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Visions of Self-Government: Constitutional Symbolism and the Question of Judicial Review

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Declaration

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Alexander Latham

26 August 2015

Abstract

This thesis investigates the question of whether judicial review of legislation is a hindrance to democracy. My main claim is that the existing literature on this topic fails to pay adequate regard to the *symbolic* significance of political institutions, that is, the role that legislatures and courts play in the popular imagination. I argue that we should not view constitutional systems merely as decision-making mechanisms, since a society's institutional structure will colour its sense of political agency and shape the way in which citizens view their relationships with political officials and with one another. Different constitutional structures accordingly project different visions of constitutionalism and democracy. In particular, I argue, representative government should be viewed not merely as a compromise between equality of input and quality of output, but as a distinctively valuable form of government in its own right. The representative assembly serves as the focal point for public political debate and symbolises a commitment to government through an inclusive process of deliberation. Legislative supremacy – the practice of accepting the enactments of a representative assembly as the decisions of the people as a whole – can therefore allow the law to be seen as the output of the political power of a self-governing people. Judicial review, on the other hand, will tend to signify a set of boundaries around the democratic political process, thus truncating the people's shared sense of self-government.

Lay Summary

In a number of countries, courts have the power to strike down legislation on the grounds that it violates constitutional rights, in effect giving a small number of lawyers a veto over the laws passed by elected representatives. Is this practice undemocratic?

Many people think that 'judicial review' of legislation is obviously undemocratic, since its whole purpose is to provide a brake on what a government supported by the majority of the people may legitimately do. But this answer is too quick, since democracy does not simply mean following the will of the majority. This criticism had led to another response, which says that judicial review is not undemocratic, since its role is to protect important components of democracy, such as freedom of speech, equal treatment and human rights.

I agree that things like free speech, equality and the protection of minorities are important parts of democracy. But I believe that those who have looked to defend judicial review simply on the grounds that it leads to good outcomes miss an important part of what a political system does. Political institutions are not merely decision-making devices; they are also symbols of the kind of relationships that society takes to pertain between citizens. For example, we prefer democracy to monarchy not just because we think monarchs will make bad decisions, but because monarchy symbolises something that we reject: the idea that some people are born to rule over others. Democracy, on the other hand, symbolises respect for the capacities of ordinary people to play a role in a kind of collective self-government. So when we debate whether a particular institution is democratic, we need to consider not only what the institution does, but also what it symbolises.

This thesis argues that judicial review of legislation damages democracy symbolically. By placing the responsibility for policing the boundaries of the constitution into the hands of judges, it presents the constitution as a fundamental law delineating the limits in which the so-called 'political branches' of government

operate. It therefore promotes the idea that the democratic agency of the people needs to be contained within boundaries that are set by a law that is above or beyond politics. This is detrimental to our vision of self-government: a vision in which citizens themselves create the law through their own political action.

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'Constitutions, like all creations of the human mind
and human will, have an existence in men's
imagination and men's emotions quite apart from
their actual use in ordering men's affairs.'

Max Lerner, *Constitution and Court as Symbols*

1. Introduction: the question of judicial review

1.1 Framing the Issue

This thesis investigates what I call the ‘question of judicial review’, that is, the question of whether judicial review of legislation is anti-democratic. Bickel famously dubbed this issue ‘the counter-majoritarian difficulty’.¹ This is an infelicitous phrase, since it suggests that judicial review is problematic because it violates majoritarianism, or ‘majority rule’. This seems to presuppose a body of people that we can identify as ‘the majority’, who are for some reason in a morally privileged position so as to have the right to have their views (rather than the views of ‘the minority’) decide the way in which the country is governed. Thus framed, the difficulty is easy to resolve. No serious thinker advocates majority rule. For instance, the twenty-first century’s leading opponent of judicial review has objected to his view being thus characterised.² And even the eighteenth century’s leading proponent of direct democracy did not believe that the will of the majority had any distinctive moral worth in and of itself.³ Bickel’s phrase distorts the issues really at stake in the question of judicial review.

Democracy is government by the people, not government by the majority. Government by the people requires a discursive political process in which everyone gets to participate on an equal footing with everyone else. This in turn requires a democratic culture, in which each citizen is valued and her capacities nurtured and respected. Claims such as these have often been used to justify judicial review, by counterposing a society which honours this ideal of equal respect against one in which the majority brutally dominates the minority. But this contrast is not the one that opponents of judicial review have in mind. I am happy to agree that democracy

¹ Alexander Mordecai Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill, 1962), p 16-23.

² Jeremy Waldron, ‘A Majority in the Lifeboat’ (2010) 90 Boston University Law Review 1043, at 1043, n 1.

³ Jean-Jacques Rousseau, *The Social Contract*, in *The Social Contract and Discourse on Political Economy* (CJ Betts tr and ed, Oxford: Oxford University Press, 1999), Book IV, chap ii.

requires a culture of equal respect for all citizens. But that does not resolve our question of institutional design.

The question of judicial review, at least as I understand it, pits judicial review against legislative supremacy. These are not two different theories about who has the moral right to see their will inscribed into law (no-one has that!); they are two different ways in which a constitution may be designed. Neither is straightforwardly majoritarian, nor, indeed, straightforwardly minoritarian. From the point of view of empirical political science, the question might actually appear relatively unimportant. Numerous empirical studies have suggested that the judiciary tends over time to follow the ideology of the legislative and executive political elites. Furthermore, legislative policies do not necessarily track popular opinion. The 'counter-majoritarian difficulty' frame fails descriptively as well as normatively.⁴

So what *is* at stake? I suggest that we need to look beyond the empirical, and towards the symbolic. Our political institutions are not merely devices for resolving disagreements and pursuing shared goals. They are also constitutive features of the lifeworld in which citizens' political identities are constructed. Without political institutions, the concept of democracy as *political self-rule* would be unintelligible. Institutions lift us out of a 'state of nature' not just materially, but by giving us the resources to think of ourselves as occupying what Rousseau called '*l'état civil*'.⁵ Ingrained within an institutional scheme is a particular way of envisaging our relations with one another, indeed, a way making sense of the world. I therefore suggest that the question of judicial review is really about the kind of political world-view that is projected by different constitutional systems. Do systems of judicial review and legislatively supremacy express different conceptions of the relationship

⁴ See Scott E Lemieux and David J Watkins, 'Beyond the "Counter-majoritarian Difficulty": lessons from contemporary democratic theory' (2009) 41 *Polity* 30.

⁵ Jean-Jacques Rousseau, *Du Contrat Social* (R Grimsley ed, Oxford: Clarendon Press, 1972), Livre I, chap viii. The standard English translation, 'civil state', does not quite capture this lifeworld constituting significance. 'Civil condition' would perhaps do a better job, although I am no way qualified to say whether or not this would be an appropriate translation of Rousseau's French.

between individual citizens and the political community? If so, which conception is more attractive from the perspective of a normative theory of democracy?

1.2 The Scope and Central Argument of the Thesis

By 'judicial review' I mean strong constitutional rights review: the institutional practice whereby courts are empowered to strike down or disapply statutes passed by the legislature if they are of the view that those statutes violate constitutional rights. This power might be held by the ordinary courts, or only by the apex court, or by a special constitutional court separate from the civil judicial hierarchy. The constitutional rights might be explicitly enumerated in a cardinal document, or they might be thought of as 'implicit' in such a document, or as in the political culture and traditions of the community more generally. The key features of judicial review, for the purposes of this thesis, is that it is undertaken by a body which is understood to be, and which understands itself as, a *court*; that it is reviewing *legislation passed by a representative assembly*; and that the decision of the court is accepted as authoritative, and binding not only on the parties before the court, but on the legislature itself. My investigation therefore does not cover the so-called 'new commonwealth model of constitutionalism',⁶ which allows the legislature to override a finding that legislation violates constitutional rights; nor pre-legislative advisory scrutiny, such as that carried out by the French Council of State;⁷ nor constitutional review carried out by a non-judicial body, such as takes place in the Finnish Eduskunta.⁸

⁶ See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: theory and practice* (Cambridge: Cambridge University Press, 2013).

⁷ See John Bell, 'What is the Function of the Conseil d'Etat in the Preparation of Legislation?' (2000) 49 *International and Comparative Law Quarterly* 661. This is not to be confused with the review conducted by the French Constitutional Council, which has a mandatory jurisdiction. The Council is itself an interesting case, since it was originally conceived of as a form of non-judicial constitutional review (such as would fall outside the scope of this thesis), but is now generally recognised as a court practising judicial review. I discuss the Constitutional Council below, p 187-91

⁸ See Jaakko Husa, *The Constitution of Finland: a contextual analysis* (Oxford: Hart Publishing, 2011), p 78-84.

The 'question of judicial review' may be straightforwardly defined as the question of whether judicial review is a hindrance to democracy. Simply put, my answer to that question is 'yes'. But it is an answer which requires explanation, since my argument is that judicial review hinders democracy in a specific way. Judicial review, I claim, damages democracy *noninstrumentally*. To understand this we need to distinguish between *causing* and *constituting* a value. If you think that pleasure is valuable, then you will approve of beautiful paintings, since beautiful paintings cause pleasure. In this respect beautiful paintings are of instrumental value. If you think that fine art is valuable, then you will also approve of beautiful paintings. But beautiful paintings do not *cause* fine art. They *are* fine art; or, to put it another way, they *constitute* fine art (we might say they *partly constitute* fine art, since there is more to fine art than just beautiful paintings). Here the value of beautiful paintings is noninstrumental. Similarly, I claim, democratic political processes are of noninstrumental value. They are constitutive of a certain political way of life, a certain way in which people relate to one another, which enhances the lives of those who partake in it. Judicial review, I shall argue, dilutes this valuable relationship and thus diminishes democracy's value.

It does not follow from this that countries that employ judicial review have no right to call themselves democracies, or that countries that practice legislative supremacy are *eo ipso* thriving democracies. The quality of democracy in a country is to be measured among many dimensions, of which the formal constitutional structure is just one. Furthermore, I do not even mean to say that judicial review is necessarily bad for democracy, all-things-considered. It might be the case that (in a particular society at a particular point in time) judicial review *instrumentally* benefits democracy, for example by striking down laws that inhibit democratic debate, or, more indirectly, by contributing to a process of decline in levels of racial or religious bigotry. Nevertheless, if my argument in this thesis is correct, such instrumental benefits must be measured against the direct, *noninstrumental* harm that is caused to democracy when questions about the fundamental principles of the constitution are taken out of the hands of the representative legislature and placed in the hands of the courts.

I should say a word about what I take the value of democracy to be. We could, and indeed often do, call that value simply 'democracy', just as we use 'art' to refer to a practice, the objects produced by that practice and the value constituted by that practice and those objects. There is a benefit to such usage: it helps us see that the relationship between practice and value is a constitutive, rather than a causal one. But it is not helpful in elucidating *why* democracy is valuable; for this, we need to reach for other words. I propose that democracy is valuable because it provides 'political autonomy'. One enjoys political autonomy when one authentically identifies as a member of a self-governing political community that respects one's status as a moral agent. Political autonomy enriches one's life by allowing an extra dimension to one's personhood. It binds one together with others in an ethically significant way, such that politics becomes a joint project in which all citizens may take pride.

We can understand political autonomy as lying between two opposed heteronomies. On the one hand, where there is no self-governing community, the law is simply imposed upon subjects by those individuals who hold the levers of power. On the other hand, where each citizens' moral agency is not respected, the community becomes an oppressive totality.

These two heteronomies show the respective dangers of an *apolitical* and an *excessively political* society. In the first case, society is presented as the field of market-oriented interactions among private individuals, and politics is taken to have the function of balancing interests and pursuing convergent goals. The status of citizen is primarily one of bearer of negative rights, as defined by law, which protect the pursuit of private interests. In such a society, individuals may enjoy a *moral* autonomy, but since it lacks a sense of politics as a collective activity, the good of *political* autonomy will not be available to them. At the other extreme, society is seen as entirely constituted by politics, and the maintenance of society becomes equated with the maintenance of an ethical/political consensus. The citizen's participation in a joint venture is secured by her adherence to a shared vision of the community's collective life. Such a society has a clear sense of the political, but it will lack any adequate notion of autonomy; the

individual becomes entirely subsumed into the collective. Democracy, then, seeks to navigate the course between these two extremes.

Although the idea of political autonomy plays an important role in this thesis, I do not embark on a detailed philosophical exploration of the concept. This is in part for the usual reasons of space and time. But a limited scope, philosophically speaking, is also called for by the nature of the question I am investigating. For regardless of whether one accepts Rawls' thesis that public reason should be 'freestanding' from 'conceptions of the good',⁹ for practical purposes a certain philosophical ecumenism is beneficial where political arguments are concerned. If one is able to make an argument on a foundation of broad agreement, then it is not necessary to keep on digging deeper. I think that the concept of political autonomy, as I use it, would be broadly accepted as valuable by most participants in the judicial review debate. Furthermore, although it does not sit detached from ideas of the good in their entirety (an impossibility that not even Rawls demands), nor does it rest on any particularly specific ideas about what is of ultimate value in life, or whence our basic moral obligations derive. When talking about the value of democracy I am referring to a particular good in a particular domain; I do not address (except by way of pointing out analogies) how this value relates to other goods and other domains. In this respect – which is not exactly Rawls' – my arguments are political, not metaphysical.¹⁰

It is in this spirit that I engage with the three main protagonists of my thesis: Jeremy Waldron, Ronald Dworkin and Jürgen Habermas. Each comes to the question of judicial review from a somewhat different angle, and it would be possible to trace the differences between them down to more fundamental philosophical disagreements about, say, the nature of moral rights, or the foundations of liberal equality, or even about the presuppositions that we make when we talk to one another. That is not my project. Starting at the political level, each of the three writers can be seen to be

⁹ See generally John Rawls, *Political Liberalism* (paperback edn, New York: Columbia University Press, 1996).

¹⁰ See John Rawls, 'Justice as Fairness: Political not Metaphysical' (1985) 14 *Philosophy and Public Affairs* 223.

wrestling with the problem of political autonomy, seeking to resolve the dialectic between respect for the individual and the need for collective action. Note that talk of liberalism *versus* communitarianism here would be crudely reductive. Writers on both sides of this supposed divide are met with the same recurring series of tensions which they endeavour to reconcile: individual and community, diversity and unity, rationality and emotion, norms and facts, universal and particular, *Moralität* and *Sittlichkeit*. None of the three 'liberals' whose work I discuss here ignore the latter part of any of these oppositions (which is not to say that there is nothing that they can fruitfully learn from those who are seen as sitting on the other side of the fence). The challenge of finding a constitutional structure that promotes political autonomy is part of this broader problem, which Habermas has called 'mediation between facts and norms', Dworkin 'integrating ethics and morality' and Waldron 'sparkling back and forth' between the universal and the particular.¹¹

When looking at these three scholars my main focus is on the way in which they address the question of judicial review, and in that regard I find the attempts of each to be wanting. My discussion of them is not, however, intended to be purely critical; I find in the work of each writer something that contributes to the approach that I synthesise in chapter six. This is not, of course, a coincidence. I have chosen my interlocutors not simply because they are prominent voices in the judicial review debate, but also because I believe that there is much that they get right. Broadly speaking, I more or less accept Habermas' ideal of deliberative democracy. I believe, however, that Habermas has a tendency to pay insufficient attention to the non-rational, affective aspects of democracy, an oversight which might be remedied by taking seriously Dworkin's analogy between citizenship and other associative

¹¹ Jürgen Habermas, *Between Facts and Norms: contributions to a discourse theory of law and democracy* (W Rehg tr, Cambridge: Polity Press, 1996), chap 1; Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Belknap Press of Harvard University Press, 2011), chap 11; Jeremy Waldron, 'One Another's Equals: the basis of human equality', Gifford Lectures, delivered at the University of Edinburgh, 26, 27, 28 January and 2, 3, 5 February 2015, <<http://www.ed.ac.uk/schools-departments/humanities-soc-sci/news-events/lectures/gifford-lectures/jeremy-waldron>>.

relationships such as ties of family and friendship. And just as I criticise Waldron's 'core case' against judicial review for being based on a shallow, 'static' methodology, so his work on the 'dignity of legislation' lays the foundations for a more successful, dynamic approach.

In lieu of a standard, chapter-by-chapter summary, I have prepared an overview of four themes that are central to this thesis. This should help guide the reader through the chapters that follow, hopefully giving a sense of how the various arguments sit together. I will therefore give only the most cursory introduction to the structure of the thesis. You are currently reading chapter one. In chapter two I set out my methodology, explaining why I think we need to take the symbolic aspects of constitutional design much more seriously. Chapters three to five then examine the contributions of my three main protagonists, Waldron, Dworkin and Habermas, in turn. In chapter six I develop what we in Scotland over the last year or so have learned to call the 'positive case'.¹² I give a brief account of the value of political autonomy, positioning it in relation to the classic theories of Rousseau, Kant and Rawls, and giving an indication as to how the shortcomings of these theories might be overcome. I then argue that representative legislatures are particularly well-placed to express and honour political autonomy, since they symbolise both the unity of the community and respect for citizens' moral-political judgment. Finally, I argue that, by projecting a 'negative' image of the constitution as a set of limits to political power, judicial review undermines this value. That is why I believe that it is a hindrance to democracy.

¹² On 18 September 2014 there was a referendum to decide whether Scotland should remain part of the UK or become an independent nation. Following criticisms that they were running a 'negative' campaign, supporters of continued UK membership began to make frequent reference to the need for a 'positive case' for the Union. To this observer, the distinction between the two seems to have been the difference between 'the economy will be worse under independence' (negative case) and 'the economy will be better if we remain in the UK' (positive case). Yet despite (or perhaps because of?) its apparent lack of substance, the phrase seems to have squarely entered the political lexicon, with a number of organisations pledging to make the 'positive case' for EU membership ahead of the planned referendum in 2017.

1.3 Thematic Overview

1.3.1 Symbolic Significance of Institutions

One influential approach to questions of constitutional design divides the issues involved into two categories: *input legitimacy* (whether the system is responsive to the preferences and/or beliefs of the citizenry) and *output legitimacy* (whether the system effectively produces solutions to problems so as to work in the interests of the citizenry).¹³ Legislative supremacy is then often seen as supported by the former and judicial review by the latter. This thesis wholeheartedly rejects such an analysis. Political institutions are not simply machines that process inputs into outputs. Such a 'black box' approach treats such phenomena as political values, beliefs and aspirations (on the one hand) and legislation, judicial rulings and administrative orders (on the other) as exogenous to the institutions with which they engage. This is misleading, since both 'inputs' and 'outputs' derive their meaning from the context of the practice in which they are embedded, a practice in which institutions play a constitutive role.

Think first of inputs. Citizens develop their political values and beliefs in interaction with the practice of politics that is ongoing in society, and such interaction includes, of course, their experience of political institutions. A certain institutional structure will expose citizens to certain kinds of attitudes, arguments and rhetoric; this will have an impact on citizens' views. More fundamentally, the institutional structure will colour a society's sense of political agency, affecting what citizens take to be the boundaries of the political, be they topical boundaries (does politics extend to the regulation of commercial arrangements between consenting adults?), territorial boundaries (are 'we' the people of Scotland, of the UK, of Europe?) or what we might call the limits of political possibility (is it feasible to expect politics to effectively govern the conduct of multinational corporations?). By altering the boundaries of the

¹³ See Fritz Wilhelm Scharpf, *Governing in Europe: effective and democratic?* (Oxford: Oxford University Press, 1999), p 6.

political, institutions affect not only what political opinions citizens hold, but also what questions citizens have political opinions about.

Now think about outputs. What does it mean to say that parliaments and courts (as well as cabinets, presidents, government departments, administrative agencies, ombudsmen, and so on) produce political outputs? Of course they produce laws, rulings, orders and other decisions which will (usually) be implemented in the world, by force if necessary. However, such decisions do not have a meaning that can be detached from the institutions that reach them. There is no such thing as a political output in the abstract, only a particular kind of decision (statute, judgment, order, recommendation) made by a particular decision-making body. A supreme court judgment has a different meaning to an act of parliament, and would have even if the two carried identical semantic content. The meanings of political decisions depend on the institutions that make them, and so they cannot be reduced to brute 'outputs' separable from the process by which they came into existence.

Political institutions, then, form part of the context within which political action can be seen as meaningful and potentially valuable. In chapter two I develop this idea to claim that democratic political institutions are of noninstrumental value. Drawing on the work of the 'new institutionalists' in political science, I argue that political institutions are fora for 'symbolic rituals' through which the political community affirms its commitment to democratic values. Since these values cannot be dissociated from the political practices through which they arise (the value of democracy can only conceivably be affirmed through democratic processes), the institutions that constitute these practices are themselves of a certain noninstrumental value. One cannot, therefore, adequately address institutional design questions without a sense of the distinctive political values that democratic institutions serve.

We should not, however, think of the symbolic significance of political institutions solely in terms of the relatively straightforward expression of values. On a more fundamental level, institutions also play a role in what Charles Taylor calls the 'social

imaginary':¹⁴ they project a certain way of thinking about our political life, a certain shared self-image. They shape the expectations we have of political actors, and of each other, and carry a sense of how we fit together as citizens engaged in a common practice. They thus allow us to orient ourselves in relation to the political world. Take, for instance, the idea of the separation of powers. The familiar tripartite distinction between the legislative, the executive and the judicial seems almost natural to us, but of course it is not, it is a construction that we have built up over the centuries and which is inextricably linked to the particular set of institutions that modern western societies have developed. We cannot understand the separation of powers without understanding our institutions: one does not, for example, really have a grasp of what legislation is unless one knows what a legislature is. Political institutions are thus a constitutive element of the concepts that organise our constitutional world, concepts which I shall call our 'constitutional imaginaries'. This idea is central to my defence of legislative supremacy in chapter six, where I argue that judicial review symbolically projects an image in which politics is constrained within the boundaries of law, truncating the field of self-government of the political community.

1.3.2 *Respect for Citizens' Capacity for Judgment*

The approach that equates questions of constitutional design with issues of input and output legitimacy may be supported by the view that the *raison d'être* of democracy is to provide *government by consent*. This view has its roots in the classic social contract tradition of Hobbes, Locke and Rousseau; at its heart is the idea that no-one can be held to be under any obligation to a political power unless he has consented to its authority over him. Although this principle has not always been taken to call for democracy (Hobbes is an obvious example), it is not a huge step from demanding government by consent to demanding democratic government. Input and output legitimacy can be seen as two (potentially competing) ways in which the supposedly consensual nature of government can be tested. On the input side, regular

¹⁴ See generally Charles Taylor, *Modern Social Imaginaries* (Durham: Duke University Press, 2004).

competitive elections and other opportunities for democratic participation provide institutional bases for establishing the consent of the people. On the output side, since individuals are taken to consent to government for the purpose of protecting their interests, we can only impute consent to those whose interests are in fact so served; it follows, one might conclude, that a legitimate government must be one that serves the interests of all.

Again, this thesis rejects such an analysis. The equation of democracy with government by consent represents what we might call a volitional conception of politics, that is, a conception of politics based on *will*. Inspired by the work of Nadia Urbinati,¹⁵ I outline a distinction between treating citizens voluntaristically, as bearers of wills, and respecting them as agents capable of political *judgment*. It is, the latter, I claim and not the former, that is central to democracy.

The capacity to make judgments is deeper than the capacity to will. One can grant one's consent to a course of action without any sense that the course of action is *worthy* of one's consent: one may simply feel like it. Judgments are different. To make a judgment in favour of a course of action is to evaluate the action as *worth pursuing*, which necessarily involves invoking criteria other than one's own desires. To use Charles Taylor's terminology, to consent one need only be a 'simple weigher', while to make a judgment one must be a 'strong evaluator'.¹⁶ So a conception of democracy based on judgment rather than will pays a deeper respect to citizens' status as moral agents.

In chapter three I argue that focusing on the need for a judgment-based conception of democracy highlights a shortcoming in Jeremy Waldron's 'core case' against judicial review: it relies on a 'static' notion of politics. Waldron makes his argument from the perspective of a citizen who disagrees with a particular political decision and who asks why the decision was made in the way that it was. The argument is based upon

¹⁵ Nadia Urbinati, *Representative Democracy: principles and genealogy* (Chicago: University of Chicago Press, 2006).

¹⁶ Charles Taylor, 'What is Human Agency?', in *Human Agency and Language* (Cambridge: Cambridge University Press, 1985), p 23.

a conception of the 'circumstances of politics' which takes political disagreements as given and treats political institutions as means for making decisions in the face of such disagreements. This is a static view, which looks at the role of political institutions through a 'snapshot' picture of the citizenry at a particular point in time: the point at which the object of disagreement comes to be decided upon. Such a conception would be adequate for a politics based on will, since an act of will, such as the giving or revoking of consent, is a synchronic act that is separable from the reasoning that leads up to it and any further consideration that might follow. Judgment, on the other hand, is essentially diachronic: it is continually shaping and reshaping in response to ongoing deliberation, so that one cannot identify a specific point in time at which judgment 'occurs'. A judgment-based conception of democracy must, then, be based on a dynamic account of politics, and so must view political institutions not merely as mechanisms for resolving particular disagreements, but as integral components of an ongoing practice.

More positively, in chapter six I follow Urbinati in arguing that a judgment-based conception of democracy will view legislation by representative assembly as a distinctively valuable mode of government. The indirectness of representative democracy plays a crucial role in forging the discursive character of a politics geared around respect for citizens' judgment. Political representation is 'a comprehensive filtering, refining and mediating process of political will-formation and expression'.¹⁷ We should therefore view the practice of representative legislation as something worthy of a special respect, and not, as it is often described, as a mere compromise between equality of input and quality of output.

1.3.3 Political Community

Democracy provides self-government: rule by the people rather than rule by a particular individual or class. This is an inherently collective ideal: 'the people' means the people as a whole, not each individual taken separately. A citizen who dissents

¹⁷ *Representative Democracy*, p 6.

from a political decision can only be expected to accept that he is nevertheless party to self-government if he has a sense that he belongs to a political community that transcends the particular decision he disagrees with. Without this sense, he will view the government as an external imposition by those who happen to hold the levers of power.

Such a sense of democratic self-government can only thrive where citizens adopt a particular attitude towards politics. Rather than setting out merely to maximise the satisfaction of their individual preferences, citizens must generally be willing to engage in discourse aimed at seeking mutual understanding and to attempt to reach solutions that are broadly acceptable to all. This means accepting obligations that are additional to those which pertain between persons in general, i.e. specifically *civic* obligations that attach to members of a democratic political community.

In chapter four I argue that Ronald Dworkin has given an attractive account of civic obligations, portraying them as associative duties analogous to those that hold between family members, friends and colleagues. Dworkin rightly claims that a failure to treat individual citizens with equal concern and respect will tend to corrode the bonds of citizenship and thus undermine the democratic community, even if such unequal treatment is supported by the majority. Dworkin is wrong, however, to conclude from this that rights-based judicial review can pose no threat to democracy. Although constitutional rights can protect against the kinds of unequal treatment that may undermine a democratic community, such protection is not the only goal of a constitutional design. Dworkin focuses on a constitution's concrete 'outputs', but neglects the role that constitutions play in constructing citizens' self-understandings, i.e. the way they view the practice of democracy, their own role in it, and the nature of their relationships with other participants. Once we appreciate the deeper role that political institutions play, we cannot satisfy ourselves with examining only whether judicial review or legislative supremacy is likely to lead to decisions that better respect citizens' rights. We also need to consider which institutional scheme is likely to be more effective at promoting a democratic civic ethos.

Habermas' theory of democracy shows a heightened awareness of the way in which the relationship between citizens is shaped over time through the practice of politics. In chapter five I give a detailed and largely sympathetic overview of this theory. I think that Habermas is right to draw attention to the role that political deliberation plays in encouraging citizens to recognise one another as co-participants in the collective endeavour of self-government (a feature that is missing in Dworkin's account). However, Habermas goes on to treat the question of judicial review as an essentially pragmatic issue. He thus fails to take into account the symbolic effect that institutional design can have on a political community. Institutions function as poles around which the various factors which link citizens together can crystallise. Their significance comes from shared understandings which are deeper than straightforward agreements over principles, and which cannot easily be altered. I argue that individuals come to view themselves as self-governing citizens partly through their relationship to the representative legislature. There is, I believe, a risk that judicially interpreted constitutional norms will symbolise a deliberate departure from the processes of self-government, in favour of side-constraints imposed by an epistemic elite.

1.3.4 The Positive Conception of Constitution

The final claim in my thesis is that, given the place that the judiciary hold in the popular imagination, placing the responsibility for policing the boundaries of the constitution into their hands will tend to have a detrimental knock-on effect on how citizens view the constitution: promoting what I call a 'negative' rather than a 'positive' conception. The negative conception depicts the constitution as a set of limits to political power: a law superior to the machinery of government within which political power is to be exercised. The positive conception, on the other hand, presents the constitution as literally *constitutive* of political power. Power, on the positive account, is created by action, so that the constitution must encourage political action even as it sets out to channel political power.

In the sixth chapter of this thesis I argue that the way in which the negative conception of constitution depicts political power is, in the final analysis, unintelligible, since the very idea of political power entails its channelling through constitutional forms. In the absence of constitutional forms, there would be no *political* power to limit. The negative conception of constitution also presents democratic government as standing in conflict with constitutionalism, by depicting the constitution as a set of pre-political boundaries that constrain the popular will. If, on the other hand, we accept the positive view that a constitution is a means of generating political power, then we need not view constitutionalism as the imposition of restraints on a sovereign people. Properly conceived, constitutionalism does not limit democracy, it enables it.

The conflict between the negative and the positive conceptions of constitution is important to the question of judicial review because there is, I argue, a symbolic link between judicial supremacy and the negative conception. Where the judiciary takes the primary responsibility for the determination of constitutional issues, the constitution will naturally come to be thought of as simply a species of law. Owing to the powerful place of law and the judiciary in the popular imagination, judicial rulings that action is unconstitutional will tend to be seen as delineating the boundaries in which the so-called 'political branches' of government must operate. So judicial review provides symbolic nourishment for the negative conception of constitution, and thus for a vision of constitutionalism that truncates the collective agency of the democratic people by placing it within bounds which are not themselves presented as products of the practice of democratic politics. Legislative supremacy, on the other hand, can allow the law, including the 'constitutional essentials',¹⁸ to be seen as the output of the political power of a self-governing people.

¹⁸ I take this phrase from Rawls, *Political Liberalism*, Lecture VI, §6.

2. Methodology: values, practices and institutions

This thesis makes an argument against constitutional judicial review of legislation. It therefore has as its target a specific (not to say historico-geographically local) feature of constitutional design. It proceeds by developing an idealised account of modern political democracy; what we might call an 'ideal theory'. Such an excursus into theory will strike some people as unnecessary. They may believe that *Brown v Board of Education*¹ (or *Lochner v New York*²) speaks for itself. Or if they do not quite believe that, then they might believe that the answer is to be found by way of a careful examination of the empirical impact of judicial review of legislation measured against a set of objective indicators roughly agreed upon as indicia of democratic good health.³ Approaching the question of judicial review by outlining an idealised account of democracy may seem complicated, unnecessary, and unlikely to be particularly effective. If our interest is in the question whether, say, the UK should embrace a system of strong judicial review, then shouldn't we look directly at what the likely consequences of introducing such a system into the UK would be, rather than aiming to tackle the question of whether we would find a place for judicial review in an idealised democratic society?

In this chapter I shall mount a qualified defence of ideal theory against the sceptic's claim that, when addressing questions of institutional design, such theory is surplus to requirements.⁴ The defence is qualified because it based upon of a specific view of what political ideals are, a view that sees political values as inhering in political *practices*. The practice account of political value claims that practices carry with them

¹ *Brown v Board of Education of Topeka* (1954) 347 U.S. 483.

² *Lochner v New York* (1905) 198 U.S. 45.

³ Examples include: The Economist Intelligence Unit, 'Democracy Index' (www.eiu.com); NDI, 'Democracy Indicators' (www.ndi.org); University of Zurich, 'Democracy Barometer' (www.democracybarometer.org); Bertelsmann Stiftung, 'Transformation Index' (www.bti-project.org); Stuart Wilks-Heeg et al, 'Democracy Audit' (www.democraticaudit.com); and Freedom House, 'Freedom in the World' (freedomhouse.org).

⁴ An archetypal example of this claim is provided by David Wiens, 'Prescribing Institutions without Ideal Theory' (2012) 20 *Journal of Political Philosophy* 45.

their own standards of appraisal, so that real-world institutions, and the practices they embed, are already impliedly committed to realising certain ideals. Rather than viewing institutions as means that we can fashion in order to achieve whatever ends we deem desirable, the practice conception recognises that institutions do not *cause*, but rather serve to *constitute*, valuable political practices. As such, they are themselves of certain noninstrumental value. Since empirical studies cannot take account of such value, they cannot be complete guides to problems of institutional design. The question of judicial review, then, cannot be adequately answered without some account of political autonomy as an ideal.

The structure of this chapter is as follows. In the first section I set out the practice account of political values, developing the claim that practices are constitutive of values. The second section proposes that we can identify and elucidate the ideals implicit in our political practices by employing Ronald Dworkin's methodology of 'constructive interpretation'. I give an overview of this method, enriching Dworkin's account with insights from Charles Taylor, who has, in a somewhat different register, developed a similar approach. In the third section I argue that the relationship between practices and institutions is also a constitutive one, so that we cannot approach institutional design questions from a purely instrumentalist perspective. In section four I introduce the idea of 'constitutional imaginaries', which is the term I use to describe the shared understandings presupposed by modern political institutions. Constitutional imaginaries are necessary in order to make possible the practices that define modern democracy, since they shape the expectations that we have of political actors and carry a sense of how we fit together as citizens. I conclude by defending my 'idealising' methodology against various objections that charge ideal theory with being unsuited to application in the real world, because it is unrealistic, naïve and/or ideological.

2.1 Political Practices as Constitutive of Political Values

Implicit within our political practices are certain ideals. Without a grasp of these ideals, an observer of the practices would not be able to understand what was going

on. To take a straightforward example, take the practice of voting.⁵ A vote would be unintelligible without the understanding that each participant makes an independent decision. So for there to be a vote at all, there must be a distinction between an autonomous and forced choice. Implicit within the practice of voting, then, is a certain ideal of autonomy.

Because the ideal of autonomy is implicit with the practice of voting, a vote will (under suitable conditions) serve the value of autonomy. Of course, I do not mean by this that a vote will cause the amount of autonomy in the world to increase. People do not become more autonomous the more votes they participate in. But *producing* a value – i.e. increasing the amount of that value that exists in the world – is only one way of serving a value. Another is *honouring* a value, i.e. acting in a way that exemplifies respect for it, whether or not this produces more of the value.⁶ Votes, when conducted properly, serve autonomy in this way; by holding a vote we honour the value of autonomy by conducting ourselves in a way that shows appropriate recognition of its significance. We might describe this as an ‘expressive’ value: voting expresses respect for the autonomy of citizens.⁷

The expressive value of a practice is distinguishable from the straightforwardly instrumental value that may derive from its empirical consequences. For instance, the expressive value of voting is clearly distinct from whatever value it might have as a tool for reaching substantively good decisions. But one might be tempted, nevertheless, to describe the expressive value as instrumental in another sense (I shall call this the expressive-instrumental analysis).⁸ The distinction between producing

⁵ This example comes from Charles Taylor, ‘Interpretation and the Sciences of Man’ (1971) 25 *Review of Metaphysics* 3, at 25-6.

⁶ On the distinction between producing and honouring values see Philip Pettit, ‘Consequentialism and Respect for Persons’ (1989) 100 *Ethics* 116; and Ben Bradley, ‘Two Concepts of Intrinsic Value’ (2006) 9 *Ethical Theory and Moral Practice* 111.

⁷ This terminology is used, for instance, by Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004), p 21-3.

⁸ This possibility is explored by Kahane in an interesting blog post which unfortunately appears not to have been developed into a full article: Guy Kahane, ‘Extrinsic Final Value or Expressive Value?’, *Ethics etc*, 8 August 2007.

and honouring values, one could argue, corresponds to a distinction between two types of value, which we might call 'telic' and 'deontic' values. Just as telic values are served by a practice that produces certain consequences, the argument goes, so deontic values are served by a practice that expresses the appropriate attitude of respect. In each case the value of the practice seems wholly derivative on the more fundamental value, be that value telic or deontic. The conclusion we might be tempted to draw is that the pertinent distinction between the two cases is the nature of the value being served, and not the status of the practice as a means to promoting that value. Just as voting instrumentally serves a telic value by producing good decisions (assuming that it does), so it instrumentally serves a deontic value by expressing respect for autonomy.

I believe that we should resist this conclusion. Despite the apparent elegance of the picture that portrays honouring a deontic value as the mirror-image of producing a telic value, I believe that (at least so far as political values are concerned)⁹ there is a closer connection between practice and value than the expressive-instrumental analysis allows. The relationship between political practice and political value cannot adequately be described as instrumental, because we need political practices not just for the flourishing of political values, but for such values even to be intelligible. Just as one cannot understand a political practice without grasping the values implicit in it, so one cannot understand a political value without having a grasp of the practices in which it features. The relationship between political practice and political value is therefore *mutually constitutive*, not merely instrumental.

This inextricable connection between value and practice derives from the fact that political ideals necessarily refer to *action*. The question whether a society is democratic (or just, egalitarian, free, etc.) cannot be answered purely by reference to some state of affairs or other set of brute facts. To view an entity *as* a political society, that is, as something to which normative political concepts potentially apply, we need to be able

⁹ Although I suspect that my arguments here have relevance for other domains of value as well, I restrict my discussion to political value.

to recognise it as containing agents whose actions are intelligible to us. It is our being able to interpret their behaviour as the actions of agents who are doing (or not doing) democracy, justice and so on, that explains why we can see that those concepts apply to them, and not, say, to a hive of bees who do not elect their queen, or to a weather system that distributes snow unequally across the country without the differences benefitting the least well off.

As MacIntyre has shown,¹⁰ in order for us to understand an occurrence *as an action*, we need to be able to place it into a context within which we can make sense of it. There is no such thing as an action *in vacuo*. Furthermore, such a context must take the form of a historical narrative which stretches across time. There is no such thing as an action *in scintilla temporis*. MacIntyre gives us a couple of pointed examples. Imagine a professor in the middle of a lecture on Kant's ethics suddenly breaking six eggs into a bowl, adding flour and milk, and stirring, while all the time continuing to explain the categorical imperative.¹¹ His physical acts may be following a sequence laid down in a recipe book, but he is not performing an intelligible action. Or imagine a man you don't know approaching you out of the blue and saying 'The name of the common wild duck is *Histrionicus histrionicus histrionicus*.'¹² Although the form of words are perfectly intelligible, you can't understand what he is *doing* with his speech act unless you can place them in a historical context (perhaps he has mistaken you for someone who earlier asked him the Latin name of the common wild duck, or perhaps he has been told by his psychotherapist to try to initiate conversations with strangers by saying the first thing that comes into his head). Intelligible action must form part of a meaningful narrative.

Political practices provide the historical narrative within which political action can be seen as meaningful and potentially valuable. Political values therefore cannot conceptually be detached from the practices through which they are realised. An

¹⁰ Alasdair C MacIntyre, *After Virtue: a study in moral theory* (3rd edn, London: Duckworth, 2007), p 239-49.

¹¹ *Ibid.*, p 242-3.

¹² *Ibid.*, p 243-4.

attempt to detach value from practice would be an attempt to detach action from the context which gives it meaning, and this we cannot do. The idea of realising political autonomy without engaging in the practice of democracy is unintelligible: attempting to do so would be like attempting to score a try without playing rugby.

For this reason, it is inappropriate to talk about political practices as instrumentally related to political values, even in the nuanced terms of the expressive-instrumental analysis. Political practices are not means to realise political values. Instead, practice and value, like rugby and tries, are conceptually indissociable. Political practices are constitutive of value.

To use Korsgaard's influential terminology, political practices are of *final* value: they are of value for their own sake, and not as means to realise something else.¹³ This should not be confused with the claim that practices are of *intrinsic* value, i.e. that a practice has value 'in itself', by virtue of its intrinsic properties. There are two separate distinctions in play here. While the opposite of final value is instrumental value, the opposite of intrinsic value is *extrinsic* value, i.e. the value that a thing gets from a source outside its own intrinsic properties. Things can be of extrinsic, but nevertheless final, value. Kagan gives a couple of straightforward and useful examples. The pen that Abraham Lincoln used to sign the Emancipation Proclamation is, as a historical artefact, of final (i.e. noninstrumental) value, not by virtue of any of its intrinsic properties, but by virtue of its relationship with a momentous historical event.¹⁴ A rare stamp is of final value by virtue of its rarity, but rarity is not an intrinsic property of the stamp.¹⁵ Furthermore, the extrinsic properties that give something final value may include that thing's very instrumentality: Korsgaard points out that a cook's

¹³ Christine M Korsgaard, 'Two Distinctions in Goodness' (1983) XCII The Philosophical Review 169.

¹⁴ Shelly Kagan, 'Rethinking Intrinsic Value' (1998) 2 Journal of Ethics 277, at 285

¹⁵ Shelly Kagan, 'The Limits of Well-being', in Ellen Frankel Paul et al (eds), *The Good Life and the Human Good* (Cambridge: Cambridge University Press, 1992), p 184.

gorgeously enamelled frying pan may have a noninstrumental value that derives in part from the fact that she uses it for cooking.¹⁶

The value of the practice of democracy is final but extrinsic. It is final because the value of political autonomy cannot be conceptually detached from the practice of democracy and therefore cannot stand as an end to which the practice could serve as a means. It is extrinsic because its value does not derive from any intrinsic property of the practice, but instead lies in the role that the practice plays in citizens' lives. There is no value in 'going through the motions' of democracy: in order to be valuable those motions must link up with citizens' own self-understandings; they must, as Williams puts it, 'make sense' to the citizens.¹⁷ In fact, like Korsgaard's frying pan, the final value of democracy is conditioned on its own instrumentality: if we were not able to use democratic processes to make important decisions competently, they would not have the same expressive significance.¹⁸ But we should not thereby be tempted into supposing that we can reduce the value of democratic practices into instrumental terms. Political practices constitute political values, they do not cause such values to be. Implicit within our practice of democracy lies a certain complex ideal that is so indissociably linked with the practice that an understanding of the ideal requires no more and no less than an understanding of the practice itself.

