes of a particular group of people, can be expected to set back the interests of those persons, thereby publicly expressing a lack of concern for them. Any arrangement that advances the interests of the dominant class at the expense of others is profoundly unjust by failing to implement public equality. When we realize that the aspiration of each citizen to achieve justice in their society is compatible with the need to ensure that each person has a say in the process of deciding how society is best organized, we can insist that democracy regulates collective decision-making because interests of whoever would be excluded otherwise are likely to be neglected.

Further, our ability to pursue one's personal projects and interests is deeply dependent on our world making sense to us so we can navigate that world and feel a sense of fit, connection, and meaningfulness in it. It is important that a person can make sense of the institutions that direct her life and the rules they make; that she can identify and affirm the larger projects of society as well as her own; and that she has a sense that she is protected and provided for in a way that will not generate tension with others. If a person has no say in the world they live in, their interests will likely be set back for the sake of those in the dominant class.

Being recognized and affirmed as an equal is essential to us as rational beings who seek to establish justice and have our moral personality acknowledged and respected. To exclude a person from participating in the processes of deciding how society is to be organized and regulated fails to acknowledge this capacity for moral judgment. Disenfranchisement or systematic political disadvantage of a particular group or person commits a serious loss of status and publicly treats them as inferior.

Another interest promoted by democratic rights, in addition to our initial three fundamental interests, is an interest in learning the truth about matters of social importance. One of the main ways a person learns about such matters is when others respond to the views that they have on these issues and the main process of doing so is from debate and discussion with others. Perhaps the best forum that allows for debate and discussion of this kind is democracy.

Therefore, with these facts and interests acknowledged, the only way to advance the interests of persons equally is to give them an equal say (within a limited scope) over how the common world is to be shaped and democracy does this best. So from an egalitarian standpoint, the case for democracy can be justified non-instrumentally. That is, democracy is not a mere means to the realization of some other end. Democracy itself realizes a kind of equal advancement of interests in a publicly clear and acceptable way in light of the facts and interests in judgment, and we do not justify it by reference to any other substantive outcome principle.[27] The value of the democratic process takes certain

[27] Ibid, 102.

priority over the values involved in substantive issues of law and policy. So, the argument goes, we can content ourselves with the fairness and intrinsic justice of the democratic process even when it does not produce the 'right' outcomes. The democratic origin of legislation thus makes it such that anyone who disobeys effectively treats others as inferiors. However, the grounds for democracy only ground a *limited* scope for its authority. Later on in this chapter, I will discuss those democratic limits at length. For now, it is only important that we understand that democracy is a public realization of equality while the issues within its legitimate reach do not exactly lend themselves to clear solutions. In addition (and what will be the subject of the next section), because democratic rights are grounded in public equality, other rights grounded in the same principle must then constitute limits to democratic authority.

### *1.1.5 Democracy and Liberal Rights*

Democracy is not the only institutionalization of social justice which rests on the Principle of Public Equality. Liberal rights are too grounded in the interests of persons and the requirement that individuals be treated as equals. The underlying rationale for liberal rights is parallel to that of democratic rights and thus serves as a limit to the authority of democracy. That is, liberal rights cannot be overridden by the aggregated interests of others.

Liberal rights mark out a sphere of activity within which a person may act as she pleases without government intervention or interference from others. Liberal rights act as

our shield from coercion and violence, discrimination and the undue burden of state regulations. There are several approaches to understanding the contours of liberal rights, including the *self-regarding actions* approach famously endorsed by John Stuart Mill or the *restricted actions* approach. However, Christiano takes the *sphere of activity* approach which suggests that there are certain classes of actions identified by appeal to underlying interests which are to be protected from interference. The interests underpinning liberal rights would not be well served if the government interfered with people's actions every time they thought some undesirable outcome would occur. The purpose of liberal rights is to advance persons' interests in living their own lives in their own way and discussing the best way of doing so with others. It is the interests that ground liberal rights that determine the shapes of the shares of activity in which each person has a right to act.

The grounds of liberal rights are pre-eminent such that they are weightier than those interests that normally compete with liberal rights by virtue of the fact that they protect fundamental interests and are capable of remedying the costs that they themselves produce.[28] For instance, the liberal rights of one trump considerations of the 'greater aggregated good' of many. The reason for this is that there are basic underlying liberal rights that ought to be protected if we are to advance the interests of persons in society

[28] A note on the costs of liberal rights. In *The Constitution of Equality* (2011): p. 156-158, Christiano acknowledges that there are other interests, aside from our underlying fundamental interests, which are threatened by the exercise of liberal rights. Interests such as not being offended or insulted, for example. If we are so committed to liberal rights, we will naturally want to protect the right to free expression but we also have an interest in not being offended by another person's speech. So, protecting the exercise of liberal rights comes at the cost of certain personal, cultural, moral, epistemic and material interests. That being said, there is a rather complicated argument on offer showing that the compromise of these interests can be remedied in some cases (e.g., the cost of preventing blasphemy is greater than the costs imposed by the exercise of liberal rights). However, for my purposes, I will not be following Christiano there.

equally. These basic interests include the freedom of conscience, the freedom of pursuits, the freedom of association, and the freedom of expression. This is not an exhaustive list, however, these are the interests that Christiano identifies as the most important.

Underpinning each of these interests protected by the institution of liberal rights are the same fundamental rights that ground democracy. The right to believe and think what one believes is true or defensible, as well as the right to change one's mind about these matters allows us to acquire truth and justified beliefs, helps us make sense of the world we live in and ensures that the thoughts and beliefs of others are not imposed on us. The freedom of pursuits, such as the freedom of association (which makes up the most important component of the freedom of pursuits), grants each person the freedom to choose the aims they wish to pursue (such as worship, occupation, private property, etc.) and determine the basic plans for achieving those aims. Having this freedom allows persons to be recognized and affirmed by their neighbours as moral equals in addition to cultivating a meaningful sense of at-homeness. Lastly, freedom of expression, understood in the way that Mill conceived it, helps us in acquiring truth and true beliefs by allowing for discourse with others.[29] Additionally, being able to express one's thoughts and beliefs in the public forum without the threat of censorship gives us a sense of fit and connection in the world, prevents persons from imposing their thoughts and beliefs on others, and

[29] John Stuart Mill famously defended a robust right to free expression that suggested there is never a reason for the government to censor the speech of its constituents because doing so: (a) robs us of exchanging the truth for a commonly-held falsehood and assumes infallibility of the state as well as the utility of opinions; (b) fails to exercise the truth by letting it hold up against falsehood, thus allowing us to remember why we believed the true opinion in the first place; and (c) prevents us from discovering a complete truth by piecing together two partial truths. See J.S. Mill, *On Liberty* (New York: Dover Publications, 2002), pp. 13-45.

allows persons to be recognized and affirmed as equals. Only under these conditions can we pursue our well-being. Failing to secure the protection of liberal rights thus runs the risk of severely setting back the fundamental interests of persons.

Only this argument of preeminent interests, coupled with the Principle of Public Equality, can show that each person's right is a powerful trump card against the aggregated interests of other members of society. Insofar as we think of ourselves as rational and moral agents in a pluralistic world, our fundamental interests confer upon these mutually-reinforcing rights preeminent value.

### *1.1.6 The Authority of Democracy*

So, now we can see that the scheme of liberal rights and democratic procedure realize the underlying fundamental interests equally. But what do we make of democratic authority? Recall that from the egalitarian standpoint, democracy has intrinsic value. But what is required of citizens when the result of democratic decision-making conflicts with their best judgment about what justice requires in substantive law and policy? To say that democracy has authority implies that a citizen is required to obey the decision even in cases where they think it is unjust to do so.[30] Thus, a proper account of democratic authority must explain: (1) how and when democracy can be authoritative even when it

[30] This authority is not unlimited of course. There are cases where the injustice of the decision outweighs or undercuts the justice of democracy. The next part of this chapter will consider this idea at length.

makes unjust decisions; and (2) how and when certain kinds of injustice can undercut the authority of democracy.

For a robust conception of political authority, there is a set of requirements that must be met. First, only a reasonably just state that grants respect to the differing opinions of each citizen can enjoy legitimate authority.[31] Second, a conception of legitimate authority must respect the fact that a settled and just legal system is necessary for establishing justice among persons. Lastly, the legitimacy of authority need not be predicated on a utopian degree of agreement. The question now is whether democracy satisfies these desiderata.

Since the right to an equal say is a requirement of public equality and is exercised when there is reasonable disagreement about justice within political society, the concept of democratic authority is compatible with the requirement that only a reasonably just society can have a government with legitimate authority. This is because the democratic assembly embodies the equal respect owed to each citizen in decision-making by giving them an equal say in the process. Democracy also respects the second requirement by setting up a scheme in which citizens can treat each other as equals in a publicly clear way. Lastly, democratic authority does not rely on a utopian extent of agreement on the substantive conception of justice which guides the state's creation of law and policy.[32] Rather, recall that a democratic idea of authority is premised precisely on the facts of

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[31] Christiano, *The Constitution of* Equality (2011): 232-233.

[32] Ibid, 102; 233.

disagreement, diversity, fallibility and cognitive bias and constitutes an egalitarian response to these facts and the fundamental interests attached to them.

Ultimately, for a state to be authoritative it must be reasonably just either in the substance of its laws or in the process by which it makes those laws. Any authority that fails to take the judgments of its citizens into account runs afoul of considerations of justice even when it acts based on an acceptable idea of what ought to be done. It is important to remember that the main purpose of the state is to establish justice among persons within a limited scope and that justice is something we owe to one another on a constant basis.[33]

Crucial to the discussion of democratic authority is a distinction between three different conceptions of authority. The first is the thinnest and most minimal sense of authority known as *Justified Coercion* wherein a state has legitimate authority if it is morally justified in coercing its subjects with respect to a certain set of issues. This moral justification is said to come from a state occupying a territory within which there are subjects to govern. So, the difference between legitimate and illegitimate political authority on this account is simply that the actions of the illegitimate political authority are not morally justified while the coercive actions of the legitimate authority are morally justified. Take two separate instances of 'authority,' for example. First, consider the orders given by a military commander to their soldiers. A commander can legitimately coerce their troops to follow orders because she is in a position to do so. That is, she occupies a

[33] Ibid, 235-237.

role under which there are individuals subject to her commands. Another point to emphasize in this instance is that the commander's soldiers are not morally bound to obey her orders, but only that she is morally justified in coercing them to obey. But consider a separate case of a robbery. If a thief were to threaten to cause harm to another person if they do not hand over their wallet, the thief in this situation technically has an 'authority' over the other person but it is not legitimate because we would say that she is not *morally* justified in coercing the victim to give up their wallet.

The second is the *Capacity to Impose Duties* which is a purely instrumental type of authority which says an entity has legitimate authority if it can impose morally-binding duties upon others. The duties are not *owed* to the authority, but the very existence and exercise of the authority itself obligates agents to obey. So where it differs from coercion, subjects do not obey because they fear the threat of sanction or feel pressured but because there is a duty present. The duty is not *owed* but it exists under the authority's moral power to impose duties. Thus, the authority and its subjects are involved in a weak moral relationship. There are two types of duties that are being imposed here. The first is merely a duty not to interfere while the second is a duty to obey.

To help visualize this kind of authority, consider a Major League Baseball game for example. If Mookie Betts refuses to comply with the directives of the umpires on the field, be it an 'out' call on the bases or a 'strike' call at the plate, Mookie is said to be interfering with the umpire's ability to carry out their duties by not complying with their calls on the field and, by extension, the actual playing of the game. The umpires are there

to administer the rules of the game and are instrumental in helping facilitate the overall play and better flow of the game, and as such have a capacity to impose duties on players to achieve those ends. But more than that, Mookie might be said to have a duty to obey the umpires' decisions simply because they are the authority on the field. There is no moral obligation to obey, but simply because the umpires are there to facilitate the play of the game, Mookie has to go along with the umpires' decisions. He can argue some of their decisions, such as if he is out or safe or if what was called a strike he thought was a ball. But in the end, the umpire still has the authority to throw him out of the game for refusing to obey and interfering with the playing of the game.

Lastly, the third conception of authority involves the idea that an authority has a *Right to Rule*. The right to rule conception is essentially a valid claim of an authoritative body against others—upon whom certain duties are imposed—correlated with a duty *owed* to the authority.[34] It is quite plainly a *right* of the authority to rule over its subjects. So there is not only a duty of non-interference and a duty of obligation to comply with the directives of the authority, but the punchline with a right to rule is that these duties are not simply imposed on subjects but are actually *owed* by subjects to the authority in question.[35] This means that the establishment of a robust right to rule depends on each citizen taking as a reason for obedience a moral duty owed to the authority. This form of

[34] Ibid, 240.

[35] There is also the possibility of a "justification right to rule." This means that an authority has the license to issue commands, make rules and coerce others to comply with its directives and its possession of this right is justified on moral grounds. However, its justification right does not amount to more than the first conception of authority that we discussed (i.e., justified coercion). This is not important at present, but we may run into something similar to this a bit later where it will be more relevant to our discussion. See Christiano, *The Constitution of* Equality (2011): 240-242.

authority includes the freedom on the part of the authority to make decisions as it sees fit as well as the power to impose duties on citizens. One of the key features worth emphasizing with this conception is that a right to rule engages citizens at a deep moral level and creates a moral relationship between moral persons. Thus, the exercise of political power under a right to rule recognizes and affirms the moral personality of each citizen.[36]

The question here is not which one of these conceptions is 'best' or even right. The question is which of these types of authority does democracy fall into? For Christiano, democratic authority is a kind of right to rule. Specifically, he says the following:

> The authority of democracy consists in the right of the democratic assembly to rule by means of law and policy and the duties of citizens to obey the assembly's decisions, which duties are owed to the democratic assembly. It also includes duties on the part of foreigners and foreign powers not to interfere in the rule of the democratic assembly.[37]

The grounds of democratic authority à la Christiano can thus be construed as follows. Recall that the Principle of Equality requires us to treat one another as equals and so we must try to realize the equal advancement of others' interests. But this duty is only fully realized when we attempt to treat others *publicly* as equals, which means we ought to bring about and conform to those institutions that publicly realize the equal advancement of interests. Enter our scheme of democratic and liberal rights. These

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[36] Ibid.

[37] Ibid, 243.

institutions are necessary for the realization of equal advancement of interests so each member of society has a duty to bring about and conform to democratic institutions, insofar as they do not themselves violate public equality.

An important feature of the right to rule to highlight in the context of our discussion is the fact that if democracy has authority then it implies a duty of citizens to obey the democratic decisions solely because of their democratic pedigree.[38] In other words, the duties of democratic citizens are *content-independent*, meaning the duty to obey exists not because of the content of the decision or consequences of their obedience, but because of the provenance of the decision in the democratic assembly.[39] It is because the decision is made by a process that embodies public equality that the decision must be obeyed by citizens. The duty to obey is independent of the specific content of the decision and thus preempts or outweighs other moral duties and considerations. Building off of this, the duty of citizens to obey is said to be preemptive since democratic equality takes precedence over other forms of equality and egalitarian considerations owing to its public nature. Remember that publicity carries such considerable weight because of the importance of the background facts and fundamental interests in judgment, and public equality satisfies these interests in a way that is compatible with equality because they are congruous with other fundamental interests.

[38] Ibid.

[39] Ibid, 244.

## 1.2 The Limits of Democratic Authority

### *1.2.1 Democratic Limits*

The fact that a decision has been made democratically provides a weighty reason in favour of each member of society obeying that decision. However, important to the discussion of democratic authority (and as has been eluded to in the previous section) is the fact the right of the assembly to rule and its correlative duties hold firm *only* when the democratic assembly makes decisions within a well-defined jurisdiction. That is, the democratic assembly's right to rule is *conditional* upon its staying within its limited scope of authority. If the democratic assembly makes decisions that violate the fundamental democratic and liberal rights of persons, fails to ensure the right of each person to a decent economic minimum, becomes occupied by a solid majority thereby producing permanent minorities, or fails to uphold or violates public equality then in those instances, the democracy has acted outside of its authority. It still has authority within the bounds of public equality, but it has transgressed those limits in the cases in which it issues laws that violate liberal rights, and thus, public equality.[40] Hence, there are reasonably clear limits to the authority of democracy that can be derived from the very same principle that underlies that authority—namely, the Principle of Public Equality.

There are two main types of limits to consider in the discussion of democratic limitations. The first is *Countervailing Considerations* against democratic authority. These are considerations that count against one's obedience to a democratic decision and

[40] Ibid, 245.

can be put in balance with the weighty considerations that ground the duty of obedience. The second is *Undercutting Considerations*. These are not merely considerations that can be weighed in balance against considerations which favour obedience, but considerations that actually undercut the claim to authority that the democratic assembly makes.[41] The authority of the democratic assembly in this case is shown either to be significantly weakened or not to exist.

There are two arguments that Christiano spells out for the limits of democratic authority, the first of which can be construed as follows: democratic assemblies have legitimate authority only when they publicly realize justice in themselves or they are instrumentally just; the disenfranchisement of a part of the population constitutes a public violation of equality; democratic assemblies publicly realize justice in themselves only when their decisions do not publicly violate justice; therefore, when a democratic assembly votes to disenfranchise some of the population, it does not publicly realize justice in itself, nor is it instrumentally just; therefore, when an assembly votes to disenfranchise some of its members, it does not have legitimate authority.[42]

The same argument can be extended to the issue of liberal rights where just as disenfranchisement publicly violates equality, so does the suspension of the core of basic liberal rights publicly violate equality.[43] Therefore, when a democratic assembly votes to suspend the core of liberal rights, radically discriminates against a part of the sane adult

[41] Ibid, 260-262.
[42] Ibid, 264.
[43] Ibid, 265.

population or fails to secure the decent economic minimum, or creates a persistent minority, it does not publicly realize justice and so does not have legitimate authority.

So, for the democratic assembly to have a legitimate claim to a right to rule, it must generate a duty to obey. But citizens never have a duty to violate public equality. Rather, their most fundamental duty is the duty to promote and act in accordance with public equality. So if legislation passes that violates public equality, citizens do not have a duty to obey and so the democratic assembly cannot have a right to make legislation that violates public equality. While this argument is important, it does not show how deep the limits to democracy really are. It only provides a sort of countervailing consideration. One could still reasonably ask in this case whether the duty to obey the democratic assembly might not be stronger than the duty not to violate public equality.

This is where a second, more powerful, argument grounding the limits of democratic authority comes into focus. The second argument for limitations on democratic authority suggests that the claim of authority is undercut at its roots. This argument shows how the limit to democratic authority is established by eliminating the basis of the authority altogether, or at least in the instance of the decision in question.[44] A democratic assembly that treats parts of its population publicly as inferiors no longer embodies public equality. Much like the first, this argument can also be extended to liberal rights due to a fundamental parallelism between democratic rights and basic liberal rights founded on the fact that the root of liberal rights is the same as democratic rights.

[44] Ibid, 266.