2.2 Working from the Inside: constructive interpretation of political practices

How, then, do we go about identifying and elucidating the ideals that are implicit in political practices? I suggest that we should engage in the process that Dworkin has labelled *constructive interpretation*,¹⁹ which requires us to adopt what Dworkin calls the 'interpretive attitude'. This attitude has two components. Firstly, someone who holds the interpretive attitude towards a practice believes that the practice does not

¹⁶ 'Two Distinctions in Goodness', p 185.

¹⁷ Bernard Williams, 'Realism and Moralism in Political Theory', in *In the Beginning was the Deed: realism and moralism in political argument* (Princeton: Princeton University Press, 2005), p 10.

¹⁸ This point is noted by Gutmann and Thompson, see *Why Deliberative Democracy?*, p 22. I discuss this aspect of democracy's value further at p 158 below.

¹⁹ See Ronald Dworkin, *Law's Empire* (London: Fontana, 1986), chap 2.

simply exist as a matter of descriptive fact, but that it 'serves some interest or purpose or enforces some principle', that is to say, it has a certain value.²⁰ Secondly, she will view the true requirements of the practice as not purely a matter of convention, but rather as sensitive to the practice's point, so that what the practice truly requires is not necessarily what the practice has historically been taken to require. The interpretive attitude, I would suggest, is inescapable once we recognise that practice and value are conceptually indissociable. As Dworkin puts it: 'Value and content have become entangled.'²¹

Dworkin draws an analogy between interpretation of a social practice and interpretation of art and literature: in each case interpreters aim to construct an account of something that has been created by a person or persons but that exists as an independent entity separate from its creator(s). Constructive interpretation, be it of a social practice or of a piece of art, involves 'imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong'.²² Note that an interpretation does not simply deduce but *proposes* value for a practice. Just as a set of scientific data will always be compatible with more than one explanation, so the brute facts about people's behaviour will be consistent with more than one interpretation of the value implicit in a practice. There is no value-neutral mechanism for determining between competing interpretations: our choice must reflect our view of which interpretation proposes the most value for the practice, i.e. which portrays the practice in its 'best light'.²³ It follows, of course, that interpretation is a controversial activity: different persons' interpretations will conflict, and thus stand in competition with one another.

Dworkin provides a useful three-stage heuristic for thinking about what interpretation of a practice involves.²⁴ In the first, 'preinterpretive' stage, we identify

²⁰ *Ibid.*, p 47.

²¹ *Ibid.*, p 48

²² *Ibid.*, p 52.

²³ *Ibid.*, p 47.

²⁴ *Ibid.*, p 65-6.

the rules and standards that we take, provisionally, to provide the content of the practice. We then move to the 'interpretive' stage, at which we settle on some general justification for the main elements of the practice, i.e. an account of what value the practice realises and how it does so. Finally comes the 'postinterpretive' stage, in which we adjust our sense of what the practice 'really' requires so as better to serve the value that we have identified. Dworkin's schema is helpful so long as we do not mistake it for a concrete procedure that we must always self-consciously follow, or (worse) an algorithm for success. The three 'stages' of interpretation are not analytically discrete. Dworkin makes it clear that even at the preinterpretive stage, a degree of interpretation is necessary in order to identify the object of the interpretation.²⁵ Furthermore, the progression through the three stages is not linear: at any point the interpreter could find, for example, that there is no way of reconciling any general justification with the practice he is interpreting, and so be forced to return to the preinterpretive stage to see if some different initial selection would be more fruitful. The different stages of interpretation do not so much flow in chronological progression as sit in a kind of reflective equilibrium. Nevertheless, the three stages – identifying and individuating a practice, deriving an account of its value, and making proposals for reform – correspond to tasks which a sound interpretation must complete.

How do we decide which interpretation of a practice is the most attractive? What does it mean for an interpretation to portray a practice in its 'best light'? If I am right that political values are constituted by political practices, then we cannot hope to stand outside of our practices in order to judge putative interpretations from an archimedean perspective. Rather, we can only assess interpretations from a viewpoint

²⁵ Hart, in his postscript to *The Concept of Law*, misunderstood this aspect of Dworkin's methodology. Hart argued that the identification of rules and standards at the preinterpretive stage presupposes the existence of a fact-based test for law (HLA Hart, *The Concept of Law* (3rd edn, Oxford: Oxford University Press, 2012), p 266). However, Dworkin does not, as Hart describes, take 'preinterpretive' law as 'settled', and interpret it as if it were somehow axiomatic. Constructive interpretation is only complete if the subject-matter chosen in the preinterpretive stage turns out, in light of the work at the interpretive and postinterpretive stages, to be a set of true paradigm instances of the practice.

that is internal to the practices themselves; there is no higher court to appeal to. The test of an interpretation is accordingly whether it is able to formulate more explicitly what it is that we are already doing, by capturing the significance of those aspects of activity and norms of behaviour that are most central to the practice. This is not to say that the role of interpretation is simply to tell us what we already know. Indeed, a theory may provide a perspicuous account of a practice while challenging the views of those engaging in it, perhaps by highlighting an aspect of the world that had previously gone unnoticed. Dworkin's interpretation of law, for example, claims that our existing legal practice presupposes the central importance of the value of integrity, even though such a value has not been explicitly recognised by legal actors. Imputing a concern for integrity to legal actors helps explain their behaviour in an attractive way, and thus renders the practice of law more perspicuous.²⁶

What we are seeking in constructive interpretation is an account of the practice that can present people's behaviour as intelligible by reference to a schema of values that we consider broadly attractive. This will to a great extent be a quest for *coherence*. A perspicuous account of a practice will render it coherent with our empirical beliefs about cause and effect and about human psychology, with our various considered value commitments, and with other practices in which we are also engaged. This is not to say that such harmony will always be attainable, but simply that coherence is something for which we always have reason to strive. (The importance of coherence resonates with our experience of social criticism, so much of which proceeds by pointing to supposed *contradictions* embedded in current practice – the most famous example being Marx's critique of capitalism.²⁷)

²⁶ Dworkin draws an analogy to the discovery of the planet Neptune: 'Astronomers postulated Neptune before they discovered it. They knew that only another planet, whose orbit lay beyond those already recognized, could explain the behaviour of the nearer planets. Our instincts about internal compromise suggest another political ideal standing behind justice and fairness. Integrity is our Neptune.' (*Law's Empire*, p 183).

²⁷ See Michael Walzer, *Interpretation and Social Criticism* (Cambridge: Harvard University Press 1987), p 35-8, for discussion of the employment of internal critique of bourgeois capitalism by the Italian Marxists Silone and Gramsci. Walzer emphasises the supposed contradiction within the *ideology* of capitalism, but note that Marx adopted a forceful version of the practice-

Since an interpretation of a practice will usually recommend changes to the way in which the practice is carried out, the process of elucidating a practice is indissociable from the process of its appraisal. This connection between the explanatory and the normative has been neatly expressed by Taylor: 'What makes a theory right is that it brings practice out in the clear; that its adoption makes possible what is in some sense a more effective practice.'²⁸ Like a map, the test of a theory is how well we can use it to get around: whether it renders our action less 'haphazard and contradictory', and more 'clairvoyant'.²⁹ If a new interpretation gains widespread acceptance, then the practice itself is likely to alter, since people will approach the practice somewhat differently if they become convinced of the challenging theory. Successful interpretation is therefore capable of giving rise to a virtuous circle, in which interpretive insight and improvements to the practice feed off one another. As Dworkin puts it: 'Interpretation folds back into the practice, altering its shape, and the new shape encourages further reinterpretation, so the practice changes dramatically, though each step in the progress is interpretive of what the last achieved.'³⁰

In undertaking constructive interpretation of our political practices, we will likely reach the view that, ideally interpreted, the standards that they impose upon participants demand significant improvements on the current *status quo*. There is, for instance, no reason why we should expect that modern-day society produces citizens who enjoy the kind of autonomy that the practice of voting tacitly endorses. In chapter six I set out an account of the virtues of the ideal legislature which requires much more than real-world legislatures provide. I am justified in doing so, I believe, because the virtues of such a legislature are implicit within our current practice of representative democracy. The ideal is a normative one, applicable to representative

based theory which I am advocating here: Marx's claim was that the contradictions were inherent in *capitalism itself*, and not (just) in bourgeois morality.

²⁸ Charles Taylor, *Social Theory as Practice* (Delhi: Oxford University Press, 1983), p 104.

²⁹ *Ibid.*, p 111.

³⁰ *Law's Empire*, p 48.

democracies in the here-and-now, because it embodies standards which real-world legislatures are already impliedly committed to meeting.

It might be objected that this account of constructive interpretation relies upon an unfeasible essentialism about practices, according to which practices have purposes of their own, distinct from the purposes of any of the participants in the practices, existing in an abstract realm like that of the platonic forms.³¹ The objection is half-right: practices do have purposes of their own, distinguishable from the subjective purposes of those who participate in them. However, these purposes are not entirely detached from the participants, and they certainly do not exist in any strange platonic realm. The essentialist objection wrongly assumes that we are faced with a choice between viewing the purposes of practices as either entirely detached from the participants, or else a purely subjective matter about which there can be no right or wrong answer but only different individual opinions. But this is a false dichotomy, since practices have an existence which is irreducibly *intersubjective*.

I argued above that political practices provide the historical narrative within which political action can be seen as meaningful and potentially valuable. Political practices form the context that allows political actions to be the kind of actions that they are. Practices therefore provide what Taylor has called a 'background of meaning', without which nothing could count as democratic, just, liberal and so on.³² A background of meaning cannot be located in individuals; like language, it can only exist by way of continuing interaction between members of a community. Individual views about the nature and value of political practices presuppose the existence of a shared background against which those views make sense as an interpretation of *something*. Acknowledging the necessity of a background of meaning means accepting an intersubjective social ontology which requires neither a reducibility to individual preferences or beliefs nor any mysterious collective consciousness or timeless abstract

³¹ See, for example, George Pavlakos, *Our Knowledge of the Law: objectivity and practice in legal theory* (Oxford: Hart Publishing, 2007), chap 6.

³² Charles Taylor, 'Irreducibly Social Goods', in *Philosophical Arguments* (Cambridge: Harvard University Press, 1995), p 132.

form. A practice, like a language, is something that is irreducibly shared. To summarise, I cannot do better than to quote Taylor:

‘The meanings and norms implicit in these practices are not just in the minds of the actors but are out there in the practices themselves, practices which cannot be conceived as a set of individual actions, but which are essentially modes of social relation, of mutual action... Hence they are not subjective meanings, the property of one or some individuals, but rather intersubjective meanings, which are constitutive of the social matrix in which individuals find themselves and act.’³³

Constructive interpretation is a matter of bringing these meanings out into the open, so as to enable the values that they embody to be identified and pursued more effectively.

2.3 The Interrelationship of Values, Practices and Institutions

I have been arguing that there are certain ideals implicit within political practices, such that a proper understanding of these practices requires a grasp of such ideals. We elucidate these through a process of constructive interpretation that seeks to bring a descriptive explanation of political activity and a normative account of political value into equilibrium. This thesis is not, however, an attempt at a complete interpretation of the practice of modern political democracy. Instead it concerns a particular institutional question of perhaps quite localised interest. Thus far I have not said anything specifically about political *institutions*. I need to explain the relevance of the practice account of political value for institutional questions such as the question of judicial review.

Political institutions are, of course, of great instrumental significance. Our institutional design will help to determine who wields political power, whose interests power-wielders take into consideration and whose interests will be sidelined. It will have an impact on the quality, quantity and type of information that political decision-makers possess and to the resources available to enable them to process such information. It will affect the ability of the political system to respond to

³³ ‘Interpretation and the Sciences of Man’, at 27.

social, environmental and technological changes, and to develop strategies to counter new internal and external threats. As a result of all of this and more, institutional design has a huge impact on the quality of political decisions. I do not intend to downplay any of this. However, if political practices are noninstrumentally valuable, then we must also view political institutions in a similar light. If political practices provide a context that enables us to make sense of the political world, then political institutions form an indispensable part of that context. In fact, just as political practices are constitutive of political values, so political institutions are constitutive of political practices. It follows that democratic political institutions possess a certain final, non-instrumental value of their own. So the question of whether judicial review is detrimental to democracy cannot be addressed by considering only its empirical impact, that is, whether courts or parliaments are most likely to reach decisions that we consider desirable. We also need to consider whether, and if so how, systems of legislative and judicial supremacy might embody somewhat different practices, and thus represent different normative conceptions of democracy. One might express more fully a value that the other obscures.

I said at the outset of this chapter that participation in practices can be a way of *honouring* values, and gave the example of holding a vote as a way of honouring the value of autonomy. This example is an incredibly simplified one, since it is deprived of context and therefore nuance. Not *all* votes honour the value of autonomy. A vote which a group of prisoners are forced to conduct in order to choose the means of their collective execution does not honour the value of autonomy, nor does a vote by five white supremacists and a black man as to who has to drop out of the lifeboat. The contexts in which these votes take place deprive them of the value internal to voting in general (such is the close link between practice and value that we might say that they are not *really* votes at all). So the noninstrumental value of a (particular instantiation of) a practice depends upon the context in which it operates.

In the case of the distinctively political values, institutions form an indispensable part of this context. A general election has a specific meaning, as a particular type of vote

in a modern political democracy, by virtue of its connection with a representative legislature. It is the *symbolic* status of an elected legislature, rather than, say, the empirical impact of or numbers of participants in the vote, that explains the cardinal significance of elections to the practice of democracy. A vote of the executive board of a central bank may have greater empirical impact, and more people might participate in a vote to decide who wins a television talent contest, but neither of these are comparable to a general election in terms of their democratic significance. (The latter kind of vote, of course, does not really have anything to do with democracy at all, but even this is a matter of interpreting shared understandings, not identifying empirical consequences.) Free and fair elections function so as to symbolically affirm the ideas of equality, autonomy and respect for citizen capacity because of the position that an elected legislature holds in the popular imagination.³⁴

This symbolic role of political institutions has in recent decades been emphasised by political scientists dissatisfied with the behaviouralist paradigm within which the discipline operated for much of the twentieth century. Much attention has been paid to the way in which political decision-making processes are not merely outcome-driven procedures but also function as what have been dubbed 'symbolic rituals'.³⁵ For example, in a study of the budgeting process in a Norwegian local authority, Olsen found the process characterised by a general lack of decision-alternatives, with debates in the council chamber very seldom affecting the budget proposal.³⁶ Many statements were not directed straight at the choice at hand, but rather gave general indications as to longer-term aspirations; and, counter-intuitively, Olsen found that there was a negative correlation between the amount of money involved in an issue

³⁴ For a discussion of the symbolic significance of voting in legislative elections see Adam Winkler, 'Expressive Voting' (1993) 68 *New York University Law Review* 330, at 363-78.

³⁵ The classic texts here are Murray J Edelman, *The Symbolic Uses of Politics* (2nd edn, Urbana: University of Illinois Press, 1985); and James G March and Johan P Olsen, *Rediscovering Institutions: the organizational basis of politics* (New York: Free Press, 1989). For a more recent example see Josef Hrdlička, 'Symbols of Consent', in Rudolf Schlögl (ed.), *Urban Elections and Decision-Making in Early Modern Europe* (Newcastle-upon-Tyne: Cambridge Scholars, 2009).

³⁶ Johan P Olsen, 'Local Budgeting, Decision-Making or Ritual Act?' (1970) 5 *Scandinavian Political Studies* 85.

and the time devoted to discussing it. Nevertheless, participants and the public alike emphasised the importance of the budgeting process, with participants describing their own role as that of rational decision-makers. Olsen concluded that the significance of the budgeting procedure to the participants and to the onlooking public could only be understood by viewing it as a kind of ritual which served to give expressive support for the values of democracy, fairness and rationality. This and other similar findings³⁷ led March and Olsen to conclude that: 'Plans, information gathering, analysis, consultation, and other observable features of normatively approved decision-making are explicable less in terms of their contribution to decision outcomes than as symbols and signals of decision-making propriety.'³⁸ We can add to this that it is the fact that these decision-making processes take place within institutions that enjoy symbolic prestige that allows them to function as such strong 'symbols and signals'. Debates *outside* Olsen's council chamber may well have had much greater impact on the final budget, but what went on *inside* the chamber had much more potent symbolic meaning. And if this is true of local authorities, then it is surely true *a fortiori* of national parliaments and supreme courts.

The noninstrumental aspect of political institutions is thus similar to the more general noninstrumental aspect of political practices that I identified above: institutions form part of the context within which political action can be seen as meaningful and potentially valuable. Again this relationship is constitutive rather than causal: although we might say that a vote is democratic because it appoints a representative legislature, the legislature does not *cause* the vote to be democratic. Rather, we need the concept of a representative legislature in order to make sense of the idea of a general election at all. Institutions, then, are constitutive building blocks of political

³⁷ For example, Christopher B Keys and Jean M Bartunek, 'Organization Development in Schools: goal agreement, process skills and diffusion of change' (1979) 15 *The Journal of Applied Behavioral Science* 61; and Leslie L Roos and Roger I Hall, 'Influence Diagrams and Organizational Power' (1980) 25 *Administrative Science Quarterly* 57.

³⁸ March and Olsen, *Rediscovering Institutions*, p 49.

practice. Since political practices are of final value, political institutions thus enjoy a certain final, noninstrumental value of their own.

Our shared understandings about political institutions have profound effects upon the behaviour of political actors. Political institutions are not just simply sets of procedures and rules, but also carry with them sets of roles (speaker of the House, committee chair, loyal civil servant, High Court judge...) based on shared assumptions on what is 'proper' behaviour for occupants of those roles. Participants internalise these assumptions and thus come to act according to what March and Olsen have called a 'logic of appropriateness'.³⁹ Rather than treating difficult decisions as rational choice problems (the behaviouralist paradigm that March and Olsen label the 'logic of consequentiality'), political officials typically try to clarify the rules that apply to them in order to find an interpretation of their role that 'fits' their predicament.⁴⁰ Rather than asking themselves 'how do I best achieve my goals', the question posed is often 'what is the proper behaviour for a civil servant/committee member/judge/etc. in these circumstances?'. The logic of appropriateness has a widespread impact, since a politically knowledgeable citizen comes to be seen as one who is familiar with the various roles of appropriate behaviour and the moral and intellectual virtues attached to them, and who can justify the division of roles by reference to the requirements of the political order as a whole (think of the law student who can give a neat normative account of the separation of powers). Society is thus permeated with a sense of what it means to be an MP, a minister, a judge, and so on, which, as well as reinforcing participants' own internalisation of those roles, has a huge impact on the way in which the public reacts to their behaviour (think of MPs' expenses). To put it crudely, people have a generally shared sense of what

³⁹ James G March and Johan P Olsen, *Rediscovering Institutions: the organizational basis of politics* (New York: Free Press, 1989), chap 9; *Democratic Governance* (New York: Free Press, 1995), chap 2.

⁴⁰ *Rediscovering Institutions*, p 161.

Parliament, the courts and so on are *for*, and this sense affects both how political officials behave and what the public expects from them.⁴¹

Our institutions, our practices and our values therefore stand in a relationship of interdependence. A change in one may unintentionally have a profound effect on the others. Institutional design is accordingly characterised by what Dryzek has called an 'informal logic', with 'no simple and unidirectional causality'.⁴² When a common-sense view is upset by a newly-accepted ideal, this will frequently mean that the way an institution works itself alters: people will treat the institution very differently if they become convinced of the challenging theory. And *vice versa*: interventions in institutional systems may affect practices so as to alter the way people perceive the values that the systems set out to pursue. For example, Polanyi has claimed that the profit motive did not play an important part in human economy prior to the creation of capitalist institutions in the early modern period.⁴³ Polanyi argues that the growth of the institutions of a market economy transformed the way in which people perceived the motive of profit-maximisation, turning the sin of avarice into the virtue of prudence. Regardless of the merits of Polanyi's particular account of economic history, it is not implausible that evolution of market institutions was not entirely driven by the needs of practice, but had at least an effect in shaping the practice itself. To take a more topical example, the introduction of student tuition fees has perhaps caused a change in the way students perceive the value of education, with an

⁴¹ Here 'expect' carries a normative, not merely descriptive sense. It might be common, for example, for members of the public to say that they do not expect MPs to behave honestly. Here 'expect' is used descriptively. The fact that this is taken as such a biting criticism of politicians shows that members of the public do *normatively* expect honesty from their MPs.

⁴² John S Dryzek, 'The Informal Logic of Institutional Design', in Robert E Goodin (ed.), *The Theory of Institutional Design* (Cambridge: Cambridge University Press, 1996), p 104. Dryzek is particularly concerned with the relationship between institutions and 'discourses', where a 'discourse' is defined as 'a framework for apprehending the world embedded in language' (*ibid.*, p 103). While a discourse is not the same as a practice, practices rely on discourses, and the interrelationship between institution and discourse can thus be seen as an aspect of the interrelationship between institution and practice.

⁴³ Karl Polanyi, *Origins of Our Time: the great transformation* (UK edn, London: Victor Gollancz, 1945), particularly chaps IV-V. As he pithily puts it, economists have a tendency to look 'at the last ten thousand years... as a mere prelude to the true history of our civilization which started approximately with the publication of *The Wealth of Nations* in 1776' (*ibid.*, p 45).

increasing emphasis on economic benefits and a corresponding diminution of ideas of intellectual self-improvement.⁴⁴

Those concerned with proposals for institutional reform cannot, then, view political institutions simply as means that we can fashion so as to target whatever ends we deem desirable. They need also to be awake to the symbolic significance of institutions: the role that they play in the popular imagination. Institutional logics of appropriateness will constrain the extent to which institutions may be radically transformed, since role-identities are likely to be resilient to change, at least in the short term. And if we accept the practice conception of political value, then we will not measure the success or failure of institutional design purely in terms of empirical outcomes, but will pay close attention to the expressive function of institutional 'ritual' and to the identities and relationships that institutions help construct. We should look to craft our institutions so as to reinforce what we take to be the values inherent in our practices, so as to render our practice more clairvoyant and our values more coherent and complete. Ideal theory therefore has a crucial, direct role in the theory of institutional design.

2.4 Constitutional Imaginaries

The symbolic aspects of political institutions, then, are critical to any attempt to understand democracy. Our institutions are constitutive of a political 'lifeworld' based on shared values and expectations, what we might call a certain shared self-image. In this respect, our political institutions are tied to a kind of 'myth',⁴⁵ or, as I have put it so far, to 'shared understandings' that lie in the 'popular imagination'.

As part of an extensive research project into the nature of modernity, Taylor has identified what he calls 'the social imaginary', which he defines thusly:

⁴⁴ See, for example, H Rolphe, 'The Effect of Tuition Fees on Student Demands and Expectations', National Institute of Economic and Social Research Discussion Paper Number 190 <<http://niesr.ac.uk/publications/effect-tuition-fees-students%C3%B5-demands-and-expectations-evidence-case-studies-four>>.

⁴⁵ See, for example, Martin Loughlin, *Sword and Scales: an examination of the relationship between law and politics* (Oxford: Hart, 2000), chap 2.

'By social imaginary, I mean something much broader and deeper than the intellectual schemes people may entertain when they think about social reality in a disengaged mode. I am thinking, rather, of the ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations.'⁴⁶

The 'myths' on which political institutions are based, their place in the 'popular imagination', might be thought of as part of the modern social imaginary. In order to acknowledge this link, I shall describe the general, value-laden ideas that political institutions embody as 'constitutional imaginaries'.

Constitutional imaginaries should be distinguished from constitutional *theories*; they are broader, more inchoate and more implicit. They are not readily susceptible to analytical definition, rather, in Taylor's words, they are 'carried in images, stories, and legends'.⁴⁷ While theories might be the possession of a small intellectual elite, constitutional imaginaries are widely shared across society as a whole. And while theories look to explain and/or to justify, constitutional imaginaries have a more primitive role: they are necessary in order to make possible the practices that define modern politics. They shape the expectations that we have of political actors, and of each other, and carry a sense of how we all fit together as citizens engaged in a common practice. They thus allow us to orient ourselves, both factually and normatively, in relation to the political world.⁴⁸ They also pick out certain aspects of our practices as being of particular significance, that is, of carrying a certain symbolic import.

Some constitutional imaginaries are particularly fundamental, central to our whole way of thinking about politics, and thus particularly difficult to consider dispensing. An example, for modern democracies, is the idea of citizenship: a relationship of

⁴⁶ Charles Taylor, *Modern Social Imaginaries* (Durham: Duke University Press, 2004), p 23.

⁴⁷ *Ibid.*

⁴⁸ Taylor describes the relationship of imaginary to theory as analogous to the relationship between a sense of orientation in a familiar environment and a map of the same area. The map provides an explicit overview and a particular structured way of viewing the area which it covers, but one can find one's way around, in a much more implicit and intuitive way, without ever having looked at it. (*Ibid.*, p 26.)

equality (in a particular sense) pertaining between members of a political community. Another is the idea of what might be called the public/private divide: the sense that there exists a protected area of life (albeit with contestable boundaries) that ought to be free from political interference. A third is representation: the idea that the acts of certain officials or bodies can stand as the acts of the political community as a whole, without the citizens being thereby straightforwardly dominated by those officials or bodies.

Other imaginaries are less fundamental to our thought about politics in general, but instead are more closely tied to particular institutional designs, so that we can without too much difficulty think about what politics might look like without them. Here an example is the separation of powers into the legislative, the executive and the judicial. It is not too difficult for us to consider what politics might be like without such a divide. It is not just that we can find examples of such politics without travelling too far, either across the globe or backwards in time. It is that, when we find such examples, we find them aberrant but not unintelligible; we do not have the same puzzlement when faced with them as we do when we are told, say, that the ancient Athenians lacked a distinction between one's public and one's private affairs.⁴⁹

Nevertheless, it is important not to underplay the significance of the separation of powers as a constitutional imaginary. For although we might not struggle to imagine the separation being ignored, it is much more difficult for us to conceive how powers could be delineated other than into our three familiar categories. To put it another way, we can imagine the functions of the legislature, executive and judiciary being agglomerated, with all-powerful institution carrying out all three. But we would want to say, of such a constitutional system, that the powers of law-making, law-application and adjudication had been conflated. We understand the deficiencies of such a system by employing the concepts with which we are familiar, even if they are

⁴⁹ I put this crudely, of course. The Athenians did possess a concept of the household (*oikos*) as a locus of privacy. But they lacked the concept of 'civil society', i.e. of a private life outside the household. See Hannah Arendt, *The Human Condition* (2nd edn, Chicago: University of Chicago Press, 1999), chap 2.

denied by the system itself. We would struggle, on the other hand, to imagine a system in which the tripartite distinction was rendered otiose, not merely as a result of the different powers being confounded, but as the result of a system separating functions according to a different conceptual scheme. This highlights the status of the separation of powers as a constitutional imaginary. It would require exceptional powers of creative thought to dream up a constitutional scheme in which the legislative, the executive and the judicial powers ceased to be useful categories. In this respect the tripartite distinction seems almost natural to us. But of course it is not natural, it is a construction which we have built up over the centuries, and one which we have no reason to suppose that a complex society must inevitably build.

The idea of the separation of powers provides the clearest example of a constitutional imaginary being linked to a particular set of institutions. The imaginary and the institutions are completely interdependent: we cannot understand what a legislature is unless we know what legislation is; but then our understanding of what legislation is comes from our experiences of legislatures. And *mutatis mutandis* for executives and courts.

Central to the tripartite division is, of course, the concept of law: legislation is the *creation of law*, administration is the *application of law*, adjudication is the *determination of the law*. In this respect, our concept of law can be said to be institutional;⁵⁰ the way we think about law is inherently bound up with the legal institutions with which we are familiar. And similarly with the concept of politics. Politics is that activity which goes on, and which ought to go on, in political institutions.⁵¹ And we do not understand political institutions unless we have a grasp of what it means for them to be *political*. This is not a vicious circle; it merely points to the fact that we already share, at the level of constitutional imaginary, an idea of what politics is, and that this idea cannot be detached from the particular institutions that embody it.

⁵⁰ In apparent contrast to the ancient conception of law; see *Sword and Scales*, chap 5.

⁵¹ Which is not to say that politics *only* goes on in political institutions.

Democratic institutions, then, are valuable as much for what they symbolise as for what they empirically achieve. Note, finally, talk of symbolism should not be mistaken for reference to a mere *appearance* of value. Respect for the status of citizens as equal moral agents is conveyed through structures and acts which can only carry the significance that they do because they are widely recognised as doing so. For example, one-person-one-vote is a procedure which conveys a deep respect for citizens' equality only because of the symbolic significance of equal voting rights in our society. The value's dependence on symbolic factors in no way diminishes its fecundity.

2.5 Some Real-World Worries

Governments in contemporary liberal democratic societies face competing demands on their resources, time and epistemic capacities. Even the most affluent countries face difficulties in alleviating poverty, eradicating illiteracy, reducing unemployment, preventing crime, providing medical and old-age care and ensuring security against external threats. We cannot expect that all of the legitimate concerns raised by citizens be completely resolved in the short-term, or even at all. What use, then, is a methodology that seeks an idealised account of our political practices? Shouldn't we focus our attention on the pressing problems in the real world?

One concern about idealisations is that they necessarily invoke a number of deliberately unrealistic assumptions in order to simplify the problems under consideration so that they might be dealt with by a relatively straightforward set of principles.⁵² These principles might be philosophically neat but, one might argue, they do not apply to the real world, in which the problems we face are far from simple. Since our diverse problems are interrelated, we cannot safely bracket away social complexity.

⁵² See, for example, C Farrelly, 'Civic Liberalism and the "Dialogical Model" of Judicial Review' (2006) 25 Law and Philosophy 489.

The first thing to say in response to this objection is to concede that ideal theory cannot solve all our problems on its own. But why should we expect it to? Certainly, when faced with a practical problem, it is rare that we are able to resolve it simply by invoking some ideal principle or value. All principles require *judgment* in their application, as even such an idealist as Kant acknowledged.⁵³ But as Erman and Möller have pointed out, the difficulty here is not simply caused by the ‘idealness’ of the principle, but rather concerns the very nature of principles: all principles, *even principles crafted to deal specifically with non-ideal scenarios*, require judgment in their application.⁵⁴ And the same can be said about virtue-based theory: to say that an agent should display the virtue of justice, or civility, or even pragmatism, is to announce the starting-point, not the end-point, of practical deliberation. There is a limit to the amount of ‘action-guidingness’ we can demand from a theory, since ultimately we need to recognise that political theory and practical political decision-making are two distinct enterprises.

Nevertheless, there is a legitimate concern that the particular kinds of principles yielded by ideal theory are problematic by virtue of their disconnect from real political contexts. There comes a point of abstraction at which even a faultlessly correct principle ceases to be of any practical assistance whatsoever (‘always do the right thing’ would be an extreme example). Yet the approach to political philosophy that I have outlined in this chapter should put pay to fears that I am advocating such a hollow formalism. I have argued that the aim of a political theory is to bring the presuppositions of our practices out into the open, to formulate more perspicuously what it is we are already doing. As we do this, I have claimed, we will unearth certain ideals which may make demands far beyond what our current society is able to

⁵³ ‘To be sure, these laws require, furthermore, a power of judgment sharpened by experience, partly in order to distinguish in what cases they are applicable, and partly to gain for them access to the human will as well as influence for putting them into practice.’ (Immanuel Kant, *Grounding for the Metaphysics of Morals* (JW Ellington tr, 3rd edn, Indianapolis: Hackett, 2010), Preface).

⁵⁴ Eva Erman and Niklas Möller, ‘Three Failed Charges Against Ideal Theory’ (2013) 39 *Social Theory and Practice* 19, at 28.

provide, perhaps even beyond that which might feasibly be achieved in the future. But since the purpose of our activity is to render our present practice more clairvoyant, it would be too easy a victory to come out with generic, contentless platitudes. The goal should be to find ideals which, when confronted with them, participants in practices might say: 'I hadn't thought of it quite like that, but yes, that does explain what I have been doing'. They therefore need to find real traction in our form of life; we need to be able to recognise them as ideals for *us*.

We should remember, as well, that if we hypothesise an idealised society we do not do so because we believe that such a society could somehow be realised, or because we naïvely intend to enjoin agents to act as if we inhabited such a state. The purpose of idealisation is to *clarify* our values, to test them for coherence (both internally and against one another) and for fit with our intuitive sense of what is desirable. This is not to deny the crucial role of learning from particular, concrete and complex experiences. But sometimes a certain degree of simplification is beneficial just because of the limits of our mental capacity for processing voluminous data. A different kind of being might be able to consider proposals for dealing with all our political and social problems simultaneously. But human beings lack that capacity. Ideals function as organising concepts that help us to deal with what would otherwise be overwhelming complexity. They allow us to clarify the core principles we are committed to without having to deal with impossible detail. Thus clarified, ideals then give us something that we can hold steady while dealing with the multitudinous moving parts of a real-world problem.⁵⁵

A related concern pertains more specifically to democracy; in particular, it questions whether we should consider democracy to be a *value* at all. Zolo, for example, has argued staunchly that realising a value-laden notion of democracy is a forlorn hope

⁵⁵ This role of simplifying assumptions is neatly summed up by Rawls: 'Taken all together the parties hope that [the assumptions in the original position] will simplify political and social questions so that the resulting balance of justice... outweighs what may have been lost by ignoring certain potentially relevant aspects of moral situations.' (John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1972), p 454).

in complex modern societies.⁵⁶ He claims that the realities of modern life mean that 'political decision-making is typified by an ineradicable lack of impartiality and universality', rendering political organisation 'essentially incompatible with the criteria of a system of public ethics'.⁵⁷ He argues that increasing social complexity leads to greater uncertainty and therefore fear among the public, which can only be palliated by a more concentrated governmental power. At the same time, however, an increasingly intrusive government threatens the autonomy of civil society and the civil liberties of citizens. Furthermore, given the complexity of contemporary societies, ordinary citizens are bound to operate with levels of information that are 'dangerously low', rendering popular participation in government at best ineffective and quite possibly positively harmful.⁵⁸ Zolo claims that efforts to remedy these problems are predestined to fail. The attempt to counteract the inability of the public to process complex political reality by way of representative democracy simply leads to a 'self-referential' system in which political parties promote their own autonomous interests.⁵⁹ And the attempt to restrain overweening governmental power through systems of checks and balances leads to 'power inflation', which inhibits the constructive use of political power, and furthermore hands sovereignty to the non-elected bureaucrats through whom legislative norms are filtered.⁶⁰ In light of these difficulties, Zolo argues, the best that we can hope for from the political system is 'pure decision': political commands justified by contingent requirements of stability.⁶¹ He therefore argues that we should reject the notion that democracy is a value, and instead embrace Schumpeter's view of democracy as a 'procedural strategem'.⁶²

One need not be an opponent of the current system in order to be drawn to this line of criticism of democratic idealism. At the opposite end of the political spectrum,

⁵⁶ Danilo Zolo, *Democracy and Complexity: a realist approach* (Cambridge: Polity Press, 1992)

⁵⁷ *Ibid.*, p 38.

⁵⁸ *Ibid.*, p 71.

⁵⁹ *Ibid.*, p 115-23.

⁶⁰ *Ibid.*, p 128-9.

⁶¹ *Ibid.*, p 71.

⁶² *Ibid.*, p 82.

Posner makes a similar argument, although he is far more sanguine about where it leads. Like Zolo, Posner believes that the complexity of the issues involved in the governance of modern societies, together with the lack of any realistic prospect of agreement on political-moral fundamentals, make ideal theories of democracy hopelessly naïve. Posner claims that few people have the time or the intellectual capacity required to participate in public affairs intelligently and in an open-minded fashion, a point which he claims is evidenced in the low levels of interest in politics, and the poor quality of political debate, seen in the contemporary US. However, he does not view widespread political disengagement as problem, taking it rather as an indicium of a contented electorate. Elitist democracy, he says, promotes the general welfare by allowing ordinary people to be free to spend their time on commercial activities and private leisure pastimes, which are ‘not only more productive of wealth and happiness than the political life, [but] also more peaceable’.⁶³ Likewise, Posner praises the tendency of elitist democracies towards inertia and conservatism.⁶⁴ The shift of political power from ordinary citizens and elected officials to interest groups and career civil servants brings with it, he says, an increasing amount of expertise, while the focus on the median voter operates as a valuable bulwark against extremism. So Posner believes that democracy brings genuine gains, but that it does so only instrumentally. Despite their radically different appraisals of the present situation, Posner and Zolo agree – for remarkably similar reasons – that democracy is not of any noninstrumental worth.

Zolo and Posner are, however, both guilty of neglecting the significance of our constitutional imaginaries. For example, Zolo’s argument that liberal democracy inevitably leads to ‘power inflation’ overlooks the place that the symbolic aspect of democracy has in the *generation* of political power. Here Arendt’s analysis of power

⁶³ Richard A Posner, *Law, Pragmatism and Democracy* (Cambridge: Harvard University Press, 2003), p 173.

⁶⁴ *Ibid.*, p 192.

is instructive.⁶⁵ Political power is not the property of an individual: it cannot simply be 'possessed like strength or applied like force'.⁶⁶ It is dependent upon a plurality of actors joining together to achieve some common purpose, and its existence through time can only be maintained where actors give assurances that they are committed to the joint project. As Arendt puts it, 'binding and promising, combining and covenanting are the means by which power is kept in existence'.⁶⁷ These assurances, whether express or implied, obtain their purchase from the shared understandings of the practice in which they are embedded. It is because democratic citizens view themselves (at least sometimes, in some respects) as co-participants in a joint venture that they feel able to rely upon one another's 'promises and covenants' so as to make political action possible.⁶⁸ Indeed, a disenchanted, Schumpeterian democracy, lacking the notions of joint venture and common good, would seem more likely to result in decisional paralysis, since political actors would find less reason to seek workable compromise arrangements and more reason to push for the greatest possible satisfaction of their own interests without regard to the potential broader costs to society.

We might say something similar about Posner's faith in a 'pragmatic', instrumentalist democracy. Posner recognises that *some* normative requirements must be met by a putative democracy in order for it to do the stabilising work he hopes of it. The 'essence' of his conception of democracy is, he says, 'that the interests... of the population... be represented in government'.⁶⁹ He gives two reasons for this. Firstly, when government is not broadly representative, the unrepresented may become disruptive, endangering political stability. Secondly, although the people as a whole

⁶⁵ See Hannah Arendt, *On Violence* (New York: Harcourt, Brace, Jovanovich, 1970); *On Revolution* (London: Faber and Faber, 1963), chap 4; and *The Human Condition* (Chicago: University of Chicago Press, 1999), chap V.

⁶⁶ *The Human Condition*, p 200.

⁶⁷ *On Revolution*, p 175.

⁶⁸ Taylor gives the example of the winning of the allegiance of the working class to the new industrial regimes in the nineteenth century, which relied upon their acceptance of the vision of society as a large-scale enterprise of production for the common good: see 'Interpretation and the Sciences of Man', p 38-9.

⁶⁹ *Law, Pragmatism and Democracy*, p 165.

are taken not to be knowledgeable about specific policy issues, they are capable of functioning as a 'repository of common sense', and so act as 'a barrier to the mad schemes... hatched by specialists and intellectuals'.⁷⁰ Yet both of these functions rely on shared understandings which Posner's methodology cannot account for. In the first case we may ask why *representation* should make a difference to the allegiance of political minorities. What should the potential rebel care that she has a senator or congressman that shares her interests if he is consistently outvoted? The answer cannot simply be that representation serves political stability; that begs the very question in issue. The only answer that might win the allegiance of the potential rebel would be that representation symbolises her inclusion in a political community that seeks the good of all. If she views such talk as implausibly idealistic, then Posner's goal of stability is thwarted. In the second case we can ask how 'the people' are to make even the rudimentary distinction between the trustworthy and the 'mad' if political campaigning is *purely* 'manipulative and largely content-free'.⁷¹ In order for citizen-consumers to choose what technocrat-brand they prefer, they must have *some* basis on which they are rationally able to place trust in experts. But if democracy is merely a method for stabilising self-interested forces, it is difficult to see how voters could rationally trust *any* politician. Posner says that 'often, in political as in economic markets, not much turns on which brand one buys'.⁷² But if this is true of the economic market it is only because there are mechanisms in place to guarantee against fraud, which allow consumers to trust economic actors whom are taken to be acting purely self-interestedly. Trust in politicians – those who operate the very mechanisms that (are supposed to) protect the integrity of the market – cannot be guaranteed in this way. Without the idea that politicians are at least *supposed* to be public-spirited, there would be no reason to trust any politician at all. So, again, without an ideal of orientation to the public good being implicit within the practice of democracy, Posner's stated goal of stability would not be realised.

⁷⁰ *Ibid.*, p 168.

⁷¹ *Ibid.*, p 153.

⁷² *Ibid.*, p 169.

Zolo and Posner both make the error of supposing ideal theory to be disconnected from the real world, which is why they believe themselves justified, as a matter of methodology, to disregard political ideals when they examine the democratic process. But this deprives them of a key sociological datum: the systems they describe are held together in part by actors' shared understandings, and these understandings ascribe a certain noninstrumental value to the practice of democracy. There is nothing 'realistic' or 'pragmatic' about ignoring that fact.

Finally, there is a third worry about ideal theorising, and one which may well have been exacerbated by my response to Zolo and Posner. It is one thing to say that shared understandings about certain kinds of value help to stabilise our political system. It is quite another to say that these shared understandings are warranted or desirable. The worry here is that a theory that constructs ideals based on an interpretation of current practices can serve only to reconcile people to their existing social order, thus muting radical social criticism. If this is the case, then constructive interpretation is *ideological* in the pejorative sense of serving (intentionally or no) to distort people's beliefs so as to perpetuate the advantage that a certain group or groups hold over others.⁷³ By focusing on identifying the shared understandings that may *justify* our current practices, the objection goes, ideal theory draws attention away from the manner in which the current balance of power influences the way we see the world.

I cannot straightforwardly refute this objection. I cannot deny *a priori* that an idealised account of democracy *might* have this ideological effect. Yet I do not accept that this possibility is in itself a criticism of idealisation. It is not a presupposition of the methodology of constructive interpretation that the interpreter will find anything of value in the social practice that he is interpreting. The question of whether progress would be better secured by rejecting the putative value and abandoning its associated practice is always an open one. If democracy is a façade that serves only to mask the

⁷³ See Raymond Geuss, *Philosophy and Real Politics* (Princeton: Princeton University Press, 2008), Part II; and Charles W Mills, "Ideal Theory" as Ideology' (2005) 20 *Hypathia* 165.

domination of the ruling classes, then the substantive arguments used to support it must be flawed, and can be criticised accordingly.

Furthermore, my defence of constructive interpretation does not deny that we may also benefit from other methodologies. It would be useful, I think, to combine ideal theory with a sociology of belief that might uncover that the roots of our shared understandings lie in a structure that privileges the interests of some advantaged minority. Such a discovery would clearly give us reason to revisit our convictions to examine whether they are supportable. But in doing so we could only test them against our existing background of meanings, that is, by testing our ideals against one another. There is no external standpoint, neither moral nor sociological, for us to have recourse to.

Those who are sceptical about the utility of ideal theory might accuse me of simply 'assuming' that democracy is valuable. The accusation is true in a benign sense. I have chosen to examine the question of whether judicial review is democratic precisely because I think democracy is of non-instrumental value; if I didn't believe that I would have no interest in the question. My conviction in the value of democracy therefore precedes my investigation into the matter, and could thus be labelled an 'assumption'. But there is another sense in which I have not 'assumed' democracy's value. I do not take the noninstrumental value of democracy as an axiom in my research. I am not asking the reader merely to concede *arguendo* that democracy is valuable. Rather I look to develop, as I go along, an account of democracy that supports that contention. Whether my arguments are sound is, of course, for the reader to judge.

2.6 Conclusion

In this chapter I have sought to defend my theoretical approach to the question of judicial review against the charge that institutional questions should be resolved without recourse to ideal theorising. The charge gains much of its plausibility, I believe, from a popular misconception about the nature of political values, which views them as entirely detached from the real world. Instead, I have argued, we

should recognise that political values are inherent in existing practices. On the practice account, we cannot conceptually detach a value from the process of realising that value. This account affords noninstrumental value to political institutions, by virtue of the role that they play in expressing the values, identities and relationships that constitute our political practices. The question of judicial review cannot be adequately addressed without an understanding of this role.

This chapter provides something of a methodological introduction to the more substantive arguments that are to follow. But it would be a mistake to suppose that it is therefore of minor importance to my thesis. The central claim of this thesis is that legislation by representative assembly is distinctively valuable, and that its value may be inhibited (I do not say destroyed) by a system of strong judicial review. To understand this claim, one needs to appreciate that a representative assembly is not simply a means to achieve democracy, but is a constitutive component of it. One needs to understand that political values inhere in practices, that constitutional imaginaries play a fundamental role in ordering our normative political world, and that political institutions bear a symbolic significance that surpasses their empirical impact. As always, methodology is key.

3. Waldron: static or dynamic?

Jeremy Waldron has mounted a well-known attack on judicial review. Waldron presents democracy as a 'second-order' issue that arises because we disagree about 'first-order' issues such as justice and rights, and argues that political equality is best served by giving each citizen an equal say over how the political community should address such issues. He claims that leaving these disagreements to be determined by supposedly expert elites – which is essentially what judicial review does – is insulting to the moral-political capacities of ordinary citizens.

In this chapter I claim that Waldron is wrong to reduce the question of judicial review to a question of what mechanism we ought to employ to resolve our various political disagreements. Waldron is wrong, I believe, to presuppose the existence of political disagreement as one of the 'circumstances of politics', since it is only through politics that we are able to arrive at that position of disagreement. Waldron's 'core case' against judicial review, I shall argue, overlooks the *dynamism* of politics, that is, the fact that politics is an ongoing practice of definition and redefinition of the political community. As a result – and despite express intentions to the contrary – the logic of Waldron's core case points us towards a shallow, statistical version of democracy.

I start by outlining Waldron's account of the 'right to participation' and his 'core case' against judicial review. I then make the observation that, if we proceed in abstraction from the shared understandings that underlie our political institutions, the 'right to participation' can be no more than a placeholder devoid of specific content. Following that I turn more directly to criticise Waldron's core case, arguing that disagreement should not be presupposed as part of the circumstances of politics, as political disagreements can only arise within the context of an ongoing practice of politics.. This error, I argue, leads the core case to have a static quality, giving it an affinity to an argument in favour of direct democracy that Waldron expressly disclaims. Finally, I suggest that, in order to remedy the shortcomings of Waldron's core case, and to

properly benefit from his own insights about the 'dignity' of legislation, one needs a *dynamic* account of democratic politics as a practice.

3.1 The 'Core Case' against Judicial Review

Waldron presents his argument against judicial review as being 'rights-based'; based, that is, on a *right to participation*, which he (following the Georgian-era radical William Cobbett) describes as 'the right of rights'.¹ Waldron traces the idea of moral rights back to the Enlightenment conviction that, just as man can grasp the workings of the natural world, so he can understand the principles according to which society ought to be organised.² Moral rights, he argues, recognise each individual's capacity for moral thinking:

'... the idea of rights is based on a view of the human individual as essentially a thinking agent, endowed with an ability to deliberate morally, to see things from others' points of view, and to transcend a preoccupation with his own particular or sectional interests.'³

As such, we cannot properly display respect for someone's rights without being prepared to respectfully consider anything he has to say about the matter. If we are committed to the idea of rights, we ought to respect the judgments of rights-holders on the nature and scope of those rights. And, therefore, when we are determining what rights are to be collectively recognised and enforced – that is, when we are doing politics – we should recognise that each individual has a right to a say. This, Waldron claims, establishes a right to participation.

Waldron applies the right to participation to what he calls the 'circumstances of politics', which he defines as the felt need for a common course of action in the face of disagreement about what that action should be.⁴ Thus politics, for Waldron, seeks to answer the question 'what ought we to do, *given our disagreement?*'.

¹ Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999), p 232.

² See Jeremy Waldron, 'Theoretical Foundations of Liberalism' (1987) 37 *Philosophical Quarterly* 127, p 134-5.

³ *Law and Disagreement*, p 250.

⁴ *Ibid.*, p 102.

Waldron claims that, if we take the circumstances of politics seriously, then it is not quite right to say that there can be a 'conflict' between democracy and justice. Waldron here refers to Wollheim's so-called 'paradox in the theory of democracy'.⁵ This stems from the fact that a citizen, faced with a choice between policies A and B, might find that he believes that A is recommended by justice, but that B has been selected by a process of which he approves. This paradox does not involve a contradiction, Waldron argues, because the values of justice and democracy operate on different levels. One's view of democracy arises as a second-order response to the lack of first-order agreement about what justice requires.⁶

Having set out the distinction between a first-order theory of justice and a second-order theory of authority, Waldron then argues that the different theories must be in a certain sense independent from one another. That is to say, the theory of authority must identify some view as the one to prevail on criteria other than those which were the source of the original disagreement. Our response to disagreement cannot be 'let the truth about justice prevail', since that is precisely what we disagree about.⁷

The question thus set, Waldron proceeds to argue that it is rational and fair in the circumstances of politics to make decisions by majority vote, or, as he calls it, 'majority-decision'. He argues that majority-decision respects individuals in two ways.⁸ Firstly, it respects differences of opinion, as it does not require any individual's opinion to be suppressed. The very idea of taking a vote portrays disagreement as reasonable; it is not necessary to invoke bad faith, ignorance, or latent self-interest to explain dissent. Secondly, it counts each individual equally, by treating each person's opinion as a reason for deciding in the way that the individual prefers. As Waldron

⁵ Richard Wollheim, 'A Paradox in the Theory of Democracy', in Peter Laslett and WG Runciman (eds.), *Philosophy, Politics and Society*, second series (Oxford: Basil Blackwell, 1969). As Waldron rightly argues, there is nothing distinctively *democratic* about this 'paradox'; it will arise in any theory which makes a distinction between justice and political legitimacy.

⁶ *Law and Disagreement*, p 105-6, 195-8, 246-8.

⁷ *Ibid.*, p 245.

⁸ *Ibid.*, p 109.

puts it, 'it attempts to give each individual's view the greatest weight possible in this process compatible with an equal weight for the views of each of the others'.⁹

Waldron contrasts majority-decision with the approach he labels 'rights-instrumentalism', i.e. choosing whatever decision-procedure is most likely to yield the right answer about what rights we have or ought to have morally. Rights-instrumentalism, he claims, is incoherent: it presupposes possession of the truth about what rights we have, whereas this is precisely what we disagree about. Furthermore, we cannot retreat to any uncontroversial moral epistemology that indicates the best procedure for identifying truth about rights; just as people disagree over what rights we have, so they disagree about the best way to reason about rights. So, argues Waldron, we are left with majority-decision as a rational and fair way of resolving our dispute. 'It is a mechanical procedure', he says, 'precisely because recourse to a substantive procedure would reproduce not resolve the decision-problem in front of us.'¹⁰

Waldron invokes his argument for the rationality of majority-decision as a 'process-related' reason for preferring legislative enactments over judicial determination of fundamental rights. Waldron's 'core case' against judicial review is premised on four assumptions, such that 'if any of the conditions fail, the argument may not hold'.¹¹

These assumptions are:

- (1) democratic institutions in reasonably good working order;
- (2) judicial institutions in reasonably good working order;
- (3) a commitment on the part of most members of society to the idea of individual and minority rights; and
- (4) persisting, substantial and good faith disagreement about rights.

⁹ *Ibid.*, p 114.

¹⁰ *Ibid.*, p 117.

¹¹ Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346, at 1360.

Waldron makes his argument by considering the position of a citizen who disagrees with a political decision that has been made by those who wield power.¹² She asks two questions:

1. Why did *they* decide? Why not leave the decision to *me*?
2. Why wasn't greater weight given to the views of those with whom I agree?

Legislatures answer both questions by reference to majority-decision; it is first used to elect representatives and then used among representatives when passing laws. This, Waldron claims, provides 'a reasonable approximation of the use of [majority-decision] as a decision-making procedure among the citizenry as a whole'.¹³ On the other hand, Waldron argues, courts cannot provide satisfactory answers to these two questions, which leaves judicial review with a significant legitimacy deficit.

3.2 The Right to Participation: a placeholder in need of content

Most supporters of liberal democracy would probably agree that citizens have a moral right to participation which flows from their capacity for moral judgment, along something like the lines that Waldron sets out. At this level of abstraction, however, the right to participation has no specific content. What has been justified is the outline of a right; what Habermas would call an 'unsaturated placeholder'.¹⁴ And most liberals would probably disagree about the content (and/or the weight) of the right.

Perhaps surprisingly, Waldron does not go into detail about what content he takes the right to participation to have. In places he suggests that it entails that each citizen have a right to equal impact on political decisions.¹⁵ But this cannot be what he means. Waldron does not favour government by plebiscite: he supports legislation by a representative assembly, which of course permits a huge inequality of impact between legislators and ordinary citizens. So we cannot take Waldron's right to

¹² *Ibid.*, at 1386-95

¹³ *Ibid.*, at 1388.

¹⁴ See Jürgen Habermas, *Between Facts and Norms*, p 160.

¹⁵ For example: 'each individual claims the right to play his part, along with the equal part played by all other individuals, in the government of the society' (*Law and Disagreement*, p 236).

participation to demand equality of impact. There is, however, little other indication of precisely what Waldron takes the right to entail, save that he clearly believes that it permits government by representative assembly, and forbids, or militates against, judicial review (in 'core' cases at least). The thrust of Waldron's argument seems to be that the right to participation establishes a *prima facie* case for using majority-decision to resolve political disagreements, that this does not translate into an absolute right to equality of impact, but nevertheless supports more broadly majoritarian procedures such as legislation by assembly over less majoritarian procedures such as judicial review.

We need to be on guard, however, that we are not induced to make an illegitimate slip from an equal right to participation to what we might call a 'right to equal participation'. Waldron argues, relatively uncontroversially, that it is inherent in the idea of rights that they are enjoyed by citizens equally. But it does not follow from this formal equality that there be a requirement that rights have some content which is distributed equally between all rights-holders. Suppose, for the sake of argument, that citizens have an equal moral right to healthcare. It does not follow that citizens have a moral right to an equal amount of healthcare. If two citizens have the same disease, treatable by a drug that is in short supply, but one of them is dying while the other is merely being made uncomfortable, they do not have the right to an equal dosage of the drug. It is no offence to an equal right to healthcare to differentiate between individuals on the basis of relevant criteria, such as the degree of their need.¹⁶

So in order to substantiate a rights-based argument for majoritarianism, Waldron needs to show that respect for each individual's capacity for moral thinking gives rise to a *prima facie* requirement that equal weight be given to each individual's view. Yet it is far from clear that this is the case. We can imagine a supporter of judicial review arguing that the right to participation entails a right to present one's case to some

¹⁶ This example is an amended version of an argument made by Ronald Dworkin in *Taking Rights Seriously* (2nd edn, London: Duckworth, 1978), p 227. (Dworkin uses the example to differentiate between *equal treatment* and *treatment as an equal*.)

body that will determine the issue by virtue of the strength of argument alone. This, they might claim, provides the deepest form of respect for the moral judgment of each citizen. On this argument there is not even a *prima facie* case for equality of impact, but the right is nevertheless an *equal* right. Now I am not endorsing this defence of judicial review. But it goes to show that something extra is required; something more than a relatively uncontroversial outline of an equal right to participation.

A related problem is that Waldron's discussion of an equal right to participation does not address the crucial issue of who ought to be the rights-holders. Most people do not believe that anyone capable of making a judgment about a political decision that affects her thereby has a right to participate in the decision. It was not a violation of democracy that Saddam Hussain did not have a vote in the 2000 US presidential election,¹⁷ even though he was more personally affected by its outcome than was the average citizen of Minnesota. This cannot be explained solely by reference to the capacity of persons as moral reasoners. Again, further argument is required.

This 'something extra', I would like to suggest, must tie in with the fact that the right to participation 'has less to do with a certain minimum prospect of decisive impact and more to do with avoiding the insult, dishonour, or denigration that is involved'.¹⁸ Unlike, say, physical injury, insult is not a simple consequence of a perpetrator's acts. Rather, it can only be inflicted where there exists a shared background understanding that certain actions bear a certain significance. Simplistically put, in order to insult someone you must do something that is generally recognised as the kind of thing that is insulting. This is not to say that insult is a purely subjective matter: one can mistakenly perceive insult, or fail to see insult where it is present. Indeed, to properly grasp the concept of insult one must be aware that it is the kind of thing that one can be wrong about; that is, one must differentiate it from a purely subjective sensation such as pain or displeasure. An insult bears a significance that can be detached from

¹⁷ Of course, this election was a travesty from a democratic perspective, for reasons which have nothing to do with the exclusion of the province of Baghdad from the US Electoral College.

¹⁸ *Law and Disagreement*, p 238.

any individual's subjective perception of it. But the significance that it bears cannot be detached from the background of shared understandings: the significance of an insult arises out of these understandings.

If this is the case, then the demands of the right to participation must themselves be linked to the shared understandings which afford significance to political participation so that excluding someone therefrom causes insult to him: what 'counts' as political participation in the relevant sense is determined by these understandings. Furthermore, our understanding of what political participation is is closely entwined with the political institutions that we have (so that it is quite natural, for example, to point to the *agora* as showing that the Athenians had an understanding of the nature of political participation that was quite different to our own). It would be wrong, therefore, to think that one could derive the content of the right to participation in abstraction from any particular constitutional form. What counts as significant and insignificant participation, of insulting and of non-insulting exclusion, is so intertwined with the way we understand our political institutions that a right to participation *in abstracto* can be no more than a hollow shell.

3.3 Rejecting Waldron's Circumstances: disagreement as downstream of politics

Waldron's argument from the 'circumstances of politics' suffers, I believe, from a fundamental shortcoming: it attempts to reduce a normative theory of democratic institutions to a defence of a particular decision-making procedure. This shortcoming infects his 'core case' against judicial review, which portrays the issue at stake as how to make a decision on particular questions that are posited as being already extant in some already-constituted political society. But, as I argued in the previous chapter, a system of political institutions is far more than a decision-mechanism. Disagreements do not present themselves ready-made for resolution by whatever institutional structure we happen to employ. Rather, the institutional structure provides a point of reference around which disagreements are forged. Our constitutional system determines which disagreements are decided upon and which are ignored, it determines the terms in which disagreements are articulated, it determines the

professional ethos of decision-makers and it determines the relationships that exist between decision-makers and ordinary citizens. (Or, at least, it partially determines these matters; they are determined by our practice of politics, of which the institutional structure is a constitutive part.) So to view the issue of institutional design as a choice of decision-making procedure – to view it from the perspective of a citizen who is unhappy with a *particular* political decision – is to ignore a host of crucial features of constitutional systems which are conceptually prior to the resolution of any particular controversy.

Politics, as an idea, provides a distinctive way of understanding one's place in the world, one's relationships with others, and the significance of particular kinds of activity, particular beliefs and particular events. While Waldron is right to say that it presupposes a certain conflict or disagreement, the idea of politics does not simply make reference to the *fact* of disagreement; instead it provides a category that enables us to understand a particular kind of disagreement as *political disagreement*. We can say, with Schmitt, that the political 'does not reside in the battle itself... but in the mode of behaviour which is determined by this possibility'.¹⁹ While a complete analysis of politics as an organising idea would be beyond the scope of this thesis,²⁰ certain key points are relevant here. For a start, political disagreements are distinctively *public*.²¹ By this I mean not merely that they take place 'out in the open' – i.e. that they are not hidden or secret – but that they are understood as concerning the 'public interest', as opposed to the 'private' interests of individuals and sectoral groups. (Indeed, publicness in the former sense is not even a prerequisite for publicness in the latter sense: think of voting.) Such an understanding must be reflected in a vocabulary of politics, i.e. a way of articulating disagreements that

¹⁹ Carl Schmitt, *The Concept of the Political* (G Schwab tr, New Brunswick: Rutgers University Press, 1976), p38.

²⁰ For an overview, see Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2004), p 32-42.

²¹ For a fascinating discussion of this notion of publicity in the context of the ancient Greek city-state, see Hannah Arendt, *The Human Condition* (2nd edn, Chicago: University of Chicago Press, 1999), § 5.

presents them as public in the relevant sense. Such a vocabulary can, in turn, only bear meaning in the context of an ongoing practice of political discourse. So the practice of politics lies 'upstream' of any specific political disagreement about what we ought to do in a given situation: without it, we wouldn't be able to understand our disagreements *as political*. Of course, there is a certain circularity here, since I am effectively saying that in order to disagree politically we need an existing practice of political discourse, but then what could such discourse consist of other than political disagreements? However, rather than think of this as a problematic chicken-and-egg paradox, we should instead view it as an instance of the general difficulty of explaining how linguistic animals come to possess and disagree about concepts: there must be some sort of iteration between employing a concept and coming to possess it, with each accruing gradually through a process which builds up in stages.²²

Secondly, politics presupposes a sense of solidarity that connects the individual citizen to a broad political community. More specifically, it is a pre-requisite for disagreements over the question 'what ought we to do?' that there is the sense in which there exist a *we* that is capable of doing anything at all, what we might call a collective subject. Of course, people can co-ordinate their actions without conceiving of themselves as a collective subject. Drivers, for example, might develop a convention of giving way to vehicles approaching from the right without there being any sense of their engaging in a collective endeavour. Such a convention could arise, and thrive, purely as a result of the discrete actions of individuals. However, this set of drivers would not be capable of having the kind of disagreement that characterises political communities. An individual driver might wish that the convention were different, but he would not be able to say, properly speaking, that *we* ought to have decided differently, for there was no collective decision. Politics is characterised by decisions that are irreducibly collective, in that they cannot be reduced to some

²² See, for instance, Ludwig Wittgenstein, *Philosophical Investigations* (E Anscombe tr, 3rd edn, Oxford: Basil Blackwell, 1994), § 7.

function of the decisions made by citizens individually. For us to disagree politically over the question 'what ought we to do?', we must take the 'we' literally.

As Walker has pointed out, disagreements as to the appropriate scope and constituency of collective decision are of a 'higher order' to the more specific disagreements that Waldron sees as characterising the circumstances of politics.²³ These higher order disagreements cannot be directly resolved by political institutions as decision-making mechanisms, since the very legitimacy of those mechanisms is part of the question in issue. It does not follow, however, that political institutions are irrelevant to the attempt to address these issue, since, quite apart from the content of the decisions that they make, institutions also play a symbolic role, by providing 'a modality of thought, affect, and discourse enabling individuals and groups within a political community to make sense of and to articulate a notion of their common past, to form and pronounce judgments about their common present, and to plan and project various imagined common futures'.²⁴ In addition to functioning as decision-making mechanisms, political institutions play a higher order role as poles around which social identities are constructed.²⁵

Our concept of politics, then, with its associated ideas of publicness and collective subjectivity, is constructed dynamically, through an ongoing practice that is partially constituted by the political institutions within which it takes place. Part of what enables us to recognise certain disagreements *as political* is the fact that they are the

²³ Neil Walker, 'Europe's Constitutional Momentum and the Search for Polity Legitimacy' (2005) 3 International Journal of Constitutional Law 211, at 215-9.

²⁴ *Ibid.*, at 223. Walker is writing in the context of the attempt in 2004 to implement the Treaty establishing a Constitution for Europe, which at the time was in front of the member states for ratification (which was, of course, never forthcoming), and so his argument is specifically about written constitutions. However, there is nothing to suggest that he would deny that concrete decision-making institutions (i.e. parliaments, courts and the like) cannot play a similar symbolic role.

²⁵ For obvious reasons, this issue has been of particular interest to EU scholars. In addition to Walker, *ibid.*, see Richard Bellamy and Dario Castiglione, 'Normative Theory and the EU', in Lars Trägårdh (ed.), *After National Democracy: rights, law and power in America and the new Europe* (Oxford: Hart, 2004); and Hans Lindahl, 'Sovereignty and Representation in the European Union', in Neil Walker (ed.), *Sovereignty in Transition* (Oxford: Hart, 2003).

type of disagreements that are resolved by institutions that we recognise as political. And political practices provide a framework within which a sense of collective solidarity can be sustained, so that democratic processes and collective identities feed off one another. The practice of politics is thus a reflexive process of continual definition and redefinition of the political community, and political institutions have a key role to play as focal points for the kind of discourse that can sustain collective political identities.²⁶

It is, therefore, an inadequate portrayal of 'politics' to depict it as a response to disagreement over particular questions of justice. The role of politics is not only to resolve disagreements but also to frame them, to tease them out, to finesse them, to enable us to understand what is at stake in them, to constitute a community capable of having them, and so on. Waldron's argument from the 'circumstances of politics' overlooks the *dynamism* of politics in this regard. Disagreements over particular issues arise in the context of an ongoing practice without which political disagreement would be impossible. *Disagreement, then, lies downstream of politics.* Waldron's 'circumstances of politics' present us with a *static* view of politics as a mechanism for resolving this or that disagreement, when what we need is a *dynamic* view which sees each disagreement as part of an ongoing practice.

3.4 Why not Plebiscite? 'Static' Will versus 'Dynamic' Judgment

To say, as Waldron does, that the electoral and legislative processes provide a 'reasonable approximation' of the use of majority-decision among the citizenry as a

²⁶ The idea that political discourse can play an important role in forging a cohesive collective identity has been a key element of theories of deliberative democracy: see, for example, John Rawls, *Political Liberalism* (paperback edn, New York: Columbia University Press, 1996), Lecture VII, § 5; Jürgen Habermas, 'Citizenship and National Identity', in *Between Facts and Norms* (Rehg tr, Cambridge: Polity Press, 1996); and Joshua Cohen, 'Deliberation and Democratic Legitimacy', in James Bohman and William Rehg (eds.), *Deliberative Democracy: essays on reason and politics* (Cambridge: MIT, 1997). However (as I shall argue in chapter five with particular reference to Habermas), deliberative democrats have not always paid adequate attention to the symbolic role that political institutions play in this process. On the latter, see James G March and Johan P Olsen, *Democratic Governance* (New York: Free Press, 1995), chap 3.

whole is to beg a rather obvious question: why should we be satisfied with an approximation? Why don't we just hold a plebiscite? On Waldron's own argument it seems that this would have been more respectful to our disgruntled citizen, who may quite reasonably ask why her participation in the decision-making process should be so indirect and her opinion given so little effective weight in comparison to the opinions of the legislators. Curiously, perhaps, Waldron's 'core case' article does not address this question. In some of his other writings, however, Waldron does mount arguments supporting legislation by a representative assembly over plebiscitary democracy.²⁷

Waldron presents one argument in favour of representative assemblies by drawing an analogy between the passing of legislation and the generation of customary law. In both cases law is not generated by the act of some sovereign will, but by a pooling of experience and judgment. Legislation and custom are thus based on an 'ascending' rather than a 'descending' theory of authority.²⁸ Now majority-decision certainly features in this account – it is the mechanism by which a legislative proposal is finally approved – but the analogy between legislation and custom requires more than majority approval of the final outcome. As Waldron puts it: 'In the case of both statute and custom, the basis of legal authority has to do with a process (formal or informal) that brings together the plural and disparate experiences and opinions of those who are going to have to live with the norm in question.'²⁹ This process enables individuals to identify with statutes as '*their* laws and the basis of the law's legitimacy [as] *their* understanding and *their* acceptance of the place the laws... occupy in *their* way of life'.³⁰ Now Waldron presents this analogy to show a way in which legislation might be a superior form of lawmaking to executive order, but it is not too much of a stretch to see that a similar argument could be made against direct democracy. Direct democracy, one could argue, is antithetical to the kind of pooling of experience and

²⁷ The most explicit statement to this effect is Jeremy Waldron, 'Representative Lawmaking' (2009) 89 Boston University Law Review 335.

²⁸ *Law and Disagreement*, p 55-6

²⁹ *Ibid.*, p 66.

³⁰ *Ibid.*, p 66-7 (emphasis in original).

judgment that is characteristic of a well-functioning representative legislature. Indeed, it is not at all fanciful to suggest that referendums are a way of closing a debate; invoking the authority of 'the people' in order to secure for the majority what it wishes.³¹

A second benefit of legislatures is presented in *The Dignity of Legislation*, where Waldron discusses, with apparent endorsement, Aristotle's theory of the 'wisdom of the multitude':³²

'[Aristotle's] view is that deliberation among the many is a way of bringing each citizen's ethical views and insights... to bear on the views and insights of each of the others, so that they cast light on each other, providing a basis for reciprocal questioning and criticism and enabling a view to emerge which is better than any of the inputs and much more than a mere aggregation or function of those inputs.'³³

Again, this benefit is lacking in a plebiscitary democracy – or at least in a plebiscitary democracy the size of a modern state – as the wisdom of which the multitude is capable emerges only 'when they meet together'.³⁴ The epistemic benefit that Aristotle claims for the multitude is not a simply a consequence of superior numbers (as it is in Condorcet's jury theorem), but rather arises because in a deliberative process that involves a large number of speakers, each contributes something distinctive to the conversation. Legislative procedures make explicit and deliberate provision for minority views to be aired and considered, and, although a minority will not be able to defeat a proposal by force of numbers, minority representatives may be able to

³¹ It is worth bearing in mind that the *doyen* of direct democrats, Jean-Jacques Rousseau, believed that unanimity or near unanimity was a sign that a decision embodied the general will, while widespread disagreement suggested 'the ascendancy of particular interests' (Jean-Jacques Rousseau, *The Social Contract*, Book IV, chap ii). I think that it is accurate to say that Rousseau would have wholeheartedly accepted the analogy between legislation and custom, and that, indeed, his argument for plebiscite depends upon it. In a heterogeneous society the analogy between plebiscitary legislation and custom fails.

³² Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999), chap 5. See also 'Representative Lawmaking', at 343.

³³ *Ibid.*, p 106.

³⁴ See Aristotle, *Politics* (WE Bolland tr, London: Longmans, 1877), Book 3, chap 11, 1281b1 and 1281b5.

procure improvements to the bill originally proposed. In contrast, a minority viewpoint in a plebiscite has no influence: it is simply defeated.

Thirdly, Waldron points to the fact that legislatures provide a political system with an institution that is publicly dedicated to lawmaking: they exist, and are known to exist, explicitly for that purpose. 'If we know this is where laws are made, then this will be the place on which to focus our attention so far as democratic principles are concerned.'³⁵

Finally, Waldron argues that representation provides a certain abstraction that is particularly appropriate for lawmaking, where what we are striving to produce are abstract norms rather than directives focused on one particular person or situation. Just as our laws should be universalisable, so 'our representatives should present people's interests, concerns and ideals, universalizably'.³⁶ In this regard a large representative assembly is superior to both non-representative institutions and lawmaking processes which rely on the personal presence of citizens.

These arguments contain important insights, some of which I shall develop further in chapter six. For now it is important to note that Waldron's arguments in favour of representative democracy draw their strength from an implicit recognition of something that has been made explicit by Urbanati: representative democracy pays respect to citizens' *judgments*, rather than merely their *wills*.³⁷ This distinction is important, since a seemingly compelling case for direct democracy can be constructed if we focus on the latter.

Acts of will, unlike judgment, possess a certain *bruteness*, by which I mean a couple of things. Firstly, acts of will do not permit of qualitative variation. While a judgment may be certain or uncertain, tentative or settled, partial or comprehensive, a will, as it were, *just is*. One either decides to ϕ or does not decide to ϕ ; one either consents to

³⁵ 'Representative Lawmaking', p 339.

³⁶ *Ibid.*, p 349.

³⁷ See Nadia Urbanati, *Representative Democracy: principles and genealogy* (Chicago: University of Chicago Press, 2006).

X or does not consent to X. One cannot strongly decide or slightly consent. Because the will does not permit of qualitative variation, instances of consent must be *qualitatively equal*. This leaves quantitative assessment – i.e. taking a headcount – as the only mechanism of combining individuals' wills to form a collective will. If we are faced with disagreement amongst citizens, with some consenting to proposed legislation and others rejecting it, then if consent is what we are really interested in we can only fall back on strength of numbers.³⁸

Secondly, acts of will are *synchronic*. An act of will, such as the giving or withholding of consent, occurs in a specific moment in time, a *scintilla temporis*. It is separable from the reasoning that leads up to it and any further consideration that might follow. Contrast this with judgment, which is *diachronic*. Judgment flows dynamically, shaping and reshaping in response to information received and ongoing deliberation. One cannot identify a point in time at which judgment 'occurs'. To illustrate this distinction, consider a citizen in a direct democracy consenting to a specific piece of legislation, by voting in its favour. At the time of the vote he both judges that the

³⁸ Rousseau understood this well. While he clearly favoured widespread agreement between citizens (Rousseau, *The Social Contract*, Book IV, chap i), he saw a majority-vote as sufficient to create binding law, even to the extent that '[a] difference of one breaks a tie' (*ibid.*, Book IV, chap ii). This is not because the outcome of a majority-vote has some inherent quality, indeed Rousseau 'presupposes that all the characteristics of the general will are present also in majority decisions; when they cease to be, *whatever view may be adopted*, liberty exists no longer' (*ibid.* (emphasis added)). The italicised words are important here. Where the general will is no longer present in the majority view, liberty cannot be preserved by following the minority. In other words, both alignment to the general will and majority support are necessary in order for citizens to 'obey [themselves] alone, and remain as free as before' (*ibid.*, Book I, chap vi). Yet a majority of only one 'breaks a tie' and is sufficient, when in alignment with the general will, to preserve the liberty even of those citizens who voted with the minority (*ibid.*, Book IV, chap ii). This is because the decision to follow the will expressed by the majority can be reached by regarding only the individual (qualitatively equal) wills. Such a decision ensures that the law 'both come from all and apply to all' (*ibid.*, Book II, chap iv). Contrariwise, a decision to follow the will expressed by a minority can only be reached by someone looking beyond the individual wills to the reasoning that underlies them. Supposing that, in this case, the 'characteristics of the general will' are in fact present in the minority. This will not rescue the citizenry from dependence on the will of another, since whoever makes the assessment that the minority view ought to be followed replaces the citizens' will with his own. Rousseau's unyielding requirement for majority (but, in strict terms, no more than majority) support for the dictates of the general will reflects his appreciation of the qualitative equality of wills.

legislation is desirable and gives his consent to it by act of will. Some time after the vote he may cease to judge that the legislation is desirable. He might change his mind and reach the opinion that it is undesirable, or the passage of time might simply lead him to cease to have any interest in the issue, losing his favourable judgment without replacing it with a disfavourable one. In neither case has he withdrawn his consent. Nor would it be quite accurate to say that he continually consents to the law notwithstanding the change in his judgment. The withdrawal or continued granting of consent can only be effected by a further, discrete, act of will.³⁹

Waldron is right not to base the right to participation on the capacity to give or withhold consent. Portraying human persons merely as consenting beings does not recognise the depth of their status as moral agents. One can grant one's consent to a course of action without any sense that that course of action is *worthy* of one's consent. One may simply feel like consenting, preferring consenting over non-consenting in the same way in which one might prefer a glass of beer over a glass of whisky. One need not evaluate the course of action against anything other than one's pre-existing or anticipated inclinations. Judgments, on the other hand, are different. To make a judgment in favour of a course of action is to evaluate that action as *worth pursuing*, which necessarily involves invoking criteria other than one's own desires. To use Charles Taylor's terminology, to consent one need only be a 'simple weigher', while to make a judgment one must be a 'strong evaluator'.⁴⁰ To base the right to participation on the capacity to give or withhold consent – i.e. on the status of persons as simple weighers – would be to rob the concept of self-government of much of its deep significance. Indeed, in overlooking the distinction between the capacity to

³⁹ Thus the past perfect ('he has consented...') may be used appropriately (say to justify some action) in circumstances where the simple present ('he consents...') is unrealistic. The simple past ('he consented') would generally be used in circumstances in which the issue of consent was no longer germane (compare 'he has consented, and so I will operate on him' with 'he consented, and so I operated on him'). With the verb 'to judge', on the other hand, usage of the past perfect is rare, and generally restricted to situations in which we are using 'to judge' to signify 'to make a decision', i.e. an act of will (e.g. 'I have judged you guilty, and you must abide by my decision').

⁴⁰ Charles Taylor, 'What is Human Agency?', in *Human Agency and Language* (Cambridge: Cambridge University Press, 1985), p23.

choose and the capacity to evaluate, it would fail to respect the latter. It is insulting to treat a strong evaluator as a simple weigher.

So the conception of democracy that portrays it as respecting the capacity of citizens to will is an inadequate one; instead democracy should be seen as respecting citizens' capacity for judgment. When this distinction is made clear, arguments in favour of representative as opposed to direct democracy – such as Waldron's arguments that I mentioned at the start of this section – begin to look persuasive. However, the move from respecting will to respecting judgment causes further problems for Waldron's 'core case' against judicial review. A will-based conception of democracy supports the *static* view, exemplified by Waldron's circumstance of politics, that views democracy as a mechanism for resolving particular disagreements. When we move to a judgment-based conception, however, the static view starts to look inadequate, and the need for a *dynamic*, practice-based account of democracy becomes apparent. By adhering to the static view in his 'core case', Waldron fails to make a complete break from the will-based conception of democracy.

Owing to the synchronicity of the will, voluntaristic conceptions of democracy are forced to take a 'snapshot' view of the citizenry at a particular point in time.⁴¹ But this provides an impoverished picture of a political community, one which separates each individual decision from past and future chains of opinions. As Urbinati has put it: 'Ideas and opinions are not like dispersed atoms or accidental entities that magically appear in the mind of the voters'.⁴² A picture which includes the reasoning and arguments of citizens provides a richer view of the way in which judgments are formed and developed by people acting together. A judgment-based conception of democracy is, therefore, necessarily a dynamic conception.

⁴¹ Though it will not literally be a single point in time if not all votes are cast at once, in which case it would perhaps be more accurate to talk of a collage made up of individual snapshots.

⁴² Urbinati, *Representative Democracy*, p 33.

3.5 Conclusion

Although Waldron believes that representative government is a more complete expression of the democratic ideal than is direct democracy, the logic of his core case against judicial review tends to point us in the direction of plebiscitarianism. This, I have argued, is a consequence of the way he puts the question; i.e. by examining it from the point of view of a citizen who is unhappy with a *particular* decision, he excludes from consideration the dynamic processes which frame individual disagreements, giving them a context without which they would be unintelligible. The move from a static to a dynamic conception of democracy is necessary to complete the move from a will-based to a judgment-based account, and it is upon the latter that the argument for representative over direct democracy relies.

It would be an exaggeration to say that Waldron wholeheartedly adopts a static conception of democracy. For example, we have hints at a dynamic view in Waldron's working assumption that he is talking about a society with 'democratic institutions in reasonably good working order', in which members of the legislature 'think of themselves as representatives'.⁴³ However, the 'core case' argument does not have the resources to determine in what way these requirements should be met; i.e. what it means for democratic institutions to be in reasonably good order, or precisely what self-conception is appropriate for a representative legislator. The assumptions on which Waldron premises his core case are left hanging without support.

I have suggested that Waldron's core case argument lacks an adequate account of democracy as a *practice*. Such an account would have to go well beyond the issue of the fairness or rationality of a particular decision-making mechanism, to look at how different institutional structures shape our politics as a whole. It would have to examine the self-understandings inherent in various constitutional forms, since these can neither be thought of as merely instrumental devices intended to achieve some externally defined end, nor reduced to competing decision-making mechanisms.

⁴³ 'The Core of the Case Against Judicial Review', at 1361-2.

Courts, legislatures and other political institutions are constituted not only by the procedures for decision-making, deliberation and for the selection of members, but also by the self-understandings of those members and by the place that such institutions hold in the popular imagination. The case against judicial review (or for it, for that matter) will need to give an account of the differences between courts and legislatures in these respects. By reducing the issue to a question of how to resolve this or that disagreement in a fair and rational manner, Waldron's core case bypasses these crucial issues.

A dynamic account of the practice of democracy would be able to give content to the right to participation, by pointing to the aspects of the practice that play an important role in recognising the capacity of citizens for moral judgment. It would, I venture to suggest, highlight the partly-functional, partly-symbolic role of the legislature as a *representative* body; a role that cannot be adequately derived from abstract or *a priori* reasoning detached from our constitutional imaginaries. Furthermore, the practice-based account helps us to make sense of the fact that not everyone capable of making a moral judgment about a political decision that affects her thereby has a right to participate in the decision. For a practice implies the existence of a *community of practice*, which is not to be identified with all those who may be affected by the practice's operation. Saddam Hussain was profoundly affected by the practice of US politics, but he was not a member of the relevant community of practice, nor did he have grounds on which he ought to have been accepted as such. Denying him the vote was therefore not undemocratic.

I have argued that Waldron's case against judicial review is inadequate, as it focuses on the resolution of individual political disagreements abstracted from our ongoing practice of democratic politics. Instead, I suggest that we shall make better progress if we take for our starting-point the arguments – including some persuasive arguments given by Waldron himself – in favour of the representative legislature as a distinctive constitutional arrangement. These arguments are based on the idea that representative democracy pays respect to citizens' *judgments* rather than merely their

wills, and as such rely on a dynamic conception of democracy. On the dynamic view, we cannot consider political institutions to be merely devices for resolving disagreement. Our institutions constitute the political world within which our disagreements unfold, and from which they gain their significance.

4. Dworkin: an incomplete interpretation

In this chapter I look at the work of perhaps the most well-known theorist of judicial review in recent years, Ronald Dworkin. Though he is best known for his work on the US Constitution, Dworkin has mounted a general defence of judicial review, presented as part of an ideal theory of democracy, which in turn forms a part of a broader political theory.

The first part of this chapter looks at the idea, introduced in the previous chapter, that a political community constitutes a collective subject. I argue that we cannot plausibly view a political community as a voluntary or consensual relationship, but must instead follow Dworkin's lead in viewing citizenship as an *associative* relationship, like family or friendship, which imposes genuine obligations, by virtue of its ethical significance. In the second part I examine Dworkin's conception of democracy. Dworkin sees democracy as promoting three values, which he calls the 'symbolic', the 'agency' and the 'communal'. I argue that each of these values identifies an important aspect of democracy that cannot be reduced to the language of political 'inputs' and 'outputs'. In the third part I examine Dworkin's institutionalisation of democracy, including his defence of judicial review. Dworkin argues in relatively straightforward terms that judicial review does not hinder, and may well promote, democracy's symbolic value. He takes judicial review to serve as a kind of democratic prophylactic: without insulting the status of citizens as equals, it protects the community against legislative decisions that would tend to eat away at the egalitarian basis on which it is founded.