So, the democratic assembly does not have the normative power to suspend the cores of liberal and democratic rights, but it also has significantly weakened authority on issues pertaining to the economic organization of society when it fails to secure an economic minimum. Here, the structure of the argument is similar to the one for democratic and liberal rights, but the nature of the limit is different. The assurance of an economic minimum is essential to treating persons publicly as equals because it is necessary for advancing the interests secured by democratic and liberal rights. Without a basic minimum, a person cannot successfully exercise their liberal and democratic rights since they lack the means to present their arguments in the public forum, associate with others, or even engage in private pursuits. Securing less than an economic minimum would thus fail to take interests that ground liberal rights seriously, but more than a minimum as a condition of democratic authority would fail to take the interests behind democracy seriously.[45] So the conclusion here is simple: the legislature has no authority at the point that its directives equate to public violations of equality, thereby setting back the very fundamental interests that make up the grounds of democratic authority.

### *1.2.2 Remedies to Violations of Public Equality*

There are a number of ways the democratic assembly can run up against the limits of its authority. For instance, the assembly can pass legislation that violates public equality by disenfranchising some part of the population or striping the liberal rights of

[45] Ibid, 271-274.

others; it can fail to do what is necessary to maintain public equality like ensuring that everyone has an equal say in the decision-making process by making adequate provision of electoral materials; or it may fail to ensure that liberal and democratic rights of some are enforced and protected through, for example, adequate police protection to certain neighbourhoods.

But generally speaking, there are two distinct ways democratic authority can be undercut which correspond to the two types of requirements of democratic authority: the *positive requirement* of ensuring that society satisfies the requirements of public equality and the *negative requirement* that certain decisions do not violate public equality. The democratic assembly is charged with ensuring that people's rights are not violated, so failure to satisfy these requirements shows that it does not take public equality seriously in its decision-making and thus poses a threat to the authority of democracy since it only has authority to the extent that it upholds public equality. It should also be noted that when the democratic assembly acts beyond its authority in some particular piece of legislation, it does not follow that citizens ought not to obey.[46] All that follows is that on that particular legislation, there is no duty grounded in the right of the assembly to obey. There may still be reasons to obey that are more instrumental.

When the democratic assembly breaches the limits of its authority, there are a few options available to us to remedy the situation. *Internal remedies* can be sought such as the use of liberal and democratic rights to bring about change. For example, using the

[46] Ibid, 275-277.

democratic right to vote to effect change at the legislative level allows constituents to voice their disapproval of democratically-made laws or policies. There may also be the procurement and enforcement of certain liberal rights to protect groups that are disproportionately affected by a legislative provision. An attractive feature of democracy, after all, is the capacity for renewal and reform from within itself. Another kind of internal remedy takes the form of civil disobedience and mobilization for change on the part of the people. These are your activists, lobbyists and interest groups who make minor public disturbances, such as a rally or protest, to call attention to an unjust law. Lastly, there may be an attempt to establish justice when the authority has completely broken down in the sense of systematically violating public equality. While Christiano himself does not elaborate on this, I take it to mean a complete shift in political power to oust an administration whose laws and policies are continually and systematically setting back the interests of all or parts of its citizenship. Aside from internal remedies, there is one other option available to remedy democratic overreach that is more *institutional*:

> It has been argued that democratic society ought to have a written constitution spelling out the basic rights people have, which is adjudicated by an independent court with the power to strike down legislation that violates constitutional law.[47]

The institution of judicial review has often been used by democratic states such as Canada and the United States to strike down pieces of legislation that have been judged as 'unconstitutional.' By enforcing the rights that are entrenched in written constitutions

[47] Ibid, 277.

such as the Charter of Rights and Freedoms, constitutional courts have the power to render a democratically-made law effectively a 'dead letter.'

A few important things to clarify before discussing judicial justification in greater detail in the final section of this chapter. The first point I want to clarify is that when the democratic assembly violates public equality, this does not then impose a duty on citizens not to comply. A lack of normative power does not entail an absence of reasons for compliance. That is to say, citizens could very well have reasons to continue complying with the decisions of the assembly that are more instrumental in nature. The only difference is that citizens no longer have a duty to comply that is grounded innately in the assembly's right to rule.

The second is that the use of internal remedies and judicial review are *not* mutually exclusive; they can and sometimes do run simultaneously. Take for instance a landmark case in Canadian constitutional law, *R. v. Morgentaler*, which officially struck down Canada's abortion law. The appellant in this case, Dr. Henry Morgentaler, performed abortions out of his Montréal and later Manitoba clinics in an open and direct violation of Section 251 of the *Criminal Code of Canada* which prohibited the procurement of an abortion or miscarriage.[48]

The decision in *Morgentaler* was the culmination of a decades-long legal battle surrounding the language and spirit of s. 251. But more than that, it stoked the fire of feminist activism and numerous women's rights movements that had been gaining steam

[48] R. *v.* Morgentaler [1988] 1 S.C.R.

across Canada between 1960 and 1985 which were heavily focused on women gaining control of their own bodies. Movements such as the Abortion Caravan in Vancouver, for example, were public demonstrations that voiced women's demands for birth control and abortion rights. Throughout his many legal battles, Morgentaler's stance was backed by such feminist movements until finally, in 1988, the Supreme Court of Canada formally struck down Canada's abortion law as unconstitutional.[49] The court found that s. 251 violated Section 7 of the *Charter of Rights and Freedoms* because it infringed upon a woman's right to "life, liberty and security of person" on the grounds that "forcing a woman, by threat of criminal sanction, to carry a fetus to term […] is a profound interference with a woman's body and thus a violation of her security of the person."[50] What *Morgentaler* demonstrates is that both an internal remedy, such as the use of liberal rights and the mobilization for change by the people, can operate alongside and quite possibly influence an institutional remedy like judicial review.

### 1.3 The Nature of Judicial Justification

How can a procedure that permits appointed judges to strike down democratically-made law ever be legitimate in a system that positions public equality as its fundamental principle of social justice? This is the question I will attempt to answer in the remainder of this chapter. To do so, I will first consider the type of authority that the courts hold in

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[49] Bernard M. Dickens, "The Morgentaler Case: Criminal Process and Abortion Law," *Osgoode Hall Law Journal* 14, no. 2 (1976): 231-234; 237.

[50] R. *v.* Morgentaler [1988] 1 S.C.R.

two different cases. The first case is when the legislature functions as it should and achieves its democratic objectives, namely securing public equality. In this case, we will find that courts hold a kind of instrumental authority such that the courts inherit the democratic assembly's inherent authority in the form of a right to rule.[51]

Second, I will consider those instances mentioned above where the legislature itself violates public equality by issuing a directive that sets back the interests of some of its population or violates liberal rights. In such cases, there is an authority gap that must be filled since the democratic right to rule in this particular instance has been undercut and gone into shambles. Should it be the courts that remedy the violation, we find that their powers to do so, in this case, resemble not a type of 'authority' per se (at least none of which we have discussed prior, certainly not a right to rule since that has been kiboshed), but something closer to a Razian brand of *justification*.

### *1.3.1 When the Legislature is Within its Limits: 'Instrumental' Right to Rule*

Recall that the democratic process is the best we can do when it comes to distributing an equal stake in making decisions that shape the common social world to ensure we are advancing the interests of persons equally in light of the pervasive facts of judgement we face in pluralistic society. By realizing public equality, democracy enjoys

[51] It is important to stress that this is not the kind of instrumental authority previously discussed. For lack of better terms available, the idea is that the courts are an instrument of the democratic assembly and thus delegated with the assembly's right to rule. So it is 'instrumental' but not in the sense that it possesses 'instrumental authority' in terms of the *capacity to impose duties* conception. So when I use the term 'instrumental' to describe judicial authority in the first case, I mean this only in the sense that the courts are an instrument or device of the legislature, imbued with democratic authority, used to achieve democratic aims and directives.

an inherent authority that confers the moral duties of obedience and non-interference on subjects since members of society are required to support those institutions which realize public equality. Therefore, democratic authority is a right to rule. When the democratic assembly issues directives that satisfy and promote public equality, it advances the fundamental principles of social justice it is charged with advancing. Of course, this does not only include the democratic assembly. Other arms of government such as the bureaucratic, executive and judicial branches enjoy democratic authority instrumentally by implementing democratically-chosen purposes. Consider the fact that the main task of the courts is to enforce the laws passed by the legislature as well as the constitutional rights that help advance the interests of persons equally.

So insofar as the courts are advancing democratic interests and pursuits, they inherit democratic authority as an instrument of the legislature. Their authority has democratic pedigree, in other words. Another way of conceiving this is in terms of results-driven reasons and procedure-driven reasons. Whereas the legislature is evaluated based on the inherent fairness of its decision-making process itself, the courts are evaluated more on the basis of the decisions they produce, again making their authority more instrumental in nature.

To bring this into the Canadian context, let us consider the relationship between the Supreme Court of Canada (SCC) and the House of Commons for example. Distinct from the House of Commons whose right to rule is derived from its embodiment of public equality, the Supreme Court is a democratic institution but not in an obvious way. Its

powers come from power-conferring provisions of law promulgated by the legislature, namely the *Supreme Court Act*. More precisely, Section 52 of the Act specifies that under the court's ultimate appellate civil and criminal jurisdiction within Canada, judgments made by the Supreme Court are said to be "final and conclusive."[52]

So whereas the House of Commons enjoys an inherent right to rule owing to the principles lying at the foundation of the democratic process, the Supreme Court is merely an *instrument* for achieving public equality whose power is derived from the assembly itself. Its authority is thus attached to the regular and proper functioning of Parliament. So the key distinction to be made here is the definitive source of the right to rule. It is not that there is a different type of authority in play for both the House and the SCC (e.g., a right to rule versus the capacity to impose duties), but rather the *origin* of each body's authority. The Supreme Court's right to rule is enjoyed as an agent of the democratic legislature and as such is instrumental as opposed to the House which is inherent.

### *1.3.2 When the Legislature is Outside of its Limits: The Service Conception*

But what are we to make of judicial authority, specifically concerning the power of constitutional courts to strike down democratically-made law, when the legislature violates public equality? Does the nature of the authority change? Is it even an authority at all?

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[52] *Supreme Court Act* (R.S.C., 1985, c. S-26).

Ideally, the democratic forum makes laws that protect liberal rights and protect public equality and neutral judges enforce these democratically-made laws through their inherited democratic right to rule as an instrument of Parliament. But recall that when the democratic assembly passes a law or issues a directive that fails to advance the interests of all or some of its subjects or violates liberal rights, it undercuts its authority. Consider the following, and admittedly preposterous, example. Let us assume that Canadian Parliament passes a law which dictates that every person in Canada named Frank is to receive a lesser share of social goods. This includes disproportionately lower access to adequate housing, work, education, and the like. So, under the provisions of what I will call the "Frank Law," anyone named Frank will undoubtedly have their interests set back, be unable to pursue their well-being, and suffer a very serious loss of moral status by being treated as inferior or subordinate to others. This is obviously an arbitrarily unjust law and because of this, the Frank Law effectively undercuts the authority of Canadian Parliament.

This means that with respect to the Frank Law specifically, the legislature still possesses the right to rule, but they have transgressed the limits of that right. The main idea to stress here is that democratic authority has gone into shambles and we are left with this pesky authority gap. So let us consider our options. As previously discussed, there are different ways to go about remedying violations of public equality. Supposing enough people feel sorry for the Franks in Canada (I should hope they would), Canadians could vote to have the legislation expunged or for some administrative change that would repeal

the Frank Law. Or perhaps all the Franks would come together in solidarity and protest against the legislation. However, for the sake of argument let us assume that the chosen remedy for this violation of public equality is judicial review. These would constitute most of the internal remedies previously mentioned.

Bearing in mind the argument that was made in the previous section, if democratic authority is undercut by violating public equality, then by extension those institutions which function as an instrument of and derive their authority from the legislature should also lose their authority on such matters. So, in the case of the Frank Law, the authority of the Supreme Court also lacks democratic pedigree and is thus undermined as well. Despite this fact, the justices sitting on the Supreme Court bench in countries like Canada and the United States possess the constitutional prerogative to strike down a law. But remember to mind the authority gap. Judges have the power or capacity to expunge a provision of law, but so far they lack the *legitimate authority* to do so since the court's right to rule was affixed to the democratic assembly whose own right to rule has been lost. For the SCC to wield its constitutional powers of judicial review would be to act independently of the auspices of Parliament.

However, the story does not end here. Simply because the SCC does not have a right to rule in this case does not rule out the possibility of court justices being a legitimate authority on some other grounds, despite lacking the delegated right to rule from the legislature. But what grounds does judicial review have for the legitimacy of its constitutional powers? As Christiano suggests, our social institutions should be designed

to preserve democracy and liberal rights. If a charter of rights with judicial review is necessary to achieve this result, then the account on offer does not rule out this strategy. It may not be desirable and its very nature may invariably run counter to the ideals of democracy, but judicial review might find legitimacy as being negatively good. That is, the very idea of appointed judges striking down democratically-made law is counter-majoritarian and negates just about every aspect of the framework of equality and social justice that we have laid out thus far. But in this instance, it is the lesser of two evils. The courts might not possess the democratic authority to remedy the violation, but neither does the legislature. Democracy loses its authority when it disenfranchises minorities or deprives them of their basic rights, so an institution that remedies this most effectively may be defensible.[53]

This argument that Christiano puts forward echoes the general thrust of Dworkin's argument in *Freedom's Law* to the effect that there can be a democratic rationale for limitations on majority rule.[54] According to this, a society could better satisfy public equality overall with the help of judicial review than if the democratic assembly were to operate unchecked. Consider the following as an example. Imagine two hypothetical societies: Society A, which has no judicial review, and Society B, which has judicial review. If the democratic assembly fails in either society, there is a definite loss to the

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[53] Note well, however, that this does not rule out using any of the internal remedies as a strategy for restoring public equality, nor does a violation of public equality impose a duty upon citizens to disobey legislative decisions. This is only to say that Christiano is open to the *possibility* that judicial review can act as a legitimate remedy in these cases and can be defended as such, even if it is perhaps not our first choice.

[54] Christiano, *The Constitution of* Equality (2011): 279.

realization of public equality. This we know. But in Society B, there is an institutional safety net and public equality can possibly be restored. It does not matter that it is not a 'democratic institution' in the purest sense of the word because when the democratic assembly violates public equality it loses its right to rule as well. So neither institution has democratic pedigree, but one has violated public equality and the other has the ability to 'right the ship' when the former threatens to run aground. This again is dependent on the court making the 'right' decision in each case.[55]

From a procedural standpoint, the fact that a constitutional court does not itself realize public equality is no more a strike against it than the fact that the democratic assembly fails to realize public equality.[56] While neither the assembly nor the courts have inherent authority in this case, the court at least has a chance to bring about greater compliance with equality. This implies that a constitutional court can be justified, the only qualifier being that it is only justified if the good decisions significantly outnumber or outweigh the bad (in importance). So, judicial review is justified only insofar as it is able to secure public equality. To be sure, judicial review is a strike against democracy, but it is also a response to a strike against liberal rights and public equality.

If we think of judicial review in terms of this *service conception*, we can see where it might possess a different kind of authority than we have already discussed; it

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[55] This will be discussed in the next chapter. For the sake of simplicity, I will avoid the debate about whether judges can find the elusive "right answer' in each case; a debate that has engaged scholars like Ronald Dworkin and Wil Waluchow. But I will consider landmark constitutional cases in the Canadian context to determine whether judicial review, to date, has been exercised in a way that warrants serious concern for these constitutional powers.

[56] Christiano, *The Constitution of* Equality (2011): 279.

possesses the second conception of authority, the capacity to impose duties. The service conception refers to the fact that judicial review is negatively good; again, the lesser of two evils. It is not our first choice, but it may be the best choice for serving our particular needs at the time (i.e., restoring public equality). With this service conception in mind, we can start to deliberate about the specific nature of the authority that judicial review might have a claim to in this case as well as the basis for such authority's justification.

### *1.3.3 Raz's Normal Justification*

Joseph Raz provides perhaps the most applicable conception of justification for our investigation with what he calls the *Normal Justification Thesis*. According to this, showing that one individual has authority over another involves demonstrating that the alleged subject is likely better to comply with the reasons which apply to her, rather than supposed authoritative directives, if and only if she accepts the directives of the alleged authority as binding and attempts to follow those directives rather than the reasons which apply to her directly.[57] This follows from the idea that authoritative directives ought to be based on reasons which already and independently apply to subjects and are relevant to their action in the circumstances covered by the directive. What should be guiding the decisions about which kinds of commands to give subjects is what subjects already have

[57] Joseph Raz, "Authority and Justification," *Philosophy & Public Affairs* 14, no. 1 (1985): 18-19.

reasons for doing.[58] Issuing a command is meant to replace reasons that already apply to the subjects.

For example, we already have good reason to give up a fair share of our resources for the sake of the common good, say to help those with fewer resources for example. Authorities simply help us comply with those reasons by establishing efficient and fair systems such as taxation to help distribute those resources more evenly. Consider also the example of your boss telling you to do your job. You already have good reason to do your job; your boss is simply helping you comply with the directives that already apply by issuing the directive to stay on task and do the work assigned to you.

An authority is therefore legitimate when it enables subjects to act *better* on applicable reasons when they take the commands as giving them preemptive reasons for acting. This meets the famous challenge posed by Robert Paul Wolff's anarchism which says that an authority is never legitimate unless one complies better overall by submitting to authority than by acting on the basis of her own judgements of what is right and wrong in each case.[59] Wolff is of the mind that there is something immoral about failing to critically reflect on what one ought to do in each instance. Submitting to the commands of the state or governing body is precisely such a case. Raz's conception of authority, however, is contingent on the thought that so long as subjects do better by reason overall by obeying certain classes of commands, the subject has a duty to obey the commands.

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[58] Ibid, 19.

[59] Ibid, 19-21.

Given this line of reasoning and the argument on offer, it is reasonable to suggest that the kind of authority that judicial review holds in cases where the democratic assembly violates public equality is something like Razian Justification. If this is true, then it can reasonably be argued that judicial review is legitimate in these cases. Subjects in a democracy, it can be said, already have reasons to treat others as equals via the Principle of Equality. So assuming the courts make the 'right' decision or at least a reasonable decision, subjects have good reason to comply with those decisions and accept them as legitimate.

### *1.3.4 What are the costs?*

While judicial review can avoid some of the charges against its legitimacy on this account, albeit in a rather roundabout way, there is still an important loss to be acknowledged. It is worth specifying exactly what the actual costs of judicial review are and what it is that is lost when judicial review is exercised in the absence of a democratic decision that successfully realizes public equality. For Christiano, it is the fact that the democratic process is the living embodiment of public equality which makes it special. That is to say, democracy is a fair procedure and is therefore inherently just. From this we can infer that Christiano sees the institution of judicial review as a *cost* of the limits of democratic authority; the cost here being the loss of a crucial politico-moral value: *intrinsic justice*.[60]

[60] Thomas Christiano, *The Constitution of Equality: Democratic Authority and its Limits* (Oxford: Oxford University Press, 2011): 278.

Intrinsic justice refers to the inherent fairness and equity of certain social and political institutions (in our case democratic institutions like the legislative assembly) when making decisions that affect the well-being of persons and the common good. Much like the Rawlsian conception of justice, this idea of intrinsic justice is based on the idea that justice is the first virtue of social institutions and that these major social institutions (such as the political constitution, legal protection of freedoms, predominant economic and social arrangements, competitive markets, etc.) should be constructed in a way that advances the well-being of all.[61]

Similar to Rawls' theory of justice, Christiano seems to emphasize the profound and present effects that the basic structure has on society. Although, while Rawls' conception of justice focuses more heavily on the distribution of rights and the division of advantages, Christiano takes a purely egalitarian approach which demands that people's well-being be advanced (or at least that everyone has equal, basic conditions for advancing their well-being available), but that no one be sacrificed for the greater good to preclude any Utilitarian calculus finding its way into the framework. So, it is the fundamental aim of social and political institutions to advance the command good and ensure that each person's well-being is advanced equally.

The inherent justice of democratic institutions is derivative of democracy's public realization of equality, but not in the minimal sense such that it is merely capable of doing so by design or even by sheer chance. Rather, it is because the democratic process is

[61] John Rawls, *A Theory of Justice: Revised Edition* (Massachusetts: Harvard University Press, 1999): 3, 6-7.

itself, in the fullest sense, the actual *embodiment* of public equality. In a democratic state, social institutions are structured such that all are treated as equals and can see that they are being treated equally. Further, the democratic process is predicated on the principle that each person ought to have an equal say in the process of establishing justice within the context of widespread disagreement, diversity, fallibility and cognitive bias.

By comparison, judicial review can help us achieve public equality but it does not itself embody public equality; it is inherently unfair from the egalitarian standpoint and therefore lacks the intrinsic justice that democracy possesses. But as we have seen, the justice of democracy is conditional upon certain facts accompanying the democratic process, but not in the sense that its justice is simply an instrument for the realization of those facts. So, the way democracy loses its authority, as has been stated previously, is by losing its intrinsic justice altogether. In the above scenarios, the politico-moral value lost is the inherent fairness of the democratic process as the embodiment of public equality. Therefore, the price that we pay for judicial review acting as the 'second best' means of achieving public equality is the loss of inherent justice in the very mechanism that is tasked with restoring justice and public equality.

With this understanding, there is another critical impact of this cost to take into account which is tied to the loss of intrinsic justice. Recall that Christiano's picture of democratic authority leaves a space that needs to be filled when the legislature violates public equality. Thus, an authority gap has been left open. While judicial review can legitimately step in to remedy violations of public equality on the basis of its Razian

justification, this does not mean that it then fills the authority gap. With intrinsic justice still undermined and public equality vulnerable, we lack democratic authority on the constitutional question at hand. Judicial review may restore public equality but it does not do so with democratic authority, and so the gap remains. Insofar as a law has been struck down or overwritten by the courts, that part of the law will always remain authoritative in a purely normal justification sense but it may never actually enjoy democratic authority again. So if the Supreme Court strikes down the Frank Law, then on the matter of the Frank Law specifically, under this account, the legislature's inherent right to rule is irretrievable. But is there a way that we can pull something back from this kind of loss? Is it possible to "pay down the cost" of judicial review? Answering this question will be the task of my next chapter.

### 1.4 Conclusion

In summation, Thomas Christiano constructs a systematic account of democracy that not only establishes a normative basis for its authority in the fundamental principle of public equality but also sets out limits to its authority. On this view, democracy holds a preeminent, inherent right to rule owing to its ability to public realize equality. By its very nature, the institution of judicial review runs counter to democratic values. However, due to the limitations on democratic authority set by its underlying Principle of Public Equality, judicial review takes on a Razian breed of justification conferred by its capacity to potentially restore public equality and protect the liberal rights and interests of

individual citizens. However, it does so at a cost since the democratic authority under which the courts normally operate has been compromised since the legislature violated liberal rights and therefore there is a loss.

In this way, judicial review acts as a second-best option when the democratic assembly undercuts its own authority by violating public equality. Could the cost of having a counter-majoritarian institution in a democratic framework, however, can be paid down through the design of our institutional software? Using various canons of construction and employing various principles such as *stare decisis* are but a few ways we have done so already. In the following chapter, we will look at the arguments of Ronald Dworkin to consider one possible strategy for paying down the cost of judicial review.

## CHAPTER TWO: Paying Down the Cost

In the first chapter, we drew from Christiano's *The Constitution of Equality* to establish that the legislature can and at times does violate the public equality and liberal rights of its constituents, and when it does so it forfeits its democratic authority over the legislation that caused the violation. Through a Razian brand of justification, the courts in this sense do us a service by overturning the law in question because it helps subjects comply with the reasons they already have for acting, such as promoting equality and affirming individuals' statuses as moral persons. But while there is the possibility of restoring public equality and remedying the violation through judicial review, this does not mend the gap in democratic authority. Therefore, restoring public equality through judicial review comes at the cost of sacrificing democratic authority and the intrinsic justice bound up with it. The question then becomes, what can we get back—if anything—through the use of judicial review when democratic authority breaks down? Is there any way to claw back some of the intrinsic justice or democratic authority that was lost?

Answering these questions will require a close examination of those accounts of judicial review and the basis of democracy which give us the best reasons to think that it can fill in the authority gap and help pay down this politico-moral cost. One of the most robust and conceptually appealing accounts of judicial review has been postulated by Ronald Dworkin. I pit Dworkin's arguments against Christiano's framework to determine if a nexus can be found that might help pay back the moral cost of judicial review. As such, the central question of this chapter will be: can Dworkin explain why, contra

Christiano, there is no disvalue when judges make certain decisions about rights rather than a democratically representative body? Is there anything new that Dworkin's account offers to the discussion which might give us reason to think we can retrieve some measure of authority of the kind enjoyed on account of having democratic roots, or retrieve some vestige of the moral value lost? If Dworkin can help us adequately fix the authority gap, then we may have reason to accept the decisions of the courts on constitutional matters as well as their place and role in our modern constitutional democracies, with greater credence. Perhaps there is no moral cost incurred in a democratic arrangement that delegates constitutional matters to non-majoritarian procedures. But if Dworkin is wrong, then we are back to where we started at the end of Chapter 1 and must accept that there is always a politico-moral cost to judicial review.

This chapter will argue that the answer to this question is somewhat inconclusive, at least at this juncture, since it largely hinges on the *kinds* of questions we ought to be asking about the aims of our decision-making process. If we are concerned with *who* should be authoritative on constitutional matters (what I call *Procedure-driven Questions*), then Dworkin does not add anything to the picture we sketched out in the first chapter; there will always be a lingering authority gap from the loss of intrinsic justice that comes with appointed judges enforcing entrenched rights to overturn decisions reached by the legislature. But if we ask a different kind of question, one that is instead concerned with the *content* of our rights and the underlying conditions of democracy (what I call *Content-* or *Rights-driven Questions*), then there may be an avenue we can

take that avoids any politico-moral cost of judicial review. It would not yet constitute a positive argument in favour of judicial review at that point, but it would level the playing field by giving the judiciary a chance to improve democracy by testing and specifying its underlying conditions without incurring a cost. As will be seen at the end of this chapter, more work needs to be done to make a positive case for judicial review on this conception.

## 2.1 Dworkin and the Constitutional Conception of Democracy:

### *2.1.1 The Majoritarian Premise*

Dworkin's approach to defining democracy's fundamental value and point, specifically what we mean by government "by the people," hinges on the question of whether or not we should accept what is called the *majoritarian premise*. The gist of this premise is that political procedures should be designed so that the decision reached on important matters is the decision that the majority of citizens would favour, and the political arrangements which constitute the democratic process should be both aimed at and tested by this goal.[62] Because of this, it is also a fundamental tenet of this premise that the community should regularly defer to the majority's judgment on what the contours of individual rights look like and how they ought to be respected. While the premise does not rule out exceptions to majority rule like judicial review, it does insist

[62] Ronald Dworkin, "The Majoritarian Premise and Constitutionalism," *Philosophy and Democracy* (2003): 242. Note that the rationale behind this premise is not to be confused with those underlying collectivist or utilitarian theories which would in some cases override individual rights for the sake of the 'greater good.'

that in these cases, even if some derogation from majoritarian government is justified, something morally regrettable has happened.[63] In a similar spirit to Christiano's egalitarian conception of democracy, "a moral cost has been paid."

The majoritarian premise thus provides the basis for the *majoritarian conception* of democracy which correspondingly holds that even in cases where there are sufficiently strong countervailing reasons to justify doing so, it is always unjust when a political majority is not allowed to have its way.[64] So if a law like the *Lord's Day Act*, which was overturned in *R. v. Big M. Drug Mart*, is passed by the legislature despite reasons one may have for going against it, our commitment to democracy demands that the law stands unless voted down by the democratic body.[65] However, Dworkin challenges this view suggesting that on some occasions, the will of the majority should not be the final judge of when its power should be limited to protect individual rights.

Dworkin's proposed *constitutional conception* rejects the idea that the defining goal of democracy should be that our collective decisions always or at least normally be those of which the majority of citizens would approve. Instead, the defining aim of

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[63] Ibid.

[64] There are two main types of limits to consider in the discussion of democratic limitations. The first is *Countervailing Considerations* against democratic authority. These are considerations that count against one's obedience to a democratic decision and can be put in balance with the weighty considerations that ground the duty of obedience. The second is *Undercutting Consideration*. These are not considerations that can merely be weighed in balance against considerations which favour obedience, but considerations that actually undercut the claim to authority that the democratic assembly makes. See Thomas Christiano, *The Constitution of Equality: Democratic Authority and its Limits* (Oxford: Oxford University Press, 2011): 261-62.

[65] The *Lord's Day Act* was an act of Parliament which compelled observance of the religious duty of resting on "the Lord's Day" by prohibiting the sale of goods on a Sunday. The validity of the Act was challenged on the basis that it violates s. 4 under the Charter and was subsequently deemed unconstitutional since it cannot be found to have a secular purpose and thus offends freedom of religion. See R. *v.* Big M Drug Mart Ltd., [1985] 1 S.C.R. 295.

democracy should be that collective decisions should be made by political institutions whose structure, composition, and practices treat all members of the community as individuals with equal concern and respect. Like the majoritarian premise, it requires that everyday political decisions be made by officials who have been chosen in popular elections to represent the will of the people.[66] But the requirement of these procedures is not owed to any commitment to the principles of majority rule, but out of concern for the equal status of citizens. For this reason, on the constitutional conception, there is no reason why a non-majoritarian procedure like judicial review cannot be employed on special occasions when this would better protect or enhance the equal status of persons which make up the essence of democracy, and it does not accept that these exceptions come at a moral cost.[67]

Fundamental to Dworkin's constitutional conception is the idea that democracy entails government subject to conditions, or what he calls "democratic conditions." We have already determined the general nature of these conditions above (i.e., equal concern and respect). If the aim of democracy is taken to be that the general scheme of political decision-making—which includes democratic and non-democratic institutions—be made to protect the equal status of citizens, then democratic institutions retain their preeminent authority on the condition that they respect equal status. But when their provision or respect of these conditions is inadequate, then on the constitutional conception there can

[66] Dworkin, "The Majoritarian Premise and Constitutionalism," (2003): 242.
[67] Ibid.

be no objection to other procedures that protect and respect them better.[68] The constitutional conception represents a *holistic* scheme of constitutional democracy. The underlying value is to protect the equal status of citizens, and so the better form of government is the one that does this better. For example, recall my previous example of the Frank Law which disproportionately sets back the interests of any named Frank in Canada for completely arbitrary reasons. Hypothetically, the democratic conditions might intuitively incorporate the demand that people not be treated unequally for arbitrary reasons such as the basis of their given name. So there would be no moral cost if a court that enjoyed the power to do so, under a valid constitution of course, struck down the Frank Law as 'unconstitutional.'

It should be noted that Dworkin admits that these requisite conditions are crucial yet there may be controversy regarding their specific content and whether a particular law offends them. However, this is not a conceptual bullet that Dworkin has to bite, nor does this fact subject the democratic conditions subject to the same regress argument that besets most majoritarian-based theories.[69] As a matter of fact, acknowledging this reality is key to Dworkin's argument. It is questionable, he suggests, to object to a practice which assigns those controversial questions about the content of the democratic conditions for final decision to a court because this practice is undemocratic since this assumes that the

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[68] Ibid, 243.

[69] Whereas we cannot base the legitimacy of democracy on the quality of procedure alone since there is disagreement about the quality of the procedure itself, we can base its legitimacy on the condition that certain rights are respected even if the contours of those rights are indistinct because we still acknowledge the fundamental value of majoritarian decision-making but within limits. It is therefore the *limits* that are in contention and not the nature of the procedure itself.

law in question respects the democratic conditions, and that is the very issue in dispute.[70] This is meant to attack those views against judicial review which intend to shift the central focus of constitutional theory to whether and when the compromise of democratic authority is justified.[71] This was the very question we were trying to answer in Chapter 1. But this creates the assumption that democracy is improved only when it caters to the majoritarian premise and is designed to produce collective decisions that match majority preferences, and Dworkin intends to make us doubt this conclusion.

### *2.1.2 Government "By the People"*

Before any further assessment of the different conceptions of democracy, there is a necessary distinction that must be made. When we talk about democracy, we say that it is most fundamentally "government by the people." But what does this mean? Government by the people is intended to mean that "the people" (the citizens) collectively do things that no individual can or does do alone.[72] A single person cannot play a symphony, for example. Nor can a single footballer win a football match on her own against another team. This being so, we have to consider what *kind* of collective action we are dealing with. Dworkin distinguishes between two kinds: *statistical* and *communal* collective action which in turn infer two readings of government "by the people."

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[70] Dworkin, "The Majoritarian Premise and Constitutionalism," (2003): 243.

[71] As will be discussed later in this chapter, this is where most theories of democracy go wrong, including Christiano's (or so Dworkin argues). For now, it suffices to say that Dworkin's qualm with this line of argument from champions of the majoritarian premise is that it shifts the onus to the procedure in question which he believes is incorrect.

[72] Dworkin, "The Majoritarian Premise and Constitutionalism," (2003): 244.

Under the statistical conception of collective action, what the group does collectively is merely a matter of some function of what each individual member of the group does on their own with no sense of doing something as a group. So, we would say that only the combined action of individuals watching the television show "Ted Lasso" contributes to the program's increasing viewership but we would not have any sense of contributing as part of some organized group whenever we watch an episode. When one thinks of an organized group they normally think of something more like the Beatles or the Royal Air Force or the Los Angeles Dodgers for example. Similarly, the statistical reading of government "by the people" thus says that political decisions are made in accord with the votes or wishes of some function (namely a majority) of individual citizens.

The communal conception, conversely, refers to those actions which cannot be reduced to some statistical function of individual action but presuppose a distinct *collective agency*. It is a matter of individuals acting *together* in a way that coalesces their separate actions into a unified act that is altogether "their action."[73] Consider again the example of a symphony orchestra. An orchestra can play a symphony, but no single musician can. It is not enough that each violinist plays some appropriate score, timing her performance as the conductor instructs. Rather, a successful orchestra requires that each individual musician play *as one* orchestra, each intending to contribute to the performance of the group and taking part in a collective responsibility for the music they

[73] Ibid.

produce. The communal reading of "by the people" correspondingly says that political decisions are taken by a distinct entity ("the people") rather than by any set of individuals one by one.[74]

With these distinctions in place, Dworkin applies the two different readings to fend off the assumption of the majoritarian premise that something morally regrettable happens when non-democratic practices make decisions on constitutional matters. As I will show next, he attempts to thwart the argument that the cost of judicial review is positive liberty, political equality, and a sense of community.

### *2.1.3 What is the Cost: Liberty?*

The first argument that supporters of the majoritarian premise make against constitutional limits on majority rule is that when a constitutional provision limits what a majority can enact, the result is to compromise the community's *liberty*. More specifically, it is said to compromise their positive freedom, understood as the freedom of self-determination or the right of the people to govern themselves over their officials.[75] Since the argument that constitutional rights compromise freedom appeals to positive rather than negative liberty, then there are two kinds of liberty being pitted against each other. In that case, the suggestion from supporters of majoritarianism is that

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[74] Ibid, 245. Rousseau's idea of the General Will is a comparable example of this: a collectively-held will which aims at the common good or interest of all. See Jean-Jaques Rousseau, "The General Will," in *Political Thought* (1999): 96-97.

[75] Dworkin, "The Majoritarian Premise and Constitutionalism," (2003): 245. The kind of freedom that is being appealed to in this argument is akin to Isaiah Berlin's idea of *positive liberty* (as distinct from *negative liberty*) as well as Benjamin Constant's *liberty of the ancients* (as distinct from the *liberty of the moderns*). See Rosen, Wolff, and McKinnon, *Political Thought* (1999): 122-128.

constitutionalism protects negative liberties, like freedom of expression, at the cost of the positive freedom of self-determination which is alleged to have preeminent value.[76]

Self-determination is a potent political ideal. People ardently want to be governed by a group not simply to which they belong, but with which they identify in some particular way. A community of vegetarians would likely want to be governed by other vegetarians rather than by a group of meat-eaters under the belief that decisions made by a group, most of whose members share their values, will be better decisions for them. The ideal of self-determination is bolstered by the additional view that when citizens put their ballots in the boxes on voting day, they are inoculated against the feeling that the government is not theirs. However, if there are more vegetarians in the hypothetical community described above, then statistically speaking the meat-eaters will have to bend to the will of the vegetarian majority. How could one be thought to be governing herself when she must obey what other people decide even if she thinks it wrong, unwise or unfair? Dworkin argues that the strength of this ideal of self-determination lies in half-articulated convictions about positive freedom considering the fact that, as individuals, members of society must often bend to the will of others and accept a majority's will in place of their own.[77]

Since we have distinguished between two different readings of government by the people, we have to then apply this distinction to the people's positive freedom of self-

[76] Ibid.

[77] Ibid, 246.

determination if we are going to talk about the freedom of the people to govern themselves. The statistical reading says that an individual's control over the collective decisions that affect her life is measured by her power, on her own, to influence the result. On this reading it is only the combined action of individuals going to the voting polls on election day that affects the election results but our reference to a collective entity does not point to any definable, organized entity. On the communal reading, freedom amounts to the relation between government and the whole citizenry understood *collectively*; "the people" as such. So, rather than discussing freedom as a relation between the government and citizens taken individually, we are more concerned with how the government treats the community as a whole.

Thus, the answer to the previous question—how we can be thought to govern ourselves when we often have to bend to the will of the majority—might lie in the communal conception of self-determination. If I am a genuine member of a political community, *its* acts are in some sense *my* acts, even when I have voted against it. This is just as much the case with, for example, the wins and losses of a baseball team of which I am a member. The team's win or loss is just as much my win or loss even if my individual contribution on the field made no decisive difference in the score either way. Only on this communal conception, the argument goes, can we comprehensibly think that we are governing ourselves as genuine members of a flourishing, productive democracy. Otherwise, the statistical reading would have us looking to establish a positive freedom that describes a relationship between each citizen and their government which is a far

more daunting task. But what does genuine membership in a political community entail? The trick will be describing a connection between an individual and a group that makes it fair to treat the individual as responsible for the actions of the collective.