In the final two sections I argue that Dworkin does not take his own interpretive methodology far enough. The symbolic significance of courts and legislatures is 'thicker' than Dworkin recognises, and thus his defence of judicial review is altogether too quick. In section four I argue that the very virtue that seems to recommend courts as arbiters of disputes over the extent of fundamental rights – their *impartiality* – is linked with a way of thinking about constitutional politics that is

problematic for democracy. Judicial decision-making is premised on the idea that it is in some respect a 'nonpolitical' process, so that, by sending questions about fundamental rights to the courts for determination, judicial review presents such issues as qualitatively differentiated from matters of 'ordinary politics'. This casts doubt on Dworkin's claim that judicial review provides an arena of contestation that is 'directly connected to [citizens'] moral lives',¹ and threatens the ability of citizens to view themselves as a self-governing political community. In the final section I argue that Dworkin fails to complete his interpretation of democracy, since he neglects to consider whether legislation by representative assembly has any distinctive democratic merit in and of itself. I argue that our practice of democracy affords the representative legislature an indispensable role as the focal point of political debate. Although legislatures do not, of course, always live up to the ideal, if we overlook, in theory, the part that legislatures play in the popular imagination, we risk losing grasp of an important aspect of what is valuable about democracy.

4.1 Political Community as Associative Relationship

In the last chapter I argued that Waldron's characterisation of the 'circumstances of politics' is inadequate because it does not recognise the reflexive role that politics plays in constituting the political community. That there exist a 'political community' at all is presupposed by the concept of politics. A claim of political authority is a claim over, and, in a certain sense, in the name of, a particular community: this is what allows us to distinguish it from, say, a claim of proprietary or contractual right, or an act of brute domination. Democracy offers the promise of congruence between the addressor of such claims and their addressee, that is to say it promises *self-government*: government of the political community over itself. So, for democracy to be more than a mirage, the political community must become a *collective subject*, capable of action of its own account.

¹ Ronald Dworkin, 'What is Equality? Part 4: Political Equality' (1987) 22 University of San Francisco Law Review 1, at 29.

Political communities are themselves constituted by ongoing political practices. They do not exist as metaphysical entities, waiting for us to find them and then institutionalise them with a government and laws. They are, in Anderson's influential terminology, 'imagined communities'.² That does not mean that they are purely subjective matters: a political community is not just what you or I or anyone else happens to think that it is. Nor are their existence and scope fixed purely as matters of convention. It is possible for two people, each with the same knowledge of the empirical facts in a particular society, to disagree over whether that society amounts to a political community or over exactly who is to be included as a member. In order to determine the existence and nature of political communities, we must engage in constructive interpretation.³ We form our opinions on such questions by reference to our views on the underlying point of our political practices.

It should be clear that we cannot view political communities as voluntary arrangements: people are born into political communities, and the decision not to emigrate can scarcely be said, in all but perhaps a tiny handful of cases, to be a genuine free choice. Nor can political communities be defined along the lines of those whose lives are affected by a particular set of political decisions, since political communities make decisions all the time that have profound effects upon outsiders (most obviously, but not exclusively, in foreign policy). We need an account of political communities which portrays citizens as bound together in a special kind of way, not merely as passive recipients of various benefits and burdens.⁴

² Benedict Anderson, *Imagined Communities: reflections on the origins and spread of nationalism* (revised edn, London: Verso, 2006). Of course, Anderson's book is about *nations*, rather than political communities *per se*, but the term 'imagined community' can be usefully applied more broadly.

³ See the discussion at §2.2, above.

⁴ Cf Robert Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell, 1974), p 93-5, in which Nozick argues against the idea of non-consensual political obligation by analogy to a situation in which a philosopher broadcasts lectures from a sound truck. Nozick is, of course, right to say that the recipients of such lectures are not morally obliged to pay for the privilege. The argument fails because the analogy does not hold: the relationship between citizens and state is not merely one of recipient and (unsolicited) provider of services.

Dworkin provides what is to me a persuasive account. He describes political communities as 'associative' groupings, analogous to families and groups of friends, neighbours and colleagues.⁵ These groups are defined by social practice, not choice or consent, yet they are characterised by special relationships that are capable of creating genuine obligations between members. The non-voluntary nature of these groups is clearest in the case of family, but is also true of the others. I can become someone's friend without really intending to; indeed, it might not dawn on me that I have become his friend until I realise that I owe him obligations that I would rather not fulfil. I might choose my place of work, but I do not choose my colleagues. The normative force of these relationships stems not from the method by which they are entered into, but from their ethical value.⁶

The fact that such non-consensual groups can give rise to genuine obligations shows that a popular argument for the will-based conception of democracy is mistaken.⁷

This argument can be clearly seen in a passage from Locke:

'that which acts any Community, being only the consent of the individuals of it, and it being necessary to that which is one body to move one way; it is necessary the Body should move that way whither the greater force carries it, which is the consent of the majority; or else it is impossible that it should act or continue one Body, one Community, which the consent of every individual that united into it, agreed that it should; and so every one is bound by that consent to be concluded by the majority'⁸

So long as we suppose that 'any Community' can only be constituted by 'the consent of the individuals of it', then such an argument seems persuasive. But the examples of family, friendship and so on show that this is not the case, and so Locke's logic does not run. There is no necessary connection between the acts of a political community and 'the consent of the majority'. We identify the acts of the community in the same way we identify the community itself: through a process of constructive

⁵ Ronald Dworkin, *Law's Empire* (London: Fontana, 1986), p 195-202.

⁶ In addition to Dworkin, *ibid.*, see Andrew Mason, 'Special Obligations to Compatriots' (1997) 107 *Ethics* 427.

⁷ See my discussion of the distinction between will-based and judgment-based conceptions of democracy at §3.4, above.

⁸ John Locke, *Two Treatises on Civil Government* (London: G. Routledge, 1884), chap VIII, §96.

interpretation that is sensitive to the purpose, point or value that the particular community serves, embodies or honours.

4.2 The 'Participatory Values' of Democracy

Dworkin, then, provides a persuasive account of the structure of a political community, one which presents the very idea as inherently value-laden. This structure does not, of course, tell us what it is about political communities that are valuable: for that we need to go further than pointing at the methodology of interpretation and begin to engage in interpretation ourselves. Just because we accept Dworkin's methodology, it does not follow that we will agree with him on the substantive issue. Questions of political value tend to be controversial, and we can expect that different people will arrive at competing interpretations. Nevertheless, there is, I believe, much in the substance of Dworkin's conception of democracy from which we can profitably learn.

Note that I have moved from talking about the value of political communities to talking about the value of *democracy*. The question of this thesis is whether judicial review is a hindrance to democracy, not whether it is a hindrance to political community *per se*. I take the former to be a special case of the latter; democracy, as I have said, is the system of government in which the political community governs itself. I do not doubt that there is value in the notion of political community *per se*; i.e. that there is a distinctive good that distinguishes being a member of a non-democratic political community from being subject to non-political power.⁹ Our concern is not primarily with that good, rather it is with the distinctive good that arises when the political community is democratic. We should remember, though, that democracy presupposes a political community, so that any account of democracy must have an account of political community nested within it. It was a failing of Waldron's 'core

⁹ At least where the political community is legitimate. I have in mind something like the conception of legitimacy given by Bernard Williams in 'Realism and Moralism in Political Theory', chap 1 in *In the Beginning was the Deed: realism and moralism in political argument* (Princeton: Princeton University Press, 2005).

case' that it did not leave space for an attractive account of political community;¹⁰ it is a strength of Dworkin's conception of democracy that it includes such an account.

In chapter one I mentioned – and rejected – a popular way of thinking about democracy that divides the issues at stake into questions of 'input legitimacy' and 'output legitimacy'.¹¹ This schema, I argued, is misleading, because it overlooks the fact that so-called 'inputs' and 'outputs' derive their meaning from the practice of democracy itself, and so cannot be treated as distinct from such practice. Unfortunately, Dworkin's account of democracy proceeds in the language of 'inputs' and 'outputs'. As I hope to demonstrate, however, Dworkin in fact rejects the substance of the dichotomy.

In the fourth of his 'What is Equality?' papers, Dworkin draws a distinction between what he calls 'detached' and 'dependent' conceptions of democracy.¹² He describes detached conceptions as based on input, i.e. they judge the democratic character of a political system by looking solely at its procedural aspects, asking whether it distributes political power equally amongst citizens. Dependent conceptions, on the other hand, are described as outcome-based, such that they recommend as democratic whatever political system is most likely to lead to the best substantive consequences. Now it might seem that the distinction between detached and dependent conceptions corresponds to the distinction between noninstrumental and instrumental views of democracy respectively. However, that is not the case, since Dworkin includes as 'consequences' of a political system those values which are constituted by the way in which they find their expression in political practices.¹³ These values Dworkin calls the 'participatory consequences' of a political process: 'the consequences that flow from the character and distribution of political activity itself'.¹⁴ Dworkin identifies three types of participatory consequence: the 'symbolic value' of the confirmation of

¹⁰ See §3.3, above.

¹¹ See p 9, above.

¹² 'What is Equality?', at 3-8.

¹³ See my discussion of the distinction between instrumental and expressive values at p 19-20, above.

¹⁴ 'What is Equality?', at 4.

the status of citizens as free and equal; the 'agency value' which accrues when politics is connected to each individual's moral experience; and the 'communal value' of a cohesive and fraternal political community.¹⁵

By including 'participatory consequences' as part of his 'dependent' conception of democracy, Dworkin recognises the noninstrumental, constitutive role of political practice. Dworkin's symbolic, agency and communal values are not 'consequences' in the instrumental, empirical sense. Unlike the 'distributive' consequences of a political process (such as the rates of taxation and public spending, the substance of the rules of property, contract and tort, and so on), the ideas of political equality, agency and community are only intelligible within the background context that political practices provide. We can note here that Dworkin's 'symbolic' value is misleadingly named. *All* of the participatory consequences rely on the symbolic status of democratic practices and institutions in order to bear the significance that they do in our society.

The value that Dworkin calls the 'symbolic' value would perhaps be better referred to as 'political equality'; Dworkin also describes it as 'a declaration of equal standing for all'.¹⁶ Dworkin associates this value with voting rights, such that one-person-one-vote signifies a commitment to the equal status of all citizens. But, as Dworkin rightly acknowledges, the shape that voting rights must take in order to successfully symbolise equality depends upon contingent historical factors:

'Our own history is such that no deviation from equal impact within a district – no deviation, that is, from equal vote – is tolerable for us. That strict requirement would not necessarily hold in a community whose history showed that unequal voting did not itself display contempt or disregard. We can imagine, for example, a society in which people gain votes as they grow older, or in which people acquire more votes by pursuing a course of study genuinely open to everyone, or something of that sort. But in a society like our own, in which the vote has traditionally been an emblem of responsibility,

¹⁵ *Ibid.*, at 4.

¹⁶ *Ibid.*, at 19.

weight, and stake, any violation of equal vote would reflect a denial of the symbolic attachment equal vote confirms.’¹⁷

Because of the nature of the symbolic status of voting rights, one-person-one-vote is an essential requirement of democracy as we know it. But the symbolic expression of equality does not require that each citizen has equal impact on political ‘outputs’. Such a requirement would rule out representative government altogether, since a representative structure is necessarily one that gives greater impact to legislators over ordinary citizens.¹⁸ Furthermore, our history does not afford a strong symbolic role to equality in the way in which the community is divided into electoral districts: for instance it does not convey disrespect for the people of California that they have far less impact on the constituency of the US Senate than do the citizens of Wyoming.¹⁹ Here Dworkin recognises something that I mentioned in my discussion of Waldron’s ‘right to participation’, what amounts to an insult to citizens’ political equality depends upon shared understandings which afford significance to particular features of our practice.²⁰

If the nature of the ‘symbolic’ value of political equality is straightforward enough, Dworkin’s discussion of the ‘agency’ value is a little more cryptic. The agency value accrues, he says, when politics connects ‘each individual, to his or her own moral experience’²¹, so that ‘our political life [is] a satisfactory extension of our moral life’.²² While it is not made completely explicit, Dworkin’s discussion of the agency value recognises, I think, two important characteristics of democracy: democracy is both practical and social. Democracy is essentially *practical* in the sense that, as I put it in chapter two, its noninstrumental value is conditioned on its instrumental value: if we were not able to use democratic processes to make important decisions competently, they would not have the same expressive significance.²³ It is crucial that those aspects

¹⁷ *Ibid.*, at 19-20.

¹⁸ *Ibid.*, at 10-11.

¹⁹ *Ibid.*, at 20.

²⁰ See §3.2, above.

²¹ *Ibid.*, at 5.

²² *Ibid.*, at 21.

²³ See p 23, above.

of democracy that have socially recognised symbolic significance are also of practical import. It is only because voting is a practical act of moral agency that the right to vote can serve as a symbol of respect: a *merely* symbolic election would fail in this regard. And it is also crucial that democratic politics is a *social* pursuit. It is not adequate, for democratic citizenship, to allow each person freely to contemplate political issues in private. It is central to one's status as a citizen that one is able to engage in discourse with others and try to persuade them to accept one's own point of view.

Dworkin's 'communal' value of democracy is that which I referred to earlier as the promise of self-government: in a genuine democracy, the laws are created by the collective agency of the people. This requires that we take 'the people' to be a distinct entity, capable of acting in a way that is irreducible to any statistical function of the actions of individual citizens.²⁴ Dworkin calls this view the 'partnership conception of democracy', since 'it holds that self-government means government not by the majority of people exercising authority over everyone but by the people as a whole acting as partners'.²⁵ As Dworkin makes clear, this is not such a mysterious

²⁴ Bratman has proffered a 'reductive' account of collective agency which is expressed purely 'in terms of the attitudes and actions of the individuals involved' (Michael Bratman, *Faces of Intention: selected essays on intention and agency* (Cambridge: Cambridge University Press, 1999), p 108; see generally chaps 5-8). On Bratman's account, a group engages in what he calls 'shared cooperative activity' when each of its members: (i) intend that the group carry out some joint activity; (ii) are mutually responsive to one another's intentions and actions; (iii) are committed to the success of the activity; (iv) are committed to supporting one another in the pursuance of the activity; and (v) are led to carry out the joint activity by virtue of their attitudes (i) – (iv). Bratman's aims are explicitly functionalist: 'What we want to show is that intentions of individuals with these special contents should lead to planning, bargaining and action of those individuals which, taken together, constitute appropriately coordinated planning and unified shared activity.' (*Ibid.*, p 123.) He takes the fact that the complex of interlocking intentions (i) – (iv) is likely to lead consistently mutually-supportive action as evidence that it adequately explains the phenomenon of joint action. However, (i) seems tacitly to assume what Bratman is at odds to deny: the existence of an ontologically irreducible collective agent. More generally, Bratman's functionalist approach is incapable of capturing what we might call the *ethical* significance of joint action: i.e. the fact that joint action is *qualitatively*, and not just functionally, different from a set of mutually responsive individual actions.

²⁵ Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Belknap Press of Harvard University Press, 2011), p 384.

phenomenon as it might at first glance appear. He borrows from Rawls the example of an orchestra: it is essential to an orchestral performance not just that a specified function of musicians each plays some appropriate score, but that the musicians play *as* an orchestra, each intending to make a contribution to the performance of the group, rather than isolated individual recitations.²⁶ This does not depend on any ontological priority of community over individual, but simply on a certain kind of shared attitude among individuals. Democracy enables citizens taking part in political action to view themselves (authentically)²⁷ as engaged in a joint venture, such that – like musicians in an orchestra – they can each share in the credit due for the achievements of the community as a whole.

Since participants in a joint venture share in the credit of the venture's achievements, self-governing citizens cannot view the success or failure of their political community as entirely detached from their personal failure or success as individuals. The achievements of the community are *their* achievements, and so form part of the goodness of their own lives. The well-being of individual citizens and that of their community thus become fused or, as Dworkin puts it, 'integrated'.²⁸ The communal value of democracy is therefore what Taylor calls an *immediate common good*: 'a sense of shared fate, where the sharing itself is of value'.²⁹ While convergent goods (such as security and a clean environment) are '*for me and for you*', democracy is '*for us*'.³⁰ This perfects the analogy with friendship through which Dworkin's conception of

²⁶ Ronald Dworkin, 'Equality, Democracy and Constitution' (1990) XXVIII Alberta Law Review 324, at 329.

²⁷ I add this parenthesis to underline the fact that collective agency here is not merely a subjective matter: it depends on, but cannot be reduced to, individual opinions about the nature of the action. It is crucial for democracy that citizens are not brainwashed or misled into thinking that they are engaged in a joint venture: the sense of joint venture must be authentic.

²⁸ See Ronald Dworkin, *Sovereign Virtue: the theory and practice of equality* (Cambridge: Harvard University Press, 2000), p 222-3.

²⁹ Charles Taylor, 'Cross-Purposes', in *Philosophical Arguments*, p 192.

³⁰ 'Irreducibly Social Goods', p 139 (emphasis added).

democracy was introduced. Like friends (but unlike, say, shareholders in a joint stock company), citizens share a good which cannot be reduced to mutual benefit.³¹

4.3 Dworkin's Attempt at Institutionalising Democracy

Dworkin claims that the participatory values recommend a basic outline of a democratic structure, leaving open a number of specifics to be crafted so as to deal with localised requirements. The 'symbolic' value, as we have seen, requires equality of vote within electoral districts. The 'agency' value requires that citizens are guaranteed the freedom to express their opinions, and that they have 'enough access to influential media... to give each person a fair chance to influence others if he or she can'.³² And the 'communal' value demands that 'collective decisions must reflect equal concern for the interests of all members'.³³ As Dworkin sees it, the symbolic value of equal voting rights sets a default of equality of impact between citizens, from which we should not depart unless two conditions are met: firstly, the different procedure must not outrage any of the participatory values; and secondly, we must have some positive reason to think that a different procedure would considerably improve the quality of political decisions.

The first condition rules out formal electoral discriminations, such as restriction of the franchise to men, whites, property-holders and so on, or any proposal that would give weightier votes to classes of persons thought more likely to make good decisions on political issues.³⁴ It does not, however, rule out representative government, since this lowers the political impact of all citizens, and thus 'disenfranchises all unelected

³¹ Dworkin is here in essential agreement with Aristotle: see John M Cooper, 'Political Animals and Civic Friendship', in Neera Kapur Badhwar (ed.), *Friendship: a philosophical reader* (Ithaca: Cornell University Press, 1993).

³² 'What is Equality?', at 22.

³³ Ronald Dworkin, 'Equality, Democracy and Constitution' (1990) XXVIII *Alberta Law Review* 324, at 339.

³⁴ With what I think is a pinch of self-deprecating humour, Dworkin gives the example of a proposal 'that only lawyers and moral philosophers should be allowed to vote on choice-insensitive matters' ('What is Equality?', at 27). Dworkin does not specify whether he is using 'and' in the conjunctive or the disjunctive.

groups and persons equally'.³⁵ Furthermore, Dworkin says, we have a positive reason to think that representation improves the quality of political decisions, since 'elected officials, rather than popular assemblies, are better able to protect individual rights from dangerous swings in public opinion'.³⁶ He accordingly concludes that both conditions for departure from equality of impact are met in the case of representative government, so that there can be no general democratic requirement that laws, even on issues of fundamental importance, be put to referendums. Issues of detail, such as the lengths of parliamentary terms, the system of election and the make-up of electoral districts, must be looked at in the context of the particular community for which they are being considered.

He addresses the question of judicial review in similar manner. Judicial review clearly creates a vast disparity of political impact: it gives a handful of judges the power to overrule policies that are supported by the overwhelming majority of the populace. But, Dworkin argues, the first condition for departure from equal impact is nevertheless met. Firstly, he claims, judicial review does not impair the symbolic value of equal voting rights, since it does not reflect any contempt for or disregard of any group within the community.³⁷ Secondly, judicial review supports the 'agency value', by providing 'a forum of politics in which citizens may participate, argumentatively, if they wish, and therefore in a manner more directly connected to their moral lives than voting almost ever is'.³⁸ Finally, judicial review promotes the communal value of democracy, since in upholding individual rights against violations by government, it preserves the political community as an inclusive democratic community.³⁹ He accordingly gives us an account of judicial review as a kind of democratic prophylactic: without insulting the status of citizens as equals, it

³⁵ Dworkin, *Justice for Hedgehogs*, p 393.

³⁶ *Ibid.*, p 394.

³⁷ 'What is Equality?', at 29; 'Equality, Democracy and Constitution', at 337-9; *Justice for Hedgehogs*, p 396.

³⁸ 'What is Equality?', at 29. See also 'Equality, Democracy and Constitution', at 340-2; and *Justice for Hedgehogs*, p 396-8.

³⁹ 'Equality, Democracy and Constitution', at 342-6; *Justice for Hedgehogs*, p 398.

protects the community against legislative decisions that would tend to eat away at the egalitarian basis on which it is founded. This still leaves open the second condition, whether judicial review in fact improves the substantive quality of political decisions. Like the issues surrounding the detail of the electoral system, an answer to this question will depend upon a host of factors that vary from place to place. Nothing guarantees in advance that judicial review will make a community more democratic, and Dworkin floats the possibility that other strategies for protecting individual rights against majority domination might prove superior.⁴⁰ Nevertheless, Dworkin is confident that in most, if not all actually existing cases, judicial review has had a positive effect. He accordingly concludes that judicial review is generally a benefit to democracy.

4.4 Court as Symbol: the myth of legality and the negative conception of citizenship

We can see Waldron's criticism of Dworkin as focusing mainly on the first value, the 'symbolic value' of political equality. Waldron essentially premises his attack on judicial review on the inequality of impact inherent in such a system. However, as I argued in the previous chapter, a judgment-based conception of democracy does not require equality of impact. In the following section I suggest that Dworkin is, surprisingly perhaps, susceptible to a similar line of criticism, since he also gives an unjustified priority to majoritarianism. In this section I want to say something about the relationship between judicial review and Dworkin's other two values. In short, I think that the symbolic significance of courts is 'thicker' than Dworkin recognises, such that his argument that judicial review does not impede the agency and communal values is altogether too quick.

Judicial review does not place decisions about fundamental rights into the hands of just *any* set of experts: it places them specifically into the hands of a *court*. And courts, of course, occupy a particular status in the popular imagination. As I put it in chapter

⁴⁰ *Justice for Hedgehogs*, p 398-9. Dworkin gives the example of an elected upper chamber, though it is not clear why he believes the upper chamber need be elected.

two, people have a generally shared sense of what courts are *for*, and this sense affects both how judges, lawyers and parties to court cases behave and how the public at large responds to their behaviour. In fact, Dworkin relies on the status of courts in the popular imagination in his defence of judicial review. He needs to be able to answer the question of why judicial review should signify a concern for equality rather than a desire to place government in the hands of an elite: why is it democratic and not aristocratic? He can answer this question because our constitutional imaginary distinguishes courts from aristocratic bodies. Judges are associated with a particular set of virtues – virtues of impartiality, rationality and fairness – and not with superiority or excellence *simpliciter*. The narrative that justifies their authority speaks of professional learning and institutional independence, not of their possessing gold in their soul.⁴¹ This narrative allows Dworkin to differentiate judicial review from aristocracy, and thus conclude that judicial review does not symbolise a lack of respect for any section of the community.

However, as scholars of cultural symbolism have pointed out, symbols often ‘condense many references, uniting them in a single cognitive and affective field’.⁴² Those seeking to defend a political institution must take its significance in its entirety; one cannot pick-and-choose those aspects of symbolic significance that are desirable and hope to discard the others. In the case of courts, the very virtue that seems to recommend them as arbiters of disputes over the extent of fundamental rights – their *impartiality* – is linked with a way of thinking about constitutional politics that is problematic for political autonomy.

For a number of decades now political scientists have puzzled over what they have come to call the ‘myth of legality’: the notion that judicial decision-making is somehow a ‘nonpolitical’ process.⁴³ Empirical investigations have found such a view

⁴¹ Cf Plato, *The Republic* (HDP Lee tr, 2nd edn (revised), London: Penguin, 2007), Book III, 415a.

⁴² Victor W Turner, *Dramas, Fields and Metaphors: symbolic action in human society* (Ithaca: Cornell University Press, 1974), p 55; see also his *The Forest of Symbols: aspects of Ndembu ritual* (Ithaca: Cornell University Press, 1967), p 27-30.

⁴³ See Gregory Casey, ‘The Supreme Court and Myth: an empirical investigation’ (1974) 8 *Law and Society Review* 385; Austin Sarat, ‘Studying American Legal Culture: an assessment of

to be widely held (at least in the US),⁴⁴ although it is not entirely clear what is meant by 'nonpolitical' in this context, and a number of studies show citizens holding apparently contradictory views.⁴⁵ The tenor of much of the political science literature tends to suggest that the myth of legality is, in the words of Caldeira, 'silly formalism', that 'no one who has taken Introduction to American Government... is going to ascribe to'.⁴⁶ But, as Caldeira goes on to point out, this attitude simplistically equates the myth of legality with acceptance of what Pound derided long ago as 'mechanical jurisprudence'.⁴⁷ The myth, however, should not be seen as acceptance of any particular jurisprudential theory, nor, indeed, as the acceptance of any particular theory at all. In fact, we need some sort of myth of legality in order to accept the very idea of law. To be clear, I do not mean by myth 'a widely held misconception', but rather 'a symbolic narrative'.⁴⁸ Myths are the stories that we tell ourselves in order for us to bring order to a complex and potentially chaotic world.⁴⁹ 'Law' is not a natural kind, an *a priori* concept or the product of pure rational thought; it is a frame through

survey evidence' (1977) 11 Law and Society Review 427; Dean Jaros and Robert Roper, 'The Supreme Court, Myth, Diffuse Support, Specific Support, and Legitimacy' (1980) 8 American Politics Quarterly 557; John M Scheb II and William Lyons, 'The Myth of Legality and Public Evaluation of the Supreme Court' (2000) 81 Social Science Quarterly 928; Sara C Benesh, 'Understanding Public Confidence in American Courts' (2006) 68 Journal of Politics 697; James L Gibson and Gregory A Caldeira, *Citizens, Courts and Confirmations: positivity theory and the judgments of the American people* (Princeton: Princeton University Press, 2009).

⁴⁴ A certain caution about drawing generalised conclusions from this empirical data is due owing to the fact that almost all studies have been conducted in the US. However, James L Gibson et al have found evidence of similar attitudes in a number of EU countries: see their 'On the Legitimacy of National High Courts' (1998) 92 American Political Science Review 343.

⁴⁵ For an overview, see James L Gibson and Michael J Nelson, 'The Legitimacy of the US Supreme Court: conventional wisdoms and recent challenges thereto' (2014) 10 Annual Review of Law and Social Science 201, at 209-12.

⁴⁶ Gregory A Caldeira, (1994) 88 American Political Science Review 485, at 485, reviewing Segal and Spaeth, *The Supreme Court and the Attitudinal Model*.

⁴⁷ Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8 Columbia Law Review 605.

⁴⁸ The former definition is from the *Oxford English Dictionary* (2nd edn, Oxford: Oxford University Press, 2000), the latter from the *Encyclopaedia Britannica* (15th edn, Chicago: Britannica, 1994).

⁴⁹ See Martin Loughlin, *Sword and Scales: an examination of the relationship between law and politics* (Oxford: Hart, 2000), p 22-6.

which we organise aspects of our social and political lives. It exists on the level of constitutional imaginary.

I therefore do not think that we should be surprised by the fact that the 'myth of legality' appears to be widespread, or by the fact that its content lacks clarity. What the empirical studies show, I believe, is citizens struggling to articulate verbally certain inchoate understandings that are usually expressed symbolically. The way in which the courts are 'different' from 'political' actors does not permit straightforward definition, but it is nevertheless deeply ingrained into our structures of thought and behaviour.⁵⁰ It is this understanding that enables us to see courts as 'impartial' arbiters. They are certainly not impartial in the sense of not being affected by the outcome of decisions: judges, like the rest of us, have to obey the law. Nor are they impartial in the sense that they may reach decisions by recourse to some algorithm that spares them the need to make normative judgments: this kind of 'formalism' is indeed 'silly'. Their impartiality comes from the fact that they are bound to 'legal' as opposed to 'political' considerations. And while there are countless competing theories about precisely what this entails for judicial decision-making, these theories only make sense on the understanding that courts *are* different from the 'political' branches of government, i.e. that the distinction between law and politics has at least *some* substance. It is this constitutional imaginary that allows us to see judicial review as premised on a liberal ideal of impartiality rather than on an aristocratic supposition of judicial superiority.

⁵⁰ My claim here is supported by the finding, in a number of empirical studies, that there is a positive correlation between strength of adherence to the 'myth of legality' and familiarity with/knowledge of the law and courts (Casey, 'The Supreme Court and Myth'; Gibson et al, 'On the Legitimacy of National High Courts'; Benesh, 'Understanding Public Confidence in American Courts'). This correlation is difficult to explain on assumption that the myth is simply a falsehood, since in that case we would expect experience of the courts to disabuse rather than bolster it. Gibson and Caldeira conclude, sensibly, I think, that exposure to legitimising judicial symbols reinforces the process of distinguishing courts from other political institutions, so that those who are experienced with courts tend to perceive and evaluate their decisions through the frame of law (*Citizens, Courts and Confirmations*, p 7-14).

The difficulty with this, however, is that our constitutional imaginary frames not only the decision-process (*nemo iudex in causa sua, audi alteram partem, etc.*), but also the subject-matter of the decision itself. By sending questions about fundamental rights to the courts for determination, judicial review presents such issues as qualitatively differentiated from matters of 'ordinary politics'. Furthermore, the supremacy of the courts over parliament promotes the idea of the supremacy of law over politics; i.e. an understanding of politics as being limited within the bounds set by law. This causes problems for both the 'agency' and 'communal' values of democracy.

The distinction between the 'political' and the 'legal' casts doubt on Dworkin's claim that judicial review provides an arena of contestation that is 'directly connected to [citizens'] moral lives'.⁵¹ Sending an issue to be determined by the court elevates it to the level of constitutional law, and thereby marks its *difference* from everyday moral issues. A constitutional ruling presents itself not merely as one side in a moral-political quarrel, but as an authoritative statement of the permissible framework within which such quarrels are to be conducted. Such statements are buttressed by powerful symbolism. This is most obviously manifested in quasi-religious courtroom design and dress and the elaborate use of supplicant honorifics,⁵² but perhaps even more important is the symbolic force of the 'sacred text' of The Constitution.⁵³ This is not to say that judges are presented as infallible, or that constitutional decisions are placed beyond dispute. The point is that constitutional decisions may only be disputed in a certain register: not the register of everyday morality, or of political action, but the learned, mystifying register of constitutional law. Citizens may indeed 'participate, argumentatively, if they wish'⁵⁴ in judicial review, but they can only do

⁵¹ 'What is Equality?', at 29.

⁵² Note the US Supreme Court's description of itself on its own website: 'The Supreme Court Building: America's Temple of Justice' <<http://www.supremecourt.gov/visiting/TempleOfJustice.aspx>>. See also Murray J Edelman, *From Art to Politics: how artistic creations shape political conceptions* (Chicago: University of Chicago Press, 1995), chap 5; and Jerome Frank, 'The Cult of the Robe', in *Courts on Trial: myth and reality in American justice* (Princeton: Princeton University Press, 1950).

⁵³ See, for example, Sanford Levinson, *Constitutional Faith* (Princeton: Princeton University Press, 1988).

⁵⁴ 'What is Equality?', at 29.

so in the sacred language of law. (Furthermore, if they expect results they are best advised to hire an acolyte to speak for them.) The link between the outcome and the citizens' sense of moral agency is, I submit, accordingly diluted.

The image of politics bounded by law also threatens to weaken the 'communal value', i.e. the ability for citizens to see themselves as engaged in a joint project of self-government. When the most basic questions about the principles upon which the political community is built are presented as questions of law, then we should not be surprised if, as de Tocqueville put it, 'the spirit of the lawyer... infiltrates all society'.⁵⁵ Judicial review places courts at the pinnacle of our institutional hierarchy, and thus presents legal action as the most fundamental way in which citizens may interact with the political community. This, I suggest, will project a 'negative' conception of citizenship, according to which the characteristic capacity of the citizen is the ability to secure one's rights as against the state.⁵⁶ However, (and without wanting to downplay the importance of government in accordance with the law), 'rights-retrieval' is not the essence of democratic self-government.⁵⁷ If citizens are to view themselves as engaged in a joint project of self-government, they will need a 'positive' conception of citizenship, where the defining characteristic of a citizen is a voice in deciding the laws by which the community defines itself. My concern here is not just the instrumental one that a society of individualistic rights-claimers will be unstable without widespread civic virtue.⁵⁸ It is a deeper claim: if people's relationship with the state is defined in terms of a list of rights, the full value of self-government is not

⁵⁵ Alexis de Tocqueville, *Democracy in America* (HC Mansfield and D Winthrop ed and tr, Chicago: University of Chicago Press, 2000), Volume I, part 2, chap viii.

⁵⁶ The classical exposition of this conception of citizenship is TH Marshall, 'Citizenship and Social Class', in *Citizenship and Social Class and Other Essays* (Cambridge: Cambridge University Press, 1950). Marshall's idea that it is through enjoyment of an array liberal-democratic rights that individuals come to see themselves as full members of society bears more than a passing resemblance to Dworkin's account of the 'communal value'.

⁵⁷ See Taylor, 'Cross-Purposes', p 200-2.

⁵⁸ For arguments along these lines see Stephen Macedo, *Liberal Virtues: citizenship, virtue and community in liberal constitutionalism* (Oxford: Clarendon Press, 1990); William A Galston, *Liberal Purposes: goods, virtues and diversity in the liberal state* (Cambridge: Cambridge University Press, 1991); and Richard Dagger, *Civic Virtues: rights, citizenship and republican liberalism* (Oxford: Oxford University Press, 1997).

available to them. A claim of right is an action taken *against* the community; people can only be self-governing insofar as they conceive of themselves as acting *through* the community.⁵⁹ By elevating legal action to the highest form of citizen-participation, judicial review celebrates individual rights-retrieval at the expense of more collaborative forms of political engagement. It therefore threatens the ability of citizens to view themselves as a self-governing political community.

4.5 Legislature as Symbol: the focal point of the practice of democracy

I argued in the previous chapter that a plebiscitary democracy cannot do justice to the complex, dynamic and collective nature of judgment-formation, and that it is therefore only capable of respecting citizens as ‘simple weighers’ and not as ‘strong evaluators’. To really respect individuals as moral agents, the connection between individual agency and the community’s political decisions cannot merely be an aggregative one. Instead the process must involve some deliberative engagement, as this is the only way to acknowledge respectfully the various *judgments* of citizens who hold differing opinions. This is fundamentally different from – indeed, it is inconsistent with – the idea that any particular individual should have any particular degree of causal impact on the final decision reached.

Dworkin is, of course, critical of aggregative conceptions of democracy. Of his own conception, he says this:

‘It denies that it is a defining goal of democracy that collective decisions always or normally be those that a majority or plurality of citizens would favour if fully informed and rational. It takes the defining aim of democracy to be a different one: that collective decisions be made by political institutions

⁵⁹ I do not, however, go so far as to say that ‘the life of the active citizen is the highest life available to us’ (Will Kymlicka, *Contemporary Political Philosophy: an introduction* (2nd edn, Oxford: Clarendon Press, 2002), p 294). Kymlicka wins a pyrrhic victory over ‘civic republicanism’ by presenting it as relying either on an instrumental conception of citizenship (and thus collapsing into ‘liberalism’) or a comprehensive conception of the good life (and thus placing an implausible intrinsic value on political participation) (*ibid.*, p 294-9). My claim is not about what makes an individual human life go well, all things considered, it is about the kind of relationship that must pertain between citizens in order to make available a particular kind of value that they enjoy by virtue of membership in a democratic community.

whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect.⁶⁰

I agree: democracy is not identified by an 'input-based' test of statistical equality of impact, nor an 'output-based' test of majority support for laws. The question is whether (or, more accurately, to what extent) citizens govern themselves collectively through a process that respects each of them as free and equal moral agents. This is not a question that can be answered by statistical data: it is an interpretive question, one which can only be answered by venturing an opinion as to the symbolic meaning and value of political processes.

Given Dworkin's apparently unequivocal rejection of majoritarianism, however, we may well ask why, when appraising institutions, he takes as his default starting position statistical equality of impact. He is happy, of course, to depart from equality of impact so long as such a departure does not signify contempt for or disregard of any group within the community. But if democracy does not demand majoritarianism, even as a theoretical ideal, then why should statistical equality feature even as a starting-point? It is as if, after expressly rejecting the majoritarian conception of democracy, Dworkin is unable completely to escape its grasp.⁶¹

I find this feature of Dworkin's theory curious. The reason for it, I think, is that Dworkin does not follow through with his own interpretive methodology. After appreciating that a normative study of democracy must take the form of an interpretation of a practice, he takes an incredibly narrow view of what that practice consists of. In his discussion of the 'symbolic' value of democracy, Dworkin focuses his attention on elections; indeed, he goes as far as to equate the symbolic value with the assertion of equality inherent in a one-person-one-vote electoral system. After

⁶⁰ Ronald Dworkin, *Freedom's Law: the moral reading of the American constitution* (Cambridge: Harvard University Press, 1996), p 17.

⁶¹ There seems to be a parallel here with Dworkin's early treatment of utilitarianism in 'Why Bakke has no Case', *New York Review of Books*, 11 October 1977, p11: despite criticising utilitarianism for ignoring individual rights, Dworkin seemed to rely on a background utilitarian conception of the common good. For criticism, see Michael J Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982), p 135-47.

identifying this positive symbolic value of elections, Dworkin then treats the symbolic significance of all departures from majoritarianism in purely negative terms, asking only whether they detract from the equality that equal voting rights establish. By focusing so squarely on the symbolic value of *elections*, Dworkin fails to consider whether other parts of the democratic process have a positive symbolic significance.⁶² The benefits secured by departures from plebiscitarianism – representative government, judicial review, and so on – are treated as merely instrumental. He fails to entertain the possibility that non-plebiscitary forms of government might noninstrumentally express respect for citizens' moral agency. Dworkin's attempt at a constructive interpretation of democracy in fact only constructively interprets the practice of voting.

The narrow scope of Dworkin's interpretation leads him to adopt a 'vote-centric'⁶³ view of democratic politics which seems better suited to aggregative theories of democracy than to his own 'partnership conception'. Dworkin presents legislatures as 'the battleground of power politics',⁶⁴ with the primary function of aggregating private interests so that decisions on 'choice-sensitive' issues are made in a manner roughly corresponding to the preferences of the majority⁶⁵ and a secondary, negative

⁶² In places Dworkin has suggested a positive noninstrumental expressive value for judicial review. For example:

'[Judicial review] calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice. I do not call that religion or prophesy. I call it law.' (Ronald Dworkin, 'The Forum of Principle' (1981) 56 *New York University Law Review* 469, at 518 (footnotes omitted))

Claims like this, however, dropped out of his later work, perhaps following accusations that he was presenting a 'rosy' picture of courts not matched by his 'cynical' picture of legislatures (see, for example, Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999), p 31-2). In any event, Dworkin fails to consider whether representative government may have any positive noninstrumental significance.

⁶³ Here I use the terminology of Kymlicka, who contrasts 'vote-centric' theories of democracy with 'talk-centric' theories (*Contemporary Political Philosophy*, p 290-1).

⁶⁴ 'The Forum of Principle', at 518.

⁶⁵ 'What is Equality?', at 23-8.

function of guarding against 'dangerous swings in public opinion'.⁶⁶ This model of the legislature is familiar from those 'interest group' theorists (mostly based in the US) who have viewed democratic politics as consisting mainly of a clash between competing self-interested groups.⁶⁷ But the model fails on both interpretative dimensions: as an account of modern democracy it is neither descriptively realistic nor normatively desirable.

Descriptively speaking, as Waldron has pointed out, the supposed inability of elected representatives to engage responsibly with matters of principle has been exaggerated. Waldron gives the example of the UK Parliament in the 1960s debating controversial moral issues such as abortion, homosexuality, capital punishment, obscenity and prostitution.⁶⁸ The Parliament passed a raft of liberalising legislation, often against the wishes of the majority of the public, following reasoned (and reasonable) debates on the matters of moral and political principle involved (without, Waldron adds, the distraction of 'issues about interpretive technique, or issues about precedent or jurisdiction or other legalisms'⁶⁹). Although legislatures clearly do not always act in such a responsible way, such examples show that they are *capable* of acting as fora of principle, at least some of the time.

Waldron's anecdotal observations gain support from the findings of more systematic studies showing that 'interest group theory' has under-appreciated the level of interaction between legislative debate and individual political beliefs: far from merely giving expression to pre-existing public views, the reasons given by legislators in support of (or against) government policy help shape the political principles that are held by ordinary voters.⁷⁰ Here legislatures are aided by their distinctive institutional

⁶⁶ *Justice for Hedgehogs*, p 394.

⁶⁷ For an overview, see Andrew McFarland, 'Interest Group Theory', in Louis Sandy Maisel et al (eds.), *The Oxford Handbook of American Political Parties and Interest Groups* (Oxford: Oxford University Press, 2010).

⁶⁸ Jeremy Waldron, 'Legislating with Integrity' (2003) 72 *Fordham Law Review* 373, at 388-94.

⁶⁹ *Ibid.*, at 393.

⁷⁰ See, for example, Arthur Maas, *Congress and the Common Good* (New York: Basic Books, 1983) (in the US); and Philip Norton, *Parliament in British Politics* (2nd edn, Basingstoke: Palgrave Macmillan, 2013) (in the UK).

features: their large numbers of members and non-specialised function allow them to provide a forum for nonexpert deliberation involving inputs from a wide variety of perspectives. Legislative debates are not (like court proceedings) detached from pre-existing public opinion, but nor do they merely reflect it mimetically. Legislative debate provides an opportunity for public opinion to be *refined*, to be given more specific content and to be brought to bear on detailed issues which require more time and attention than ordinary citizens are able to give.