When we say that the moral cost incurred is the loss of liberty, we understand this to mean that the people govern themselves when the majoritarian premise is satisfied and that any compromise of that premise compromises that sense of self-governance. However, self-government properly understood (in the communal sense) entails genuine membership in the community; a qualification not acknowledged by the majoritarian premise. Consider the fact that German Jews still had votes in the elections that led to Hitler's Chancellorship, but the Holocaust would not be considered part of their self-governance even though the majority of Germans at the time would have approved of it.[78] Therefore, German Jews were not *moral* members of the political community because the racist laws of the National Socialist regime and the Nazi Constitution actively (and horrifically) violated the conditions of equal status for Jews living in Germany. If true democracy is government "by the people," in the communal sense that is, then democracy must be based on *moral* membership in the community.[79]

The condition of moral membership consists of both *structural* and *relational* conditions. Structural conditions describe the character that a collective must have if it is to count as a genuine political community. That is, it must be more than nominal; it must

[78] Ibid, 247.

[79] Ibid.

have been established by a historical process that has produced generally-recognized and stable territorial boundaries. Relational conditions, on the other hand, describe how an individual must be treated by a genuine political community so that they be a moral member of that community. A political community cannot count anyone as a moral member unless it gives them a stake in and independence from the collective decision. The political process of a genuine community must express some bona fide conception of equal concern for the interests of all members so that every person has an opportunity to make a difference in collective decision-making.[80] A genuine political community must also be a community of independent moral agents. Rather than dictate what its citizens ought to think about matters of political or moral or ethical judgments, it must provide circumstances that encourage them to arrive at beliefs on those matters through their own reflective and individual conviction.[81]

The constitutional conception then presupposes democratic conditions that must be met before majoritarian decision-making can claim any moral advantage over other procedures. This is congruous with the idea that for true self-governance the condition of moral membership must be met. So, Dworkin's argument is suggesting that a true democracy—or true self-government—is only possible when a community meets the conditions of moral membership, because then and only then are we entitled to refer to government "by the people" in a strong communal sense, and this qualification is only

[80] Ibid, 248.

[81] Ibid, 249.

acknowledged under the constitutional conception. So, we ought to turn to a conception of democracy whose very existence insists on those conditions being met; the constitutional conception. Liberty is not compromised because majority will is only flouted when those conditions are not met and when those conditions are not met, democracy cannot be violated since democratic authority effectively does not exist.

### *2.1.4 What is the Cost: Equality?*

The second argument for the cost of judicial review suggests that it is *equality* that is compromised when the majoritarian premise is ignored. The kind of equality being dealt with here is naturally that of political equality, but what this means specifically will again depend, once again, on our understanding of collective action. Starting with the statistical reading, political equality may be understood as the equality of citizens taken individually. But how do we measure political equality in this sense? Is it to be understood as the *power* of each citizen taken individually? Or is it perhaps the *impact* or *influence* of each citizen?

For Dworkin, there is no interpretation of 'power' we could draw up that would make equality seem appealing or even attainable to us.[82] To think in terms of one individual's power over another is not exactly an inviting line of inquiry when we talk about equal status in the political community. What then do we make of impact? The problem here is that impact can never be equal in representative democracy, nor does it

[82] Ibid, 250.

immediately capture our intuitive conceptions of political equality because it is insensitive to the most prominent source of power inequalities: wealth. Lastly, what about political equality as influence? This conception, unfortunately, is no better than the previous two. Like power, it is both an unattractive and unattainable idea of political equality, and like impact it is insensitive to the fact that wealth, which confers influence in the political realm, is unfairly and unequally distributed. So, we can start to see how the statistical reading makes little sense of the idea that political equality is compromised when the majority will is frustrated. This is especially true when we consider that individual power, impact, or influence is quite small in a full-scale democracy anyway.

Dworkin instead proposes that an egalitarian argument for the majoritarian premise, if detached from the statistical reading and instead recast from the communal reading, would be far more promising. On the communal reading, equality is understood not as the equality of citizens taken one by one but as the relation between the people and those who govern them.[83] So, political equality would be the state of affairs where the people rule their officials which, again, appeals to the ideas of self-government and political self-determination. From here, Dworkin's argument is the same as it was with liberty. Positive liberty and the sense of equality we have just plucked out are the same virtues. This being so, political equality appeals to self-government which is based on moral membership which is only acknowledged by the constitutional conception of democracy and not the majoritarian one.

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[83] Ibid, 251.

### *2.1.5 What is the Cost: Community?*

So, if constitutional limits on majority will do not compromise liberty or equality, then perhaps it compromises a sense of community. Imagine yourself seated at the table with your family for a typical Sunday dinner. You have seen on the news that the controversial Bill 2112, informally known as the "Frank Law," has just been passed through the Senate and given royal assent. The passing of the Frank Law by Parliament has divided many people in the community, including you and your family. As is often the case (at least in my household), when drinks are had things get political. You and your family members will discuss current events, news and politics at the dinner table. Naturally, the Frank Law makes its way into the dinner conversation. Views are shared, arguments are made, and personal political and moral judgments about justice are revealed.

This sort of discussion is certainly not limited to the family household. The discussion will more than likely make its way into other communal interactions. We feel justified in having our say in the matter (a "right to complain" if you will) because we know that we have a stake in the decision-making process and believe we are genuinely governing ourselves. Some wish to have the Frank Law repealed while others think it ought to stand (a bias against the name no doubt). But what if the decision ultimately came down not to the representative you voted for in the last election (assuming your choice of representative won the election), but rather to a group of appointed legal experts whom you had no hand in appointing nor have any control over either in influencing or

holding them accountable for their decisions. Do we still have a right to complain in this case? That is, do we still feel justified in having our say in the matter and talking this over with family, friends, and other community members?

The argument from defenders of the majoritarian premise suggests that assigning fundamental political decisions to elite, appointed legal officials weakens the public's sense of community. But what is meant by community? People certainly have an interest in sharing their projects, language, entertainment, assumptions, and ambitions with others and a good political community will aim to serve those interests as best as it can. Communitarians who appeal to the majoritarian premise have in mind a different idea of "community." They have in mind the special benefits that they believe follow for people as individuals *and* political society as a whole when citizens actively engage in political activity in a certain spirit.[84] If genuine deliberative democracy can be realized, not only will collective decisions be better but citizens will lead better lives. This goal, however, is jeopardized by judicial review (or so advocates of the premise argue).

Dworkin submits that the problem with this argument lies in its questionable assumption that public discussion of constitutional justice is of better quality and engages more people in a deliberative way if these issues are finally decided by legislatures rather than the courts. First, Dworkin believes there is no necessary connection between the impact that a majoritarian process gives each individual and the influence that that person

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[84] Ibid, 252. Communitarianism is the theory that advocates a recognition of common moral values, collective responsibility, and the social importance of the family unit. See "Communitarianism," *Stanford Encyclopedia of Philosophy* (2020).

has over potential decisions.[85] I take this to mean that if we understand self-government in the communal sense, then there is no individual power that each citizen holds in the decision-making process which directly connects them to the outcome of the legislature's decision. Thinking back to the example we began with, we believe we are justified in discussing matters of justice with others because we believe we have a stake in the decision-making process. But what if the representative we voted for was not the one that was elected? How can we reasonably think we have any say when someone whose views we disagree with is making decisions that affect our lives? Why would we bother discussing the Frank Law with others in the community if the majority voted for it? It seems we have no more say with a representative we did not vote for than with an appointed judge.

This leads to Dworkin's second point: there is no connection between citizens' political impact and the ethical benefit secured by participating in public discussion.[86] So in the case where our choice of representative was not elected and we feel that our impact is diminished or altogether devoid of meaning—'impact' as understood in a statical rather than communal sense—then we feel unheard in the political process as well as public discussion. Dworkin posits that judicial review provides a superior kind of deliberation. Constitutional legal cases can and do provide widespread public discussion that focuses on political morality. The ideal of political community does not support the majoritarian

[85] Ibid, 253.

[86] Ibid.

premise any more than liberty and equality. So in the example we have been using, those who previously felt powerless perhaps now feel as though they have regained a stake in the conversation by being able to point to explicit rights and community values or moralities that are in contention with a decision which they believe they have not contributed to making but to which they are merely subject. While I am not so sure that Dworkin successfully argues for the *superior* quality of discussion that comes with judicial review, I do think he manages to fend off the argument that judicial review compromises this sense of community (not that it was one of the stronger criticisms to begin with). In fact, a decision by the Supreme Court of Canada last year generated a conversation rife with political and moral values between myself and my aunts at a family gathering earlier this year.[87] So perhaps there is something to Dworkin's argument here, even if not in terms of 'superior' quality.

### *2.1.6 A Level Playing Field*

It is clear that a constitutional provision giving an oligarchy of unelected experts the power to override or replace a legislative decision they thought unwise or unjust would be a strike against democracy. Even if the decision improved the legislation, there

[87] The decision reached in *R v. Bissonnette* in May of 2022 struck down s. 745.51 of the *Criminal Code* which allowed the periods without eligibility for parole for each murder conviction to be served back-to-back (consecutively). Writing for a unanimous Supreme Court, Chief Justice Richard Wagner ruled that s. 745.51 violated s. 12 of the *Charter*—the right not to be subjected to cruel and unusual punishment—in a way that cannot be justified in a free and democratic society. See *R v. Bissonnette*, 2022 SCC 23. The concern of many is that even though there is exceptionally little or practically no chance of murderers like Paul Bernardo or Dellen Millard ever making parole, there is a sense of security that is lost knowing that the possibility (however likely or unlikely) of letting people of a violent nature back into society remains.

would be a loss of self-government that the merits of their decision could not reasonably outweigh. On this, even Dworkin agrees. But what if we instead ask whether or not that same rule or policy being overridden undercuts or weakens the democratic character of the community, and the constitutional arrangement in place assigns *that* question to the court?[88] What if we shift our focus not to who should be the final authority on claims of right but what the specific content of those rights are? This is the crux of Dworkin's argument.

If the court's decision is correct, then on this account they do not just avoid the charge that they are anti-democratic (albeit not in an obvious way) but their decisions actually *improve* democracy. There is no moral cost paid because no one is individually or collectively worse off; the people's capacity for self-government and power to participate in a self-governing community have not worsened because everyone's power in that respect has been improved by the court's decision.[89] Had the court not intervened, everyone would have been worse off because the legislation which violated the democratic conditions would still be in place. If the Frank Law, for instance, stands in force and effect despite efforts by the public to voice their displeasure of it—and if no constitution can directly point to an entrenched right which has been violated nor any capacity of the court to overturn this obviously absurd law—then all of those poor Franks in society will continue to have their rights and interests set back and a clear injustice will

[88] Ibid, 254.

[89] Ibid.

persist. So because of this failure to meet the democratic conditions caused by the legislature in passing the Frank Law, there is an opportunity for the court to step in and right the ship without paying any moral cost.

A further point that is hinted at here is that because people are able to participate in the judicial decision-making process as litigants, and more generally as discussants regarding the merits or faults of a judicial decision, there is an argument that judicial review strengthens moral membership in this way. In bringing our affairs before the court and making claims of right, or simply discussing the details of a decision around the dinner table as discussed previously, we can still voice our judgements and play a role in the system even though we do not have a direct hand the decision process itself as we are alleged to have in the democratic process. Thus, when the courts get it right we are treated as moral members.

But if a court's decision is wrong or even harmful, then none of Dworkin's argument applies. It invariably damages democracy when an authoritative court makes the wrong decision about what the democratic conditions require. A court that misjudges or misinterprets the moral values to which a community is committed violates democracy. A recent example of this came out of the United States in June of 2022 when the U.S. Supreme Court overturned the landmark decision in *Roe v. Wade.* The American counterpart to *Morgentaler*, the initial decision in *Roe* had struck down the laws prohibiting women from getting abortions in the U.S. and when the decision was reversed last summer in *Dobbs v. Jackson Women's Health*, there was a great deal of pushback

from the American public.[90] However, per Dworkin, it no more impairs democracy when the court makes a wrong decision than it does when a legislature makes a wrong decision that is allowed to stand.

What is important to note here is that this is not yet a *positive* argument in favour of judicial review. All Dworkin has done is simply level the playing field upon which the contest between different institutional structures for interpreting the democratic conditions must take place.[91] What Dworkin is proposing is a theory about how certain clauses of some constraints should be read and what questions might be asked, rather than *who* must ask these questions or whose answer must be taken to be authoritative. For those questions, Dworkin says that we ought to instead turn to results-driven standards for determining the answer. From this standard, the argument can be made that the best institutional structure is one that is best calculated to produce the best answers to the

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[90] The Supreme Court in *Dobbs* (per Justice Alito) defended its conclusion on the grounds that the court was simply returning the matter to the states' jurisdiction for a purely legislative decision. Cf. Dworkin in *Law's Empire* 186 (1986): if we consider leaving abortion up to individual states, "a question of integrity remains: whether leaving the abortion issue to individual states to decide differently if they wish is coherent in principle with the rest of the American constitutional scheme, which makes other important rights national in scope and enforcement." See Jeremy Waldron, "Denouncing Dobbs and Opposing Judicial Review," *NYU School of Law, Public Law Research Paper*, no. 22-39 (2022): 1-2.

[91] The *moral reading* is a famous theory of constitutional interpretation postulated by Ronald Dworkin. The moral reading proposes that we all—judges, lawyers, and citizens—interpret and apply the abstract clauses of the Constitution on the understanding that they invoke moral principles about political decency and justice. The moral reading, therefore, brings political morality into the heart of constitutional law. But since political morality is inherently uncertain and controversial, any system of government that makes such principles part of its law must decide whose interpretation and understanding will be authoritative. This is not a revolutionary theory of legal practice but is believed to be something that lawyers and judges do on a day-to-day basis; instinctively treating the Constitution as expressing abstract moral requirements that can only be applied to concrete cases through avant-garde moral judgments. Stronger advocates like Dworkin argue that legal officials not only do and ought to interpret the Constitution in this manner but more fundamentally that they have no other real option except to do so. The biggest charge against the moral reading is that it gives judges absolute power to impose their own moral convictions on the public. For more on the moral reading, see Ronald Dworkin, "The Moral Reading of the Constitution." *New York Review of Books* 43 (1996): 46-49.

question of what the democratic conditions are and to secure stable compliance with them.

## 2.2 The Dworkin-Christiano Nexus

### *2.2.1 Distinguishing Modular vs Holistic Models of Democracy*

I will begin this analysis by situating Christiano in the present discussion. Remember that Dworkin's inquiry hinges on two conceptions of democracy, one which accepts the majoritarian premise—that political procedures should be designed so that the decision reached is the decision of which the majority of citizens would approve—and one which rejects it. In Chapter 1, we laid out Christiano's conception of democracy whose normative grounds were based on the democratic process being the realization of public equality: the most fundamental principle of social justice which demands not only that well-being ought to be advanced and distributed equally by social institutions but that individuals can see this at work because of distinct background conditions we experience in pluralistic society which give rise to salient interests in publicity. The first question we need to ask here is whether or not Christiano's egalitarian conception accepts the majoritarian premise.

Despite appearances, I do not think it is quite so simple to say "Christiano embraces this conception or that one." If we take a closer look at the three theories on offer, you will notice that Christiano's scheme constructs a much more developed, comprehensive version of the majoritarian premise but with added features that resemble

more of Dworkin's thinking—somewhat of a hybrid between the majoritarian and constitutional conceptions with the more consequential differences coming from its contrast with the constitutional conception. Like the majoritarian premise, Christiano agrees that there is a loss suffered whenever the democratic assembly cannot get its way. However, his reasoning for this loss, as well as his identification of what is lost, differs from the majoritarian premise and acknowledges much deeper normative grounds for democracy overall. In the first place, Christiano's explanation for why there is a loss suffered by overturning popularly-voted legislation extends beyond the majority "getting its way." Rather, it has more to do with the fact that democracy is our best chance at realizing public equality and as such is assigned a special kind of authority (the right to rule). So any compromise of the democratic process, such as striking down a letter of law, compromises democratic authority in addition to the intrinsic justice bound up in that right to rule.

This leads to the second distinction which highlights the normative grounds of democracy that establish necessary limits on majority rule. Similar to the constitutional conception, Christiano roots democratic authority in principles of fundamental justice that, only when served and protected by the democratic body, provide the basis of that authority. When those principles are not honoured, that is when democratic authority is forfeited. So it is not that the decision needs to be the one that the majority would favour, but more fundamentally that the decision-making process, and the institutions that facilitate this process, be one that treats members of society with equal concern and

respect. The fundamental interests of each person (of which there are three which were enumerated in the first chapter) are to be advanced equally. To advance these interests equally, public equality is necessary, and so too is democratic rule (decision-making procedures that give each an equal formal say), enforcement of liberal rights and an economic minimum.

So, while there is some agreement between Christiano and the majoritarian premise, there is also a difference in what is at stake and why. But what we can pull from this distinction that might better help our discussion along is the fact that these democratic systems—egalitarian and majoritarian—are both *modular*. This means that public equality, or the grounds of democracy broadly speaking, is at stake at two separate locations in the governmental apparatus. Different from Dworkin, however, these limits on the egalitarian scheme only provide a more nuanced justification for judicial review and a legitimate reason for the court's intervention, but it does not reclaim any democratic authority or intrinsic justice. Dworkin on the other hand believes that there is a potential to pay down this cost. This is because Dworkin's scheme, unlike Christiano's, is not modular but *holistic*. The key distinction here is that the constitutional conception seems to locate equal concern and respect as something realized by the *entirety* of the decision-making process, where that includes the democratic assembly and institutions like the courts. So rather than each module (the legislature and courts taken separately) being responsible for honouring the conditions of equal concern and respect, it is the entire system that is responsible for this.

On the modular view, when one module, like the legislature, fails to uphold public equality then the system adapts to allow another module, like the courts, to serve that purpose. The concession, however, is that doing this comes at a cost since public equality was not protected by the first module. But on the holistic model, when one part of the model fails to uphold public equality then there is no loss because there is still a chance for the system as a whole to protect public equality since it is the entire governmental apparatus that is responsible for this. Evidently, both schemes have the potential to experience a total loss of public equality when the courts make the wrong decision, but the difference is that in the latter scheme, this kind of loss is only at stake when it comes down to the court's decision. On the former, it is at stake in two separate places.

Before jumping to any conclusions, let us consider another dimension of this comparison that will play an important role later in this chapter. It is worth noting that the standard of evaluation for both Christiano's conception and the constitutional conception are the same, at least in the way that Dworkin draws it up.[92] Both the egalitarian and constitutional conceptions are *procedure-driven* arguments, although they are conflicting

[92] A closer look into this reveals that this may not be the case for Dworkin's constitutional conception. But for the sake of argument, let us assume for the time being that they are both procedure-driven arguments.

procedure-driven arguments.[93] This makes sense because, on the egalitarian conception, there is a loss when majority will is thwarted. We are committed to the democratic process, so even when a decision is the wrong one we accept it since we are committed to democracy—any procedure that overturns that decision is not ruled out but compromises democracy and therefore imposes a loss.

But for Dworkin, this sort of model is incomplete. We are indeed committed to democracy, but the democratic process on the constitutional conception *includes* non-democratic instruments like judicial review to create a more complete, holistic scheme of government. So even if the decision reached is not one that reflects majority will due to a conflict of liberal rights, we can at least see that the overall procedure by which the decision was reached was fair and just. It is because we can agree that the goal of democracy is to raise and support institutions which treat members of society with equal concern and respect that—so long these democratic conditions are met either by majoritarian institutions preferably or non-majoritarian institutions when the majoritarian ones fail to respect the conditions—the decision reached by this general scheme is one we can and should accept as the right decision.

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[93] This standard of evaluation was alluded to in the first chapter when we evaluated Christiano's conception of democracy and is important for understanding intrinsic justice. *Procedure-driven arguments* are those arguments which provide reasons for insisting that a person make, or participate in making, a given decision that stands independently of considerations about the appropriate outcome (content-independent reasons, if you will). *Results-driven arguments*, by contrast, provide reasons for designing the decision procedure in a way that will ensure the appropriate outcome (you may find that this manner of thinking is reflected in Raz's Justification Thesis, or the "service conception" as we called it, which we looked at in Chapter 1). While this sounds inherently consequentialist, the right outcome we are concerned with here involves the nature of rights and rights violations, so there is a deontological urgency that avoids this association. See Jeremy Waldron, "The Core of the Case Against Judicial Review," *The Yale Law Journal* 115, no. 6 (2006): 1372-76.

But in light of all this talk about different "models" and "schemes" of democracy, a crucial question remains. How does the intervention of a non-democratic procedure not constitute a failure of equal concern and respect and by extension a blow to the democratic process? After all, this is consistent with thinking that a bad decision on rights by the democratic assembly would also be a cost. Dworkin's whole argument seems to resemble something like a Hobson's choice (an illusion that multiple choices are available but only one thing is actually offered) between undermining moral membership by removing equal say or doing so by enacting a decision with content that undermines moral membership. Regardless of whether the system is modular or holistic, is there not still a cost to judicial review either way? For Dworkin, it all comes down to asking the right questions.

### *2.2.2 Asking the Right Questions: Procedure vs. Content*

Thus far, we have established that there are two different types of democratic models on offer: the modular model and the holistic model. We have also determined that Christiano's modular egalitarian democracy operates as somewhat of a hybrid between the majoritarian and constitutional conceptions of democracy but with important distinctions coming between it and the constitutional conception. The majoritarian premise is more or less the featherweight class of Christiano's egalitarian scheme, but they share a critically important feature: while it may not be entirely ruled out, there is always a cost to judicial review. Despite sharing similar normative grounds which set

democratic limits, the constitutional conception conversely purports to circumvent any cost to judicial review with its holistic scheme of government. However, the holistic scheme cannot by itself pay down the cost of judicial review. So the question that remains now is a familiar one, and an especially weighty one at that: is there a cost to the limits on democratic rule? When majority will is stymied, is there something morally regrettable that happens?

To answer this imposing third question, I believe it best to build our account of Dworkin and Christiano's conceptions of democracy from the ground up. So far, we have dealt with three proposed models of democratic government: the majoritarian conception, the constitutional conception, and the egalitarian conception. All three of these models constitute procedure-driven arguments in favour of democratic authority. They all suggest that we should accept the decisions of the legislature because of the quality of the procedure itself rather than because of the justness of the outcomes it produces. It is because we can agree on the grounds of democracy that we accept the democratic process as a fair procedure so that even when a 'bad' or undesirable outcome is reached we can at least agree that it was reached through a fair and just process and deal with the consequences later.

So, all three offer procedure-driven arguments for democracy which would satisfy even the most zealous advocates of majoritarianism like Jeremy Waldron at this stage. But what about the actual grounds of democracy? This is where the conceptions start to break off. The majoritarian conception maintains plainly that the aim of democracy should be to

arrive at those decisions that the majority would favour (the majoritarian premise). The constitutional and egalitarian conceptions, on the other hand, are in agreement that the defining goal of democracy should be to have collective decisions be made by institutions whose structure, composition, and practices uphold the equal status and moral membership of all individuals. The egalitarian conception offers a much more extensive architecture that runs deeper than the constitutional conception but their general aims are very much in line with one another.

Next, neither of these three theories rules out the exercise of judicial review. In fact, all of them justify judicial review but on *results-driven* arguments only. This brings us back to the service conception that we defined in Chapter 1 with Raz's Justification Thesis: "The enforcement of fundamental rights should be entrusted to whichever political decision-procedure is, in the circumstances of the time and place, most likely to enforce them well, with the fewest adverse side effects."[94] What should guide decisions about what commands to give subjects is what subjects already have reason to do and the authority is there to enable subjects to act better on those reasons.

This is where we arrive at that ever-so-pressing question: does something morally regrettable happen by authorizing constitutional limits on majority rule? Let us start with the majoritarian conception since it is the most potent and emotional argument in favour of majority rule. As we have established, even the potent majoritarian conception does not rule out judicial review on results-driven grounds but it says that such a procedure indeed

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[94] Joseph Raz, "Disagreement in Politics," *American Journal of Jurisprudence* 43 (1998): 45.

comes at a moral cost. Advocates of this view list three potential costs to judicial review: political equality, the positive liberty of self-governance, and a sense of community created through deliberation in the democratic process.

Next, Dworkin's constitutional conception takes issue with the argument of moral costs. There are a few reasons for this. First, he says that this comes about if we take the more appealing communal reading of government "by the people" instead of the statistical reading. Second, he says this is true when we realize that the majoritarian conception and its grounds in the majoritarian premise offer a minimalist, flat reading of democracy that constructs an incomplete scheme of government. Similar to other potent majoritarian arguments for democracy like Waldron's, it is not clear why we should accept the quality of that procedure. Advocates do not do enough to show why we should accept majority rule when, if disagreement does indeed go as far down as we know it does, there is nothing ruling out disagreement about the democratic process itself.[95]

Democracy in its full and proper form, says Dworkin, is a larger, complex and complete scheme that includes procedures like judicial review to help secure the democratic conditions of equal status. On this conception we are more concerned with protecting liberal rights than the quality of procedure, hence the notion of government subject to democratic conditions. Owing to these conditions, Dworkin is rather easily able to thwart the majoritarian arguments of a moral cost paid by flouting majority will. There

[95] Recall the regress argument explained on p. 4.

is another important reason for this that we will discuss in detail, but let us first consider our last conception of democracy to get a better idea of this.

The egalitarian conception like the majoritarian conception says that there is in fact a politico-moral cost to judicial review. If this is so, then the egalitarian conception must also be concerned with the quality of the procedure. But how can this be if this and the constitutional conception share similar aims to democracy (i.e., respecting and promising equal status and protecting liberal rights)? Where does the difference lie? It seems Christiano has his hand in both of these conceptions, so let us look at this more closely. The constitutional conception argues that a violation of liberal rights by the legislature compromises democratic authority and therefore there cannot be a moral cost because if we are concerned solely with protecting rights and equal status rather than the quality of the procedure even though the democratic process is preferred. So, we cannot rule out a procedure that does this best (by dint of the service conception) if this is part of the greater scheme of democracy.

In comparison, the egalitarian conception says that while equality, liberty, and community are not compromised (if we accept the communal reading, that is), the compromise of democratic authority *is* the cost. Judicial review is therefore a concession to justice. It therefore seems as though Dworkin is taking for granted that it is the actual *authority* of democracy which is lost and *that* is the politico-moral cost. The egalitarian conception thus acknowledges the complicated reality that we are committed to upholding public equality and the best way to do this is by giving each person an equal

share in the decision-making process, but sometimes to protect liberal rights we have to forfeit the intrinsic justice of the democratic system and allow a non-majoritarian procedure to better help us comply with the reasons we already had for acting on results-driven grounds. With this in mind, Christiano appears to have his hand both in the quality of the procedure—qua the majoritarian conception—*and* protecting rights—qua the constitutional conception.

If the story ended here, the punchline of this chapter would be that Dworkin does *not* add anything to Christiano's picture that we sketched out in Chapter 1; there remains an authority gap that cannot be remedied and we suffer the cost of losing intrinsic injustice. But there is something more at play here. For the sake of rounding out this thesis, I propose we humour Dworkin's line of thought and take a closer examination of what is at stake. How is it that Dworkin takes this for granted? How does he justify shifting from the procedure-driven standards of the democratic process to justifying judicial review on results-driven standards without a moral cost to be paid? How does he justify this 'complete' scheme of democracy that *incorporates* judicial review? What is he seeing that Christiano is not? I think I have the answer.

Dworkin is of the mind that one of the main reasons advocates of the majoritarian premise are convinced that there is a cost is because, at the point where the legislature violates the liberal rights of some of its constituents, they are simply asking the wrong questions. It is typical of this kind of thinking to be asking the question of who should be authoritative in this case. Who should be the one to decide this question of whether a right

has been violated and how we ought to proceed? After all, this is the question we start with when creating a conception of democracy. Who is the boss in a democracy? The people are. Therefore, it is clear why at this stage we would be asking who should have authority over this matter. This line of inquiry will inevitably lead us to conclude that any decision which overrides the decision of the 'boss' (the people as such) comes at a cost.

However, Dworkin says this approach is mistaken. Rather than asking "Who's the boss?" we should be more concerned with the *content* of the democratic conditions; we should be asking questions about the specific contours of the conditions themselves, not who should decide them. Remember that Dworkin admits that the specifics of the democratic conditions are controversial, and so it is this deliberation over the conditions of equal status—by judges, lawyers and citizens—which is essential to the proper functioning of democracy. Since democracy cannot prescribe procedures for testing or specifying the very conditions underlying the procedures that it does prescribe, then a non-democratic institution that does so best is justified (negatively, of course) but without a cost.

So, if Dworkin is correct in thinking that this is the question we should be asking ourselves and not which institution ought to have jurisdiction over constitutional matters, then maybe he does save the day and we can pay down the cost of judicial review. However, Dworkin may need some help here. It seems that Dworkin thinks that this question should undoubtedly be left to the court. Who is to say the courts are the best at doing this? What grounds does he have for this? In the following chapter, I will turn to the

arguments of one of my undergraduate professors, Dr. Wil Waluchow, to see if the arguments in his common theory of judicial review can help us better understand Dworkin's reasoning, or perhaps add something to Dworkin's theory that might give us reason to think that judges are the best suited to test and decide our constitutional moralities.

**2.3 Conclusion**

So far in this thesis, we have established the legitimate grounds for judicial review on the results-driven justifications that come standard with the service conception of authority. We had previously found this legitimacy lying within the limits of democratic authority. However, given the deep normative grounds that Christiano cultivates on his egalitarian conception of democracy, the service conception of judicial authority leaves a gap in democratic authority. Therefore, judicial review, while legitimate on this conception, is a concession to justice. While we may get the result or outcome we want by deferring to the courts on constitutional matters, we get this back at the cost of the intrinsic justice that was bound up with democratic authority (insofar as democratic institutions protect public equality). This being so, we turned to the arguments of Ronald Dworkin to help us determine if there was anything in Christiano's conception of democracy that might retrieve some of the justice or democratic authority that was lost.

We found that between the majoritarian conception of democracy, which relies on the premise that democratic decisions ought to reflect majority preference, and Dworkin's

constitutional conception of democracy, the constitutional conception most apparently resembled the normative grounds laid out in Christiano's framework. Both conceptions, as opposed to the majoritarian view, describe limitations or conditions on democratic rule; it is not the case that the majority should always get its way. There are instances where undercutting considerations for protecting certain basic rights or conditions, such as equal status and moral membership, outweigh considerations for maintaining the integrity of the process itself. However, while these theories share similar grounds, Dworkin does not share the sentiment with Christiano that there is a politico-moral cost to judicial review.

How is it that both conceptions of democracy can establish similar foundations for democratic authority and justify judicial review on results-driven standards, yet one conception concedes a cost while the other purports to improve democracy in instances where the correct decision is made? The reason for this difference lies in the sorts of questions we ought to be asking. Dworkin is of the mind that if we are committed to respecting and protecting the normative grounds of democracy, we ought to have a procedure, within a broad, complete scheme of government, which can test these conditions in a way that democracy cannot itself prescribe. As such, we ought to concern ourselves not with who should be testing and specifying these conditions and when they are violated (as Christiano and defenders of the majoritarian premise are), but the content of the conditions.

Depending on which questions we should be asking, Dworkin could either offer nothing new to the scheme we have laid out to this point or he could resolve the issue of

remedying the moral cost of judicial review. But how are we to know which question we should be asking? While the scope of this thesis may not be comprehensive enough to delve into this question, we will proceed as follows: if we concern ourselves with a question of authority, then there is no hope in retrieving the justice lost and we can wrap up the thesis right here (it would certainly make my life a little easier). But for the sake of argument, let us buy into Dworkin's reasoning: we should be more concerned with the content of the democratic conditions and defining the contours of constitutional rights that set out to protect the equal status and moral membership of citizens. Who is to say that this should be left to the courts to decide? Is there no chance of sorting this out via democratic institutions? In the next and final chapter, we will turn to Professor Waluchow's common law theory of judicial review to determine if judges truly are best suited to make judgments on our communities' constitutional morality.

## CHAPTER THREE: Constitutional Morality and Public Equality

Thus far, we have done two things: first, we have reviewed and evaluated a comprehensive schema of democracy to help frame our inquiry into whether or not judicial review is democratically legitimate. On this account from Christiano, we established firm roots for democratic authority and liberal rights that in turn set limits to democratic authority. It is within these limits that judicial review finds its legitimacy, albeit in a roundabout way, on a service conception that makes use of a Razian breed of justification. However, this justification only legitimizes judicial review as a decision procedure that we are not 'ruling out' as a remedy for legislative overreach, but it does not claw back any of the intrinsic justice that was lost by the compromise of democratic authority. So, judicial review is legitimate but it is only a second best and comes at a politico-moral cost whenever it is imposed.

Second, we have considered a similar account of democratic authority proposed by Dworkin which might serve to fill this authority gap and pay down the cost of judicial review. In that chapter, we came to the realization that there are two potential ways of conceiving the democratic system. If we are concerned with the quality of the process by which we make the decisions that shape and mould society and who should be making these decisions—i.e., if we are asking procedure-based questions—then democracy is a modular system where the correct decision has to be made twice to prevent what

Christiano calls a "double loss."[96] In contrast, if we are more concerned with specifying the nature of the democratic conditions (equal status, moral membership, and by extension liberal rights)—asking rights-based questions—then the system is more holistic. If we accept the former conception, then the conclusion reached at the start of this thesis holds and there is always a politico-moral cost to judicial review. Dworkin then, unfortunately, does not add anything that would retrieve the politico-moral value that was lost by compromising democratic authority. But if we accept the latter conception—which we are tentatively doing in this chapter for the sake of argument with the added qualification that the basis for this holistic scheme is public equality—then it may be possible to pay down the cost of judicial review. However, for the holistic conception to succeed, there needs to be an adequate account for (a) why judges are best suited for specifying a community's constitutional commitments, and (b) why the courts retain democratic authority even when they are not applying democratically-made law. For the purposes of this chapter, I will simply grant the first of these and focus on the latter.

That brings us to the task of this third and final chapter. The key focus of this chapter is to explain why, even if Waluchow is right that judges are best suited for clarifying the implications of our moral commitments, there is still a cost. Waluchow's idea is that the constitutional morality to which a community is generally committed—a

[96] Christiano, *The Constitution of Equality* (2011): 280. The idea behind "double loss" is that there is already a strike against democracy when the legislature violates public equality with bad law allowing the courts to intervene. But it is doubly bad when the courts make the wrong decision on top of that.

Community's Constitutional Morality (CCM)—acts like positive law; a kind of special customary law that judges apply and develop. Christiano argues that judges have democratic authority when they apply democratically-enacted law, but only in this case. So the issue that arises from these lines of argument concerns whether judges have democratic authority when applying the special customary law that is constitutional common morality. Another way of formulating this issue is whether Waluchow's CCM norms can also be grounded in public equality.

This chapter will consult Waluchow's arguments for why judges are best situated for the fiduciary role of interpreting and implementing the moral commitments of the community over which they preside. The goal is to measure this up against Christiano's Principle of Public Equality to determine if CCM norms can share the normative basis that similarly grounds the authority of the democratic body and thus pay down the cost of judicial review. I argue that even if we grant Waluchow and Dworkin's arguments—that democracy is a holistic system of government and judges are indeed best-suited for deciding a community's moral commitments which accord with public equality—judicial review is still costly in terms of democratic value.

We are dedicated to the democratic process and because of this, we owe it to ourselves to give that process its due. Assuming Dworkin and Waluchow are correct on all counts should not sway us to rely on judicial review more readily. If anything, acknowledging that the courts are better at clarifying our moral commitments, for example, should make judges more cognizant of the dangerous implications for

democracy that come with their expertise in making judgments about the rights and moral norms of the community and compel them to exercise more caution in their deliberations. It is necessary to strike a balance between these two branches of government if we are to have a healthy system of democracy.

### 3.1 Waluchow and the Community Constitutional Morality

When judicial decisions are scrutinized for being out of sync with the moral views of citizens, the focus of this criticism is almost always on some widespread moral opinion that is at odds with the court's ruling rather than the general principles and values to which most citizens are committed. For instance, judicial recognition of same-sex marriage is often criticized for running counter to the moral beliefs of Canadians, but the reference is always to moral opinions on same-sex union and not the true principles and values to which citizens are committed such as justice or fairness (i.e, moral judgements that could survive Rawls' test of *reflective equilibrium*).[97]

For Waluchow, we must distinguish between moral *opinions* and moral *commitments*; between personal morality and communal morality. This will weed out the inauthentic wishes of the popular complaint from the authentic wishes of the moral

[97] W.J. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (New York: Cambridge University Press, 2007): 224. The Rawlsian notion of *reflective equilibrium* refers to the end-point of a deliberative process in which we reflect on and revise our beliefs about some inquiry, moral or non-moral. It consists in working back and forth between our judgments about particular matters or cases, the principles or rules that we believe govern them, and the theoretical considerations that we believe bear on accepting these considered judgments, principles, or rules, revising any of these elements wherever necessary to achieve an acceptable coherence among them. The method succeeds and we achieve reflective equilibrium when we arrive at an acceptable coherence among these beliefs.

principles and values to which a community is truly dedicated. The one caveat here is that this 'communal morality,' while especially distinct from an individual's moral beliefs, does not refer to a community's morality broadly speaking but a community's *constitutional* morality. So, following Dworkin's lead, the kind of political morality being referenced is in some sense tied to the community's constitutional law and practices.[98]

### *3.1.1 An Alternative to Platonic Morality: The CCM*

Waluchow assumes that constitutional charters refer to rights of a decidedly moral nature.[99] Given the considerable weight we have ascribed to rights as necessarily stitched the fabric of democratic rule, per the constitutional and egalitarian conceptions considered in Chapter 2, we can safely grant this assumption. So beginning on this footing, Waluchow's assumption raises an important question: when a judge is asked to apply charter provisions against potentially incongruous acts of government, to what *kind* of morality does a constitutional charter direct a judge's attention?