In order to understand the normative shortcomings of interest group theory, it is important to note a distinction between merely widespread or general opinion, on one hand, and a truly *public opinion*, on the other.⁷¹ While general opinion may be simply inherited from preceding generations, or passively absorbed by the recipients of propaganda, public opinion is the product of active reflection and discussion. Public opinion can only arise where there exists a common space of discussion that allows people to share thoughts, beliefs and arguments without ever meeting in person, or even communicating with one another directly. This requires citizens to have a certain self-conception: they must understand themselves as taking part in a discursive process that is oriented towards a common resolution. This is qualitatively different to a group of people who just happen to be talking and forming opinions about the same thing. Public opinion is irreducibly shared, rather than merely convergent, opinion.

The 'communal value' of democracy – the idea that the laws are created by the collective agency of the people – relies entirely on the existence of a public opinion as opposed to merely general opinions. We can only view ourselves as a self-governing community if we see political power as answerable not simply to widely-held opinions about the general welfare but to a public opinion which is the common property of us all. The notion that our disagreements over particular issues take place

⁷¹ Here I follow Taylor, 'Liberal Politics and the Public Sphere', in *Philosophical Arguments*, p 260-5. See also Habermas, 'Popular Sovereignty as Procedure', in *Between Facts and Norms*, which I discuss at §5.1.3, below.

within the context of a broader shared fabric prevents them from threatening our sense of common enterprise. As Warner has put it: 'It silently transforms the ideal of a social order free from conflictual debate into an ideal of debate free of social conflict.'⁷²

What I want to suggest, then, is that had Dworkin taken seriously the task of constructively interpreting the practice of representative government, he would not have seen the value of the legislative assembly (negatively) as an instrumentally valuable reflection of/brake on *majority* opinion, but rather (positively) as reflecting a commitment to the idea that government ought to be steered by *public* opinion. Public opinion cannot be equated with the opinions that happen to be held by the majority of citizens and its content cannot be ascertained by empirical inquiry, opinion polls, or referendums. It is the opinion that arises when people, understanding themselves as a community that shares some common purposes, engage in a reflective and critical debate. For public opinion to be *democratic*, every group and class of citizen must be given a genuine hearing so as to be able to have a real impact on the debate (we can contrast the eighteenth century 'republic of letters'). Such a debate is the ideal towards which legislative debates aspire, and is implicit both in the procedures for the composition and conduct of legislatures and in the role that legislatures play in the popular imagination.

By reaching decisions through a process of public debate, legislative assemblies respect citizens' moral/political agency in such a way as to recognise that the relevant faculty is not the will but the capacity for judgment. A voluntaristic conception of democracy will be concerned with respecting *majority* opinion since, as I argued in chapter three, wills are qualitatively equal.⁷³ But a conception of democracy based on respect for judgment, recognising the latter's essentially collective and diachronic nature, will ground itself in a concern for *public* opinion. The practice of legislation by

⁷² Michael Warner, *The Letters of the Republic: publication and the public sphere in eighteenth century America* (Cambridge: Harvard University Press, 1990), p 46.

⁷³ See p 63-4, above.

assembly represents a commitment to the kind of public, reasoned debate that is the lifeblood of political judgment. It therefore has a certain distinctive, noninstrumental value.

By representing inclusive and reasoned elaboration of a public opinion that is oriented towards a common good, legislatures can promote the communal value of democracy, i.e. the idea that the political community is collectively self-governing. Legislatures can also promote the agency value, by serving as the target of participation that connects the politically active citizen with the procedure by which significant political decisions are made. Taken individually, each citizen has a representative (or group of representatives) to whom she may make political arguments and expect a considered response.⁷⁴ In its individualised nature, this mode of participation has something in common with participation as a 'citizen-claimant' in a judicial review action, though it does not require the petitioner to speak the language of law, or to assert an individual right. However, the legislature is also the focal point of political action of an irreducibly collective kind, namely demonstrations and protests. As Norton points out, the continued relevance of Parliament in UK politics is shown by the fact that demonstrations against particular measures are held, not outside a particular ministry, but outside Parliament.⁷⁵ This behaviour cannot be explained in straightforwardly instrumental terms as trying to influence those who hold the levers of power, since, although Parliament of course has the power to make significant changes to government legislation, in practice it is extremely rare that it does so. The phenomena of protests outside Parliament only make sense when we take a broader perspective. Parliament is understood to be the focus for political activity and thus the proper place for attempts to garner public attention to a political cause. The aim is not simply to get MPs to act in the way that the demonstrators want, but to 'send a message' both to government and to the wider public. Parliament thus

⁷⁴ Again, I am using 'expect' in a normative, not a descriptive sense, see p 34, n 41, above.

⁷⁵ Norton, *Parliament in British Politics*, p 261. See also Rob Boggatt, *Pressure Groups Today* (Manchester: Manchester University Press, 1995), chap 7.

provides a 'dignified site' for interaction between citizens and the state.⁷⁶ Even when it is perceived to be unjust, unrepresentative, even cynically self-serving, and even when its members are considered merely puppets of political parties and commercial interests, Parliament is seen as the proper venue for (attempts at) popular sovereignty. Its symbolic status at the heart of democracy runs deep. If we view it merely as an instrumental guardian against 'dangerous swings in public opinion', we miss its true significance.

4.6 Why Idealise Legislatures?

I am not so naïve as to suppose that the above describes how real-life legislatures always operate. Legislators do not tend to come from all sections of society, they are predominantly white,⁷⁷ male⁷⁸ and upper-middle class.⁷⁹ They do not generally spend

⁷⁶ See John Parkinson, *Democracy and Public Space: the physical sites of democratic performance* (Oxford: Oxford University Press, 2012), p 94.

⁷⁷ The underrepresentation of ethnic minorities is a recurring trend in economically developed countries. Examples include Canada (19.1% of the population as a whole is non-white, 9.4% of legislators are non-white); France (12.6%, 1.56%); the Netherlands (11.1%, 5.3%); New Zealand (33.4%, 22.8%); Sweden (13.3%, 10.9%); the UK (12.9%, 4.2%); and the US (36.3%, 22.8%). (See Didier Ruedin, 'Ethnic Groups in National Legislatures' (2012) Harvard Dataverse <<http://hdl.handle.net/1902.1/17476>>.)

⁷⁸ Data collected by the Inter-Parliamentary Union shows that only 22.2% of parliamentarians worldwide are women (Inter-Parliamentary Union, 'Women in National Parliaments' (2015) <<http://www.ipu.org/wmn-e/world.htm>>).

⁷⁹ In the UK, over a third of MPs have attended fee-paying schools, compared with 9% of the population as a whole; 27% of MPs have an Oxbridge background, compared with 0.8% of the population as a whole (House of Commons Library, 'Social Background of MPs', Briefing Paper SN1528 (2010); Social Mobility and Child Poverty Commission, *Elitist Britain?* (2014)). In the US, the median net worth of members of Congress is \$1.5 million, roughly nineteen times the median net worth of Americans in general; the alumni of 13 prestigious universities constitute about 15% of the House of Representatives, but less than 1% of the population as a whole; and only 20% of legislators grew up in working-class homes, compared with 65% of the population as a whole (Nicholas Carnes, 'Does the Numerical Underrepresentation of the Working Class in Congress Matter?' (2012) XXXVII Legislative Studies Quarterly 5; and *White Collar Government: the hidden role of class in economic policy making* (Chicago: The University of Chicago Press, 2013), p 4-8). Across the EU fewer than 4% of legislators are drawn from the ranks of blue collar workers, a figure which has been in steady decline since the 1950s (Heinrich Best, 'New Challenges, New Elites? Changes in the recruitment and career patterns of European representative elites', in Masamichi Sasaki (ed), *Elites: new comparative perspectives*).

their time debating a representative selection of viewpoints on their merits, and all too often devote their time debating only two positions – ‘government policy good’ versus ‘government policy bad – picking sides solely according to what party they belong to. The demands of the common good are often out-trumped by the interests of a few swing voters in marginal constituencies. A convenient scapegoat can be worth a thousand convincing arguments. It can, I admit, be difficult at times to see how any of this respects citizens as intelligent moral agents. Furthermore, the formation of public opinion is not an egalitarian, inclusive, deliberative process; it is distorted, right at its centre, by powerful media interests who often quite deliberately oversimplify, trivialise and mislead with the aim not so much to persuade the public to agree with them as to dissuade them from thinking at all. In light of all of this, is there any point in constructing an idealised account of legislatures?

With respect to a given legislature it may well be the case that, if its shortcomings are sufficiently acute, it will utterly fail to provide any noninstrumental good. The best we could say about it then would be that it provides a compromise between the symbolic value of equal vote and the practical need for quality of outcome (assuming it achieved even that). We would then have little reason to suppose that its decisions necessarily had any greater democratic quality than the decisions of a constitutional court; they might even have less.

It is not my aim here to assess the operation of existing legislatures; any such assessment would need to be highly context-sensitive and involve a degree of empirical analysis beyond the scope of this thesis. I would like to suggest, however, that, despite some rather acute flaws, the way in which legislative assemblies operate in modern western democracies is premised upon the idea that, according to our dominant constitutional imaginary they are at least *supposed* to be arenas for reasoned deliberation, representative of society as a whole and firmly grounded in a reflective and critical public opinion. We overlook a vital aspect of our practice – our interpretation of our political institutions is wanting – if we do not recognise these internal virtues of legislatures.

So I do not deny that a version of Dworkin's argument might succeed as a piece of nonideal theory, intended for particular contingent circumstances. Dworkin, however, does not develop his argument in these terms. His defence of judicial review is presented as an ideal constitutional theory, an interpretation that portrays the practice of democracy in its best light. As such, it fails, since it overlooks much of the significance of the central institution in modern democracy, the representative legislature. In a sense, Dworkin is guilty of not taking his own methodology far enough: he does not portray legislatures in their best light, and thus misses the distinctive role that they play in the democratic ideal. This failing has potentially more than merely theoretical consequences. As Dworkin himself says: 'Interpretation folds back into the practice, altering its shape, and the new shape encourages further interpretation, so the practice changes dramatically; though each step is interpretive of what the last achieved.'⁸⁰ If so, then interpretations of democracy that, consciously or otherwise, do not require the legislature to function as a deliberative and representative assembly run the risk of becoming self-fulfilling prophecies.

4.6 Conclusion

It is a great virtue of Dworkin's theory of democracy that it is premised on an account of political community that does not portray citizens either (implausibly) as having consented to political authority or as mere passive beneficiaries (or victims) of state action. We determine the nature and constituency of a political community not by examining who can be said to have tacitly consented or who has been empirically affected by political decisions, but through a process of constructive interpretation that is sensitive to the point or value that we take political communities to serve. We should remember that special relationships – like family, friendship and citizenship – do not exist as brute facts: they can only be understood when we have a grasp of their significance to the lives of those who are party to them. Political communities

⁸⁰ *Law's Empire*, p 48.

must therefore be interpreted 'from the inside', i.e. from the point of view of someone who shares in the background understandings that lend them meaning.

Although Dworkin talks of the 'inputs' and 'outputs' of a democratic system, he should not be taken to endorse the 'black box' view that takes political values as exogenous to the institutions with which they engage. By including 'participatory consequences' as part of his 'dependent' conception of democracy, Dworkin recognises the noninstrumental role that political practice plays in constituting political value: what amounts to 'insult' or 'respect' depends upon shared understandings which afford significance to particular features of our practice. And with his 'symbolic', 'agency' and 'communal' values, Dworkin identifies important normative characteristics of democracy: it recognises citizens as equals; it is inherently practical and social; and it enables members of the political community to view themselves as collectively self-governing. Democratic citizens thus share an irreducibly social good which cannot be reduced to mutual benefit.

When it comes to institutionalising his theory, however, Dworkin adopts a curious starting-point: arithmetical equality of impact between voters. While this may be a reasonable starting-point for a theory of *elections*, it provides an overly 'vote-centric' perspective from which to examine democracy as a whole, better suited to aggregative theories of democracy than to his own 'partnership conception'. It is as if, after expressly rejecting the majoritarian conception of democracy, Dworkin is unable completely to escape its grasp. The effect of this is that Dworkin ends up viewing any departures from plebiscitarianism as bearing instrumental value only. Yet representative assemblies, constitutional courts and so on are not merely practical expedients to improve the quality of our political decisions, they are institutions that occupy particular places in our constitutional imaginaries. As well as being decision-making mechanisms, they are cultural symbols that condense many references into a single affective field, with courts representing the panoply of meanings associated with 'law' and legislatures roughly representing 'politics'. Our constitutional

imaginaries frame not only the decision-processes, but also the very subject-matter and meaning of the decisions that fall to be made.

I have argued that the distinction between the 'political' and the 'legal' casts doubt on Dworkin's claim that judicial review provides an arena of contestation that is 'directly connected to [citizens'] moral lives'.⁸¹ Judicial review may dilute the link between decision and citizens' sense of moral agency, and threaten the ability of citizens to view themselves as a self-governing political community. Legislatures, on the other hand, are not merely majoritarian institutions, but provide a forum for nonexpert deliberation involving inputs from a wide variety of perspectives. When they function well, they symbolise a commitment to government in accordance with a critically-reflective public opinion.

I develop these claims further in chapter six. First, however, reflection upon Dworkin's failure to recognise the centrality of the legislature in the democratic process should lead us to consider the deliberative democratic theory of Jürgen Habermas. Habermas expressly recognises that the heart of democracy lies 'in the interplay between, on one hand, the parliamentary will-formation institutionalised in legal procedures and programmed to reach decisions, and, on the other hand, political opinion-building in informal circles of political communication'.⁸² Yet judicial review still forms part of his theory. How does he reconcile the democratic centrality of the legislature with an institution that seems to grant superiority to the judiciary? And is his reasoning persuasive? These questions are the subject of the next chapter.

⁸¹ 'What is Equality?', at 29.

⁸² Jürgen Habermas, *Between Facts and Norms*, p 275.

5. Habermas: reason, relationships and representation

In chapters three and four I have argued for two claims about the nature of democracy. Firstly, democracy presupposes a *collective subject*, that is to say, a 'we' capable of acting jointly, without which the idea of self-government is incoherent. Secondly, democracy must respect the capacity of citizens to render normative political *judgments*, rather than merely their capacities to *will*.

If these claims are true, then a theory of democracy will need to account for the following. Firstly, how do democratic citizens come to view themselves as a collective subject? Clearly the means by which this occurs must be compatible with democratic values: an unreflectively traditional society, or a herd of brainwashed drones, may engage in collective action, but these are not democratic communities. Secondly, how can the judgments of citizens on moral and other normative political matters make its way into the content of the law? If there is no link between the content of the law and citizens' judgments, then surely democracy fails to respect the latter.

Habermas has put forward a complex theory of democracy according to which the answer to both of these questions is 'through the communicative use of reason'. Through practical deliberation with one another in the public sphere, citizens (1) come to recognise one another as equal members of a self-governing political community, and (2) form a 'communicative power' that binds the administrative power of the state apparatus to their collectively produced will. Habermas' approach to both questions shows an awareness of the dynamic nature of democracy that is not always present in Waldron's and Dworkin's work. When he comes to apply his theory to the question of judicial review, however, he fails to pay adequate attention to the symbolic dimension of constitutional design.

In the first section of this chapter I conduct my own reconstruction of Habermas' position. I then argue, in section two, that Habermas shows a lack of concern for the ethical significance of political relationships. Such relationships cannot be explained purely in terms of the communicative use of reason, since they depend upon largely

unarticulated, shared background assumptions. Habermas' focus on rational processes of communicative action therefore appears excessively narrow. A constitutional design is not merely a mechanism for translating the communicative power of citizens into the administrative power of government: it also tells us something about the kind of association that a political community is. When it comes to questions of institutional design, our constitutional imaginaries must play an important role.

In the third section I reflect on the fact that there will always be an irreducible gap between ideal consensus following uninhibited communicative action and any actual decision reached in imperfect real world procedures. A 'cut' must be made in the process of deliberation, and the timing of and place in which this cut is made will be decided by a particular individual or body who thereby enjoys a certain freedom from the communicative process. The idea of representation, I suggest, is necessary to maintain the link between communicatively-acting citizens and particular political decisions. The 'cut' is not arbitrary insofar as it is made by a person or institution that speaks for the self-governing political community as a whole. This need for decision-makers to represent the people gives rise to a particular concern about judicial review, since in the modern popular imagination it is the legislature, and not the courts, that is seen as the institution that represents the self-governing people. There is therefore a risk that judicially-enforced constitutional norms will be seen as detached from the process of ordinary political deliberation, and thus appear as a set of side-constraints imposed by an epistemic elite.

5.1 Habermas' Rational Reconstruction of Democracy

5.1.1 The Jurisgenerative Potential of Communicative Power

The starting-point of Habermas' theory of democracy is an essentially Kantian account of the legal form as presupposing equal rights that abstract from citizens' capacity for moral autonomy and from their individual needs and wishes.¹ However,

¹ Jürgen Habermas, *Between Facts and Norms*, p 111-2.

Habermas criticises Kant for subordinating the notion of collective self-determination to the universal principle of moral right, or, in Habermas' terms, for prioritising *private autonomy* over *public autonomy*.² Habermas claims that we must instead appreciate that these two principles are in fact mutually dependent upon one another.³ The basic thought here is that both forms of autonomy should be understood as an expression of the modern conception of a person as a free and equal moral citizen. This status entails both an entitlement to rights to individual freedom and rights to participate in the process of political will-formation; neither can take priority. As Habermas puts it: 'the scope of citizens' public autonomy is not restricted by natural or moral rights just waiting to be put into effect, nor is the individual's private autonomy merely instrumentalized for the purpose of popular sovereignty'.⁴

Habermas postulates a system of rights intended to secure for each person individual freedom and equal participation in the legislative process.⁵ These rights are divided into five categories. The first three represent the private autonomy that Habermas infers from the form of law itself. These are:

1. Rights to the greatest possible measure of equal individual liberties.
2. Rights associated with the status of membership in a political community.
3. Rights to legal protection.

A fourth category of rights is necessary to allow legal subjects to view themselves as authors of the legal order:

4. Rights to equal opportunities to participate in processes of opinion- and will-formation in which citizens exercise their political autonomy and through which they generate legitimate law.

Finally, a fifth category of rights is necessary for the effective enjoyment of the other rights:

5. Rights to the provision of basic living conditions.

² *Ibid.*, p 120-1.

³ *Ibid.*, p 121-2.

⁴ *Ibid.*, p 128.

⁵ *Ibid.*, p 122-3.

The key thing to note about Habermas' conception of the basic rights is that they function only as 'unsaturated placeholders', lacking in specific content.⁶ It is only through citizens' exercise of their political autonomy (i.e. rights in category 4) that these abstract rights can be interpreted and their meaning developed. Were it otherwise, citizens would not be able to view themselves as authors of the law to which they are subject. In Habermas' theory, rights without democratic political participation would have no shape, while democratic political participation without a system of rights would be a subject without an object. We can see then, that Habermas has a dynamic conception of democracy. As he puts it: 'every constitution is a living project that can *endure* only as an ongoing interpretation continually carried forward at all levels of the production of law'.⁷

Of course, the idea that basic rights function as unsaturated placeholders to be filled by citizens' exercise of political autonomy does not in itself answer the question of *how* citizens' judgment can work its way into the content of the law. His answer to this further question involves conceptualising democratic politics as a form of *communicative action*: the free and open exchange of reasons between citizens who are committed to reaching an agreement that is acceptable to all.⁸ Taking inspiration from Arendt's distinction between 'power' and 'violence',⁹ Habermas calls the motivational force of this communicative action *communicative power*: 'the potential of a *common will* formed in noncoercive communication'.¹⁰ Through democratic social and political processes, communicative power is converted into the 'administrative' power that is implemented by government.¹¹

Habermas sets out a 'two track' account of democratic processes, according to which informal communication in the public sphere ('weak publics') provides a close-to-the-ground and unregulated arena for detecting new problems, while formal political

⁶ *Ibid.*, p 126.

⁷ *Ibid.*, p 129 (emphasis in original).

⁸ *Ibid.*, p 144-54.

⁹ See, in particular, Arendt, *On Violence*.

¹⁰ *Between Facts and Norms*, p 147 (emphasis in original).

¹¹ *Ibid.*, p 150.

processes ('strong publics') provide institutionally regulated ways to assess the acceptability and viability of various ideas and, of course, to make binding decisions.¹² Habermas describes the interaction between formal decision-making bodies and informal civil society as a 'sluice' through which communicative power flows from the 'periphery' of the democratic political process to its 'center'.¹³ The legislature must 'remain anchored in the informal streams of communication emerging from public spheres that are open to political parties, associations and citizens'.¹⁴ To this end, legislatures should provide the broadest possible spectrum of perspectives, be informed by active political debates in society, and be designed so that the better arguments are more likely to be those that prevail. Parliamentarians should view themselves as the 'organized midpoint or focus of the society-wide circulation of informal communication'.¹⁵

Of course, real-world processes of discourse can only approximate the ideal of consensus following uninhibited communicative action between free and equal citizens. We cannot expect universal agreement in real-world discourse, where we need unambiguous and binding decisions to be made in a timely manner. Habermas accordingly recognises that we will need to resort to majority-vote, as 'a caesura in an ongoing discussion'.¹⁶ We should therefore always consider the outcome of any actual decision-making process to be only *provisionally* justified, liable to be revised as a result of future argument or new information.

¹² *Ibid.*, p 304-8.

¹³ *Ibid.*, p 356.

¹⁴ *Ibid.*, p 171.

¹⁵ *Ibid.*, p 182.

¹⁶ *Ibid.*, p 179. Note that Habermas' conception of deliberative democracy cannot be adequately characterised in Rawls' terminology as either 'imperfectly procedural' or 'purely procedural' (Rawls, *A Theory of Justice*, p 74-5), since although the decisive criterion for the validity of a legal norm is the procedure through which it was enacted, a valid norm is not thereby insulated from critique, and the question of what constitutes the best practicable approximation of ideal speech conditions is itself always potentially up for debate (see, for example, William Rehg and James Bohman, 'Discourse and Democracy: the formal and informal bases of legitimacy in Habermas' *Factizität und Geltung*' (1996) 4 *Journal of Political Philosophy* 79 and Stefan Rummens, 'Democratic Deliberation as the Open-Ended Construction of Justice' (2007) 20 *Ratio Juris* 335).

We can view Habermas' theory of democracy as based on the idea of the flow of *reasons*: reasons flow from the communicative action of citizens engaging in political deliberation in the public sphere, through legislative processes in representative assemblies, and into the content of the law itself. Clearly, this process is not supposed to be rational in a noumenal sense: Habermas does not claim that the rationality of discourse eliminates the contingency of the context of the particular interests and values of the particular people concerned. Indeed, as Rummens points out, it is the contingency of such particularity that makes deliberation necessary; if people did not have a variety of interests and value-orientations, a 'monological' approach to reason would suffice.¹⁷ The contingency that makes deliberation necessary also renders the outcomes of deliberation fallible and temporary, so that there is an irreducible gap between any actual decision and the regulative idea of an ideal consensus. From this perspective, *any* decision, not just a majority one, is 'a caesura in an ongoing deliberation'.

5.1.2 Constitutional Patriotism

The question of how democratic citizens are to come to identify themselves as a collective subject highlights an internal tension in the concept of democracy. On one hand, in opposing the distinction between rulers and ruled, democracy is clearly premised upon a sense of equality. This seems to call for inclusivity, perhaps even cosmopolitanism. On the other hand, democracy is supposed to provide self-government, not of each individual taken separately, but of the whole of the citizenry in common. Citizens who dissent from this or that political decision can only be expected to accept that they are nevertheless part of a larger self-governing community if they have a sense that they *belong* to the community. And this seems to call for a particularistic identity, such that might threaten to generate exclusion of those who do not conform to a certain national self-image. This tension gives rise to

¹⁷ Stefan Rummens, 'Democratic Deliberation as the Open-Ended Construction of Justice' (2007) 20 *Ratio Juris* 335, at 345-6; 'Deliberation Interrupted: confronting Jürgen Habermas with Claude Lefort' (2008) 34 *Philosophy and Social Criticism* 383, at 402.

the potential for what Taylor has called 'democratic exclusion'.¹⁸ Democratic exclusion can take the form of the straightforward denial of citizenship and/or political rights to certain classes of people, but it might also take place through more subtle, less overt means. People who are granted formal rights might yet still not quite find themselves to be insiders in the practice of democracy. The common identity might not quite be capable of encompassing all of those who have legal rights to participate, perhaps because its boundaries are drawn along ethnic, cultural or linguistic lines, or perhaps because it stipulates a certain way of life which certain members of society are simply unable to accept.

Habermas argues that the threat of democratic exclusion can be avoided without losing the sense of collective identity by the development of 'an abstract patriotism that no longer refer[s] to a concrete whole of a nation but to abstract procedures and principles'.¹⁹ Historically, nationalism and democracy have common origins, which Habermas traces back to the French Revolution.²⁰ Whereas in ancient and medieval thought, the *natio* was seen as a prepolitical entity, in early modernity the nation became a constitutive feature of the political identity of the citizens of a democratic polity. When it did so, it made possible a new mode of legitimation based on a new, more abstract form of social integration. Democratic participation generated a new level of legally mediated solidarity via the status of citizenship. This led to a 'double coding' of citizenship, with the result that the legal status defined in terms of equal rights also implied membership in a culturally-defined community.²¹ However, Habermas argues, the fact there is a social-psychological connection between citizenship and national identity does not mean that the two are linked at the

¹⁸ Charles Taylor, 'Democratic Exclusion', in Alan Cairns et al (eds.), *Citizenship, Diversity and Pluralism: Canadian and comparative perspectives* (Montreal: McGill-Queen's University Press, 1999).

¹⁹ Jürgen Habermas, 'Historical Consciousness and Post-Traditional Identity', in *The New Conservatism: cultural criticism and the historians' debate* (SW Nichol森 ed and tr, Cambridge: Polity Press, 1994), p 258.

²⁰ See Jürgen Habermas, 'Citizenship and National Identity', p 490-515, at 491-500; and 'The European Nation-State', in *The Inclusion of the Other: studies in political theory* (C Cronin and P De Geiff ed and tr, Cambridge: MIT Press, 1998).

²¹ 'The European Nation-State', p 113.

conceptual level. Given the dangerous potential, and troubled history, of the idea of an 'organic' ethnocultural nation, Habermas concludes: 'The lesson to be learned from this history is obvious. The nation-state must renounce the ambivalent potential that once propelled it.'²²

Despite his opposition to nationalism, however, Habermas recognises the necessity that democratic citizens be able to view themselves as acting in concert, or as he puts it, that the political community be 'settled in the "we" perspective of active self-determination'.²³ But he denies that this needs to be rooted in a shared national identity. Instead, he argues, the democratic process can *itself* serve as a guarantor for the social integration of an increasingly diverse society, with a commitment to the common good maintained by a shared liberal political culture. As each national culture develops a distinctive interpretation of constitutional principles in light of its own national history, he says, citizens can come to be bound together by a 'constitutional patriotism', through which universalistic principles are situated 'in the horizon of the history of a nation'.²⁴

It is important to bear in mind the link between Habermas' conception of constitutional patriotism and his more general theory that democracy should be understood as a form of communicative action. As Markell has noted, Habermas is sometimes interpreted as if he is pursuing what Markell calls the 'strategy of redirection', according to which liberal constitutional principles become the object of affective attachment, as a *replacement* for a concrete ethnonational community.²⁵ However, this interpretation overlooks Habermas' dynamic conception of the system of basic rights as 'a living project that can *endure* only as an ongoing interpretation continually carried forward at all levels of the production of law'.²⁶ Constitutional rights can therefore not be thought of as a concrete object that can serve as the basis

²² *Ibid.*, p 117

²³ 'Citizenship and National Identity', p 499.

²⁴ *Ibid.*, p 496.

²⁵ Patchen Markell, 'Making Affect Safe for Democracy? On "Constitutional Patriotism"' (2000) 28 *Political Theory* 38, at 39.

²⁶ See p 104, n 7, above.

of a 'civic national' identification. Rather, we should interpret Habermas as seeing constitutional patriotism as flowing from the integrative force of communicative power.

Habermas is perhaps partly to blame for the misinterpretation that Markell identifies, since in his writings on constitutional patriotism he is not explicit about the link with communicative power. He has, however, affirmed Günther's useful elaboration of this connection.²⁷ Günther describes communicative power as the motivational force which flows from the 'reflexive identification and confirmation of those who have factually accepted a validity claim'.²⁸ According to Günther, where participants in discourse each accept a validity claim for shared reasons, each will become aware that the other expects them to be motivated to act accordingly. This gives rise to what Günther calls a 'singular action community', constituted by the illocutionary force of shared reasons.²⁹ When each member of such a community recognises the community as such and positively identifies with it, Günther argues, the illocutionary community is transformed into a social community of persons of who view themselves as acting *together*. We can thus see that, with the idea of communicative power, Habermas and Günther attempt to link citizens' communicative use of reason both to the content of the law and to the dynamic definition of the political community as a collective subject.

Habermas thus goes some way to remedying a defect of Dworkin's account of democracy that I highlighted in the previous chapter. I criticised Dworkin for underestimating the effect that political institutions have on the way in which citizens view the practice of democracy, their own role in it, and the nature of their relationships with other participants. Habermas, on the other hand, is acutely aware

²⁷ Klaus Günther, 'Communicative Freedom, Communicative Power, and Jurisgenesis', in Michel Rosenfeld and Andrew Arato (eds.), *Habermas on Law and Democracy: critical exchanges* (Berkeley: University of California Press, 1998). In his 'Reply to Symposium Participants', Habermas says: 'There is nothing I can add to Klaus Günther's exemplary analysis...' (*ibid.*, p 381)

²⁸ *Ibid.*, p 247.

²⁹ *Ibid.*, p 243.

of the impact that democratic processes can have on individuals' understandings of themselves as citizens. He recognises that the practice of democracy itself plays a key role in orienting citizens toward one another as co-participants in the collective endeavour of self-government. While Dworkin paid scant attention to the source of citizens' democratic motivation, Habermas views such motivation as dynamically produced by the ongoing practice of democracy. It is through communicative engagement with one another in the public sphere, that is to say, through political debate and action, that individuals come to recognise one another as free and equal citizens.

5.1.3 Popular Sovereignty as Procedure

This dual role of the communicative use of reason as both binding the administrative power of the state to the collective will of the 'people' and binding citizens together as equal members of a political community provides what Habermas calls a 'procedural' conception of popular sovereignty, which he presents as an alternative to what he sees as the prevailing 'liberal' and 'republican' models.³⁰

The liberal model presents the democratic process as a succession of compromises between individuals and groups acting in the pursuit of their own interests.³¹ On this view, citizens are seen primarily as the bearers of negative rights (and particularly property rights), with the state as guardian of an essentially pre-political market society. Within this framework, citizens compete for control of governmental power, with the political authority of the sovereign people being exercised only through means of elections which determine which officials will wield political power. (This model essentially corresponds with the 'interest group' theories that I briefly criticised in chapter four.)³²

³⁰ Jürgen Habermas, 'Three Normative Models of Democracy' (1994) 1 Constellations 1.

³¹ *Ibid.*, at 1-2.

³² See p 92-3, above.

The republican model, on the other hand, equates democratic will-formation with the expression of an authentic ethico-political self-understanding.³³ Citizens are seen as co-authors of a collective form of life which finds its very embodiment in the state. The state is therefore presented as the institutionalisation of an ethical community, such that 'society would finally develop into a political totality'.³⁴ Here the authority of the sovereign people is not converted into a *pouvoir constitué* embodied in elected representatives, but remains grounded in citizens' practice of self-determination.

Habermas rejects both what he sees as the individualism of the liberal model and the holism of the republican model. He describes his discourse theory as looking to set a course between the two, according to which, although citizens are not portrayed as self-interested actors, the success of deliberative politics depends not on a citizenry acting as a collective whole but on the institutionalisation of democratic procedures.³⁵ These procedures – which include both formal processes and the free flow of information in the informal public sphere – ground a presumption that political decisions are reasonable and fair. Thus, Habermas believes, he can retain the republican ideal of popular sovereignty without submitting to a problematic holism:

'The "self" of the self-organizing legal community disappears in the subjectless forms of communication that regulate the flow of discursive opinion- and will-formation in such a way that their fallible results enjoy the presumption of being reasonable. This is not to denounce the intuition connected with the idea of popular sovereignty but to interpret it intersubjectively. Popular sovereignty, even if it becomes anonymous, retreats into democratic procedures and the legal implementation of their demanding communicative presuppositions only to make itself felt as communicatively generated power.'³⁶

³³ 'Three Normative Models of Democracy', at 2-3.

³⁴ *Ibid.*, at 7.

³⁵ *Ibid.*, p 6-10.

³⁶ *Between Facts and Norms*, p 301.

5.1.4 Reasons as Transmission-Belt: application discourse and the justification of judicial review

Now, if the political judgments of communicatively-acting citizens are to be more than merely theoretically present in the law, the impact of citizens' exercise of moral-political agency must filter through from the legislation of general norms in the representative assembly into adjudication by the courts in particular cases. Habermas seeks to secure this connection by arguing that, in adjudicating individual cases, courts should limit themselves to constructing a coherent ordering of the reasons already 'packaged in, and linked to, statutes';³⁷ they cannot look to justify norms that do not already find a place in the legal system. To explain what he means by this, Habermas adopts Günther's distinction between justification and application discourses. The purpose of a justification discourse (the province of the legislature) is to determine whether we should accept a given norm as *valid*, without examining any particular fact-scenario, by considering whether we would accept it in a paradigm case. In an application discourse (the province of the courts), on the other hand, we determine whether a valid norm is *appropriate* in light of all relevant features of a particular situation. The two forms of discourse are presented as completely distinct: 'What is relevant to justification is only the norm itself, independent of an application to a particular situation... The judgment on the appropriateness of a norm does not refer to all application situations, but always only to an individual one.'³⁸

Günther has argued that application discourse requires that courts construct a coherent ordering of all valid norms, and thus they must presuppose that all valid norms ultimately constitute an ideal coherent system.³⁹ Günther (and Habermas following him) thus largely adopts Dworkin's theory of law as integrity, according to which a judge, when faced with a case that is not covered by a clear legal rule, should seek to find a coherent interpretation of principles that would justify the institutional

³⁷ *Ibid.*, p 192.

³⁸ Klaus Günther, *The Sense of Appropriateness: application discourses in morality and law* (J Farrell tr, Albany: State University of New York Press, 1993), p 37-8.

³⁹ *Ibid.*, Part IV, chap 3.

history of the legal system.⁴⁰ However, Habermas criticises Dworkin's view that a judge should 'reach his own opinion'⁴¹ on the best interpretation of the legal sources, describing it as 'monological'.⁴² Instead, Habermas argues, the judge 'must conceive of her constructive interpretation fundamentally as a common undertaking supported by the public communication of citizens'.⁴³ Any judgment is thus provisional, 'a coherent order of reasons constructed *for the time being* and exposed to ongoing critique'.⁴⁴ As Günther has made clear, it is these reasons that are supposed to serve as the mode of transmission from the communicative power generated in democratic processes to the decision in the individual case.⁴⁵

Finally, we are able to come to Habermas' defence of judicial review. Now, given Habermas' stress on the importance of citizens' reasoned deliberations on political issues, it is not obvious that judicial review should be justified by his theory. If laws gain their legitimacy by being enacted in accordance with a procedure that links legislative outcomes with ongoing public discourses, then why shouldn't *all* legislative outcomes be thus legitimate? Habermas' answer is that judicial review may serve to ensure that the system of rights necessary to secure the legal form and the democratic procedure is maintained. In reviewing legislation for compliance with the basic rights, Habermas says, the judiciary are not usurping the legislative role so long as they restrict themselves to applying those constitutional norms which have been given their content by the exercise of citizens' public autonomy,⁴⁶ i.e. so long as they engage only in application discourse:

⁴⁰ See Ronald Dworkin, *Taking Rights Seriously*, chaps 2-4; *Law's Empire*, chap 7.

⁴¹ *Law's Empire*, p 264.

⁴² *Between Facts and Norms*, p 222.

⁴³ *Ibid*, p 224.

⁴⁴ *Ibid*, p 227 (emphasis in original).

⁴⁵ See Klaus Günther, 'Legal Adjudication and Democracy: some remarks on Dworkin and Habermas' (1995) 3 *European Journal of Philosophy* 36.

⁴⁶ See *Between Facts and Norms*, p 278-9; Jürgen Habermas, 'A Conversation About Questions of Political Theory', in René von Schomberg and Kenneth Baynes (eds.), *Discourse and Democracy: essays on Habermas's Between Facts and Norms* (Albany: State University of New York Press, 2002), p 256.

'The legitimating reasons available from the constitution are given to the constitutional court in advance from the perspective of the application of law – and not from the perspective of a legislation that elaborates and *develops* the system of rights in the pursuit of policies.'⁴⁷

This does not, however, entail judicial conservatism, indeed, according to Habermas, 'a rather bold constitutional adjudication is even required'.⁴⁸

Habermas does not *insist* that constitutional review must be undertaken by a court; he mentions, without considering in detail, other institutional possibilities, such as review by a special committee of the legislature. But he concludes that 'pragmatic and legal-political considerations seem to support the institutional locus of authority as it exists in the Federal Republic [of Germany] and the United States'.⁴⁹ The explanation for this is terse, but seems to be one of expertise: the judiciary specialises in the rational application of legal norms to particular situations and so naturally should be considered as the appropriate organ for the application of constitutional norms *vis-à-vis* ordinary statutes.

5.2 Citizenship as an Ethically Valuable Relationship

In the previous chapter I endorsed Dworkin's view that political communities are associative groupings analogous to families and groups of friends. The normative force of these relationships stems not from any voluntary act of will, but from their ethical value. Political communities, like families, friendship groups and so on, can (when they function well) enrich the lives of their members by allowing an extra dimension to their personhood. It is a constitutive feature of such groupings that members incur special obligations to one another: to be under such obligations is simply part of what it is to be, say, a friend, brother or citizen. Such a conception of political community is, I believe, compatible with a Habermasian conception of democracy – to say that a political community is ethically valuable is not to adopt the 'holist' view that straightforwardly equates democratic will-formation with the

⁴⁷ *Between Facts and Norms*, p 262.

⁴⁸ *Ibid.*, p 280.

⁴⁹ *Ibid.*, p 262.

expression of an authentic ethicopolitical self-understanding. However, in basing his defence of judicial review on 'practical and legal-political considerations', Habermas fails to take into account the symbolic effect that constitutional design can have on a political community. Despite the benefits that Habermas' theory of democracy has over Dworkin's, then, in his defence of judicial review he succumbs to a similar criticism. To bring this out, I shall discuss the idea that citizenship as an ethically valuable relationship in a little more detail, with a view to showing that it provides an attractive conception of political community. While Habermas' account of 'constitutional patriotism' might appear to be opposed to such a 'republican' notion, I argue that Habermas did not intend to rule out the idea that a nation's historical traditions might contain something of ethical value. In his defence of judicial review, however, Habermas focuses solely on the rational processes of communicative action, thus neglecting the symbolic significance that constitutional forms have in constituting the political community.

If my argument in chapter two is correct, then the ethical value of membership in a political community cannot conceptually be detached from the practice which constitutes such communities.⁵⁰ This may give rise to a worry, since our political practice ascribes membership of political communities – i.e. the status of citizenship – on the basis of straightforward matters of fact. The boundaries of political communities, and the criteria upon which membership thereof is determined, have been set through a historically contingent and seemingly morally arbitrary process. There is no *a priori* reason why someone born in San Diego should be a US citizen and someone born in Tijuana a Mexican, nor why birth in San Diego should be a sufficient condition for citizenship, but not birth in Santiago de Compostela, Sankt Jakob in Deferegggen, or St James' Park. It might seem problematic for such contingencies to have a decisive role in determining the crucial moral issue of the nature and extent of our political rights and responsibilities.

⁵⁰ See §2.1, above.

This worry might be ameliorated by reflecting on the fact that familial obligations are determined in a similar way. Not only does one not choose one's family, but the content of one's familial obligations are themselves determined by conventions that are historically contingent and socio-geographically local. In traditional Asian communities children owe deeper familial obligations, to a wider range of people than do those born into more individualist European or North American cultures. And in fact this is true of all obligation-generating associative groupings: what friends, business partners or trade union colleagues owe one another depends on conventions that might be very different in different places and different times. This *might* ameliorate the particular worry about political communities; but on the other hand, it might simply be thought to postpone the problem, with the doubt spreading from political to *all* associative obligations. For still the question arises: how can contingent historical facts create genuine duties?

If values arise in the context of practices, we must accept that contingencies of time and place will affect both the kinds of obligation that we are under and the nature of what we have to do to fulfil our obligations. Practices are historically contingent phenomena. However, practices do not give rise to obligations by simple fiat of convention. Associative duties are not created by the sheer fact that we find ourselves in certain relationships, but arise by virtue of the *value* of those relationships, and of the practices that sustain and are sustained by them. So although we may be in thrall to historical contingency, we do not collapse into brute subjectivism.⁵¹ The Mafioso who claims that he is under obligations to fellow *uomini d'onore* has fallen into error:

⁵¹ By 'subjectivism' I mean the view that moral/ethical matters are determined by the opinion of the relevant actor, so that X ought to ϕ iff X believes he ought to ϕ , A is good for X iff X believes that A is good for X, and so on. I prefer this term to the more commonly-used 'relativism', since my position is relativist in a sense: I claim that obligations and values are relative to the ethical life-world constituted by our various practices. It does not follow that no evaluative comparison may be made across different life-worlds; on the contrary, my argument relies on the claim that a life-world that lacked associative relationships would be ethically impoverished in comparison to our own.

the Mafia's lack of respect for human life renders it incapable of generating genuine associative duties.