Consider a fictitious judge that I will call Groucho as an example. Groucho does not subscribe to the idea that judges ought to be constrained by any formal standard of adjudication, whether it be some sort of customary law or practice. He is of the mind that judges not only do but ought to rely on their own principles when dealing with claims of right since they are more in sync with true morality owing to their expertise in the field of

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[98] Ibid, 226-227.

[99] W. J. Waluchow, "Democracy and the Living Tree Constitution," *Drake Law Review* 59, no. 4 (2011): 1035.

law and constitutional cases. More than that, however, he is unabashedly egotistical and believes wholeheartedly that when it comes to deciding constitutional matters, his own set of moral principles is the closest and most precise reflection of true morality. He is by very definition the antithesis of Dworkin's noble Judge Hercules.[100] In his mind, he is more or at least better capable than anyone else of discovering and comprehending the abstract contours of "true morality." While Groucho is indeed an excellent judge, no reasonable person would think it true that Groucho, more than anyone else, has some pipeline to Platonic moral truths. So regardless of how many times he might get it right, how comfortable are we knowing that when he takes his seat on the bench of a constitutional case, Groucho is openly relying on his own set of moral values to make decisions that specify the shape of our rights?

Granting that Groucho is an overtly elaborate and exaggerated character of my own creation, it seems clear to critics of constitutionalism that this is actually quite similar to how judges operate in practice. This is not to say that they believe judges all share the same temperament as Groucho. Again, he is but an exaggeration; the temperament and tendencies of a judge will inevitably come down to the individual sitting on the bench. But similar to the Groucho example, critics seem to believe that the moral norms appealed to in a charter of rights are of the kind pursued by philosophers; an elusive "true morality."[101] If this is true in practice, then it should seem immediately clear

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[100] Hercules is a fictional judge introduced by Dworkin in *Law's Empire* who is supposed to represent an idealized version of a jurist with extraordinary legal skills and capable of challenging various predominant schools of legal interpretation.

[101] Waluchow, "Democracy and the Living Tree Constitution," (2011): 1035.

that these sorts of ambiguous moral norms should in no way be allowed to play a role in charter cases. To do so would be to assign judges the role of "philosopher kings"; a role to which judges and lawyers alike are not appropriately-suited. Despite making good decisions most of the time, if a judge like Groucho tries to act as a philosopher king, then there is always the possibility that he may make a decision that secures his interests and is out of sync with public values—like an emphatically askew "sense of situation" to use the legal realists' terms.[102]

But is it true that this is the kind of morality to which judges are referencing when they are called to sit on a charter case? And are these truly the kinds of moral norms that charters themselves appeal to? If so, what does this mean for the role of the judge, and charter review more broadly, in the scheme of democracy? These are the kinds of questions upon which we wrapped up the previous chapter and which Waluchow provides a possible answer with his concept of the CCM.

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[102] The concept of a judge's "situation sense" comes from the tradition of legal realism which is premised on the fundamental realization that the law is indeterminate. Thus, the sense of situation is the judge's sense of how a particular ruling will affect society, especially in future cases. In the case of *Re Rizzo & Rizzo Shoes, Ltd*. for example, the plain meaning of the relevant provisions in the *Employment Standards Act* would have yielded a result that was out of sync with the spirit of the Act—i.e., providing minimum benefits and standards to protect the interests of employees. So the judges on the bench employed a sense of situation to ensure that in similar and future cases, decisions would be consistent with the scheme of the Act. A modified version of the situation sense was later revolutionized by Duncan Kennedy in his Critical Legal Studies with the introduction of a sense of "how-I-want-to-come-out" which is an attempt to reconcile a judge's initial sense of what the outcome should be (i.e., adhering to the plain meaning of a legal statute) and the judge's sense of situation in the traditional legal realist sense. See Karl N. Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed," *Vanderbilt Law Review* 3, no. 3 (1950): 395-406; Herman Oliphant, "A Return to Stare Decisis," *American Bar Association Journal* 14, no. 2 (1928): 71-162; and Duncan Kennedy (1987), "Freedom and Constraint in Adjudication: A Critical Phenomenology," *Journal of Legal Education* 36: 518-62.

The idea put forward here is that constitutional charters can be rendered consistent with democratic commitments if and only if they are viewed as incorporating the widely-accepted principles of *positive morality*. Distinct from the Platonic morality pursued by philosophers, positive morality is understood as those moral values, beliefs, and principles which are endorsed and/or practiced by members of a community, "the existence and content of which can be empirically discovered and applied by judges without imposing their own subjective moral views on us."[103] Unfortunately, as is often the reality in this kind of discourse, this is much easier said than done. In fact, given the background facts discussed in previous chapters, we run into a pretty glaring problem here.

Let us return to the example of a vegetarian society. How can the goal of protecting minorities like meat-eaters from overzealous and often misguided majoritarian governments be achieved if the charter's moral provisions are only interpreted in terms of positive morality and thus in favour of the majority itself? The positive morality of a vegetarian society will undoubtedly include principles such as prohibiting the killing of animals for the purpose of consumption which will blatantly conflict with the interests of our carnivorous minority groups.

This unfortunately leaves us between a rock and a hard place. On the one end of the spectrum, if a charter's abstract moral provisions are thought to incorporate the moral norms pursued by philosophers (as critics seem to think), then we end up being

[103] Waluchow, "Democracy and the Living Tree Constitution," (2011): 1035.

undemocratic because we are empowering unaccountable judges to make judgments about our deepest moral questions on our behalf. This is obviously silly since judges are not philosopher kings with a pipeline to objective moral truths. So by default, judges are naturally relying on their personal moral beliefs which is an especially unsettling thought when you consider that those sitting on the bench were not elected by way of the democratic process.

On the other hand, if a constitutional charter incorporates positive morality, understood as nothing more than current consensus on relevant moral issues, then we do achieve some measure of democratic legitimacy since the inputs to the judicial decision originate from within the democratic body. However, again calling back the background facts of pluralistic society, we realize that shared positive morality is sometimes misguided, resulting from adverse inputs such as fear, ignorance, fallibility, and cognitive bias as well as widespread differences of moral opinion. We thus end up with an unfair result because in basing the decision on positive morality, we will have failed to offer minorities and other vulnerable groups and individuals adequate protection of their interests. So unless we can find an alternative, it seems we are "damned if we do and damned if we don't."

This is where Waluchow comes to the table with what he calls a Community's Constitutional Morality. Rather than a mere consensus on some moral issue like whether same-sex marriage should be legal, CCM is a "community-based, positive morality consisting of the fundamental moral norms and convictions to which the community has

actually committed itself and which have, in one way or another, acquired some kind of formal constitutional recognition."[104] Put differently, it is not simply a morality that is agreed upon by the wider community but the positive morality that is embedded within, endorsed and expressed by a community's constitutional practices. Distinct from the broader positive morality previously mentioned, the CCM is a *community-based* positive morality; a subset of the wider class of moral norms and beliefs which enjoy some measure of reflective support within the community itself. For ease of understanding, the distinction is actually quite similar to the one drawn up by Dworkin between statistical and communal collective action. Rather than simply incorporating the morality that is widely agreed upon by some function of the society like regular positive morality (e.g., the majority of citizens), the CCM instead looks to the morality of the community *taken as a whole*.

The upshot of this argument is that owing to its social origin, the CCM provides us with a source of moral norms and fundamental convictions which judges can draw upon in constitutional cases *without* compromising democratic legitimacy.[105] This is because judicial review involves the task of ensuring that acts of parliament do not infringe on the fundamental moral norms to which the community has committed itself in ways that could not have been reasonably foreseen or avoided by the legislators. If this is the role a judge plays in charter review, and not that of some philosopher kings, nor

[104] Ibid, 1036.

[105] Ibid, 1037-1038.

simply constructing the objects of the constitution from their internal point of view, then democratic legitimacy in these cases need not be compromised but can implement the democratic will and render it effective.

What is important to note is that Waluchow is thinking of CCM norms as a kind of positive or customary law.[106] The reason for this is that in perceiving the CCM as a custom in this respect, he is able to sidestep the democratic concern that judges rely on their personal moral views when making judgments about constitutional commitments. If an argument can be made that judges are referencing a kind of customary law when making judgments on constitutional matters, then there is a chance to save judicial review from the challenge that judges put the objects of their interpretation in their best moral light from their own point of view which is far more problematic from a procedural perspective. It is bad enough that appointed judges are in a position to make decisions that affect our everyday lives, insulated from being held accountable by the community over which they preside or other branches of government. But to also know that their decisions might be informed by their own set of moral beliefs only gives more cause for concern.

From Waluchow's perspective, judges cannot be relying on their own set of moral values because there is always a set of moral norms available to judges that are generated by and embedded within the community itself upon which judges can and must rely. So it is not only that this set of norms is available to those sitting on the bench, but that it constrains judges' decisions so that their verdicts are in keeping with the customs

[106] W.J. Waluchow, "The Misconceived Quest for the Elusive Right Answer, or Dedication to a Process, Not a Result," *Oxford University Press: Constitutionalism, New Insights* (2021): 60.

reasonably agreed upon by the community itself. While a successful application of this customary law would skirt any challenge of judges relying on their own moral beliefs, it does raise another, more pressing question in the context of this thesis: does this customary law have grounds in public equality?

Recall that the main task of this thesis is to determine if there is anything another author can add to Christiano's conception of democracy that can salvage the loss of democratic authority when legislatures make bad laws. Dworkin's constitutional conception claims that we do not lose democratic authority because the courts are part of a larger system. Despite sketching this holistic system that can potentially avoid the cost of judicial review, Dworkin's conception lacks a clear argument for how, within this scheme, the courts reasonably retain democratic authority on constitutional matters. This can only be the case, I would think, if judges (a) are best suited to be making determinations about our constitutional commitments (the validity of will be granted for the sake of argument); and (b) the constitutional commitments upon which judges rely could find their grounds in public equality. Before evaluating this further, however, I think it is important to flesh out the rest of Waluchow's argument to build up this idea of CCM norms more fully.

### *3.1.2 The Possibility of Common Law Reasoning*

Recall that the objection suggests that the practice of judicial review asks judges to be philosopher kings; discovering elusive moral truths with respect to matters of

equality and justice, and applying their understanding of that truth against the mistaken interpretations of democratically-elected legislators. This is obviously problematic given the reasonable pluralism of modern constitutional democracies as well as the fact that judges experience the same limitations or "burdens of judgment" in moral matters that the rest of us face. Judges do not possess some monopoly on objective moral truth. Moreover, it would considerably alter the task of the judiciary—where judges are traditionally thought of as natural arbiters—by asking them to make decisions on the basis of what invariably ends up being their own, likely partisan, discretionary moral opinions about the demands of an equivocal morality.

But if judges are instead seeking to hold the democratic community to its own constitutionally-grounded and reflective moral commitments, then Waluchow believes that this type of challenge can be avoided. So already the CCM looks more promising not just as a more accessible morality for judges by rendering their adjudicatory role more acceptable, but also as a kind of restraint on or standard of judges' discretionary judgements. This is even more so if that set of moral commitments is capable of being

discovered through a form of morally-neutral, impartial reasoning.[107] In these circumstances, it can be argued that judges are doing nothing more controversial here than trying their best to apply, in a fair and impartial manner, standards that originate from an entirely legitimate, social source—namely the community's own fundamental moral commitments.

However, we run into a similar problem as before; this is easier said than done. Admittedly, there is considerable room for disagreement, uncertainty, and even indeterminacy as to what the specific demands of CCM norms are. If this is true, then in choosing from among the various solutions on offer, it may not be true that judges inevitably have to draw on their own moral opinions which is an illegitimate source from which to draw in making constitutional decisions in a democracy. There is no avoiding the fact that disagreement and indeterminacy threaten to undermine the democratic

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[107] Waluchow, "Democracy and the Living Tree Constitution," (2011): 1038. This method of impartial, morally-neutral common law reasoning that Waluchow alludes to here is what he calls *detached constructive interpretation*. The idea is that judges need not be putting the objects of their interpretations in their best moral light as viewed from their *own* first-order moral judgements. Rather, per Raz, judges both can and characteristically do attempt to put the objects of their interpretations in their best moral light from the perspective of the democratic community as a whole and *its* first-order moral judgments. Building off of Dworkin's moral reading and the living tree doctrine, this theory is premised on the idea that the positive constitution is not a finished product, the original meanings and intentions of which are seldom dispositive of constitutional meaning. So, it is the judge's fiduciary role to act as a partner with the authors of the constitution in an ongoing, creative political project rather than simply carrying out previously-made decisions. Since constitutional meaning is difficult to determine and subject to ongoing dispute and controversy, it requires that every interpreter do their best to interpret the limits placed on the government in their best moral light. For this, Waluchow relies on Raz's theory of detached normative statements which suggests that it is possible to both know and state what should be done from a point of view that one does not necessarily endorse. This is different from an internal point of view, which describes one's personal commitments or beliefs, and an external point of view, which describes the point of view of others. A detached point of view or normative statement, like a statement of law, uses a standard to evaluate and judge conduct but in a way that does not commit the speaker to the normative view expressed. For example, a lawyer may use this category of statement to express to their client what they ought to do according to the law even though the lawyer does not commit themselves to that action. See W.J. Waluchow, "Constitutional Rights and the Possibility of Detached Constructive Interpretation," *Problema. Anuario de Filosofía y Teoría Del Derecho* 1, no. 9 (2015).

legitimacy of judges' attempts to justify their decisions by drawing on CCM. We are effectively back to where we started with the democratic argument.

However, Waluchow's answer to this problem is that in constitutional cases, there is actually more of a basis for agreement and consensus on moral principles than we might be initially led to think by the democratic challenge. The limits of justification do not extend only so far as Canadians find explicit agreement on some particular question. Rather, the argument goes that individuals' judgments concerning the moral commitments of their community can be brought into reflective equilibrium with one another, and when this happens a community can see that its members actually agree, or are at least committed to agreeing, on more than they think they do.[108] The judge's role in a charter case—where that role is now understood as enforcing CCM commitments—will lead her to draw on these bases of agreement when making her decision. When such a basis is established and a decision is made on its footing, the background fact of disagreement can be substituted by reasonable agreement, as was the case with the acceptance of same-sex marriage in Canada.

### *3.1.3 Right Answers and Public Reasons*

So far, Waluchow's notion of CCM has been congruous with Dworkin's constitutional conception and the moral reading. One point of difference between these two authors concerns what comes next in this analysis. It is possible that in some CCM

[108] Ibid, 1039.

cases, particularly those where passions run deepest and disagreements are rooted in significantly different moral and political views, CCM norms provide no uniquely correct answer for judges. While Dworkin's *Right Answer Thesis* would beg to differ, Waluchow's view is that judges should, and in fact do, engage in common law reasoning to determine the answer to a CCM case.[109] However, it could be argued that by developing CCM in this way, a judge is no longer viewed as attempting to follow the standards previously set by others possessing the democratic authority to set them in a fair, impartial manner.[110] Quite the contrary. It appears that it is the judge herself who is setting the relevant standards or at the very least deciding what those authoritatively-established standards mean. Simply put, the judge will be involved in the creation or construction of law, rather than its discovery and application as is traditionally thought to be the judge's role. So admitting that CCM is not always fully determinate threatens to yet again reintroduce the democratic argument against judicial review because a judge's creative construction of CCM renders us no longer "masters in our own house."

Waluchow responds by developing a more nuanced account of what it is that judges are and should be doing when they engage in the discretionary construction of CCM by way of common law reasoning. Perhaps discretionary constructions of CCM norms can be made consistent with the aims of democracy if we place restrictions on the

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[109] According to Dworkin's *Right Answer Thesis*, in a mature legal system, there is always an antecedently existing right answer to any legal question upon which a case might turn and it is the fiduciary duty of the judge to both find and apply that answer in deciding a case. See W.J. Waluchow, "The Misconceived Quest for the Elusive Right Answer, or Dedication to a Process, Not a Result," *Oxford University Press: Constitutionalism, New Insights* (2021): 54.

[110] Waluchow, "Democracy and the Living Tree Constitution," (2011): 1040.

*kinds* of reasons upon which judges may legitimately draw when they engage in discretionary decision-making. The kinds of reasons that Waluchow has in mind are of the kind envisaged by Rawls—what he referred to as *public reasons*. These are not reasons everyone within the community would endorse under ideal conditions of deliberation, nor are they reasons that every reasonable person in such circumstances would consider especially strong or worthy of support were it not for the fact of reasonable pluralism.

A reason is public, and hence a legitimate basis upon which a court can draw when engaging in discretionary constructions of CCM when it is a reason to which no reasonable dissenter could object given the duty of civility to which all members of democratic communities are bound.[111] It is a reason that such a dissenter, despite their differences, could accept as "good enough" or at least "not unreasonable." Public reasons so-construed are as neutral as possible concerning the wide range of reasonable conceptions of the good and normative political ideologies that currently exist in the community. They should be uncontroversial to the extent that an ideal reasonable person could not reasonably reject them.

Restricting judges to public reason in such cases provides a promising route for warding off this latest incarnation of the democratic challenge. The discretionary decisions judges are sometimes called on to make will be consistent with democratic principles because they appeal to reasons that no reasonable dissenter within the democratic community could object to, given the duty of civility to which all members of

[111] Ibid, 1042.

a democratic community who find themselves in a state of reasonable moral pluralism are committed. But in each case, the dissenter must be prepared to recognize the legitimacy of the decision made, despite any displeasure he might experience over its substance.[112]

Requiring that a judge always make a good faith effort to base a discretionary decision squarely on some acceptable array of public reasons permits each citizen, including those whom strongly but reasonably dissent from the decision made, to nevertheless take ownership of the decision and see it as the product of a decision-making process which appeals to democratically legitimate inputs and to which she could not reasonably object. Judges who make a decision after a sincere attempt to offer justification in terms of CCM or, failing that, in terms of a CCM construction justified by way of some reasonable balance of relevant public reasons, need not be viewed as an alien force compelling democratic citizens to act independently of their deepest convictions. Rather, the decision should be viewed by each member of the democratic community as an exercise of public power to which none of them, reasonable dissenters included, can reasonably object, given their joint commitment to the duty of civility.[113] But insofar as, and to the extent that the decision is based on a good faith attempt to strike a reasonable balance of what is sincerely taken to be relevant public reasons, and given

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[112] Ibid, 1043.

[113] Devised by John Rawls, the *duty of civility* is a duty that applies to everyone in a democracy which is characterized by reasonable pluralism. The thought is that each person realizes that garnering the benefits of civil society almost invariably requires that most everyone settle for less than their ideal choice on some political question. In the same spirit, each person also acknowledges the requirement that an acceptable compromise from one's own vantage point must also be an acceptable compromise for others whose fundamental moral and political views often suggest a different order of preference. See Waluchow, "Democracy and the Living Tree Constitution,"(2011): 1035.

that this step is taken only after all other resources have, in the opinion of the court, been exhausted, it is one that all reasonable citizens in a democracy can accept as "good enough."[114]

### *3.1.4 The Argument Schematized*

This section has covered a great deal of content, so I think it is helpful to briefly sketch out the most important premises of Waluchow's argument to tee up the next section of this chapter. First, if judicial review was an exercise in reasoning about the requirements of true morality, it would not be justified because it would assign judges the unfeasible role of philosopher kings. Second, judges are best positioned to reason about the requirements of positive normative commitments. Third, given premise two, if judicial review is an exercise in common law reasoning about the requirements of positive normative commitments, it would be justified. Fourth, judicial review is not an exercise in reasoning about true morality. Fifth, judicial review is an exercise in reasoning about the requirements of positive normative commitments via the possibility of detached constructive interpretation. Therefore, judicial review is justified.

## 3.2 The Waluchow-Christiano Nexus

So, where can we locate Waluchow in this discussion? If we first grant that the aim of democracy necessitates a holistic rather than modular scheme of government—

[114] Waluchow, "Democracy and the Living Tree Constitution," (2011): 1044.

creating space for judicial review as part of the overall scheme to specify the underlying conditions of democracy (equal status)—and also grant that judges are indeed best-suited for the job of clarifying these conditions, then what is left to be determined is whether these judgements are reached via a commonly accepted set of conventions that could be said to satisfy public equality. An answer in the affirmative would successfully pay down the cost of judicial review whereas an answer in the negative would firm up the conclusion reached in Chapter 1.

### *3.2.1 Public Equality: A Refresher*

Perhaps the best way approach to this section is to briefly recapitulate the idea of public equality. Public Equality is the most fundamental principle of social justice underlying democracy and liberal rights. It is the idea that social institutions ought to be constructed such that all members of society are treated as equals. However, to have any chance at achieving social justice—fairness in both the institutions making up the social world as well as relationships among persons—we need not just equality but more fundamentally *public* equality: that people not only be treated as equals but can see for themselves that they are being treated as such. The requirement of publicity when striving to achieve social justice arises from three interests—correcting cognitive bias, feeling at home in the world, and being recognized and affirmed as an equal—that become salient in the context of reasonable pluralism. This context of pluralistic society, if you will

recall, is defined by the facts of diversity, fallibility, cognitive bias, and widespread disagreement.

It is because the democratic process affords each member of society an equal stake in the decision-making process which shapes the common world we live in that democracy is said to be the realization of public equality. More than any other scheme of government, democracy ensures that each person's judgment about how society ought to be organized is taken seriously and thus protects the interests of individuals from being set back. As such, any decision made by the democratic body is imbued with a special kind of authority—a robust right to rule—to which members of society are not only obliged to obey or refrain from interfering with, but to which those duties of compliance are actually owed, qua a moral responsibility, by members of the community.

With this brief refresher in place, we can return to the discussion of constitutional law customs. What we are trying to get after in this section is whether Waluchow's CCM norms can be grounded in public equality and whether this sort of customary law can have democratic authority. Recall that under Christiano's framework, the courts do have democratic authority. However, they only have democratic authority insofar as the legislature retains its authority by promoting public equality since that authority is enjoyed by virtue of the fact that the courts are simply enforcing democratically-enacted law. But when they override that law via judicial review, they no longer act under the auspices of the democratic assembly and take on a different, lesser kind of authority with

no democratic pedigree. But does this change if we grant Dworkin's holistic scheme of government and Waluchow's customary constitutional law?

Dworkin's constitutional conception, granting content-driven questions over procedure-driven questions, seemed to take a step in the right direction by incorporating judicial review into the broader government apparatus. But for this to fully succeed, there has to be something in this argument that can adequately explain exactly how the courts retain democratic authority without applying democratic law. We can grant that judges are the best positioned to specify the nature of the democratic conditions of equal status, and we can grant that it is not a judge's own moral values nor some abstract morality that is being appealed to. Rather, it is a positive set of constitutional customs or moral norms that judges rely on. But we still lack a positive case for judicial review—and only have a justification for it—unless we can locate a basis of public equality within these positive normative commitments to prove how the courts retain democratic authority.

### *3.2.2 CCM Norms and Public Equality*

Recall that Waluchow's CCM is defined as a community-based, positive morality comprised of the fundamental moral norms and convictions to which the community has committed itself and has acquired some sort of formal constitutional recognition. If we understand CCM norms as a kind of positive law or set of constitutional customs, then the only way it retains any semblance of democratic authority is if it can share the same grounds as any other democratic law. One obvious realization here is that CCM norms are

neither codified nor originate from the democratic body; they are neither voted on nor specified by popularly-elected representatives. The reason that the democratic process realizes public equality is that it gives each member of the community an equal stake in the decision-making process. Thus, any law drafted and passed by the legislature is imbued with democratic authority. Even on a holistic scheme, without any way of electing judges or holding them accountable for their decisions, despite drawing from the customary law of CCM norms rather than attempting to interpret the elusive norms of "true morality" so-called, how can the people be said to have a share in the decision-making when it is effectively taken out of their hands? Granted, it is part of the same general scheme, but how can we be dedicated to the democratic process when those positive normative commitments are not grounded in public equality?

But is it taken out of the people's hands? Or does common constitutional morality have some popular basis that can satisfy the requirement of equal status? Remember that the democratic assembly is not the only institutionalization of public equality. While it is the most obvious realization of public equality, there is another institutionalization of this social justice principle that might more closely resemble the kind of institutionalization being hypothesized with CCM norms; by this, I mean the institution of liberal rights. Recall that liberal rights share the same normative grounds as the legislature and even set limits to the authority of the legislature's decisions, yet the case for liberal rights is not quite as obvious as the democratic process more broadly speaking. Liberal rights are even

said to have a pre-eminent value that weighs heavier than the aggregate good of the majority.

So, in the same way that Christiano found liberal rights to be grounded in Public Equality, we can apply the same Public Equality Test—as I will refer to it—to Waluchow's CCM norms. What we are looking for is simply whether the positive normative commitments upon which judges rely in constitutional cases advance or satisfy each of the three fundamental interests in publicity or set them back.

### *3.2.3 CCM Norms and Correcting Cognitive Bias*

Calling to mind the facts of pluralistic society discussed in Chapter 1, the first fundamental interest we encounter when we look to satisfy public equality is our interest in correcting cognitive bias. This interest arises from the fact that our conceptions of others' interests and the common good tend to be cognitively biased toward our own well-being. To be treated in accordance with someone else's conceptions of justice is very likely to set back one's own interests, and as a result, we are interested in correcting this bias to protect our interests when balancing them with those of others, especially a majority.

Consider the *Reference re Same-Sex Marriage* for a moment. Until 2005, Canada had no legislation defining marriage. Rather, marriage was defined by common law as "the voluntary union for life of one man and one woman" per *Hyde v. Hyde* until this

definition was challenged by *Halpern v. Canada* in 2003.[115] *Halpern* was the catalyst of the *Civil Marriage Act* which expanded the definition of marriage to include same-sex couples: "Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others."[116] The courts established that excluding same-sex partners from access to marriage is contrary to the guarantee of equality in s. 15 of the Charter. Conscious of the possible challenges to the proposed legislation, the government of Canada referred four questions to the Supreme Court: whether the proposed Act was *intra vires* the legislative authority of Parliament; whether extending the capacity to marry to persons of the same sex consistent with the Charter; whether the Charter protects religious officials from being compelled to perform same-sex marriages; and lastly whether the opposite-sex requirement established by common law was consistent with the Charter.[117] The last of these the court exercised its discretion to opt out of answering.

I direct your attention to this case to highlight some key features of CCM norms that might help us apply the Public Equality Test. In particular, I want to highlight two of the questions brought before the court and the court's answer to them. The first is the question concerning the consistency of broadening the definition of marriage with the provisions of the Charter. The court ruled that "the purpose of s. 1 [of the Act] is to extend the right to civil marriage to same-sex couples and, in substance, the provision embodies the government's policy stance in relation to the s. 15(1) equality concerns same-sex

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[115] Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, 2004 SCC 79.

[116] Ibid.

[117] Ibid.

couples."[118] In this spirit, the court determined that the purpose was not just unequivocally in keeping with the Charter but actually "flow[ing] from it."[119] The court also took the stance that the promotion of charter rights and values enriches our society as a whole and cannot undermine the principles the Charter was meant to foster.

The second question of interest is meant to address the fact that a right to same-sex marriage conferred by the proposed legislation may potentially conflict with the right to freedom of religion. Specifically, it protects religious officials who may feel forced to conduct a marriage ceremony between a same-sex couple. But the court held that conflicts of rights do not imply conflict with the Charter itself, but the resolution of such conflicts generally occurs within the scope of the Charter itself through internal balancing. The court's answer to the second question thus holds that the guarantee of religious freedom contained in s. 2(a) of the Charter is broad enough to protect religious officials from being compelled by the state to perform either civil or religious same-sex marriages that are contrary to their religious beliefs.

The purpose of highlighting the answers given by the Supreme Court in this reference is to showcase how the court employs positive normative commitments and constitutional customs when deciding constitutional matters and conflicts of right. For starters, the decision to declare the legislation consistent with the Charter was based on the purpose of s. 15 itself and the overall spirit of the constitution—to enrich the

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[118] Ibid.

[119] Ibid.

community as a whole and promote values of equal moral status among all members of the community. At the time that the common law definition of marriage came into being, 1866, community values would have been much more skewed against the rights and interests of homosexuals. But as society grows and progresses over time, so too do commonly-held values and beliefs; they begin to shift and challenge dated belief systems, culminating in decisions like the one in the Same-Sex Marriage Reference. The increased advancement of LGBTQ+ rights we see in Western society today is proof of this kind of change or at least the possibility of such change. While there is still much work to be done, these kinds of movements likely would have been thought impossible were it not for cases like *Halpern*, *Vriend v. Alberta* and the like to help pave the way for moral progress in the law. In other words, the values appealed to by the court corrected the cognitive biases of heterosexual or anti-homosexual beliefs about marriage so that the interests of same-sex couples were not set back by laws that are out-of-sync with current values.

The other important thing to highlight is that not only was the law changed to accommodate changing and progressing moral values widely accepted in Canadian society, as evidenced by the string of constitutional cases that lead up to the decision in the Same-Sex Marriage Reference. On top of this, the court would not impose this kind of change without first weighing these values with the rights of those who might have their interests set back. Specifically, the right of religious officials to exercise discretion not to officiate same-sex marriages. So, it was important in the court's decision to account for

both the equality rights of homosexuals as well as the religious rights of spiritual leaders to ensure that all are treated persons with equal moral status and have their interests respected. In this way, a correct decision by the court having drawn on a set of positive normative commitments and customary law could be said to satisfy the interest in correcting for cognitive bias.

### *3.2.4 CCM Norms and At-Homeness*

The second part of the test concerns the interest in being at home in the world. When we recognize that individuals' judgments often reflect the way of life one is accustomed to, we can see that we are also interested in having the sense that we are "at home" in the world. Living in a world that corresponds more or only to the interests of others can make one's judgement and appreciation of value in the world blurred, however, it can also even be harmful to one's interests. Being forced to live in a world that is shaped entirely by another person's judgements and values is to submit entirely to the interests of another and concede one's interests as being subordinate.

Prior to the *Reference re Same-Sex Marriage*, homosexuals in Canada suffered a great deal (or more accurately a great deal more) of setbacks to their rights and interests. In particular, they lacked a sense of feeling at home in the world. Not only had homosexuals been marginalized and alienated but at a point were actively persecuted for their sexual orientation both socially and formally under law. Consider the history of homosexual law reform in the United Kingdom and its Commonwealth nations. Until *The*

*Report of the Committee on Homosexual Offences and Prostitution* for example—more commonly known as the Wolfenden Report—any homosexual activity between males was illegal under England's *Criminal Law Amendment Act, 1885*.[120] By the end of 1954 in England and Wales alone, there were over a thousand men in prison for homosexual acts.[121] The Wolfenden Report established the principle that certain matters of private morality are no business of the law and especially not the proper business of punishment under criminal law.[122] One by one, many Commonwealth countries followed the Wolfenden lead in England, including Canada.

So, similar to how we witness changing attitudes about the particulars of certain moral beliefs like homosexuality, abortion, and women's rights, we also see the courts appealing to beliefs about the scope of governmental interference in the lives of its citizens and the values that ought to dictate individuals' conduct in the public sphere. What was previously considered a public matter, like one's sexual preferences, has become increasingly (though not yet fully) protected by the private sphere to better secure the interests of discriminated communities, thereby facilitating a greater sense of being at home in the world. Being unable to express one's sexuality or simply live one's life how they see fit is important for insulating one from the sense that they are living in a world shaped by the beliefs of others that are not only contrary to one's own but even harmful or threatening to their way of life.

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[120] Michael Kirby, "Lessons from the Wolfenden Report," *Commonwealth Law Bulletin* 34, no. 3 (2008): 551.

[121] Ibid, 551-552.

[122] Ibid.

Increasing legal recognition of changing values like those referenced in The Wolfenden Report and *Reference re Same-Sex Marriage* demonstrates a capacity on the part of the judiciary and other officials to reference commonly-held beliefs and values accepted in the community to better secure a sense of at-homeness for members of the community who are otherwise persecuted; advancing the interests of persons as moral equals in the community. It ought to be stressed that when it comes to positive normative commitments, these are not shared by *every* member of society or even the community "on average." Rather, they are representative of the *aggregate* beliefs of the community. You may liken this to the proverbial "reasonable person" often referenced in different areas of law and legal tests as a touchstone of behaviour for determining whether an action in question was "reasonable" or not. The point is not that the reasonable person is an ideal community member or even the average person, but someone who represents a composite of the community—someone who is sufficiently informed or "right-minded" but not of any special capacity for moral judgement or reasoning. So akin to this "reasonable person," CCM norms represent a *composite* of accepted communal beliefs and values.

### *3.2.5 CCM Norms and Affirmation of Equal Status*

It is important to acknowledge the fact that the CCM represents a composite of communal values since that moral progress does not entail blanket acceptance by the community as a whole on issues of morality. However, as was acknowledged by the

Wolfenden principle, there are certain beliefs and interests we begin to recognize as not only private matters but also as especially valuable for being recognized and treated as equal moral members of society. There of course remains significant pushback against moral progression or changes in attitudes on issues such as LGBTQ+ rights. This can be for reasons of prejudice, cognitive bias or simply a conflict of rights or interests as seen in the *Reference re Same-Sex Marriage* with the balance of equality rights for same-sex couples and religious freedom for spiritual leaders. So, it is important to balance conflicting rights to treat all community members as equals and do so in a public way.

That brings us to the last leg of the Public Equality Test: the interest in being recognized and affirmed as an equal in society. To not have one's judgments—such as religious tenets or sexual preferences—taken seriously is to be denied recognition of their moral personality since it is this capacity which confers the special status of equal, moral membership to persons. Failing to recognize an individual's capacity to appreciate justice in their own way expresses indifference to their moral status and consequently sets back their interests. This part of the test is a bit easier having already evaluated the first two interests. If we can see that constitutional customs can (1) correct for the cognitive biases of community members which might—either intentionally or inadvertently—set back the interests of certain groups like same-sex couples, and (2) facilitate a sense that one is at home in the world they live in, then we can more readily conclude that individuals are being treated as moral equals in society and can be seen to be treated as equals when

judges cite their reasons for the verdicts they reach and refer to the spirit and purpose of constitutional rights provisions.

### *3.2.6 CCM Norms and Democratic Authority*

With the Public Equality Test having been conducted, we can try our hand at answering the question of whether CCM norms satisfy public equality and possess democratic authority. Despite passing the test *prima facie*, I think we are to answer this question in the negative. Waluchow's CCM norms certainly can and at best often do satisfy public equality. However, the reality is that while correct decisions by the court can satisfy public equality, this is not quite enough to reclaim democratic authority.

In the first place, positive normative commitments play an important role when we realize that liberal rights—which constrain democratic authority to protect public equality from legislative majorities that set back the interests of minority groups—are not exactly hard-and-fast. That is to say that liberal rights are, as Dworkin pointed out, somewhat ambiguous and in need of specification. That is where customary law like common constitutional commitments enters the equation. Reflecting on these commitments is instrumental in specifying the basis of liberal rights and democracy itself.

The fact that CCM norms *can* reflect community commitments and there may be a basis for this in reflective equilibrium and other forms of common agreement is not a convincing case for having democratic pedigree. The democratic process by its very structure and process affords each individual in society a share in the decision-making

process designed to shape the common world. Liberal rights are indisputably important as safeguards for minority rights when legislative majorities make decisions that disproportionately set back the interests of certain groups whose judgments are not adequately represented in the democratic assembly. But Liberal rights are unique in that they are necessary and widely recognized safeguards against interference from the government and other members of society in how we manage our own lives. CCM norms, however, are not quite as entrenched.

All that a correct court decision proves is that when these commitments are followed, our fundamental interests are indeed protected and public equality can be resolved. But the simple fact is that while these norms provide an appealing standard and practice of adjudication, they are appealed to and determined by officials that cannot be held accountable by the public. Even if judges get it right most or perhaps even every time, there is something to be said for taking the power out of the people's hands. Even if Groucho in all of his judicial prowess and moral competence made the correct decision on every case—whether that be in the sense of Dworkin's elusive "right answer" or a verdict in sync with the normative commitments of the community—this does not do enough to make us think this set of customary law has democratic authority (and there is an important procedural reason for this which I will attempt to carefully unpack here).

This is not to say that we should never rely on judicial review but only that when we do, there is a loss. Even if the norms being appealed to can satisfy the fundamental interests when a correct decision is made, we have to concede that getting back public

equality comes at the price of having the courts intervene in the democratic process. Having their hand in the decision-making that shapes our everyday lives and the world we live in plainly compromises important democratic values of participation. Again, this is not to say that judicial review ought to be ruled out entirely. It has proven effective in the past and at times necessary in cases like *Brown v. Board of Education*, but all this thesis is asking is that we recognize that something of serious politico-moral value has been compromised in each instance—and there is good reason for thinking so.

There may be another, better way of conceiving this conclusion that actually might take some of the scrutiny off of the courts and help us conceive this scheme more completely; a perspective that has been danced around but not explicitly stated. It is not entirely the case that judicial review is itself a cost, but only that there is a strike to democracy in instances where the courts overturn democratically-enacted law. We have firmly established that liberal rights set limits to democratic authority. They act as a safeguard for minority rights so that when the throngs of people head to polls on election day and place their ballots in the boxes, those groups whose interests are disproportionately represented in the community are protected from having those interests set back. As much as we are committed to the democratic process, and indeed we are very much committed, there are cases where the majority should not get its way—when the interests and equal status of others would be compromised or set back.