I am relying, then, on a positive ethical claim: our statuses as family-members, friends, citizens, and so on constitute deep and important bonds to our fellow beings which enhance the quality of our lives. Furthermore, the fact that these bonds are non-voluntary adds to their profundity.⁵² As Hardimon puts it:

'The wish for a social world in which all roles were contractual [i.e. voluntary] reflects a failure to appreciate the dimension of human social life that we, following Hegel, could call "substantial": the ethical dimension constituted by deep and enduring, unchosen relationships. A life devoid of such attachments would be flatter, less full, less human than a life with such attachments. It would also be ethically impoverished: a form of life in which an important ethical dimension was lost.'⁵³

Although the idea that our obligations depend upon seemingly arbitrary matters of fact might seem unsatisfactory to the modern universalist temperament, we must recognise the truth in Geertz's memorable observation that 'man is an animal suspended in webs of significance he himself has spun'.⁵⁴ Practice establishes a 'vocabulary of behavior'⁵⁵ through which certain forms of action come to symbolise respect, concern, compassion, solidarity and so on, and others disrespect, aloofness, callousness, disloyalty, etc.. We would not be justified in acting as if this vocabulary simply did not exist. Dworkin gives the analogy of racial slurs:⁵⁶ a word may have a

⁵² It might seem odd to describe friendship as 'non-voluntary', but it is true: I cannot make someone my friend by an act of will; I can make a friend unintentionally.

⁵³ Michael O Hardimon, 'Role Obligations' (1994) 91 *Journal of Philosophy* 333, at 353. Hardimon says that 'role obligations... are not usefully thought of as a species of associative obligation... in Dworkin's sense of the term' (*ibid.*, at 335). I do not understand why he feels it necessary to make this distinction: this disclaimer aside, he seems (to me at least) to have in mind a very similar idea, and in fact the article can usefully be read as an elaboration of the Dworkinian view.

⁵⁴ Clifford Geertz, *The Interpretation of Cultures: selected essays* (rpt, London: Fontana Press, 1993), p 5.

⁵⁵ Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Belknap Press of Harvard University Press, 2011), p 315.

⁵⁶ *Justice for Hedgehogs*, p 315. Actually, I am not sure whether this is an analogy: it might better be seen as an application of the very same principle. But Dworkin describes it as such, and the matter is not too important for our purposes here.

literal meaning that is purely descriptive of skin colour or other physical characteristic and yet, by dint of use, have a figurative meaning which is derogatory and hateful. One cannot acquit oneself of responsibility for the insult caused by the use of such a term by pointing to the fact that the practice by which the derogatory meaning accrued was historically contingent and not of one's own choosing. Similarly, the fact that moving your elderly parents into a care home might not signify a lack of familial attachment in California does not exonerate you of such a charge if you are from Calcutta. The historical contingency of associative groupings is not a threat to the idea of associative obligation, since it is by virtue of historically contingent factors that such groupings gain their very ethical significance.

The 'substantial ethical life' of associative groupings might, however, come into strain with other values that we hold. Even in the case of the Mafioso we can observe a tension between genuine values. It would be a mistake to think of *Cosa Nostra*⁵⁷ simply as a kind of rational bureaucracy dedicated to the pursuit of profit through criminal means.⁵⁸ Rather it is, as Paoli has put it, a 'ritual brotherhood', grounded in an ethos of trust and solidarity in which acts of mutual assistance are carried out without the expectation of short-term reward.⁵⁹ For a *uomo d'onore*, Mafia membership is an identity-constituting allegiance, which overrides all other ties. Indeed, evidence from clinical psychologists working with former Mafia members suggests that those who have left the Mafia often suffer an identity crisis characterised by confusion and a lack of a sense of purpose in life.⁶⁰ So when a Mafioso is ordered to kill, there arises a conflict between the value of the life of the would-be victim and the value of the sense of community, dignity and purpose in life enjoyed by the would-be perpetrator. This

⁵⁷ This is the name by which members of the Sicilian Mafia refer to their organisation. Meaning 'our thing', it is itself indicative of the sense of community that pertains between members.

⁵⁸ This is the view that Donald R Cressey took of the American Mafia in *Theft of the Nation: the structure and operations of organized crime in America* (New York: Harper & Row, 1969).

⁵⁹ Letizia Paoli, *Mafia Brotherhoods: organized crime, Italian style* (Oxford: Oxford University Press, 2003), p 17.

⁶⁰ Girolamo Lo Verso and Gianluca Lo Coco, 'Working with Patients involved in the Mafia: considerations from Italian psychotherapy experiences' (2004) 21 *Psychoanalytic Psychology* 171.

is not to say that there is a conflict of *obligation*: as I said earlier, the gross immorality of the Mafia renders it incapable of being a source of genuine duties. It is clear what the Mafioso ought to do: he should repudiate the association even at great cost to himself. But there *is* a cost to himself: not just the obvious risk of reprisals, but the loss of a solidaristic commitment of great significance to his life.

Other cases of tension between associative commitment and other values will present more difficult moral dilemmas. Consider, for example, the case of a young Indian woman who has ambitions to travel to the city to go to university, but whose father wants her to marry a local man and stay in the village to raise his children. She might find a conflict between her sense of fidelity to her family, on one hand, and what she feels is commanded by her own self-respect, on the other. This is not like the Mafia case: we can suppose both that her family is a source of ethical enrichment to her and that it is capable of generating moral obligations (her father loves her, he is not profoundly immoral, he has her best interests at heart, and so on). It might be that the right thing for her to do is to go to university, but, if she does, she will have cause to regret any consequential damage done to her family. There is nothing to regret, on the other hand, in the damage caused to the Mafia when the former gangster takes the decision to turn in his accomplices.

A tension like this might amount to an out-and-out conflict of obligations: perhaps it is not possible for the woman to remain loyal to her family in a way that fully preserves her self-respect. It might, on the other hand, be possible to resolve the tension, if the woman is able to arrive at an attractive interpretation of her family obligations such that they do not forbid disobeying her father on this issue (or an attractive interpretation of self-respect such that acceding to her father's wishes does not violate it). As I highlighted in chapter two, constructive interpretation is largely a pursuit of coherence between our various value commitments. Although there is no *ex ante* guarantee that such a project will succeed, nor can we say from the start that an attempt is doomed to failure. An innovative re-interpretation of her family obligations – even if it is one that her father himself would never accept – might be

able to reconcile her sense of loyalty to the family with her decision to go to university.⁶¹

I think we should understand constitutional patriotism in this way: it is an attempt at a constructive interpretation of modern liberal democratic political communities so as to rescue them from the 'ambivalent potential' connected with the notion of the nation as a prepolitical cultural entity. While traditional interpretations have tended to support militarism, jingoism, racism even, Habermas believes that a 'voluntary nation of citizens'⁶² may justify the allegiance of citizen to state in terms amenable to contemporary multiculturalism, while still retaining compatibility with our 'substantial ethical life' that is tied up with the history, society and politics of existing nation-states.⁶³

Yet it is not clear exactly how much historical baggage Habermas would have us jettison. At times he talks as if acceptance of the legitimacy of the constitution could become the only source of political identity in modern democracies, displacing our historical traditions in their entirety.⁶⁴ But this would be to throw the baby out with the bathwater since, as I have argued, it is the very *non-voluntary* nature of citizenship that renders it such a deep and important ethical bond. The fact that membership of a political community is typically passed on as a matter of familial inheritance is indissolubly entwined with the deep significance that citizenship has as a constitutive aspect of identity.⁶⁵ *Jus sanguinis* is not simply a fact about how citizenship can be

⁶¹ Of course, this is not to say that there would still not be anything to regret in her decision to go to university: she might yet have cause to regret to pain her decision causes her father. But she would no longer view the decision as damaging to the *family*, i.e. the collective group of which she is a member.

⁶² 'The European Nation-State', p 131.

⁶³ See, for example, 'Historical Consciousness and Post-Traditional Identity', p 261:

'identification with one's own form of life and tradition is *overlaid* with a patriotism that has become more abstract' (emphasis added).

⁶⁴ E.g.: 'The consensus fought for and achieved in an association of free and equal persons ultimately rests only on the unity of a *procedure* to which all consent.' ('Citizenship and National Identity', at 496 (emphasis in original).)

⁶⁵ On constitutive components of identity see Charles Taylor, *Sources of the Self: the making of the modern identity* (Cambridge: Cambridge University Press, 1989), chap 2.

acquired, it tells us something about the kind of association that a political community is. The inheritance of citizenship marks political community off as a non-optional association, projecting the idea that it is closer to family than to, say, a business partnership.⁶⁶ It points to, and at the same time nourishes, an affective bond between citizens, a bond which cannot be reduced to shared acceptance of the legitimacy of the constitution. Furthermore, it is important that people who do not accept the legitimacy of the constitution may nevertheless be considered full members of the political community. Habermas would not make acceptance of the legitimacy of the constitution a criterion for the enjoyment of political rights; he would not, for example, deprive philosophical anarchists of the vote. Yet in the absence of the idea of a relationship that transcends the acceptance of particular validity claims, the source of such political rights seems mysterious.

In fact I do not believe that Habermas intends for the historical traditions of nation-states to be completely replaced by a rational acceptance of the liberal constitution. It is worth remembering that Habermas developed his conception of constitutional patriotism in the context of the so-called 'historians' debate' about how historians, politicians and the general public in Germany ought to treat the Nazi period.⁶⁷ Habermas objected to the work of certain historians, such as Ernst Nolte, who

⁶⁶ This connection was noted by Burke: 'By a constitutional policy, working after the pattern of nature, we receive, we hold, we transmit our government and our privileges in the same manner in which we enjoy and transmit our property and our lives. The institutions of policy, the goods of fortune, the gifts of providence are handed down to us, and from us, in the same course and order... Thus, by preserving the method of nature in the conduct of the state, in what we improve we are never wholly new; in what we retain we are never wholly obsolete. By adhering in this manner and on those principles to our forefathers, we are guided not by the superstition of antiquarians, but by the spirit of philosophic analogy. In this choice of inheritance we have given to our frame of polity the image of a relation in blood, binding up the constitution of our country with our dearest domestic ties, adopting our fundamental laws into the bosom of our family affections, keeping inseparable and cherishing with the warmth of all their combined and mutually reflected charities our state, our hearths, our sepulchres, and our altars.' (Edmund Burke, *Reflections on the Revolution in France* (Oxford: Oxford University Press, 1999), p 33-4.) Note that there is no ethnic essentialism here: Burke, a Protestant who described himself as an 'Englishman', was born in Dublin to a Catholic mother.

⁶⁷ See Jan-Werner Müller, *Constitutional Patriotism* (Princeton: Princeton University Press, 2009), p 26-32.

contested the uniqueness of Nazi crimes.⁶⁸ Habermas saw such work as an attempt to put the horrors of the holocaust to one side in order to create a new, positive German identity grounded in a sanitised version of German history. He argued that a failure to properly face up to the past would make social cohesion impossible: 'If we were to brush aside this [Nazi] legacy, our fellow Jewish citizens and the sons, daughters and grandchildren of all those who were murdered would feel themselves unable to breathe in our country.'⁶⁹ He thus reached to the idea of constitutional patriotism not to discard all references to history, but as a means by which Germans might develop a coherent national identity out of the ruins of the Third Reich. History must be neither forgotten nor left unexamined, but rather 'appropriated critically',⁷⁰ so that 'the overcoming of fascism forms the *particular historical perspective* from which a post-national identity centered on the universalist principles of the rule of law and democracy understands itself'.⁷¹

So when Habermas says that 'the commitment of constitutional patriotism... must nourish itself on compatible cultural legacies',⁷² I do not think that Habermas believes that this is important simply for reasons of empirical stability, i.e. that citizens will only be committed to upholding a liberal constitution if it somehow resonates with their national culture. Rather, the embeddedness of the constitution in existing 'cultural legacies' ensures what we might call 'stability for the right reasons':⁷³ a constitutional patriotism situated 'in the horizon of the history of a nation'⁷⁴ will be able to command citizens' allegiance precisely because it preserves what is valuable about the nation's historical traditions. The integrative force of communicative action

⁶⁸ Habermas took particular exception to a feuilleton piece: Ernst Nolte, 'Vergangenheit, die nicht vergehen will', *Frankfurter Allgemeine Zeitung*, 6 June 1986.

⁶⁹ Jürgen Habermas, 'On the Public Use of History', in *The New Conservatism*, p 234.

⁷⁰ *Ibid.*

⁷¹ Jürgen Habermas, 'The Limits of Neo-Historicism' (1996) 22 *Philosophy and Social Criticism* 1, at 33 (emphasis in original).

⁷² 'Historical Consciousness and Post-Traditional Identity', p 173.

⁷³ I take the phrase from John Rawls, *Political Liberalism* (paperback edn, New York: Columbia University Press, 1996), p xxxix.

⁷⁴ See p 108, n 24, above.

builds on, and does not entirely displace, traditional affective identifications.⁷⁵ We therefore do not need to take Habermas to be making the implausible claim that ‘post-traditional’ citizens would, could or should be linked with one another *solely* by shared acceptance of the validity of the constitution.

However, once we make explicit the idea that affective identification with the polity is not merely an attitude which usefully serves stability, but is an aspect of a relationship which has noninstrumental ethical value, then Habermas’ focus on rational processes of communicative action starts to look excessively narrow. If we take the latter as building on, and not replacing, the ‘webs of significance’ in which existing understandings of citizenship are intertwined, then, when it comes to institutional design, we should expect the symbolic aspects of political institutions – our constitutional imaginaries – to play an important role. We need to consider what impact different institutional systems might have on the way in which citizens conceive of their relationships with one another, and thus on the ‘substantial ethical life’ of the political community. Habermas neglects this dimension of institutional design when he takes the question of judicial review to be answered by ‘pragmatic and legal-political considerations’.⁷⁶ In fact *symbolic considerations* are relevant to questions of institutional structure just as they are to the question of how citizenship can be acquired. A constitutional design is not merely a mechanism for translating the communicative power of citizens into the administrative power of government, it also projects an ethical message: it tells us something about the kind of association that a political community is.

At this point the arguments I made in the previous chapter about the symbolic status of courts and legislatures become pertinent: judicial review presents issues of fundamental rights as qualitatively different from, and in a sense superior to, matters of ‘ordinary politics’; legislative supremacy presents them as part-and-parcel of the collective self-government of the democratic people. I develop some of these claims

⁷⁵ See p 120, n 63, above.

⁷⁶ See p 114, n 49, above.

further in chapter six; I shall not repeat them now. Before moving on, however, I would like to highlight the importance of another constitutional imaginary, without which Habermas' theory would fail to make sense. This is the concept of *representation*: the idea that an individual or body may speak and act on another's behalf. This notion cannot be reduced to purely rational terms, but to overlook it would be to miss a crucial element of the practice of democracy. Its significance raises a particular problem for judicial review.

5.3 Who makes the Cut? The importance of representation

As I discussed above, there is an irreducible gap between ideal consensus following uninhibited communicative action and any actual decision reached in imperfect real world procedures.⁷⁷ No particular political decision can be determined, in advance, as it were, by communicative rationality. A cut needs to be made in the process of deliberation, and the timing of and place in which this cut is made will be decided by a particular individual or body who thereby enjoys a certain freedom from the communicative process. Of course this freedom is limited: the decision-maker will have to defend the particular decision reached with reasons which will then potentially be subject to public critique. But the liability of the decision-maker to give an account of its decision, or, indeed, the decision's 'presumption of being reasonable',⁷⁸ does not alter the fact that, had the decision been taken by a different individual or body, it could have been taken differently. The decision does not simply bubble up naturally from the 'circulation of informal communication';⁷⁹ it is made by a particular person or group of people, who will have particular interests, value-orientations, virtues and vices.

Although this fact might sound obvious, it is somewhat obscured by the aquatic metaphors that Habermas invokes to describe the democratic process. Habermas

⁷⁷ See p 106, above.

⁷⁸ See p 111, n 36, above.

⁷⁹ See p 105, n 15, above.

talks of communicative power 'circulating'⁸⁰ and passing through 'sluices',⁸¹ and of individual contributions to the process being 'dissolved'.⁸² Such terms might be appropriate for a sociological model of a democratic process from the point of view of an external observer, but they hardly project a suitable image when seen from the perspective of the engaged citizen. It is not difficult to see how a citizen might have concerns about a democratic process presented in such terms. The imagery of 'circulation' seems overly mechanistic, as if it were an attempt to camouflage the fact that the outcomes of the democratic process are in fact decisions by flesh-and-blood human beings. And from the point of view of an individual who doubts whether the democratic process really serves to respect his status as a moral agent, it would seem to reinforce, not ameliorate, the worry to suggest that his individual contribution to the political debate had been 'dissolved'.

Here I believe that we need the idea of representation to supplement the incompleteness of communicative rationality. My suggestion is that the 'cut' in the process of deliberation is not damaging to democracy insofar as it is made by a person or institution that represents the people as a self-governing political community.

Representation is one of our most basic, and most important, constitutional imaginaries. More fundamental than democracy, it is a key constituent component of modern politics. It is the idea of representation that enables us to make sense of 'the king's two bodies', i.e. the distinction between political rulers acting in a public capacity (acting *as* political rulers) and those same persons acting in a private capacity. It is part of the essence of the modern idea of politics that rulers rule *in the name of the people*; this is what enables us to distinguish *political* rule from, say, exercises of proprietary or contractual right, or the brute assertion of power.⁸³

⁸⁰ *Between Facts and Norms*, p 136, 183, 185.

⁸¹ *Ibid.*, p 170, 327.

⁸² 'Popular Sovereignty as Procedure', in *Between Facts and Norms*, p 463-90, at p 486.

⁸³ It is on this basis that Hont has claimed that the Jacobin attack on representation was 'aimed at reversing the whole development of *modern* popular sovereignty' (Istvan Hont, 'The Permanent Crisis of a Divided Mankind: "contemporary crisis of the nation state" in historical perspective' (1994) *XLII Political Studies* 166, at 204, emphasis in original).

The need for a cut in the process of deliberation highlights the fact that representation is an inevitable feature of political government. Since political decisions must stand in the name of the people, but no particular decision can be unproblematically attributed to 'the people' as a whole, then every political decision amounts to a claim to *represent* the people.⁸⁴ This is true regardless of the way in which the decision is made, whether it be an edict of an absolute monarch, legislation passed by assembly or the result of a popular referendum.

While the basic notion of political representation is not tied to the idea of democracy as such, since the latter part of the seventeenth century a distinctively democratic form of representation has developed. A democratic representative represents the people in a special sense that goes beyond the basic political notion of ruling in the name of the people: she represents the people *as a self-governing community*. I shall develop this idea further in the next chapter;⁸⁵ here I shall restrict myself to indicating how Habermas' pragmatic treatment of the question of judicial review underestimates the significance of this idea of democratic representation.

As Pitkin has shown, the relationship between a representative and those represented is a multi-faceted one.⁸⁶ A representative *acts for* the represented, in that the former's actions are, in a sense, ascribed to the latter; Pitkin calls this the 'substantive' aspect. A representative also *stands for* the represented, i.e. it is 'the recipient or object of feelings, expressions of feeling, or actions intended for what it represents'.⁸⁷ It is important to note that the relationship here is not one of correspondence: a representative stands for the represented *in a particular respect*, where the precise nature of this 'standing for' is determined by symbolic cues and requires a shared understanding as to how these cues are supposed to be read. These cues might take the shape of a kind of resemblance between representative and represented (a diverse

⁸⁴ See Lindahl, 'Sovereignty and Representation in the European Union'.

⁸⁵ See §6.2, below.

⁸⁶ See generally Hanna Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967).

⁸⁷ *Ibid.*, p 99.

Parliament might represent the diversity of the citizenry), but they need not (a monarch might represent the unity of the people). The former Pitkin calls 'descriptive' representation and the latter 'symbolic' representation.⁸⁸ Finally, a representative must somehow be *authorised* to act on the behalf of the represented, and liable to be held to *account*; these aspects of representation Pitkin labels 'formalistic'.⁸⁹

Habermas' focus on processes of argumentation restricts his attention to the 'substantive' dimension of 'acting for'. He believes that democratic concerns about judicial review can be overcome so long as judges adopt an appropriately democratic *self-understanding*, according to which she 'conceive[s] of her constructive interpretation fundamentally as a common undertaking supported by the public communication of citizens'.⁹⁰ Yet while such a shift in judicial attitude might improve the deliberative quality of decisions, this does not resolve the overall question of whether the relationship between courts and citizens can be characterised as one of *democratic representation* adequate to allow courts to 'close the gap' between deliberation and decision in such a way that retains citizens' political autonomy. To understand whether courts really can perform this representative role, we must also look at what courts 'stand for', from where they are taken to derive their authorisation, and to what they are liable to account.

Of course, constitutional courts function as representatives in the basic political sense; we have no difficulty distinguishing between court rulings and assertions of brute power. Nevertheless, courts do not represent the *demos* in the same way as do legislative assemblies. Courts owe their popular legitimation to their association with a combination of political independence and technical expertise. Courts are seen as

⁸⁸ I think Pitkin errs in considering 'descriptive' and 'symbolic' representation as two distinct categories of representation (*ibid.*, chaps 5-6). The idea of a representative 'standing for' the represented always relies on symbolism; the fact that such symbolism might consist of a descriptive resemblance means that 'descriptive "standing for"' is best seen as a subcategory of 'symbolic "standing for"'.
⁸⁹ Perhaps misleadingly, since authorisation need not be formally given, but might rather be (taken to be) the result of acquiescence.
⁹⁰ See p 113, n 43, above.

non-political venues, and judges as a kind of *expert*.⁹¹ In this respect they present a direct contrast to legislatures. Legislatures are seen as political venues *par excellence*, and legislators as generalists rather than experts, whose authorisation comes, of course, from the fact they are elected.⁹² This difference maps onto a distinction between two different senses of representation in the modern popular imagination: while legislatures represent the political agency of the people, courts represent the impartial rationality of the law.

The idea that courts represent an abstract, rational 'law' is a deeply ingrained part of our constitutional imaginary; it cannot simply be shifted at will, and certainly cannot be changed unilaterally by judges adopting a different approach to adjudication. It is reinforced by a host of symbolically significant factors: the legalistic language of judicial decisions, the orientation to authoritative texts, the status of judges as a professional class, even the architecture of court buildings, courtroom design, judicial dress, the use of honorifics and so on. And while some of these features of courts might permit of relative simple change, others are more deeply intertwined with our very idea of what a court is. Although one is of course free to propose novel institutions that do not easily match up with our existing categories of constitutional form, if one opts to make use of an existing institution (for 'pragmatic and legal-political considerations', or otherwise), one must accept that that institution will come charged with some existing meaning. Courts *stand for*, derive their *authority from*, and are *accountable to* not the self-governing people but the law. As such, they are poor candidates for the role of democratic representative.

It might be thought that the distinction that Habermas draws between the justification and the application of norms obviates the need for courts to function as democratic representatives. Where courts restrict themselves to the *application* of constitutional

⁹¹ See my discussion of the 'myth of legality' at §4.4, above.

⁹² Of course, legislators don't tend to be 'ordinary people', indeed, they are often seen as comprising an elite expert class of their own. But this is generally taken as problematic: a departure from the *proper role* of the legislature. 'Career politician' is a term of abuse; I've never heard anyone criticised for being a 'career judge'.

norms, then expecting them to represent the democratic citizenry in the way in which the legislature (the arena of *justification*) does might seem to be simply making the wrong comparison. The true analogy, the argument goes, is to the application of ordinary legal norms, and therefore to the everyday work of the courts in resolving legal disputes. Just as ordinary adjudication is not a task for democratic representatives, nor is constitutional adjudication.

However, this argument overlooks a pertinent disanalogy between ordinary adjudication and constitutional judicial review. In ordinary adjudication, in applying legislative norms the court renders an interpretation of the law which the legislature is free to reject by passing a fresh enactment. The continuing political agency of the self-governing people is represented by the ability of the legislature to amend the law. In the case of judicial review, on the other hand, in applying constitutional norms the court renders an interpretation which is deliberately designed to be relatively immune to change by ordinary politics. The court therefore enjoys not only with the power to apply constitutional norms, but also the *Kompetenz-Kompetenz* to police the boundary between the application of existing norms and the justification of new ones. In the absence of any superior institution,⁹³ the court becomes the body responsible for 'making the cut' in any debate about the proper content of the constitution. It must therefore meet the burden of representing the ongoing political agency of the democratic people. If (as I have argued) it is unable to do so, then its standing as 'guardian of the constitution' will be a hindrance to democracy.

When it is recognised that the idea of representation is needed to supplement the incompleteness of communicative rationality, and that, in the modern concept of democracy, it is the legislature which is taken to represent the people as a whole, then we can see that judicial review poses a threat to popular sovereignty. There is a risk that raising judicially-interpreted constitutional norms to a higher symbolic plane

⁹³ Of course, we might think of a system in which there were a superior institution, for example there might be some kind of standing constituent assembly superior to both parliament and the courts. But in this thesis I am concerned only with the comparative merits of legislative versus judicial supremacy, not with potential alternative systems.

than the enactments of the principal representative body may represent a deliberate departure from the ongoing processes of public political debate, in favour of side-constraints imposed by an epistemic elite.

5.4 Conclusion

In chapters three and four I argued that Waldron's and Dworkin's respective contributions to the judicial review debate lack sufficient consideration of the arguments in favour of the representative legislature as a distinctive constitutional arrangement. To an extent, Habermas' account provides a much-needed change of focus. Habermas does not treat the legislature, even *arguendo*, as the best practical approximation of a plebiscite, but rather he views it as the 'organized midpoint or focus of the society-wide circulation of informal communication'.⁹⁴

Habermas' recognition of the central importance of the legislature is linked to his appreciation of the fact that political power does not lie, statically, in the hands of individuals, but rather is something which must be dynamically generated by citizens acting in concert. Habermas takes from Arendt the insight that concerted political action cannot take place in a vacuum, but requires structures to ensure that incipient energies do not simply dissipate. Representative processes thus cannot be seen simply as limiting or controlling the power of the self-governing people (protecting against 'dangerous swings in public opinion', as Dworkin puts it),⁹⁵ since it is only through such processes that political power is created. Political power is generated by citizens interacting with political institutions; institutional structure therefore affects not only the ends towards which political power is directed, but the very shape that that power takes in the first place.

However, Habermas' model of power being transmitted through a series of more or less rational communicative interactions fails to pay adequate attention to the symbolic significance of political structures. Citizen identity is forged through

⁹⁴ See p 105, n 15, above.

⁹⁵ *Justice for Hedgehogs*, p 393.

symbolic as well as through rational-communicative interactions. Our constitutional imaginaries imbue political institutions with meanings that cannot be captured in purely rational terms. As a consequence, different institutional systems will project different visions of the way in which citizens relate to one another and to the political community as a whole.

This is not yet an argument in favour of legislative supremacy; it is merely a flag noting some relevant considerations which appear thus far to have been overlooked. To make good my thesis, I need to develop a substantive account of the conception of self-government that I see as inherent within the modern idea of representative democracy. I believe that a system of government by representative assembly is capable of constituting a political community in such a way as to express respect for the capacity of citizens to render their own judgments on political matters. In the next chapter I provide a fuller account of why I believe this to be so, and attempt to explain why the democratic vision implicit within the practice of representative government may be threatened by a system of judicial review.

6. Synthesis: in defence of legislative supremacy

In chapters three to five I have proceeded negatively, by criticising what I see as the shortfalls in the attempts made by Waldron, Dworkin and Habermas to answer the question of judicial review. In this chapter I mount the positive claim that a constitution based on legislative supremacy is, *ceteris paribus*, democratically superior to one that embraces judicial review. I argue that the practice of legislation by a representative assembly can serve to help integrate citizens into a political community which respects each citizen as a moral agent, but that its ability to do so is undermined where a system of judicial review is in place.

The chapter is divided into three sections. The first looks to provide a little more detail on the noninstrumental value of democracy, a value I call 'political autonomy'. My claim here is not that this is a novel theory of democracy, in fact quite the opposite: I think it is an idea that unites Waldron, Dworkin and Habermas. As I see it, the value of political autonomy has two limbs. Firstly, democracy provides *self-government*: rule by the people as a whole. Secondly, democracy affords respect for citizens as equal moral agents. To illustrate the idea, I look to position this conception of political autonomy in relation to classic works in political theory, presenting it as an attempt at reconciliation between the theories of Rousseau and Kant.

In the second section, I argue that the practice of legislation by representative assembly is particularly valuable in promoting the good of political autonomy. Firstly, I draw upon a range of sources, from medieval conciliarist theory, through the classic accounts of Burke, Tocqueville and Mill, to contemporary writers interested in themes of inclusion and recognition of difference, to argue that a representative assembly can help link persons together into a collective agent. Secondly, I argue that a well-functioning representative process has non-instrumental value in that it pays respect to citizens' political judgments. I therefore argue that legislation is worthy of a deeper respect than would be the case if it were merely a compromise between equality of impact and quality of outcome.

In the final section I turn directly to the question of judicial review. I defend my concern with this issue against a recent argument by Allan that focusing on the merits and demerits of judicial review overlooks the way in which the judiciary are responsible for the protection of rights in both legislative supremacy and judicial review systems. Allan, I argue, misses the main thrust of this debate, which is primarily concerned with the *symbolic*, not the *empirical*, consequences of judicial review. A concern with the relative symbolic implications of legislative supremacy *vis-à-vis* judicial review requires us to shift our discussion to the more abstract terrain of constitutional imaginary. On this level I argue that, given the place that the judiciary hold in the popular imagination, placing the responsibility for policing the boundaries of the constitution into their hands will tend to promote a 'negative' conception of the constitution as a set of limits to political power, which carries with it inadequate versions of democratic agency and political community. Legislative supremacy, on the other hand, promotes a 'positive' conception of the constitution as a means of generating political power. Only the positive conception, I claim, is able to reconcile democracy with constitutionalism. I conclude by offering a reconstruction of the school of thought known as 'political constitutionalism', as espoused by the likes of Bellamy and Tomkins. Taken in its most persuasive light, I suggest, political constitutionalism should be seen as highlighting the link between, on one hand, an institutional design that gives the courts a prominent role in the resolution of constitutional disputes, and, on the other hand, the negative conception of constitution. Regardless of its empirical impact, judicial review symbolises a boundary being placed around the agency of the political community, thus undermining our commitment to the self-government that (I argue) affords citizens political autonomy. This gives us reason to support legislative supremacy.

6.1 Political Autonomy

6.1.1 The Noninstrumental Value of Democracy

While discussing the theories of Waldron, Dworkin and Habermas, I have stressed two crucial features of democracy. The first is the idea that democracy provides *self-*

government: rule by the people rather than rule by a particular individual or class. A necessary corollary of this view is that there must be some sense of who ‘the people’ are. As I put it in the introduction, a citizen who dissents from a political decision can only be expected to accept that he is nevertheless party to self-government if he has a sense that he belongs to a political community that transcends the particular decision he disagrees with.¹ In order to explain how this is possible, we need an account of our political practices that moves beyond viewing them as instruments for the resolution of particular disputes or the promotion of particular principles. Politics must be seen as a kind of collective action: the government of the community as a whole over itself.²

The second crucial feature of democracy is the respect that it affords citizens as equal moral agents. Implicit within the practice of democracy lies a particularly rich recognition of citizens’ capacity for making moral-political judgments. I contrasted this capacity with citizens’ capacity to will. While one can *choose* a course of action without any sense that it is choiceworthy, to make a *judgment* in favour of something is to evaluate it as worth pursuing. Democracy thus respects citizens not just as ‘simple weighers’ but as ‘strong evaluators’.³

I would now like to tie together some theoretical threads that have remained loose throughout the discussion so far. We can combine these two features of democracy – self-government and respect for moral agency – by identifying the noninstrumental value of democracy as *political autonomy*.

¹ See p 13-4, above.

² Note that I am using a very different sense of collective action than that employed by Shapiro in his ‘Shared Agency Thesis’, which states that the law is the product of the shared activity of legal officials engaged in a project of social planning (Scott Shapiro, *Legality* (Cambridge: Harvard University Press, 2011), p 204-9). Firstly, Shapiro is not attempting to provide an account of democratic self-government (and thus his Shared Agency Thesis restricts the class of participants to legal officials; he does not attempt to explain how citizens can be party to the making of the law). Secondly, Shapiro bases his account of collective action on Bratman’s theory of ‘shared cooperative activity’, according to which collective action is built up out of individuals’ meshing intentions. Such a reductivist account is unable to account for the ethical significance of collective action (see p 79, above).

³ I take this terminology from Charles Taylor, ‘What is Human Agency?’, in *Human Agency and Language* (Cambridge: Cambridge University Press, 1985), p 23.

One enjoys political autonomy when one authentically identifies as a member of a self-governing political community that respects one's status as a moral agent. I thus see political autonomy as arising from the successful resolution of the tension between unity and individuality. It avoids two forms of heteronomy that flow from distortion of the political community. On one hand, where the community disintegrates into an aggregation of discrete individuals, the law cannot be seen as the product of a collective subject: it is simply imposed by those who hold the levers of power. On the other hand, the community may become an oppressive totality that overwhelms each citizen's individuality, so that citizens are *governed by* but no longer *govern through* the community. To avoid heteronomy, then, the political community must be capable of acting collectively while still respecting each individual citizen as a moral agent in his or her own right.

While formulating political autonomy as the avoidance of particular forms of heteronomy is, I believe, an accurate way of setting out the challenge that would-be democratic communities face, we should not be deceived into thinking of political autonomy in purely negative terms. Political autonomy is not about preserving the autonomy that one would otherwise have enjoyed in a state of nature, it is a distinctive genus of autonomy which enriches the lives of individuals by allowing an extra dimension to their personhood: that of *citizen*, of *zoōn politikon*. It does not merely respect citizens' 'pre-political' capacity for moral judgment, but makes possible a deepening of that capacity, since the shift from reasoning on a purely individual level ('what ought I do?') to reasoning as a member of a collective subject ('what ought we do?') represents a broadening of one's moral horizons. Rousseau, in a characteristically expressive passage, put this point well:

'Although, in [the civil] state, he deprives himself of some advantages which he got from nature, he gains in return others so great, his faculties are so stimulated and developed, his ideas so extended, his feelings so ennobled, and his whole soul so uplifted, that, did not the abuses of this new condition often degrade him below that which he left, he would be bound to bless continually

the happy moment which took him from it for ever, and, instead of a stupid and unimaginative animal, made him an intelligent being and a man.’⁴

Note that this is not to denigrate other, non-political concepts of autonomy, such as Kantian moral autonomy, or the ‘ethical’ autonomy enjoyed by a person with an authentic conception of what the good life means for her.⁵ We are not, as the likes of Constant and Berlin would have us believe, forced to make a choice between ‘the liberty of the ancients’ and ‘the liberty of the moderns’.⁶ We need not settle for a single exhaustive definition of autonomy, we are capable of enjoying different forms of autonomy alongside one another.⁷ The important point to recognise is that political autonomy is a value in its own right: a democratic republic is a non-instrumental – and irreducibly social – good.

6.1.2 *The Rousseauian and Kantian Conceptions of Political Autonomy*

I have described political autonomy as arising from the successful resolution of the tension between unity and individuality. Resolving this tension is not a straightforward theoretical task, as can be illustrated by looking at the way in which leading political philosophers have grappled with the issue.

The idea that democracy secures political autonomy is a common theme in classic works of political theory. I have already mentioned Rousseau: it was political autonomy that he had in mind when he said that in an ideal republic each citizen ‘will obey himself alone, and remain as free as before’.⁸ In Rousseau’s model political

⁴ Rousseau, *The Social Contract*, Book I, chap viii.

⁵ For the former see Kant, *Grounding for the Metaphysics of Morals*, Part III; for a discussion of the latter see Lewis Hinchman, ‘Autonomy, Individuality, and Self-Determination’, in James Schmidt (ed.), *What is Enlightenment? Eighteenth-century answers and twentieth-century questions* (Berkeley, University California Press, 1996).

⁶ Benjamin Constant, ‘The Liberty of the Ancients compared with that of the Moderns’, in Ian Carter et al (eds.), *Freedom: a philosophical anthology* (Oxford: Blackwell, 2007); Isaiah Berlin, *Two Concepts of Liberty: an inaugural lecture delivered before the University of Oxford on 31 October, 1958* (Oxford: Clarendon Press, 1958).

⁷ For one way of distinguishing between different forms of autonomy without viewing them as mutually exclusive alternatives, see Rainer Forst, ‘Political Liberty’, in John Christman and Joel Anderson (eds.), *Autonomy and the Challenges to Liberalism: new essays* (Cambridge: Cambridge University Press, 2005).

⁸ Rousseau, *The Social Contract*, Book I, chap vi.

autonomy is secured by each citizen forming part of a collective sovereign that governs in accordance with the *general will*. Citizens are politically autonomous because they obey only a body of which they are a member and whose will is also their own will, so that 'each in giving himself to all gives himself to none'.⁹ On this account, the whole activity of legislation is essentially a means for expressing the general will, which itself is 'indestructible'¹⁰ and so exists quite apart from the uncertain outcome of particular votes. The general will should not be thought of as a kind of natural law detached from the minds of the citizens: Rousseau thought of the general will as a real, empirical will which citizens possess as a matter of psychological fact.¹¹ Nevertheless, Rousseau felt that the general will will only come to the fore, so as to find embodiment in legislation, under certain (somewhat demanding) conditions, and Rousseau's political theory should be seen as much as anything as an attempt to state what these conditions are. This is at heart a sociological thesis: that men will only truly unite and cooperate when the principles of *The Social Contract* are fulfilled.

However, the conditions that Rousseau sees as necessary for the political community to govern itself in accordance with the general will are not attractive. In *The Government of Poland*, the citizen is described as 'a mere cipher', having imbibed a love of his fatherland with his mother's milk.¹² Everything in the life of the citizen is designed to bring him to a state of identification with the *polis*: a nationalist education,¹³ a shared 'civic profession of faith',¹⁴ censorship of the arts,¹⁵ and the institution of community festivals in which 'the only pure joy is public joy'.¹⁶ As

⁹ *Ibid.*; see also Book II, chap iv.

¹⁰ *Ibid.*, Book IV, chap i.

¹¹ See Arthur M Melzer, *The Natural Goodness of Man: on the system of Rousseau's thought* (Chicago: University of Chicago Press, 1990), chap 9.

¹² Jean-Jacques Rousseau, *The Government of Poland* (Willmoore Kendall tr, Indianapolis: Hackett Publishing Company, 1985), p 19.

¹³ *The Government of Poland*, chap 4.

¹⁴ *The Social Contract*, Book IV, chap viii.

¹⁵ Jean-Jacques Rousseau, 'Letter to d'Alembert', in *Letter to d'Alembert and Writings for the Theater* (A Bloom et al tr and ed, Lebanon: University Press of New England, 2004).

¹⁶ *Ibid.*, p 351.

Kendall puts it in his introduction to *The Government of Poland*, Rousseau 'founds his political regime on a people who have been made more or less homogeneous through the inculcation of a national ethos'.¹⁷ The problem is clear: Rousseau does not attend to the second aspect of political autonomy. Rousseau's political community is cohesive and self-governing, but does not respect each individual as a moral agent in his own right.

Kant recognised this defect in Rousseau's theory and attempted to set it right. Kant shared with Rousseau the conviction that political autonomy was of the goal of a republican government, and, like Rousseau, saw the key to realising it in the generality and publicity of the law. Kant's republic would be governed by 'a public law that determines for everyone what is to be rightfully permitted or forbidden him', such a law being 'the act of a public will'.¹⁸ However, allegiance to the law is not to be guaranteed by inculcation of a particular ethos, but rather by the use of reason:

'In every commonwealth there must be obedience under the mechanism of the state constitution to coercive laws... but there must also be a *spirit of freedom*, since each, in what has to do with universal human duties, requires to be convinced by reason that this coercion is in conformity with right, lest he fall into contradiction to himself.'¹⁹

The law, by the employment of coercion, compels citizens to act in accordance with its dictates. But it does not compel citizens to believe that they are under a *moral* obligation to comply. Citizens are not externally compelled to reach this conclusion, but do so in the free exercise of their reason. So the law has a kind of dual existence. As a manifestation of external force, it does indeed coerce those who are disinclined to obey. But, from the point of view of pure practical reason, the obligation to obey

¹⁷ Willmoore Kendall, 'Introduction', in *The Government of Poland*, p xxxviii. See also Geraint Parry, 'Thinking One's Own Thoughts', in Robert Wokler (ed.), *Rousseau and Liberty* (Manchester: Manchester University Press, 1995).

¹⁸ Immanuel Kant, 'On the Common Saying: that may be correct in theory, but it is of no use in practice', in *Practical Philosophy* (MJ Gregor tr and ed, Cambridge: Cambridge University Press, 1996), 8:294 (emphasis in original). See also Immanuel Kant, *The Metaphysics of Morals* (MJ Gregor tr, Cambridge: Cambridge University Press, 1991), Part II.

¹⁹ *Ibid.*, 8:305.

the law is not an external dictate but a conclusion which citizens reach of their own accord.

The prerequisite for a citizen to be so 'convinced by reason' is the '*spirit of freedom*'. This entails not only the freedom to engage in inward reflection, but freedom of *communication*, since 'the same external constraint which deprives people of the freedom to *communicate* their thoughts in public also removes their freedom of *thought*'.²⁰ In marked contrast to Rousseau, Kant holds that one's judgments can only be truly free when they are made in the context of an enlightened public culture with generally shared standards of public reasoning.²¹ If we undermine the public use of reason by intolerance or indoctrination, then all uses of reason are ultimately in jeopardy. But where I am able to determine for myself the legitimacy of the legal regime on the basis of public standards of rational justification, then, Kant says: 'The law by virtue of which I regard myself as under obligation in every case proceeds from my own pure practical reason.'²² Therefore, Kant argues, in obeying the law citizens are following the commands of their own rational will, and so are politically autonomous.

Unlike Rousseau, however, Kant has little to say about the process of legislation. His theory is therefore problematic in its treatment of the first aspect of political autonomy. Kant does not give the citizen any reason for viewing himself as the member of a political community as collective agent, i.e. as joint author of the law. A Kantian citizen might enjoy a form of autonomy, in that he obeys the law not out of physical compulsion but out of a genuine appraisal that it is normatively binding, but this is not the full *political* autonomy which comes from being a member of a community that collectively decides on its ends and its terms of association. He may be a free moral agent, but he is not yet a self-governing citizen.

²⁰ Immanuel Kant, 'What is Orientation in Thinking?', in HS Reiss (ed), *Kant: Political Writings* (HB Nisbet tr, Cambridge: Cambridge University Press, 1991), p 247 (emphasis in original).

²¹ On this see Onora O'Neill, 'The Public Use of Reason', in *Constructions of Reason: explorations of Kant's practical philosophy* (Cambridge: Cambridge University Press, 1989).

²² Kant, *The Metaphysics of Morals*, 6:417-8.

Rawls took the Kantian view a step further, claiming not only that the public use of reason would be able to convince all of the *legitimacy* of the law, but that over time it would be possible for all citizens of a democratic society to come to share a conception of *justice* from which the law could be seen to flow. Rawls initially took the view that this conception of justice would be premised upon a shared acceptance of the ethical value of autonomy.²³ However, he later came to believe that citizens could not converge on this (or any) particular conception of the good without intolerable indoctrination (perhaps of the kind endorsed by Rousseau), and instead developed a conception of political autonomy that is 'freestanding' from ethical considerations. While retaining the view that citizens might come to share a conception of justice, in his later work this conception is the subject of an 'overlapping consensus' between individuals who endorse it for different reasons, i.e. from the perspectives of their own diverse ethical, religious or metaphysical doctrines.²⁴ In both the 'metaphysical' and the 'political' versions, Rawls viewed democratic citizens as self-governing because they abide by such terms of cooperation that they would give to themselves.²⁵

As a proportion of his voluminous work as a whole, Rawls paid relatively little attention to institutional matters. Unlike Kant, however, he did insist that the principle of equal liberty required that the constitution of a well-ordered society be democratic. Yet in Rawls' account democracy is of derivative value only, flowing from the principles of justice. Therefore, the constitution 'is to be framed so that, of all the feasible just arrangements, it is the one more likely than any other to result in a just and effective system of legislation'.²⁶ This lends Rawls' conception of political autonomy a paradoxical air, since political autonomy turns out to be realised in a system calibrated to generate consensus over a particular conception of justice. Although Rawls is surely right to say that a democratic constitution must aim at

²³ Rawls, *A Theory of Justice*, §78.

²⁴ John Rawls, *Political Liberalism* (paperback edn, New York: Columbia University Press, 1996), Lecture IV.

²⁵ *A Theory of Justice*, §85; *Political Liberalism*, Lecture II, §6.

²⁶ *A Theory of Justice*, §36.

justice,²⁷ it does not follow that it must aim at a particular *conception* of justice. The moral capacity to which democracy pays respect includes the capacity to make an evaluation between competing conceptions of justice. A political system does not fully respect this capacity if it is designed from the outset to favour one conception of justice over the others.²⁸

6.1.3 The Path towards Reconciliation

The three theorists whose work has been the subject of discussion in the preceding chapters can all be presented as engaged in attempts to resolve the opposition between the Rousseauian and the Kantian conceptions of political autonomy. This is most explicit with Habermas, who expressly presents his work as a reconciliation of the two schools of thought.²⁹ Yet Dworkin's attempt to 'integrate' individual and community,³⁰ and Waldron's intuition that a strongly individualist notion of liberal rights should be combined with an 'ascending' (as opposed to 'descending') model of authority,³¹ indicate close connections with the same project.

While Habermas' theory is a significant improvement upon the Rousseauian and Kantian views, it perhaps suffers from an excessive rationalism. In this respect (and perhaps surprisingly), Dworkin's methodology could usefully come to Habermas' aid, since it stresses attention to the shared background understandings that underlie our political values. However, despite the promise of his methodology, the use that Dworkin makes of our shared understandings is limited, since his interpretation is restricted to the symbolic significance of voting. In fact our constitutional imaginaries lend significance to a broader range of institutional phenomena, as Waldron's work on the 'dignity of legislation' makes clear.

²⁷ *Political Liberalism*, Lecture IX, §5.

²⁸ For a related criticism see Jürgen Habermas, 'Reconciliation through the Public Use of Reason: remarks on John Rawls's *Political Liberalism*' (1995) 92 *Journal of Philosophy* 109.

²⁹ Habermas, *Between Facts and Norms*, p 100-3.

³⁰ Ronald Dworkin, 'Liberal Community' (1989) 77 *California Law Review* 479, at 491-9.

³¹ Waldron, *Law and Disagreement*, p 56.

Even in the fairest decision-making system, most citizens will find it difficult to perceive the effect of their individual agency on the output side of politics. We need the idea of *representation* to fill the gap. The very idea of democratic government – indeed, the idea of any government that is not sheer domination – relies upon a non-rational (though not *irrational*) sense that those who make political decisions do so not as individuals but as representatives of the community as a whole. This creates a relationship between citizens and officials that transcends any particular issue or decision. However, not all possible senses of representation will signify democratic respect. The challenge is to find a form of relationship which enables decisions to be made in the name of the people as a whole, in such a way that is respectful to each individual citizen as a distinctive intellect in her own right. I believe that such a relationship can be found in our practice of legislation by representative assembly. Representative government can help integrate a pluralistic population into a community capable of collective self-government, while respecting individual citizens as agents capable of moral-political judgment.

6.2 The Value of Representation

6.2.1 The Integrative Function of Legislative Assemblies

The idea that a representative relationship can help link persons together into a collective agent pre-dates modern democracy. For instance, it played a prominent role in the debate between conciliarism and papalism in the medieval Catholic Church.³² Pope Innocent IV (1195-1254) had established the doctrine that cathedral chapters were *persona ficta*, whose collective agency was empowered by the fact that they had representatives (the bishops) who could act in their name. Without such representation they would be incapable of acting as a body in their own right. In challenging the authority of the Pope over that of the secular state, Marsilius of Padua (c.1275-c.1343) argued that those who represented a corporate agent must derive their authority from consent, to be found in the will of the *valentior pars*. During the Papal

³² See Mónica Brito Vieira and David Runciman, *Representation* (Cambridge: Polity Press, 2008), p 10-15.

Schism of 1378-1417, conciliarists looking to defend the authority of the Ecumenical Councils drew upon Marcilius' arguments, claiming that the will of the *valentior pars* was to be found in the Councils' decrees. Their papalist opponents countered in proto-Hobbesian vein by arguing that the unity of the church resulted from its subordination to a single head, that of the pope. It is worth noting that conciliarist arguments drew on formal, descriptive and symbolic aspects of the idea of representation: they claimed that the Councils were *authorised* by members of the Church by way of election, that, in its (relative) diversity, the Councils *resembled* the entire Christian community, and that the Council *symbolised* the essence of the wider Church.³³ While the Pope could also claim to represent the Church in the symbolic sense, his claim to formal authorisation was weak, and his claim to descriptive resemblance even weaker.

A similar development can be seen in the history of European parliaments. In parallel to the rise of the ecclesiastical conciliar movements, secular representative assemblies emerged all over Europe during the thirteenth and fourteenth centuries. Originally, these parliaments were instruments of royal authority, functioning to ensure that centralised decisions could be reliably translated to the localities. But, as time passed, members of parliament gained an increasing awareness of parliament as a body distinct from that of the crown, and a sense of a duty to refer back to their constituents before taking binding decisions. By the sixteenth century, in England at least, parliamentarians were claiming that Parliament was capable of speaking for the nation as a whole,³⁴ and this idea went on to form the basis of Parliament's claim against Charles I. Again the descriptive aspect of representation was invoked, although it was taken further by Parker, who claimed that Parliament is not simply a miniaturised, map-like replication of the people, but rather an improvement on the original, transforming the bulky and clumsy mass of the public into a manageable

³³ *Ibid.*, p 14.

³⁴ See Thomas Smith, *De Republica Anglorum* (M Dewar ed, Cambridge: Cambridge University Press, 1982); and the speeches of Sir Edward Coke and William Hakewell in Sir Simonds D'Ewes, *The Journals of All the Parliaments during the Reign of Queen Elizabeth* (London: s.n., 1682), available at English Early Books Online (<eebo.chadwyck.com>).

form.³⁵ Note that this view was not presented as *democratic*; indeed, it was raised in opposition to Leveller demands for democratic reforms such as biennial parliaments, an increase in the number of MPs, equalisation in the size of parliamentary districts and universal male suffrage.³⁶

Parker's line of thought probably reached its peak in the writings and speeches of Edmund Burke. Burke believed that it was important that Parliament contain members capable of voicing the concerns of all sectors of society, not for reasons of political equality, but because it was the only way in which society could be held together as a cohesive whole. For Burke, Parliament could at once provide recognition of the particularity of each 'class or description of men',³⁷ while, through constructive deliberation between members, provide reassurance to each that they share in a common interest. Despite the diversity of the interests that persist in society, 'Parliament is not a *congress* of ambassadors from different and hostile interests... but... a *deliberative* assembly of *one* nation, with *one* interest, that of the whole.'³⁸ A representative assembly can serve to harmonise the various interests within the nation, and the test of good government is whether it succeeds in keeping the whole together.

It is tempting to be dismissive of Burke on account of his opposition to universal suffrage, his elitist epistemology and his conservative approach to political reform in general. This would, however, be a mistake. For Burke reminds us of three crucial points. Firstly, attachment to the political community cannot be based entirely on acts of individual consent, but requires also an affective dimension. Secondly, the workings of political institutions are to a large part governed by inherited traditions

³⁵ Henry Parker, *Observations upon some of his Majesties late Answers and Expresses* (London: s.n., 1642), available at English Early Books Online (<eebo.chadwyck.com>).

³⁶ See John Wildman, 'An Agreement of the People for a Firm and Present Peace upon Grounds of Common Right and Freedom', <<http://www.constitution.org/eng/conpur074.htm>>.

³⁷ Edmund Burke, 'Letter to the Chairman of the Buckinghamshire Meeting', in *The Works of the Right Honourable Edmund Burke* (London: Henry G. Bohn, 1856), Volume VI, p 162.

³⁸ Burke, 'Speech to the Electors of Bristol', in *The Works of the Right Honourable Edmund Burke*, Volume II, p 96 (emphasis in original).

that at once reflect and reinforce our constitutional imaginaries. Thirdly, a process of dialogue between people from different backgrounds can play an important socially integrative function. We can accept each of these points while still rejecting Burke's elitism.

The link between representative government and social integration becomes more overtly democratic in tone with Tocqueville's classic *Democracy in America*, which is in large part an examination of the way in which political institutions affect the self-understandings of citizens. Tocqueville recognised that well-functioning democratic institutions lead citizens to view their fates as intertwined, and so tend to draw them together in the pursuance of a common good.³⁹ Tocqueville chiefly associated this phenomenon with participation in local affairs, which he saw flourishing in the United States in the 1830s. Yet he saw national politics as also playing an important role, with participation in local affairs and engagement with nation-wide issues mutually reinforcing one another. 'In politics, men unite for great undertakings, and the advantage they derive from association in important affairs teaches them in a practical manner the interest they have in aiding each other in lesser ones.'⁴⁰ This he linked to the democratic process as a whole, since 'the electoral system brings together in a permanent manner a multitude of citizens who would always have remained strangers to one another'.⁴¹

In like manner, Mill argued that representation of the various interests, as advocated by Burke, is inadequate to sustain a true political community. Instead he argued for universal suffrage, on the basis that an individual must engage in a degree of political participation in order to benefit from the enrichment of personhood associated with the status of citizenship.⁴² Without widespread political participation, a community, however otherwise well-governed, will tend to disintegrate into an aggregation of

³⁹ Tocqueville, *Democracy in America*, Volume II, Part 2, chap (iv).

⁴⁰ *Ibid.*, Volume II, Part 2, chap (vii).

⁴¹ *Ibid.*, Volume II, Part 2, chap (iv).

⁴² John Stuart Mill, *Considerations on Representative Government* (Cambridge: Cambridge University Press, 2010), in particular chaps III and VIII.

individuals in which the 'intelligence and sentiments of the whole people are given up to the material interests, and, when these are provided for, to the amusement and ornamentation, of private life'.⁴³ Here he recognised the symbolic potential of the vote, something which Burke had neglected: 'It is a great discouragement to an individual, and a still greater one to a class, to be left out of the constitution; to be reduced to plead from outside the door to the arbiters of their destiny, not taken into consultation within.'⁴⁴ From this position it might be thought that Mill would advocate direct democracy, so as to maximise the potential for political participation for all. But he did not do so. In part this was because of a (surely well-grounded) fear that direct democracy would make for a low quality of legislation. But this practical reason was not the only one for endorsing representative government. Mill also saw a role for the legislative assembly that provided a principled reason for preferring representative over direct democracy. In a manner reminiscent of Burke, Mill saw that a representative assembly can function as the nation's 'Congress of Opinions': an arena for the critical discussion of the opinion of every class in society.⁴⁵ Adding the democratic element that Burke's theory lacked gives this argument an extra dimension: that 'those whose opinion is overruled, feel satisfied that it is heard, and set aside not by a mere act of will, but for what are thought superior reasons'.⁴⁶ In other words, once we allow that the legislature should represent individuals not just as interest-bearers but as agents capable of political judgment in their own right, then legislative deliberation serves as a form of recognition of those who hold dissenting views, acknowledging that, although they have not prevailed, they are not simply to be cast aside, but are deserving at least of an audience and a reasoned response.

Still, it might be asked why these considerations favour a representative assembly over other institutions that allow for popular participation. Indeed, it is often said that a particular strength of judicial review is that it enables any citizen to force

⁴³ *Ibid.*, p 32.

⁴⁴ *Ibid.*, p 140

⁴⁵ *Ibid.*, p 116.

⁴⁶ *Ibid.*, p 156.

government into a public arena to explain its actions, in reasoned terms, to him as an individual.⁴⁷ One response to this might be that a representative legislature is more efficient than the courts in this regard: it provides a standing body of potential complainants from across all sectors of society, while courts rely on actions being raised by private individuals who may lack the requisite knowledge, expertise and funds to press their case effectively. Yet this response is inadequate, because it pits an idealised model of the representative legislature against a less-than-ideal model of courts. It is true that there are significant practical barriers to individuals bringing judicial review actions, but there are similarly such barriers to effective representation in the legislative arena. It will be a matter of empirical contingency which barriers are the more demanding, and therefore whether the courts or the legislature present a more efficient mechanism for a citizen to force government to explain its actions in terms directed to him as an individual. Such an argument cannot found a principled, ideal-theoretical case in favour of legislative supremacy.

However, although parliament and the courts may both function as arenas for participating in politics and drawing a reasoned response from government, it would be wrong for us to view them as simply more or less efficient venues for doing this. For participation through the legislature is *qualitatively* different from participation by way of court action. Where a citizen takes legal action against the government, the two stand opposed to one another as claimant and defendant. In the typical case, the claimant must identify an individual right of his that has been violated; and while this requirement might be relaxed, for example by a broadening of standing rules, the general individualistic and adversarial orientation of courts is bound to colour the attitudes of participants in the proceedings. Court proceedings are designed around the expectation that claimants will present themselves as having been unlawfully prevented from pursuing their own individual (or perhaps group) interest, which conflicts with that of the defendant. The parties wield arms against one another, and

⁴⁷ See, for example, TM Scanlon, 'Due Process', in J Ronald Pennock and John W Chapman (eds.), *Due Process* (New York: New York University Press, 1977).

it takes an impartial judge to arbitrate between them. In a legislature, on the other hand, parties stand in a much more ambiguous relationship towards one another. In some senses they are adversaries, either because they are on the opposing sides in a particular debate or, more generally, because they are from opposing parties. However, and unlike litigants, they are also members of the same collegiate body. While the idea of conflicting interests is built in to court proceedings, the same is not true in legislative bodies. Indeed, as has been pointed out by figures as otherwise different as Burke and Habermas, the very practice of deliberation presupposes that there is a common interest towards which discussion is oriented. Furthermore, legislative decisions are made not by an impartial arbiter, but by the legislative body itself, so that in a legislative debate parties are at one and the same time both opposing one another and attempting to persuade one another. When a piece of legislation is passed, it represents not the success of A's claim over B's, but a (fallible and provisional) interpretation of the common good of the nation as a whole.

In providing a 'metatopical'⁴⁸ space for deliberation (i.e. a space that is not tied to a particular issue or concern), a legislative assembly is capable of functioning as the focal point of public political debate, giving the various discourses ongoing in the 'weak publics' of civil society a point of contact. This is particularly important in a multicultural society, in which the concerns of certain groups might not be immediately comprehensible to outsiders. As Young puts it: 'Different groups and segments of the polity best talk across their difference through representatives who meet together and listen to one another, open to the possibility of changing their positions.'⁴⁹ The Janus-faced position of representatives, at once both advocates and judges, allows them to function as what we might call 'transformers', turning the competing demands arising from diverse parts of society into interpretations of the common good, capable of being appreciated as such from various different viewpoints. In turn, the terms in which legislative deliberation is conducted will feed

⁴⁸ I take the term from Charles Taylor, 'Liberal Politics and the Public Sphere', in *Philosophical Arguments*, p 263.

⁴⁹ Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000), p 131.

back to the citizenry as a whole, encouraging them to see their own concerns and opinions in a different light by placing them in the context of a wider debate. Clearly this argument relies upon the idea that political identity is not a concrete 'given', but that a sense of belonging to a political community may develop over time through a process of debate and discussion. The point is not that this process will eventually give rise to a consensus between all groups in society, but that parties to ongoing disputes will see themselves as disagreeing over a common good; that is, as members of a community engaged in a joint project of self-government, rather than rival factions uneasily sharing the same piece of land.

Again I should add the caveat that real-life legislatures do not tend to operate in this idealised way. The culture of politics in a given country might, for instance, be so adversarial that members of parliament are virtually indistinguishable from opposing parties in a case at the bar. This could be because of deep social divisions in society, or simply because opposing political parties have developed such a hostility towards one another that any moves towards consensus politics would be seen as betrayal of the party cause. Alternatively, parliamentarians might view themselves as representatives only of the partial interests of their constituencies, corporate backers, or other sectoral group. Where this is the case, legislative 'deliberation' will be no more than a bargaining procedure, in which outcomes represent the extant balance of power rather than any sense of genuinely common good. It is likely that one or both of these failings afflicts all real-world legislatures to some degree or another. But while the argument that legislatures play an integrative role in society clearly becomes weaker the less consensus-oriented legislative deliberation actually is, it does not straightforwardly follow that in societies with defective legislatures the social integration case for legislative supremacy⁵⁰ disappears. Firstly, we need to bear in mind that the issue is comparative; the question is not whether the legislature is

⁵⁰ I am aware that I have not yet made the argument for legislative *supremacy*; thus far I have only made the case for *legislation*. I make the more ambitious argument – that is the main conclusion of this thesis – in the final section of this chapter.

perfect in the abstract, but how it performs in comparison to other institutions.⁵¹ That the legislature does not quite do what it is supposed to is not an argument for transferring its functions to another body unless we can be confident that that other body would perform them better. Secondly, even where a legislature is not providing an integrative role today, we need to consider whether changes to the legislative system (e.g. to the voting system, to party finance, to the rules governing deliberation, etc.) might allow it to do so in future. Only if such reforms are utterly impracticable does the argument fall off the table completely. Thirdly, we need to be on guard against creating what I called in chapter four a 'self-fulfilling prophecy': if we construct a model that diminishes the respect owed to legislation by pointing to legislators' self-interested behaviour, there is a risk that we thereby legitimate such behaviour. Finally, it should be noted that there is empirical evidence that the inclusion of members of historically disadvantaged groups in legislative bodies can shift the dynamics of legislative decision making towards a discursive, consensus-oriented model.⁵² So while a degree of real-world scepticism is healthy, it doesn't warrant us losing sight of our ideals.

6.2.2 *The Role of Legislatures in Respecting Judgment*

I have argued for a distinction between a conception of democracy based around respect for citizens' *wills* and one premised on respect for citizens' *judgment*, claiming that only the latter recognises the depth of citizens' moral agency.⁵³ The significance of this distinction has been highlighted in recent work by Urbinati, who has argued persuasively that a judgment-based conception should regard representative democracy not as a pragmatic concession to the impracticability of direct democracy, but as the first-best democratic solution.⁵⁴ It should be clear that 'representation' here

⁵¹ Waldron, 'The Core of the Case against Judicial Review', at 1389.

⁵² See Abigail M Thernstrom, *Whose Votes Count? Affirmative action and minority voting rights* (Cambridge: Harvard University Press, 1987); and Sue Thomas, *How Women Legislate* (Oxford: Oxford University Press, 1994).

⁵³ See §3.4, above.

⁵⁴ Nadia Urbinati, *Representative Democracy: principles and genealogy* (Chicago: University of Chicago Press, 2006).

requires more than formal processes for the election and authorisation of officials. Representation should be seen in dynamic terms, as ‘a comprehensive filtering, refining, and mediating process of political will formation’.⁵⁵ Most theorists of democracy will acknowledge that such a process is likely to be of not inconsiderable instrumental value, and Urbinati would not dissent from that view. But Urbinati’s claim, which I am adopting here, goes further than this: procedures of representative democracy have noninstrumental value, since they are constitutive of a ‘form of political existence’ which allows for a deep recognition of citizens’ capacity for political judgment.⁵⁶

6.2.2.1 What is Judgment?

I should briefly say a word about what I mean by ‘judgment’. I am using the term in a broad, non-technical sense – I would like so far as possible to remain agnostic with respect to philosophical debates in the ‘theory of judgment’.⁵⁷ This is in part due to modesty of ambition: a philosophical account of the nature of judgment would be beyond the scope of this thesis. However, a certain agnosticism is also called for by the nature of the matter in hand, for it is not the role of a theory of democracy to pin down every moving part *ex ante*.⁵⁸ The precise nature of judgment that is the object of democratic respect ought itself to be something that is amenable to democratic debate, and not fixed by philosophical dictat. Nevertheless, my claim that representative government respects citizens’ judgment must of course rest on *some* account of judgment to make it an intelligible claim at all. There are certain features of judgment

⁵⁵ *Ibid.*, p 5.

⁵⁶ *Ibid.*, p 24.

⁵⁷ In this respect I am somewhat less ambitious than Urbinati, who bases her account on a particular interpretation of Kant (*ibid.*, chap 3). I should add two caveats, however. Firstly, it is far from clear that Urbinati intends to adopt the Kantian interpretation of judgment in its entirety, rather than merely use it as a base from which to attack the voluntarist conception of democracy. Secondly, in constructing my modest account of judgment, I have been greatly influenced by Urbinati’s less modest account.

⁵⁸ I have therefore taken the same approach to the concept of judgment as to the concept of political autonomy, see p 6, above. Cf. my criticism of Rawls at p 141-2, above.

that I take to be central, and upon which my argument for the noninstrumental value of representative government rests.

I have already stressed the most fundamental premise on which I am basing the distinction between will-based and judgment-based accounts of democracy: unlike the exercise of will, the exercise of judgment requires the agent to put his desires to the test, to consider whether what he wants is what he *should* want, whether his intentions, desires and ambitions are noble or ignoble, just or unjust, and so on. To this we can add the two features of judgment that I highlighted in chapter three.⁵⁹ Firstly, judgments are not qualitatively equal entities: they may be certain or uncertain, tentative or settled, partial or comprehensive, and so on. They may be the product of prolonged reflection drawing on the resources of a time-honoured tradition of thought, or of the most perfunctory consideration. We should therefore not think of them as suitable for arithmetical aggregation. Secondly, judgment is essentially diachronic: it flows dynamically, shaping and reshaping in response to information received and ongoing deliberation. One cannot identify a specific point in time at which judgment 'occurs'.

A further premise is that the capacity for judgment is not something that an individual can possess in isolation. The ability to reach one's own judgments is not a capacity that men and women are born with: it has to be developed, and its development relies upon the existence of a certain type of society. There must exist a vocabulary of judgment, which means that a culture of judgment must be embedded in common practices. To develop the capacity for judgment, agents must 'live in a world in which there is such a thing as public debate about moral and political questions and other basic issues'.⁶⁰ Kant was therefore right to say that 'the same external constraint which deprives people of the freedom to *communicate* their thoughts in public also removes their freedom of *thought*'.⁶¹ Since a practice of public

⁵⁹ See §3.4, above.

⁶⁰ Charles Taylor, 'Atomism', in *Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985), p 205.

⁶¹ See p 140, n 20.

communication is a pre-requisite for the capacity for judgment, judgment thus has an irreducibly intersubjective nature.

The intersubjectivity of judgment takes on a particularly strong guise in the specific case of *political* judgment. As I noted in chapter four, the idea of popular self-government relies entirely on the existence of a body of *public opinion*.⁶² While the capacity for *any* judgment relies upon the existence of discussion and intersubjective standards, *political* judgment requires a further sense that a certain domain is the common concern of all, a *res publica*. A political system based on the idea of respecting the capacity for political judgment must therefore provide a public space which is in principle open to the contributions of all.

Respecting the capacity of judgment also necessitates an acknowledgment of fallibility, since to render a judgment is to hold oneself to standards that are not fully under one's own control.⁶³ One cannot mis-will, but one can misjudge. A conception of democracy that respects judgment cannot, therefore, throw itself whole-heartedly on the side of the political winners, declaring the losers to be simply 'mistaken'.⁶⁴ Rather, our political institutions should be organised in such a way as to recognise the legitimacy of continuing critique. A democratic political system needs a way to symbolise the fact that while the views of some will for the time being prevail, theirs is not *ipso facto* to be taken as the last word.

6.2.2.2 How do Legislatures Respect Judgment?

Political judgment, then, is strongly evaluative, arithmetically inaggregable, diachronic, intersubjective, public and fallible. With these features in mind we can begin to see how representative democracy allows for citizens' capacity for judgment

⁶² See p 93-4, above.

⁶³ See, for example, Immanuel Kant, *Critique of Pure Reason* (P Guyer and AW Wood tr and ed, Cambridge: Cambridge University Press, 1998), A738/B766: 'Reason must in all its undertakings subject itself to criticism; should it limit freedom of criticism by any prohibitions, it must harm itself, drawing upon itself a damaging suspicion.'

⁶⁴ As did Rousseau: 'When an opinion contrary to mine prevails, therefore, it proves only that I have been mistaken, and that the general will was not what I believed it to be.' (*The Social Contract*, Book IV, chap ii).

to be recognised and respected. This requires us to take a particular view as to the nature of political representation, one which does not fit within the frame in which the issue of representation is usually presented.

On the voluntaristic view of popular sovereignty, political representation is the result of a consensual delegation of authority by the voters. Two possible conceptions of representation follow, in the shape of what Pitkin called 'the mandate-independence controversy'.⁶⁵ If we think that the periodic granting of consent in elections is sufficient for the retention of popular sovereignty, then we will be drawn to the idea that political representation involves the appointment of a group of specialists who will take care of the work of politics on behalf of the people, and thus to the 'independence' (or 'trustee') approach. If, on the other hand, we believe popular sovereignty requires continual adherence to the will of the people, then will view the duty of the representative to follow the wishes of the people throughout his tenure, i.e. the 'mandate' (or 'delegate') approach. Based, as they are, on the voluntaristic view of popular sovereignty, both approaches offer a static conception of the relationship between representative and citizen. A delegate must take a series of 'snapshots' of the citizenry (or perhaps of his particular constituency), one each time he votes in the assembly. Although these may be many in number, each of them is a static picture which has no necessary connection to any of the others. A trustee, on the other hand, is not forced to view the people in such static terms; indeed, it would be an inadequate way of fulfilling her task of promoting their interests. But her *relationship* with the people is nevertheless defined statically, by the periodic granting of electoral consent. Between elections she has no tie to the people at all; she is free to promote their interests as she sees best.

Both the delegate and the trustee conception view legislation by representative assembly as a useful practical device, of perhaps quite considerable, but nevertheless merely instrumental, value. The delegate version views representative democracy as the closest approximation of direct democracy that is practicable under modern

⁶⁵ *The Concept of Representation*, chap 7.

circumstances. This view is contingent, and so liable to empirical contestation. Perhaps a monarch, steeped in the traditions of the community and able to engage in consultation with his subjects without the pressures of electoral competition, would be better equipped to approximate the outcomes of a series of plebiscites. Or perhaps it would turn out that direct democracy is not so impractical after all. Similarly, the trustee approach views the assembly as instrumentally valuable, since the citizens' interest exists separately from and is defined without reference to the process of representation itself. The aim of promoting the citizens' interest might in principle be more reliably realised by a plebiscitary democracy, an hereditary aristocracy, or a benign dictatorship.

If we take democracy to be concerned with respecting citizens' judgment, we will view both the trustee and the delegate approaches as unsatisfactory. Since judgment is diachronic, a representative looking to respect citizens' judgment cannot view his relationship with his constituents in static terms, but rather must view representation as a dynamic process. It will accordingly not be adequate for him to view his relationship with citizens as defined by a delegation, or a series of periodic delegations, of authority. As Urbinati puts it:

'Contrary to votes *on* single issues (direct democracy), a vote *for* a candidate reflects the *longue durée* and effectiveness of a political opinion or a constellation of political opinions; it reflects citizens' judgment of a political platform, or a set of demands and ideas, over time... when politics is scheduled according to electoral terms and the political proposals the candidate embodies, opinions create a narrative that links voters through time and makes ideological accounts a representation of the entire society, its aspirations and problems.'⁶⁶

Citizens' opinions on various issues should not be taken as distinct from one another, as the delegate model proposes. Opinions form 'an intricate fabric of meanings and interpretations', they are not 'dispersed atoms or accidental entities that magically appear in the minds of the voters'.⁶⁷ Since opinions inhabit the realm of meaning, and

⁶⁶ Urbinati, *Representative Democracy*, p 31 (emphasis in original).

⁶⁷ *Ibid.*, p 33.

not of brute fact, we should approach them as we do social practices, by subjecting them to *interpretation*. A representative body should therefore aim to render a constructive interpretation of citizens' opinions which transcends individuals' views on this or that issue. Representation thus has the potential to provide the collective action of the political community with an integrity which a set of piecemeal aggregations of viewpoints would lack, while still remaining receptive to the broad currents of opinion in society.⁶⁸

The legislative assembly, as an institution, represents a distinctive approach to resolving the problem of the arithmetical inaggregability of political judgment. Through a combination of large numbers, diverse population and deliberative procedures, well-functioning legislative assemblies can bring together contributions from across society, playing them off one another in a process of critical discussion, without reducing them to the status of brute preferences to be statistically assimilated into a vector sum. When legislators come from different geographical regions, employment sectors and social classes, and have different cultural, ethnic and sexual identities, they will provide a diversity of opinion based on a wide range of knowledge and experience. Where it is unfeasible for each citizen to have an informed opinion on every political issue on which the community must reach a decision, representative assemblies are structurally well-placed to allow for specialisation (they can form specialist committees which hear evidence from experts and topical pressure groups) without becoming technocratic (the decision-maker remains the assembly as a whole). Diversity of 'input' can accordingly be combined with a high

⁶⁸ In a similar vein, Pettit describes the task of a representative as one of constructive interpretation: see Philip Pettit, 'Varieties of Public Representation', in Ian Shapiro et al (eds.), *Political Representation* (Cambridge: Cambridge University Press 2009), p 76. However, Pettit does not link this aspect of representation to the institutional form of a representative assembly; indeed he even cites Hobbes' statement that 'it is the unity of the representer, not the unity of the represented, that maketh the person one' (Thomas Hobbes, *Leviathan* (N Malcolm ed, Oxford: Clarendon Press, 2012), chap XVI, para 13). Pettit's general point – that the representative has a role in constructing the people whom he represents – is taken, yet a Hobbesian supreme monarch would not have anything like the capacity for rendering an authentic constructive interpretation of popular opinion than would a representative assembly.

quality of 'output'. In fact, diversity provides an epistemic advantage. As Waldron puts it, 'deliberation among the many is a way of bringing each citizen's ethical views and insights... to bear on the views and insights of each of the others, so that they cast light on each other, providing a basis for reciprocal questioning and criticism and enabling a view to emerge which is better than any of the inputs and much more than a mere aggregation or function of those inputs'.⁶⁹ The diversity of a representative assembly should thus serve instrumentally to enhance the substantive quality of legislation. Furthermore, the fact that the diversity of society is taken advantage of in this way is itself of *noninstrumental* value, since it expresses respect for the political judgments of those whose backgrounds are represented in the chamber.⁷⁰ This helps to explain the perhaps slightly cryptic claim that I made in chapter two, that the final value of democracy is conditioned upon its own instrumentality.⁷¹ The fact that a diversity of viewpoints are combined in such a way as to improve the substantive quality of political decisions enhances the expressive significance of the process, as well as emphasising that the faculty to which respect is being paid is that of *judgment* and not the sheer ability to bear a preference or give consent.

Finally, the indirectness of representative democracy serves to respect citizens' capacity for judgment by projecting the idea that any given decision is only a fallible interpretation of the common good. The space between public political discussion and the exercise of political power allows ongoing processes of disagreement to be seen as benign; without this space, dissensus would be viewed as dangerous, potentially destructive of the political community. The separation of the public sphere from political power 'silently transforms the ideal of a social order free from conflictual debate into an ideal of debate free from social conflict'.⁷² Defeat in the

⁶⁹ Jeremy Waldron, 'Aristotle's Multitude', in *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999), p 151.

⁷⁰ Of course, the corollary of this is that insofar as certain backgrounds are not represented in the chamber, this will signify a lack of respect to persons from those sectors of society.

⁷¹ See p 23, above.

⁷² Michael Warner, *The Letters of the Republic: publication and the public sphere in eighteenth-century America* (Cambridge: Harvard University Press, 1990), p 46.

assembly is therefore not defeat *tout court*; a political decision is merely 'a caesura in an ongoing discussion'.⁷³ A process that encourages the publicity of a plurality of dissenting views can 'represent[] the reservations we should have towards all political decisions as only temporary interpretations of the will of the people'.⁷⁴ Representative democracy thus symbolically recognises the fallibility of the *status quo*, the legitimacy, and indeed necessity, of ongoing dissent, and the potential of all citizens to contribute to the collective, ongoing process of political judgment.

6.3 Legislative Supremacy Defended

In this final section I argue that, since the legislative assembly represents the political autonomy of the self-governing people, judicial review will tend to signify a set of boundaries around the processes of self-government. By lowering the symbolic status of the legislature below that of the courts, it dilutes the values of integration and respect for judgment which I have claimed that representative legislative processes embody. Through its individualistic procedures, judicial review enervates the sense of collective agency. And by its elitist nature, it weakens the respect that is paid to citizens' moral-political judgment. In order to perfect this argument, however, I need to say some more about the nature of legislative supremacy, since although it is a term in common currency in constitutional theory, we are not always given an adequate account of its meaning.

6.3.1 Legislative Supremacy not a Political Fact

If I am to defend legislative supremacy, I clearly have to give an intelligible account of what 'legislative supremacy' means. One simple view is that legislative supremacy (or 'parliamentary sovereignty', as it is sometimes called) is a straightforward political fact.⁷⁵ Do the courts, as a matter of empirical fact, accept that legislative

⁷³ Habermas, *Between Facts and Norms*, p 179.

⁷⁴ Stefan Rummens, 'Deliberation Interrupted' (2008) 34 *Philosophy and Social Criticism* 383, at 406.

⁷⁵ See, for example, HWR Wade, 'The Basis of Legal Sovereignty' [1955] *Cambridge Law Journal* 172.

enactments are binding upon them, regardless of their content? If so, we have a system of legislative supremacy; if not, we do not.

However, although this definition may sound simple, it proves impossible to apply. How do we know, in advance of the situation transpiring, whether courts would apply a statute demanding the extermination of all blue-eyed babies or purporting to disestablish the Church of Scotland? And if in such a case a court did refuse to apply the enactment, how would we know whether this showed that the legislature's powers had always been subject to such limitation, or on the other hand whether a 'revolution' had taken place?⁷⁶

Furthermore, on the 'political fact' account, legislative supremacy becomes a principle which no-one could sensibly endorse. The political fact account presents legislative supremacy as riding on a conditional claim something along the lines of: 'for all X, if the parliament enacts X, then the courts will apply X as law'. To claim that a legislature enjoys supremacy, on this account, is to make a counterfactual claim about how the courts would act in a range of hypothetical scenarios, including the bizarre nightmare case of an infanticidal parliament. To defend legislative supremacy would therefore be to claim that we should have as judges people who would, in the case of the baby-killing statute, apply it as law.⁷⁷ And that is something that no humane person could rationally claim.

We can imagine someone defending the ideal of legislative supremacy, on the political fact account, on the basis that is democratic. The argument would go something like this: 'Parliament has better democratic credentials than do the courts, because it is elected and the courts are not. Therefore the courts should apply acts of Parliament rather than enforcing their own ideas about what morality requires or

⁷⁶ Wade claimed that courts had the *de facto* power to change the basic rule of the legal system by way of 'revolution' (*ibid.*, at 189).

⁷⁷ I can imagine an objection here which claims that the baby-killing statute would be law, but that because of its immorality judges ought not to apply it and instead lie about what the law requires. But this objection does not hold water. The political fact account equates the law with whatever is, as a matter of fact, applied by the courts. So it makes no sense on this account to say that judges could lie about what the law is.

what basic rights we have.’ But this argument only makes sense if we view ‘democracy’ as an entirely procedural concept, so that we can equate the requirements of democracy straightforwardly with the decisions of an elected body, without making any normative demands upon the process. This is because, as soon as we make normative demands of the democratic process, some decisions are going to become ruled out. A decision to mandate the murder of blue-eyed babies would, I suggest, provide conclusive evidence that the decision-making process has failed to meet even minimal normative standards. So we can only suppose that it would be democratic to enforce such a statute if we think that democracy does not impose any normative demands upon the political decision-making process. And anyone who does think that about democracy is going to have an incredibly hard job defending it as an ideal.

So the political fact approach renders legislative supremacy impossible either to apply as a descriptive label or to endorse as a normative ideal. If this was all that legislative supremacy could mean, then we would be best advised to abandon the concept altogether. This would resolve the judicial review debate almost by default. Indeed, if the political fact approach to legislative supremacy were correct, it would be remarkable that the judicial review debate existed at all. Opponents of judicial review would be defending the clearly indefensible. But even the supporters of judicial review would, I think, concede that the case against judicial review was at least vaguely arguable. So legislative supremacy must mean something other than the straightforward fact that the courts accept the bindingness of legislative enactments regardless of their content.

I would like to suggest that we can only understand the meaning and value of legislative supremacy if we appreciate that it is bound up with a certain normative conception (or set of normative conceptions) of democracy. It is not something that can be observed as a brute fact, but rather a potential part of the practice of democracy which (as I argued in chapter two)⁷⁸ can only be identified by way of *interpretation*. Of

⁷⁸ See §2.2, above.

course, your interpretation of democracy might lead you to reject legislative supremacy as an ideal. But even if you do, you will only be able to understand the judicial review debate if you see legislative supremacy as a (flawed, in your eyes) attempt to realise the value of democracy. We must therefore reject the political fact approach. In order to give an account of what legislative supremacy means we must leave the external viewpoint of the detached observer and adopt the internal viewpoint of the engaged interpreter.

6.3.2 Is the Judicial Review Debate 'Crude'?

A candidate account of legislative supremacy, one that portrays it as a normative feature of the practice of democracy, has recently been put forward by Allan.⁷⁹ Looking particularly at the English constitution, Allan identifies legislative supremacy as 'a general rule requiring obedience to statute'⁸⁰ which is given shape by the interaction between various principles of the common law. These principles at once both justify and limit the power of Parliament. Allan reconciles legislative supremacy with the idea of limits on Parliament by stressing two points. Firstly, legislative supremacy only enables Parliament to govern through *law*, which is not to be equated with the mere will of the sovereign. Allan argues, not implausibly, that the idea of government through law imposes certain requirements on legislation, such as intelligibility, generality and prospectivity, so that, for example, '[a] bill of attainder derives no support from the doctrine of legislative supremacy... because it lacks even the *form* of a valid statute'.⁸¹ Secondly, the 'basic values of freedom, justice, and legality' justify a presumption that Parliament does not intend to violate fundamental rights.⁸² This is not an empirical estimation of the probable intention of parliamentarians, but rather an exercise in constructive interpretation that places the words of a legislative enactment in the context of the constitutional values that justify adherence to statute. Accordingly, he argues, we do not deny the supremacy of

⁷⁹ TRS Allan, *The Sovereignty of Law* (Oxford: Oxford University Press, 2013).

⁸⁰ *Ibid.*, p 137.

⁸¹ *Ibid.*, p 141 (emphasis in original).

⁸² *Ibid.*, p 168.

parliament by allowing courts to infer exceptions to statutory rules by reference to moral criteria.