In such cases, a decision by the legislature that compromises the rights of certain groups constitutes a strike against democracy. This much we know. The democratic

process, it could be said, has failed. But the point we might be skirting around is that there is already a loss here regardless of whether the courts act to overturn the law or not. We want to see democracy succeed; the hope is that the processes of voting, reflective equilibrium, the duty of civility and the like can facilitate the publication of laws that ideally treat everyone as equals and moral members of the community. But when the legislature fails to do this, as was the case with the law defining common law marriage as exclusive to opposite-sex couples, then the process can be said to have failed and we arrive at a loss. When the *Same-Sex Marriage Reference* later expanded the common law definition of marriage to include same-sex couples, a decision was made that satisfied public equality better than the law that had already been in place and passed by the legislature. So if anything, we have arrived at a somewhat similar conclusion to Dworkin where we can maybe avoid the notion that judicial review is itself a cost (at least when it makes good decisions) but there is no positive argument in favour of judicial review on the table, and for good reason I would wager.

Perhaps we cannot restore democratic authority because a mistake was made and judicial review does nothing to add democratic authority back because it is inherently undemocratic even when it gets the answer right and is in accord with a community's constitutional morality. The loss is simply that we saw the democratic process through and the result was a decision that failed to meet the underlying aims and conditions of democracy. The fail-safe of liberal rights kicked in to protect us from doing something morally regrettable. We want a decision that would promote equal status. But due to the

intentions of the legislators, the popularly-held moral opinions at the time of law creation, the background facts of pluralistic society, or even ambiguous wording in the language of the law itself, we failed to advance our three fundamental interests. The cost then does not necessarily amount to the institution of judicial review itself but only that when the courts decide to overturn a problematic law, it is because the democratic assembly failed to uphold public equality.

This also explains why, in cases where the courts get it wrong, we find ourselves in a condition of double loss because a loss has already been suffered when the legislature fails to advance the people's interest equally but we at least restore public equality at the expense of democratic equality. So while we pass the Public Equality Test mechanically, there is an important *value* argument to be made for the integrity and maintenance of the democratic process. If we isolate the argument to this point to be entirely mechanical, then there is, I think, some real possibility of submitting the claim that CCM norms maintain some semblance of democratic authority when judges make decisions that are in sync with common constitutional commitments thus formulating a positive case for judicial review. But from a value perspective, there is something meaningful at stake in this argument: intrinsic justice.

### 3.3 Conclusion

In this chapter, we covered the essential elements of Professor Waluchow's arguments in favour of judicial review stemming from his idea of constitutional

customary law (CCM norms). The idea of the CCM was meant to thwart those charges that judges are appealing to either some abstruse morality or their moral values and replace these with a kind of positive, customary law from which judges draw when deciding constitutional cases. The purpose of this chapter was to determine whether we could render a positive case in favour of judicial review by locating democratic authority in the grounds for Waluchow's CCM norms.

Waluchow introduced the CCM as a community-based, positive morality comprised of the fundamental moral customs and beliefs to which a community is committed and which have acquired some form of formal, constitutional recognition. From here, we looked further at the possibility of common law reasoning—so-called detached constructive interpretation—to reinforce the idea that judges not only can but do draw from this constitutional customary law from a detached point of view rather than from their own internal point of view. From this that the role of the judge is no longer thought to be seeking elusive objective moral truths and coming to a decision which invariably ends up being the judge's own partisan moral opinion. Rather, the judges' role consists in holding the community to its constitutionally-grounded moral commitments. Attached to this standard is the additional standard of public reasons which Waluchow borrows from Rawls. The restriction of public reasons further ensures that when judges make their decisions that these decisions are such that no reasonable dissenter could object to them.

The possibility of detached constructive interpretation further rests on a foundation of agreement, upon which the judge can draw, which is reached through a deliberative process of working back and forth between our judgments about particular moral issues until an acceptable coherence is reached among them. Of course, the process of reflective equilibrium is based on the duty of civility which essentially makes two claims: (1) that each person realizes that yielding the benefits of civil society requires that nearly everyone occasionally settle for less than their ideal choice on some political questions, and (2) that an acceptable compromise from one's vantage point must also be an acceptable compromise for others whose fundamental political and moral views often differ from one's own.

Once this account was laid out, we were better positioned to evaluate whether the CCM could be grounded in Public Equality and subsequently put employed the Public Equality Test. To conduct this test, we pitted the CCM against Christiano's three fundamental interests—correcting cognitive bias, at-homeness, and recognition and affirmation of equality—to determine if each interest was satisfied. Applying the Supreme Court decision in *Reference re Same-Sex Marriage*, we examined how these norms are appealed to in practice and whether or not this satisfies public equality. Ultimately, in a decision like Same-Sex Marriage where a decision was made in sync with communal values and beliefs, such customary law satisfies the interest in correcting cognitive bias against the interests of minority groups; creates a greater sense of minority groups feeling at home in the common world they share with those in the majority whose interests run

counter to theirs; and ensures that the judgements of marginalized peoples are taken seriously, thereby recognizing and affirming their status as equal members in society.

So, on a purely mechanical level, a definite case could be made that Waluchow's CCM could be grounded in Public Equality and therefore retain some semblance of democratic authority when the courts make decisions that are in sync with positive normative commitments accepted by the community. However, from a value perspective, there is more at stake in this argument than simply passing the Public Equality Test. The intrinsic justice of the democratic process, our dedication to it and the intervention of the court in that process point to a big-picture argument that stresses the politico-moral value that is always compromised when the people are no longer masters in their own house: even when the courts get the decision right, and regardless of whether judges are indeed best-suited for specifying the contours of our moral normative commitments, judicial review always comes at a politico-moral cost. The implications of this conclusion are not quite as black-and-white as they seem, however, and I will discuss this at length in the concluding chapter to follow.

## CONCLUSION

The punchline of the argument that I have laid out over the last three chapters is that we can at best "level the playing field" (as Dworkin put it) to the extent that we do not rule out the possibility of judicial review, and with Waluchow's CCM norms now have an appealing account of judicial decision-making standards to boot. However, despite Waluchow and Dworkin's best efforts, there exists no positive case in favour of charter review—one in which there is no political or moral cost to bear in exchange for its service. If we return to Dworkin's questions for a moment, we can see that in a similar spirit to Waluchow, even if we accept that the questions we should be asking are content-driven and can satisfy public equality with a holistic account of democracy which includes judicial review, there is an inherent value in the democratic process that cannot be compromised even if public equality can be satisfied mechanically. Therefore, by virtue of the arguments considered in this thesis, there is always a politico-moral cost to judicial review.

However, we are not finished just yet. For the moment, let us set this conclusion aside to address a more pressing issue that has come to the fore regarding the possible conclusion of Dworkin and Waluchow's account if they were successful.[123] This realization may also in turn help to solidify the conclusion we have just reached. Let us

[123] Dworkin's writing is somewhat ambiguous on the issue of judicial review and democratic legitimacy. It is possible to read his general argument in two different lights: one that more closely resembles Christiano, such that judicial review is legitimized on a service conception of justification (the modular reading), and one that sees judicial review as a cog in a broader, more complete and complex system of government (the holistic reading). For the purpose of this thesis, Dworkin was read in the latter interpretation as it serves to better tease out important conceptual puzzles in this debate.

assume that Dworkin and Waluchow are completely correct in their assertions and we accept the mechanical conclusions about public equality. Assume that we accept Dworkin's holistic account—we ought to be more concerned with the contours of our rights—and we agree with both him and Waluchow that judges are indeed the best-suited to decide the contours of our rights and moral commitments since democracy does not prescribe a method for specifying the nature of our rights; the courts are simply better-positioned than anyone else to reason about the contours of our rights owing to their extensive expertise and experience in the field of law. They need not be philosopher kings but they characteristically position themselves in a detached, constructive point of view to reflect on the moral norms embedded within the community itself and make judgments that are in sync with a community's morality.

With all of these assumptions in place, what would be the implications of this? What does this conclusion mean for judicial review? Or perhaps more forbidding, what does it mean for democracy? If we agree with everything Dworkin and Waluchow say—judges are the best at clarifying the implications of our moral commitments—then what does this say about our dedication to the democratic process? If it is true that judges are simply applying the implications of our moral commitments, then is it undemocratic at all? Do legislators not do the same when they draft laws? Are our constitutional commitments not then analogous to democratically made law that the judges have democratic authority to apply? We have established that the legislature can and does on occasion run up against its limits, but does this mean that we should then defer to the

judiciary immediately to correct the mistake? If we are dedicated to a process, then we owe it to ourselves to give that process a fair go.[124] Maybe judicial review should not be thought of as a 'second best' as it were, but perhaps it serves us better as a last resort.

### 4.1 Next Steps: A Garden to Nurture and Protect

My late grandfather, my "Nonno" as we called him in Italian, had a vast and beautiful garden from which we harvested a variety of fruits, vegetables, and herbs. He and my Nonna would tend to the garden every day; weeding, watering and rotating the soil annually as well as fending off pests and birds. Maintaining such a large and complex system of plants, trees, and vines takes a great deal of time, care and energy as well as trial and error. When tending a vast and beautiful garden as they had, a gardener must plant many different seeds, never knowing which ones will germinate, which ones will produce the most wonderful flowers, or which will bear the sweetest fruit. But a good gardener plants them all, tends and nurtures them, and wishes them well.

My argument is not one that is simply against or in favour of judicial review. What I have established is that judicial review is a legitimate form of decision-making in a democracy (albeit in a rather roundabout way), where "democracy" is properly and holistically understood in Christiano's terms. However, judicial review will always come

[124] The phrase "dedication to a process" that I use here comes from a letter signed by 2,400 U.S. law professors in 2018 urging the U.S. Senate to reject the nomination of Brett Kavanaugh to the US Supreme Court. See "The Senate Should Not Confirm Kavanaugh," *New York Times*, 2018, https://www.nytimes.com/interactive/2018/10/03/ opinion/kavanaugh-law-professors-letter.html. This quote was also employed by Professor Waluchow in his most recent paper "The Misconceived Quest for the Elusive Right Answer or Dedication to a Process, Not a Result," (2021). Unfortunately, I have to use those words against my former professor to make a different case.

at a politico-moral cost owing to the underlying foundations of democratic authority and the modular nature of the democratic system. Even if judges are better-suited than anyone else to make decisions about the nature of our rights and moral commitments, the act of striking down democratically-made law will always constitute a strike against democracy. Because of this, we are not necessarily ruling out judicial review but only suggesting that if it is used, then the scope of its power ought to be significantly restrained. So, what is on offer is two things: first, the realization that judicial review while legitimate will always come at a politico-moral cost regardless of whether or not judges are better at specifying the contours of our rights and moral commitments.

Second, the suggestion that a more ideal form of democratic government might include something like a weak form of judicial review—where the courts may only scrutinize legislation but cannot strike it down—with some degree of parliamentary deference for cases of severe rights violations that demand urgent and immediate correction. At least in these cases, we can say confidently that there is an obvious and egregious failure by the legislature and because of this we can stomach the blow to democratic authority if it means correcting the severe shortcomings of the legislature in promoting public equality and protecting liberal rights.

Much like my Nonno's garden, democracy is an intricate, complex system that requires a great deal of care, balance and dedication from those tending to it. We need to plant the seeds and tend and care for the system well in the hopes that the seeds we sew will germinate and grow into something we can all benefit from. We will get it wrong at

times, but the important thing is to stay committed to the process. The idea is that this garden metaphor should serve as an extension of the living tree doctrine. It is important to remember that it is not simply the Constitution but the system as a whole that is living, breathing and ever-growing. It requires a great deal of care and dedication to ensure that the system stays healthy. The living tree only refers to part of the vast and beautiful garden we are looking after.

We have established that the governmental system in question is modular (qua Christiano) rather than holistic. In other words, it is not that one unit of a broader system like the legislature can make the wrong decision and be picked up by another unit as part of the proper functioning of that system, but there are two places where there is a potential to go wrong. For example, on the holistic view, if the legislature passes the Frank Law which is perceived as a blatant failure on the part of lawmakers, then there is a chance to reconcile this failure without a cost to democracy because on this view the democratic system is taken to include judicial review.

If the Frank Law is passed by parliament (again, an obvious rights violation) then there is already a strike against democracy and a right call under judicial review would only serve to prevent a "double loss," to use Christiano's terms. But in these cases, the initial strike to democracy does not get remedied with regard to that failure of the legislature. For this reason, judges may very well be right in their decisions about constitutional rights, but they must realize that their decision (specifically in choosing to strike down a piece of democratically-made law) comes at a cost for the democratic body.

A balance must be struck, with necessary constraints on the scope and limits of judicial review, to protect democratic authority and intrinsic justice.

This brings me to my proposal.[125] The scheme on offer suggests that an ideal framework to balance the powers of the judiciary and legislature is to institute a system of weak form judicial review with only the occasional use of the override power in those rare instances of major rights violations which would reasonably warrant parliamentary deference to the courts. In this way, we can have the judiciary scrutinize legislation and make regular changes from a "software" perspective—made possible by the living tree doctrine and moral reading—through various schools of interpretation and canons of construction. But "hardware" changes like expunging a piece of democratically-made law from the criminal code should come with serious constraints or conditions so that it may only be used for certain cases.

To illustrate this point more clearly, it may be helpful to review some constitutional history. Consider two separate cases where judicial review was used to remedy a rights violation: *Brown v. Board of Education* and *R v. Oakes*. The former is a landmark decision in American constitutional history and the latter is a landmark decision in the Canadian context. Any reasonable person familiar with these cases would see that while these indisputably involve two rights violations that ought to be remedied, one

[125] It should be noted that this is only a modest proposal since sketching out the specific parameters of this scheme would require a great deal more research and analysis which, unfortunately, lies well beyond the scope of this Master's thesis. So I leave that task to those more capable than I (and those with more time on their hands).

violation is arguably much more egregious than the other and demands more urgency, or action "with all deliberate speed" to quote the *Brown* court.

Arguably one of the most important legal decisions in American legal history, and for many people the U.S. Supreme Court's finest hour, the verdict in *Brown* ruled that state-sanctioned segregation of public schools was a violation of the 14th amendment—granting citizenship to all persons "born or naturalized in the United States"—and therefore unconstitutional.[126] The decision marked the end of the "separate but equal" precedent which was set by the Supreme Court in *Plessy v*. *Ferguson* nearly 60 years before *Brown*, served as a catalyst for the expanding civil rights movement during the 1950s, and effectively sent other forms anti-black and discriminatory on the road to extinction.[127] So not only was the decision needed to remedy the rights of black people whose rights were being set back by racist, discriminatory laws at the time but the effects of the decision have also reverberated for future generations—it was the prime mover that set the wheels of the civil rights movement in motion. Brown represents an exemplary case for when constitutional courts should be able to strike down a law.

The *Oakes* court, on the other hand, struck down s. 8 of Ontario's *Narcotics Control Act* which held that if a court finds the accused in possession of a narcotic, the accused is presumed to be in possession "for the purpose of trafficking" and that, barring

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[126] Waldo E. Martin Jr., *Brown vs. Board of Education of Topeka: A Brief History with Documents,* Springer, 2016. Accessed June 2, 2023.

[127] Ibid.

the accused's establishing the contrary, they must be convicted of trafficking.[128] Mr. Oakes' charter challenge claimed that the reverse onus created by the presumption of possession for purposes of trafficking violated the presumption of innocence guarantee under s. 11(d) of the *Charter*. The challenge was upheld and s. 8 was overturned by the Oakes' court, further establishing mechanical standard which has famously been called the Oakes Test.[129] While the decision in the Oakes court was instrumental in removing a problematic law and establishing the reverse onus doctrine, there is a clear distinction between the two rights claims being put before the court.

Oakes undoubtedly established important normative and methodological standards which have long stood at the heart of Canadian legal procedure since the decision and have even been said to have taken on "the character of holy writ."[130] But the decision in *Brown*, which effectively ended segregation laws in the United States and sparked the surge of the civil rights movement in the United States, is arguably a much more severe rights violation and warranted the erasure of the separate but equal doctrine from the law books. So when it comes to the hardware changes that inflict a cost upon the democratic body, it stands to reason that we ought to save such a change for cases carrying a great deal of moral weight, and the potential to have lasting, positive and progressive effects in the future regarding the protection of minority rights as was the case with *Brown.* That is,

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[128] Leon E. Trakman, William Cole-Hamilton, and Sean Gatien, "R. v. Oakes 1986-1997: Back to the Drawing Board," *Osgoode Hall Law Journal* 36, no. 1 (1998): 83.

[129] Ibid.

[130] Ibid, 83-85.

one case presents a procedural and mechanical rights violation whereas the other presents a rights violation that is decidedly moral in nature.

Another reason for constraining judicial review in this way is that we have seen much-needed changes to problematic legislation or the language of certain provisions made through the use of interpretation. The Person's Case and the Same-Sex Marriage reference are perfect examples of this kind of effective software change. In both cases, the language of a provision of law was seen to disproportionately discriminate against and set back the interests of a particular group in society. In the former case, the word "persons" was read and redefined to include women. In the latter case, the word "marriage" was reinterpreted to mean both opposite- and same-sex unions. But no law was struck down in order to effect this change which, like *Brown*, had reverberating effects which set the wheels in motion for enhancing the rights of women and homosexuals in Canada for years to come. So, the hope is to achieve a balance in institutional design where the courts can still effect change through software developments like employing cannons of construction or scrutinizing legislation that may be running up against the limits set by liberal rights. But the potential for hardware development is saved for circumstances with conditions similar to *Brown* (i.e., an egregious rights violation demanding action "with all deliberate speed" and the potential to enact change significant enough to improve the overall justice of the community better than if the provision was left to stand).

If we are committed to democracy, then we owe it to ourselves to see it through until it is necessary to defer to the courts. Therefore, judicial review should not be a

'second best' option for making the right call but a last resort to remedy an egregious violation and blatant oversight or shortcoming by the legislature. We ought to instead fashion a more balanced system of weak judicial review to reap the benefits of judicial scrutiny and the living tree doctrine and save the override power for serious violations.

While a clear scheme of how to best realize these kinds of limits on judicial review lies beyond the scope of this thesis, my hope is that I have made a clear case for why we ought to tend to our democracy like a vast and beautiful garden. Even if I am wrong on my account, I hope this at least serves as a primer for a more fruitful and productive conversation on this topic. Our complex and delicate system requires great care and commitment as well as a great deal of balance between the different branches of the system. It is important that we see our democracy as a living, breathing system capable of growth and progression. It is ever more important that we put aside any adversarial notions of trying to "win" this debate. After all, there is more to be gained from working together on this project in which we are invested. Rather than dismiss any of the authors I have discussed herein—Christiano, Waluchow, Dworkin, Raz, Rawls, and even Waldron—I have attempted to fuse their ideas to cultivate a fuller, richer, and more nuanced picture of how our system does, can and should function, much like my Nonno's garden. Ultimately, the garden metaphor is meant to help us see the purpose of democracy as it should be: dedication to a process, not a result.

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