Allan calls his approach 'common law constitutionalism', and he advances it as a middle-ground between 'constitutional judicial review, American-style,' on one hand, and 'unfettered parliamentary sovereignty' on the other.⁸³ With shades of Habermas, he says: 'There is no inconsistency in insisting that fundamental freedoms... are integral parts of any legitimate regime, while at the same time recognising that their precise specification depends on positive law and thereby conceding scope for legislative initiative.'⁸⁴ From the perspective of this middle ground, 'the debate over the merits or demerits of strong judicial review begins to look somewhat crude'.⁸⁵ Instead:

'What is most important is not the formal characterization of judicial review, but rather the manner in which courts determine the content of fundamental rights, on the one hand, while showing proper deference to the legislative role of furthering the public good within the broad limits of those rights, on the other.'⁸⁶

Allan lays down a formidable challenge to those who, like myself, want to argue that there is an important distinction between legislative supremacy and a system of judicial review. For it seems reasonable to suppose that, as a principle of statutory interpretation, legislation should wherever possible be interpreted so as to be consistent with fundamental rights. Similarly, if Parliament is to be sovereign as a *legislator*, it seems reasonable to suggest that some constraints are required in order for a purported enactment to qualify as *law*. If we accept these two points, then the cases in which we are faced with a rights-violating statute – that is, a statute which *cannot* be read in a rights-consistent way – may be rare indeed. Does this render the question of whether the courts should have authority to *override* statute relatively unimportant, 'crude' even?

⁸³ *Ibid.*, p 323.

⁸⁴ *Ibid.*, p 324.

⁸⁵ *Ibid.*, p 326.

⁸⁶ *Ibid.*, p 326.

There is a sense in which it does. Suppose we are told that in jurisdiction X courts enjoy the authority to disapply statutes that violate constitutional rights, whereas in jurisdiction Y they do not. What can we conclude, from this information, about the empirical impact that the judiciary has had upon rights-implementation in the two jurisdictions? The answer is: very little. The fact that courts in X enjoy the authority to disapply statutes does not tell us anything about the frequency or boldness with which they do so. And the fact that courts in Y lack this authority tells us nothing about the approach they take to statutory interpretation, which (as Allan makes clear) might involve frequent and substantial departure from the literal words of statutes in order to ensure compliance with constitutional rights ('common law' or otherwise). And these facts also tell us nothing about the broader interplay between courts and legislature: about whether, for example, the legislature in Y operates under a 'chilling effect' of potential court action, deliberately operating cautiously for fear of provoking the courts to depart from their existing permissive practice; or whether the courts in X adopt an approach of 'deference' to or 'dialogue' with the legislature, amending their judgments on constitutional rights so as to align them more closely with the legislature's vision.⁸⁷ So if the nature of our concern is the empirical impact that unelected judges have on state policy, then a focus on the question of judicial review is unwarranted.

However, the persistence of the judicial review debate, among constitutional scholars who can scarcely be taken to be ignorant of the complexities of the relationship between courts and legislatures, suggests that there are concerns with something other than the empirical impact of judges. As I have been at pains to stress throughout this thesis, there is a vitally important symbolic dimension to constitutional design. Allan's critique of the judicial review debate is reminiscent of my own criticism of Waldron in chapter three;⁸⁸ Allan too attacks defenders of judicial review for

⁸⁷ Considerations like these have led Conrado Hübner Mendes to argue that constitutional theories that focus on whether it is courts or legislatures that get the 'last word' are 'unbalanced and myopic' ('Is it All About the Last Word? Deliberative Separation of Powers', (2009) 3 *Legisprudence* 69, at 70).

⁸⁸ See §3.3, above.

approaching it as if it were a stand-alone decision-making mechanism that could be analysed in abstraction from the rest of the political process. But Allan fails to see the real thrust of Waldron's argument: its shortcomings aside, Waldron's case against judicial review is primarily concerned with the *symbolic*, not the *empirical*, consequences of judicial review. As he puts it, the right to participation 'has less to do with a certain minimum prospect of decisive impact and more to do with avoiding the insult, dishonour, or denigration that is involved'.⁸⁹ Even if a system of judicial review and one of legislative supremacy were to work in empirically similar ways, they may well function quite differently on the symbolic level of insult, dishonour and denigration, a point which Allan seems to overlook.

6.3.3 A Shift to the Level of Constitutional Imaginary

A concern with the relative symbolic implications of legislative supremacy *vis-à-vis* judicial review requires us to shift our discussion from the relatively concrete level of judicial interpretation of statutes to the more abstract and somewhat nebulous terrain of constitutional imaginary. At this level, the interminability of the judicial review debate represents something of a crisis in the popular self-understanding of democratic citizens. This is scarcely a novel claim, but it bears repeating. On one hand, modernity brings with it the promise that free citizens will be subject to no higher authority – they will be subject to no law other than the law they give to themselves. On the other hand, the status of the citizen as a rights-bearing individual entails limits on government interference, even where government is seen as the embodiment of the popular will. The opposition between these two perspectives can at times make the competing sides in the judicial review debate appear to be simply contradicting one another by emphasising opposing horns in an irresolvable dilemma.⁹⁰

Where popular understandings lead to a stand-off, theorists have work to do. And so the philosophers, lawyers and political theorists that I have discussed in this thesis,

⁸⁹ Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon, 1999), p 238.

⁹⁰ Frank I Michelman seems to interpret the debate in this way (though that doesn't prevent him from taking sides in it): see 'Brennan and Democracy' (1998) 86 *California Law Review* 399.

and many more besides, have attempted to construct theories explaining how the competing demands of democracy and human rights can be reconciled. Such theories combine interpretations of the problem – accounts of our practices – with prescriptions as to how our practices could be improved so as to further the values implicit within them. This is difficult work, not least because the various concepts that we employ in constitutional thinking form an intricate web such that an interpretation of one concept may have ‘knock-on effects’ on other concepts. The interrelatedness of concepts manifests itself on the purely theoretical level, where the adoption of a particular interpretation of a concept (say a purely negative conception of freedom) can effectively close the door to certain interpretations of other concepts (such as a civic humanist conception of democracy). But it also manifests itself on a more practical level, such as where a particular reform proposal (say a switch from election to sortition) would, if successfully implemented, lead to the withering away of a previously popular idea (such as the delegate conception of representation). So a theory may have certain unintended consequences as a result either of its abstract claims or of its institutional prescriptions (or both). Theorists looking to resolve an apparent dilemma therefore face the additional challenge of doing so in such a way as avoids undesirable unintended consequences. A conscientious attempt to resolve a particular problem might yet lead to a theory that distorts and devalues the practice as a whole.

An example of this is the claim that I made in chapter four, where I argued that Dworkin’s defence of judicial review fails to consider the possibility that judicial review may lead to a distortion of a society’s conception of citizenship, by privileging the inferior ‘negative’ conception over the superior ‘positive’ one. This is not Dworkin’s intention,⁹¹ but is, I suggested, an unintended consequence of the implementation of Dworkin’s theory. In concluding this thesis I shall argue a further claim: that, given the place that the judiciary hold in the popular imagination, placing

⁹¹ See Ronald Dworkin, ‘Liberal Community’ (1989) 77 California Law Review 479, where Dworkin describes himself as a ‘liberal civic republican’.

the responsibility for policing the boundaries of the constitution into their hands will tend to have a detrimental knock-on effect on how we view the constitution. Judicial review promotes a 'negative' conception of constitution,⁹² which carries with it inadequate versions of democratic agency and political community.

6.3.4 Two Conceptions of Constitution

The negative conception of constitution views the constitution as a set of limits to political power: a law superior to the machinery of government. It has its roots in the social contract theory of the early-modern period, which postulated a set of rights as natural and pre-political, demarcating the private sphere of family life and civil society that ought to be free from government interference. It is therefore often associated with the negative conception of liberty as non-interference.⁹³ However, despite the historical links, it would be wrong to define the negative conception of constitution analytically as adhering to a particular conception of liberty. It is not such an explicit theory: it operates more at the level of constitutional imaginary that, by lurking in the background, shapes the contours of much of our constitutional discourse. Its basic idea is, we might say, that the constitution is a fundamental law which sets out the boundaries within which political power is to be exercised.⁹⁴

⁹² Dario Castiglione ('The Political Theory of the Constitution' (1996) XLIV Political Studies 417) uses the terms 'liberal' and 'republican' to denote these conceptions of constitution. However, I feel that such terminology suggests a concreteness that the conceptions of constitution do not possess. As I state in the text below, the conceptions of constitution are not so much explicit theories as constitutional imaginaries. Although the negative and positive conceptions are connected to liberal and republican theories respectively, the link is not analytic. As constitutional imaginaries they shape, but do not determine, our approach to more specific theoretical issues. Finally, and perhaps most importantly, my claim that a system of judicial review promotes the negative conception of constitution does not rely on any particular defender of judicial review accepting that conception. As Martin Loughlin puts it: 'The error... lies not in the work of these political philosophers of liberalism. Instead, it is to be found in the modern culture of legalism...' (*The Idea of Public Law* (Oxford: Oxford University Press, 2004), p 49).

⁹³ For example by Castiglione, *ibid.*, at 433. (See also the previous footnote.)

⁹⁴ The negative conception of constitution probably received its most explicit articulation and defence from Giovanni Sartori, 'Constitutionalism: a preliminary discussion' (1962) 56 *American Political Science Review* 853 (though precisely because of its explicitness, Sartori's defence of the conception is not typical).

The positive conception, on the other hand, presents the constitution as literally *constitutive* of the political order.⁹⁵ This is not to say that it denies that constitutionalism opposes unlimited power; as Sartori rightly points out, this would be to dissolve the distinction between constitutional and non-constitutional government altogether.⁹⁶ But the positive conception conceives of the constitution as limiting political power not through the placing of 'external' boundaries, but through the construction of institutions that promote a culture of liberty and restraint.⁹⁷ As Loughlin puts it: 'Constitutions – and constitutional laws – are as much instruments in the ongoing business of state-building as they are constraints on the practices of government... the political order – the sense of political unity of the people – must precede the constitutional order understood as text.'⁹⁸

Another way of thinking of the distinction between the negative and the positive conceptions of constitution is that, while on the negative view constitutionalism is a means of *limiting* power, the positive view holds that constitutionalism is a means of *creating* power.⁹⁹ The negative view thus takes the existence of political power as a given, with which constitutionalism must contend. The positive view has no such luxury: a constitutional theory that follows the positive conception must itself incorporate an account of how political power is created and maintained. The positive

⁹⁵ Castiglione, 'The Political Theory of the Constitution', at 426-30; Loughlin, *The Idea of Public Law*, p 42-52.

⁹⁶ 'Constitutionalism', at 861.

⁹⁷ In this respect the positive conception resembles the ancient Greek conception of *politeia*, which equates the constitution with the political order as a whole. As Charles Howard McIlwain puts it: 'the Greeks thought of the [constitutional] law in a state only as one part or rather as one aspect of the whole polity itself, never as something outside or apart from the state to which that polity must conform, nor even as any special provision within the state to which other laws are subordinate' (*Constitutionalism: ancient and modern* (revised edn, Ithaca: Cornell University Press, 1966), p 39). On the link between the ancient Greek conception and the modern positive conception, see WH Morris-Jones, 'On Constitutionalism' (1965) 59 *American Political Science Review* 439.

⁹⁸ *The Idea of Public Law*, p 51.

⁹⁹ See, for example Hannah Arendt, *On Revolution* (London: Faber and Faber, 1963), p 152, where, ascribing the positive conception of constitution to the American revolutionaries, she says: 'the founders were afraid of... not power but impotence... the true objective of the American Constitution was not to limit power but to create more power'.

conception is therefore more amenable to republican or discourse-theoretical views that maintain that political power is not something which is possessed by individuals but must continually be created by citizens acting in concert.¹⁰⁰ If power is created by action, then the constitution must encourage political action even as it sets out to channel political power. The negative conception of constitution does not seem to leave space for this requirement.

It should come as no surprise which conception I believe is the more adequate. The negative conception comes up short, I believe, for 3 reasons. Firstly, it is unrealistic to suppose that one could detach those features of a constitutional set-up which have the effect of limiting governmental action from those which have the effect of enabling it. As Morris-Jones puts it in his reply to Sartori, 'the sharpness of distinction he calls for seems more than the substance of the matter will bear'.¹⁰¹ For example, Holmes argues that 'gag rules' – rules which remove certain matters from the political agenda – have the effect of empowering, not disabling government, by preventing it from being torn apart by interminable conflict over deeply divisive issues.¹⁰² The negative conception of constitution seems bound to view such empowerment as a side-effect of the constitutional rule, but this might well be a distortion, since the empowerment might plausibly be the more significant, or primarily desired, effect. Here we can see that the negative conception of constitution has a 'static' nature: it focuses on the immediate effect of the constitutional provision as and when it is explicitly invoked (it prevents discussion) and overlooks the persistent effect of its ongoing, and perhaps even unconscious, subsistence (it empowers government).

Secondly, and more fundamentally, the negative conception relies upon a depiction of political power that is, in the final analysis, unintelligible. Portraying political

¹⁰⁰ See Arendt, *On Revolution*, chap 4; and Habermas, *Between Facts and Norms*, p 133-51. Not that one needs to be a republican or discourse theorist to accept the positive conception of constitution. For a distinctively liberal account, see Stephen Holmes, *Passions and Constraint: on the theory of liberal democracy* (Chicago: University of Chicago Press, 1995).

¹⁰¹ WH Morris-Jones, 'On Constitutionalism' (1965) 59 *American Political Science Review* 439, at 439.

¹⁰² *Passions and Constraint*, chap 7.

power as something distinct from the constitutional forms that limit it not only overlooks the double-edged nature of apparent limitations, it also overlooks the fact that the very idea of political power entails its channelling through constitutional forms. In the absence a constitutional structure, there would be no *political* power to limit. Where the first objection denies the *empirical* separability of political power and constitutional limits, this objection denies that they are even separable *conceptually*. We can only identify power as political, and thus as the appropriate subject of constitutional limitation, if we are also able to identify a political constitution through which the power passes. Political power and the constitution are thus co-original. Again we can see the link with the static/dynamic divide. The negative conception of constitution presupposes a kind of political power that can be (statically) presented as simply existing and standing in want of limitation. But this misses precisely what it is that makes such power *political*: its (dynamic) creation through constitutional forms.

The final objection is most important for my present project.¹⁰³ The negative conception of constitution depicts democratic government as standing in conflict with constitutionalism. In conceptualising the constitution as something that stands apart from political power, it presents it as containing the popular will within pre-political boundaries. But the popular will is not some organic, unmediated force which constitutionalism is forced to confront. The very idea of a democratic decision relies on the existence of some institutional form through which the 'voice of the people' can be expressed. If we accept the positive view that a constitution is a means of generating political power, then we need not view constitutionalism as the imposition of restraints on a sovereign people. Rather it is only through a constitution that the political power of the people could be recognised as such, and distinguished from mere personal, social or economic power. Constitutionalism, therefore, need not limit democracy. Properly conceived, it enables it.

¹⁰³ Here I have taken inspiration from Loughlin, *The Idea of Public Law*, p 111-3.

6.3.5 'Political Constitutionalism'

Those who have followed recent debates in constitutional theory in the UK will find that the objections I have raised against the negative conception of constitutionalism have a familiar ring. The claim that the law of the constitution is not prior or superior to politics is a central (perhaps *the* central) assertion of a school of thought that has come to be known as 'political constitutionalism'.¹⁰⁴ The arguments of political constitutionalists, I believe, highlight an important symbolic feature in our constitutional imaginary: the role of law as a debate-stopper. It is this symbolic feature, I believe, that makes political constitutionalists rightly wary of clothing the basic principles of the constitution in the garb of law. In this respect I am in fundamental agreement with political constitutionalists. At the same time, however (and at the risk of over-generalisation), I feel that political constitutionalists have often failed adequately to articulate the importance of the symbolic aspects of constitutional design, eschewing the more inchoate level of constitutional imaginary in favour of (what they see as) the *terra firma* of a particular theory of political freedom. This, I believe, is a mistake; a mistake which has led them to misrepresent their opponents' positions, and to fail to express what is truly distinctive and valuable about their own. In what follows, I shall focus my attention on the work of Bellamy, since he has made the most sustained critique of judicial review from a political constitutionalist perspective.¹⁰⁵

¹⁰⁴ Political constitutionalism takes its name, and much of its inspiration, from JAG Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1 (which has itself acquired something of a symbolic status that goes further than its rational content). For important statements of political constitutionalism, see Richard Bellamy, *Political Constitutionalism: a republican defence of the constitutionality of democracy* (Cambridge: Cambridge University Press, 2007); Adam Tomkins, *Our Republican Constitution* (Oxford: Hart, 2005); Graham Gee and Grégoire CN Webber, 'What is a Political Constitution?' (2010) 30 *Oxford Journal of Legal Studies* 273; and the articles collected in the *German Law Review* special issue on 'Political Constitutions': *German Law Review*, Vol.14, No.12 (2013). For a pair of very insightful (sympathetic) criticisms of political constitutionalism that are in a certain respect similar to my own, see Marco Goldoni, 'Two Internal Critiques of Political Constitutionalism' (2012) 10 *International Journal of Constitutional Law* 926.

¹⁰⁵ I should say, by way of disclaimer, that although I believe what I see as the shortcomings of Bellamy's approach are also present in the work of other political constitutionalists (most

As is common among political constitutionalists, Bellamy presents political constitutionalism as a contrast to legal constitutionalism.¹⁰⁶ 'Legal constitutionalism', he says, 'takes the prime task of constitutional government to be the placing and policing of various boundaries to politics.'¹⁰⁷ He calls this 'depoliticising the constitution', and identifies two strategies through which legal constitutionalists try to achieve this.¹⁰⁸ The first attempts to depoliticise substantively, as it were, by delineating a realm which is not to be touched by politics; such a realm is typically constituted by a set of 'pre-political' natural rights. The second depoliticises procedurally, by employing certain 'apolitical' procedures (such as judicial review), to resolve certain fundamental disagreements. Bellamy believes that these depoliticising strategies are doomed to be unsuccessful. Firstly, even if we agree philosophically that human beings enjoy a set of natural rights, there is no noncontestable way of defining their scope, and any attempt to define them is itself 'inextricably political'.¹⁰⁹ Secondly, the recourse to apolitical procedures cannot succeed in resolving our disagreements, since different procedures will produce different kinds of outcome. We will therefore disagree about what constitutes a fair procedure; and this disagreement is, again, necessarily political in nature. In trying to constrain politics within an apolitical constitution, therefore, legal constitutionalism is attempting the impossible. At this point, Bellamy's argument has striking similarities with the claims Waldron makes about the ineradicability of disagreement in the circumstances of politics, and it is not entirely clear what the claim about supposed 'depoliticisation' (as opposed to the mere resolution of disagreement) is

notably that of Tomkins), I do not take these shortcomings as somehow definitive of political constitutionalism. Indeed, I would like to suggest that what truly unites political constitutionalists is an awareness, albeit perhaps an unconscious one, of the symbolic status of law in our constitutional imaginary and of the significance that this has for normative arguments about constitutional design.

¹⁰⁶ *Political Constitutionalism, passim*; see also *Our Republican Constitution*, chap 1. Gee and Webber describe the juxtaposition of political and legal constitutionalism as 'a commonplace' ('What is a Political Constitution?', at 273), although they themselves attempt a somewhat different approach.

¹⁰⁷ *Ibid.*, p 145.

¹⁰⁸ *Ibid.*, p 147-54.

¹⁰⁹ *Ibid.*, p 149.

supposed to add. Indeed, if depoliticisation were impossible, as Bellamy claims, then it is difficult to see how political constitutionalism would be a distinctive constitutional ideal, rather than simply an unescapable fact.

To make his positive claim, Bellamy makes a distinction between two philosophical theories of the political value of freedom. He associates legal constitutionalism with the 'liberal' view of freedom as non-interference, and political constitutionalism with the 'republican' conception of freedom as non-domination. Freedom as non-interference is the view of freedom expressed by Berlin's seemingly straightforward claim that 'liberty... is simply the area within which a man can act unobstructed by others'.¹¹⁰ Pettit has famously objected to the non-interference view of freedom on the grounds that it is unable to account for the significance of the *power* of interference in cases where that power is not actually exercised.¹¹¹ For example, suppose a slave has a beneficent master who, despite having the power to interfere gravely with her, nevertheless chooses to leave her more or less alone to act as she wishes. On the non-interference account of freedom, we would be committed to the highly counterintuitive view that the slave enjoyed a significant degree of freedom.

Pettit argues that the conception of freedom as non-domination is superior to the non-interference view as it is able to avoid this undesirable conclusion. Pettit defines 'domination' as the power to interfere with another's set of options on an arbitrary basis, with 'arbitrary' interference being defined as interference which is not forced to track the interests of those affected according to their own judgments.¹¹² Thus one may dominate without interfering: the beneficent slave-master still dominates his slaves since he possesses the *capacity* for arbitrary interference. And one may also interfere without dominating: Bellamy gives the example of Ulysses being bound by his sailors, on his own orders and in accordance with his perceived self-interest.¹¹³

¹¹⁰ Berlin, *Two Concepts of Liberty*, p 192.

¹¹¹ Philip Pettit, *Republicanism: a theory of freedom and government* (Oxford: Oxford University Press, 1997), chap 2.

¹¹² *Republicanism*, p 107.

¹¹³ *Political Constitutionalism*, p 159.

Bellamy parts company with Pettit, however, as to whether freedom as non-domination is inhibited by a constitution that imposes legal boundaries around the power of an elected legislature. Pettit claims that, without constitutional guarantees to ensure that governmental power-holders track citizens' common recognisable interests, a legislature will be a source of domination. This leads Pettit to endorse a system of constitutional judicial review.¹¹⁴ Bellamy, on the other hand, argues (again in Waldronian vein) that, in failing to respect citizens' opinions in circumstances of disagreement, it is judicial review, and not the legislature, which poses the greater threat of becoming a dominating power. Bellamy postulates two criteria for a non-dominating political procedure: firstly, that there exist no difference of status between citizens and decision-makers; and, secondly, that the reason the views of some citizens may count less than those of others cannot be because they hold the 'wrong' view and other the 'right' view.¹¹⁵ Constitutional courts, he says, do not meet these criteria, since judicial review 'seems premised on an unjustified assertion that those on the bench are more equal than the rest'.¹¹⁶ Instead, 'we need a process that treats all views as deserving equal respect in the authorising, if not literally the authorship, of the decision'.¹¹⁷ The process that he endorses is a parliamentary democracy, with universal suffrage, one-person-one-vote and competitive political parties.¹¹⁸

It is curious that, having supposedly built his theory around the idea of freedom as non-domination, Bellamy ends up accepting, pretty much in its entirety, the argument of the 'liberal' Waldron as against the 'republican' Pettit. Indeed, I do not believe that Bellamy's argument is supported at all by the conception of freedom that he takes to be its premise.¹¹⁹ I would suggest, instead, that we can only understand it

¹¹⁴ *Republicanism*, p 193.

¹¹⁵ *Political Constitutionalism*, p 164.

¹¹⁶ *Ibid.*, p 166.

¹¹⁷ *Ibid.*, p 167.

¹¹⁸ *Ibid.*, chap 6.

¹¹⁹ That is not to say that I think that adherence to the republican conception of freedom as non-domination necessitates acceptance of judicial review, only that Bellamy's argument against judicial review does not rely on that conception of freedom.

if we see it as operating on the symbolic level by way of appeal to the shared background understandings that make up our constitutional imaginary.

Insofar as Bellamy's argument is essentially the same as Waldron's, it is subject to the criticisms that I raised against Waldron in chapter three. I do not intend to repeat these criticisms here, but I will add that the apparent majoritarian implications of the argument from disagreement are all the more surprising when coming from a self-professed republican. The argument from disagreement has majoritarian implications if we take citizens' right to *equal respect* of their views to imply a right that all views should *count equally* in the decision-making process, and Bellamy's argument seems to rely on precisely such a step. However, the majoritarian move is a profoundly individualistic one, which rules out the possibility of a *collective* decision that cannot be reduced to an aggregate of some set of individual decisions.¹²⁰ But the possibility of a democratic decision being collective in this strong sense is a key tenet of republican thought, whether based on Pettit's account of freedom as non-domination,¹²¹ or on the more 'positive' account of freedom that I have endorsed under the name 'political autonomy'. It does not follow from the fact that citizens' views have been afforded equal weight that the 'democratic losers' are not dominated by the winners. It is only plausible to say that those who find themselves on the losing side in a democratic process nevertheless avoid domination if we can view the political community as a collective agent of which they are a member. So the introduction of republican freedom adds nothing to Waldron's argument from disagreement; if anything, it gives us further reason to doubt it.

If, however, we look beyond Bellamy's explicit argument, it appears that he is reaching towards a different kind of objection to 'legal constitutionalism' that he does not quite fully articulate. He makes a number of comments about judicial review

¹²⁰ See my discussion of Waldron in this regard, above...

¹²¹ See Philip Pettit, *On the People's Terms: a republican theory and model of democracy* (Cambridge: Cambridge University Press, 2012), p 132-46 and 280-92; and Philip Pettit and Christian List, *Group Agency: the possibility, design and status of corporate agents* (Oxford: Oxford University Press, 2011), p 64-72.

being premised upon an inequality of *status* between citizens and judges. He tells us, for example, that 'constitutional judicial review seems premised on an unjustified assertion that those on the bench are more equal than the rest'.¹²² This puts the point so crudely that it is tempting to dismiss Bellamy here as simply attacking a straw man.¹²³ As Bellamy well knows, supporters of judicial review make no such claim. But Bellamy's argument might be restated so as to make it more attractive. Perhaps Bellamy's real point is that, regardless of the rational arguments that are used to support it, constitutional review *symbolises* an inequality of status between citizens and the judiciary. Shifting discussion to the level of symbolism might also help make some sense of Bellamy's (and other political constitutionalists') otherwise somewhat elusive claim that judicial review is a strategy for 'depoliticising' the constitution. Again it is tempting to dismiss Bellamy here on the grounds that supporters of judicial review do not necessarily claim that it is in any way an 'apolitical' practice or that it somehow presents a way for us to avoid having to make controversial political decisions.¹²⁴ But perhaps Bellamy has a sense that, by sending certain issues for judicial resolution, judicial review might *symbolise* a removal of those issues from the political realm, regardless of the reasons that might be invoked in its favour.

6.3.6 Political/Legal Constitutions and Positive/Negative Constitutionalism: distinct but related dichotomies

Political constitutionalists such as Bellamy could, I believe, benefit from drawing more explicitly the link between, on one hand, the dichotomy between legal and

¹²² *Political Constitutionalism*, p 166.

¹²³ As does Lars Vinx, 'Republicanism and Judicial Review' (2009) 59 *University of Toronto Law Journal* 591.

¹²⁴ For example, Ronald Dworkin says: 'Law... is deeply and thoroughly political. Lawyers and judges cannot avoid politics...' ('How Law is Like Literature', in *A Matter of Principle* (Oxford: Clarendon, 1986), p 146). He also tells us that judicial review 'means that judges must answer intractable, controversial and profound questions of political morality that philosophers, statesmen and citizens have debated for many centuries, with no prospect of agreement', and that 'the rest of us must accept the deliverance of a majority of the justices, whose insight into these great issues is not spectacularly special' ('What the Constitution Says', in *Freedom's Law: the moral reading of the American Constitution* (Cambridge: Harvard University Press, 1996), p 74).

political constitutionalism and, on the other, the negative and positive conceptions of constitution discussed in the previous section.

The two dichotomies are different in nature. The first is *institutional*: what defines a constitution as legal or political (or possibly both or neither) is the mechanisms that it employs for the resolution of constitutional disputes. The second is *conceptual*: the negative and positive conceptions of constitution depict not two different kinds of constitution but two different ways of thinking about what a constitution is. Political constitutionalists sometimes use the word 'political' in a way that elides this distinction. As I mentioned above, Bellamy describes depoliticisation as 'impossible' while at the same time seeming to rile against it. Yet, of course, if it were impossible, there would be nothing to rile against. But we can understand Bellamy here if we take his statement that depoliticisation is impossible to be not a defence of political constitutionalism, but an invocation of the positive conception of constitution. On the other hand, when he attacks depoliticisation, he is defending political constitutionalism as a particular kind of institutional set-up: depoliticisation is undesirable in the sense that legislatures, and not courts, should be the primary arena for the resolution of constitutional disputes.¹²⁵

If the two dichotomies are distinct from one another, what is the connection between them? The answer lies, I believe, in the interrelationship between our constitutional imaginaries and our constitutional design.

In chapter two I gave the separation of powers as an example of a constitutional imaginary that is linked to a particular set of institutions; our concepts of legislative, executive and judicial power are inextricably tied up with our concepts of legislature, executive and judiciary.¹²⁶ Central to that tripartite division are the concepts of law and politics. Again, there is an iterative relationship here: our understanding of what

¹²⁵ Griffith is perhaps the source of this (possibly deliberate) elision of concepts. The 'Political Constitution' referred to in the title of his Chorley Lecture seems to be both a description of the peculiar nature of the UK constitution *and* a way of thinking about the nature of *any* constitution.

¹²⁶ See p 37-8, above.

law is is influenced by our political institutions, and our understanding of what legislatures, executives and courts are is influenced by our concept of law. And similarly with the concept of politics. We share, at the level of constitutional imaginary, a certain implicit understanding of what law and politics are, and this understanding cannot be completely detached from the particular institutions in which these practices take place.

When we say, therefore, that the judiciary apply the law, we are saying something *both* about the nature of the judiciary *and* about the nature of law: the judiciary is that which applies law; law is that which is applied by the judiciary. In our constitutional imaginary, it is a short step (not quite an irresistible one) from saying that something is law to saying that the judiciary should apply it.¹²⁷ And, similarly, it is a short step from saying that the judiciary ought to apply something, to saying that it is law.

An important aspect of our understanding of law is its peremptory nature. By this I mean to say something both about the *force* of law and something about the *nature* of law. Firstly, although we do not all believe that there is an obligation to obey the law in all circumstances, there is a general background assumption that the law is, *pro tanto* at least, something to be obeyed. This assumption is stronger in certain circumstances, two of which are relevant here. Firstly, it is of particularly high importance that the *government* obey the law. This is a consequence of the rule of law (there are many different theories about the precise nature of the rule of law, but we share the perhaps somewhat vague idea that the government should obey the law at the level of constitutional imaginary – if the rule of law means anything at all, then it must at least mean *that*). Secondly, the obligation to obey the law is stronger when what one is confronted with is not a general legal rule, but a specific judicial ruling. For example, most theories of civil disobedience hold that even where disobedience is justified, disobedients must nevertheless submit themselves to the punishment that the legal system inflicts upon them *ex post* their protest.¹²⁸ The idea that the obligation

¹²⁷ For example, see the reasoning of Marshall CJ in *Marbury v Madison* (1803) 5 US 1.

¹²⁸ See, for example, Rawls, *A Theory of Justice*, § 55-9.

to obey a judicial ruling is stronger than the general obligation to obey the law is, I would submit, an integral part of our idea of what a judicial ruling *is*, i.e. what distinguishes it from any other statement about what the law requires.

So law is peremptory in the sense that it carries with it the force of obligation, a force which bears particularly heavily (i) upon government and (ii) where the law takes the form of a particular judicial ruling. There is, furthermore, another, related but not identical sense of peremptoriness: judicial rulings are *non-negotiable*. As I put it above, law is a debate-stopper. Or, more precisely, a judicial ruling is a debate-stopper. Contrary to the impression sometimes given by political constitutionalists, we do not think that there is no meaningful debate to be had about the content of the law. But we do take a judicial ruling to signify the time for such debate to cease. It is the time to stop arguing and move on. Again, this is an integral part of what we take a judicial ruling to be, something that distinguishes it from other statements about law.¹²⁹

Taken together, these ingrained understandings entail that a judicial decision that a certain government action is unconstitutional will have a powerful signification. The fact that the decision has come from a court will inevitably tend to associate it with *law*. At the level of symbolic association (if nothing else) there will be a strong assertion of the idea that the decision must be followed and that, furthermore, it is time to stop arguing, and to move on.

This, I believe, provides the link between the two dichotomies of legal/political and negative/positive conceptions of constitutionalism. Where the judiciary take the primary responsibility for the determination of constitutional issues, the constitution will come to be thought of as a species of law. Owing to powerful place of law and the judiciary in the popular imagination, judicial rulings that action is unconstitutional will tend to be seen as delineating the boundaries in which the 'political branches' must operate. And so legal constitutionalism provides much

¹²⁹ For simplicity I ignore here the prospect of appeal, although my point is not fundamentally affected by it. Even when a decision is appealable, it stands as *res judicata* unless and until it is actually appealed. And, of course, a chain of appeals has to end somewhere.

symbolic nourishment for the negative conception, and thus for a vision of constitutionalism that truncates the collective agency of the people by placing it within bounds which are not themselves presented as products of the practice of democratic politics.

6.3.6 Legislative Supremacy as a Valuable Practice

Contra Allan, then, there is an important distinction between a constitution that employs judicial review and one which embraces legislative supremacy. It is not so much a question of who gets the ‘last word’ – for no-one gets that – but a question of how we view the constitution. It puts it much too mildly to say that legislative supremacy is ‘a general rule requiring obedience to statute’.¹³⁰ Rather, legislative supremacy is the practice of accepting the enactments of a representative assembly as the decisions of the people as a whole. This does not tell us how those enactments should be interpreted: that is a question for another day. Perhaps Allan is right that we should be prepared to depart from apparently plain words in order to protect ‘basic values of freedom, justice, and legality’. But we need to be aware that there is an important distinction between interpreting a statute creatively and declining to apply that statute. For when courts embark upon the latter course, they lift the content of the constitution – and themselves as the constitution’s arbiters – onto a higher symbolic plane than the representative legislature. Regardless of its empirical impact, the decision will symbolise a boundary being placed around the agency of the political community, as represented by the legislature.

I have argued that the decisions of a well-functioning legislature will be able to stand in the name of the political community in such a way that is respectful to each individual citizen as a distinctive intellect in her own right. This is an ambitious goal, and one which requires far more of the democratic process than merely competitive elections. It requires, as Habermas would put it, a communicative current connecting the continuing political debate in the ‘periphery’ of civil society to parliamentary

¹³⁰ *The Sovereignty of Law*, p 137.

decision-making in the 'center'.¹³¹ Representatives must view themselves not merely as delegates whose task is to discover their constituents' antecedently-existing will, nor as trustees charged with the care of the nation, but as participants in a political discourse which requires them both to listen and to advocate, to follow and to lead, to persuade and to seek compromise. It is a complex role which requires attuned political judgment, and we cannot hope to set out in advance an algorithm for success. It is clear that my ideal requires far more than present institutions provide: far more responsiveness and candour from parliamentarians; far more engagement and civic-mindedness from citizens; far more inclusiveness and egalitarianism from the system as a whole. But these are not transcendental requirements detached from the human condition. The demands that they make are implicit in our existing practice of democracy: a valuable tradition that provides the standards for its own criticism.

Legislative supremacy can allow the law to be seen as the output of the political power of a self-governing people. In making this claim I do not fall prey to what Pettit calls 'the fallacy of misplaced concreteness', i.e. the idea that a collective agent must have a corporate mind located in a single body.¹³² My claim is not that legislative supremacy is conceptually required in order for the democratic state to act as a collective agent at all. A public limited company, for example, might act as a collective agent without there being any particular body which speaks for the company as a whole. My claim is that legislative supremacy *symbolically strengthens* the unity-in-diversity of the political community, thus allowing its members to identify with it more strongly than could shareholders of a public limited company, or citizens of a decentred, 'contestatory' democracy.¹³³

Avoiding the fallacy of misplaced concreteness allows us to escape the idea that legislative enactments articulate 'the will of the people' in any essentialist sense. We need not see them as anything other than the product of a popular political discourse

¹³¹ See *Between Facts and Norms*, p 352-9.

¹³² *On the People's Terms*, p 224.

¹³³ The latter is Pettit's conception of democracy, see *On the People's Terms*, p 225-9.

through which citizens act, together, to try and govern themselves in a just and choiceworthy way. Legislation is an act of 'the people', in a sense which cannot be reduced to the acts of individual citizens. But just as collective action cannot be reduced to a set of individual actions, nor can it be entirely separated from them. As List and Pettit usefully put it, group actions 'supervene' on the contributions of its members.¹³⁴ A consequence of this is that there is nothing contradictory or treacherous about citizens calling into question the justice, or even the legitimacy, of the laws that are passed by the legislature. In so doing they are only continuing the process that grants the legislature its legitimacy in the first place. Legislative supremacy respects citizens' judgments (as opposed to their mere wills) by acknowledging not only their force but also their fallibility.

A further consequence of the rejection of the fallacy of misplaced concreteness is that we reject the idea that legislative supremacy is to be equated with instilling sovereignty in the persons of the legislators. They have no special standing other than that they acquire and hold *ex officio*. So legislative supremacy is not to be interpreted as including the claim that we ought to make it relatively easy for the will of *legislators* (considered as flesh-and-blood individuals) to become the law of the land. The requirement is only that the judiciary is not raised symbolically above the *legislature* (considered as an institution). There are a number of possible mechanisms of restraint – most familiar are requirements of multiple stages of voting, committee scrutiny and of course bicameralism – which do not offend against this. The so-called 'new commonwealth model of constitutionalism'¹³⁵ has been deliberately designed to incorporate the benefits that a system of judicial review might provide without symbolically subordinating the legislature to the judiciary. So long as the use of

¹³⁴ See List and Pettit, *Group Agency*, p 54-72.

¹³⁵ This is the name given by Gardbaum to the systems pioneered in Canada, New Zealand, the UK and Australia, which allow the courts to review legislation against a bill of rights, but (through mechanisms which vary slightly between jurisdictions) allow the legislation to remain in force notwithstanding a finding of a rights-violation. See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: theory and practice* (Cambridge: Cambridge University Press, 2013).

legislative override does not become taboo,¹³⁶ this system does not offend against legislative supremacy as I see it. (Whether it is a useful system I think remains to be seen. Innovations such as this, that depart from the simple ideal types with which I have been working, require a much closer level of empirical scrutiny than I am able to provide.)

In sum, my argument is that (i) the practice of legislation by a representative assembly can serve to help integrate citizens into a self-governing political community which respects each citizen as a moral agent, but (ii) judicial review undermines this democratic agency by representing external restrictions on the citizens' collective political power. Judicial review presents constitutionalism as an external force that contains popular sovereignty within pre-political boundaries. This might be thought to be desirable if we view the will of the people as some organic, unmediated force along the lines of Rousseau's general will. But if we embrace the positive conception of constitution, and avoid the fallacy of misplaced concreteness, then we do not need to rely on any such essentialised notion of popular sovereignty. The people form a collective agent through the political institutions that aim to both generate political power and to prevent power from being exercised tyrannically. And while political institutions are not concrete embodiments of 'the people', nor are they merely abstract principles. They are artefacts that we inherit from our forefathers, which carry with them certain understandings that we may endeavour to reform, but cannot recreate *de novo*. We need to consider the implications of these understandings, and not merely 'pragmatic and legal-political considerations',¹³⁷ when appraising constitutional design. At the level of constitutional imaginary, legislative supremacy can represent a commitment to a dynamic, reflexive self-government that affords citizens political autonomy. Judicial review, on the other hand, will tend to signify a set of boundaries around the processes of self-government, boundaries which are set by a procedure

¹³⁶ For a suggestion that this may have become the case in Canada, see FL Morton, 'The Political Impact of the Canadian Charter of Rights and Freedoms' (1987) 20 Canadian Journal of Political Science 31.

¹³⁷ *Between Facts and Norms*, p 262.

that is necessarily adversarial, individualistic and elitist. We therefore have, at least, a reason to prefer the former over the latter.

7. Conclusion: visions of self-government

I have argued that implicit within the practice of modern political democracy lies a valuable vision of self-government, that this vision is nourished by symbolic aspects of our political institutions, and that it may be damaged by a system of judicial review of legislation. The problem I have identified with judicial review cannot be reduced to the language of input and output legitimacy: the difficulty is not that judicial review is anti-majoritarian, nor that it necessarily fails to be conducive to the just resolution of constitutional disputes. The problem, I have argued, is that judicial review will have a deleterious impact on the way in which citizens envisage the political world; it promotes a narrative that depicts constitutionalism as standing at odds with democracy and which presents constitutional rights as belonging to a 'pre-political' realm that is not the product of democratic agency. It accordingly dilutes the respect that democratic practices afford to citizens as self-governing moral-political agents.

In this thesis I have attempted both to provide a useful perspective from which we can view the question of judicial review, and to mount an argument against judicial review from within that perspective. The latter of course relies on, but does not flow inexorably from, the former. A few caveats here are in order. Firstly, pointing out the symbolic significance of political institutions clearly does not grant a knock-down victory to those who oppose judicial review. One might, for instance, accept that democracy is dependent on symbolic nourishment from political institutions without believing that judicial review projects the constraining, negative conception of constitution with which I have associated it. Furthermore, my investigation has been restricted to a comparative assessment of two systems of constitutional design: judicial review versus legislative supremacy. There are, of course, other institutional possibilities, which might bring with them quite different democratic visions. Finally, nothing I say in this thesis should be construed as in itself an argument against novel attempts at constitutional experimentation. My aim is certainly not to glorify the British constitution as it is today, or as it was in 1971, or in 1885. Insofar as the

arguments presented here might contribute to a debate over constitutional change (or inertia) in the UK or elsewhere, I hope that they would serve to open up, rather than close down, potential areas of discussion.¹

Even for those who do not accept that judicial review has the kind of anti-democratic symbolic significance I claim it has, I would hope that this thesis might help to illuminate the current state of play of the judicial review debate. The trenchant attacks on judicial review mounted by political constitutionalists can appear puzzling if one views them as concerned about political outcomes (where is their empirical evidence?) or as premised on support for brute majoritarianism (why should we

¹ Indeed, constitutional inertia in the UK today appears not to be an option. The UK constitution is presently, if not quite in a state of crisis, at least one of profound 'unsettlement' (Neil Walker, 'Our Constitutional Unsettlement' [2014] Public Law 529). The aftermath of the referendum on Scottish independence has exposed a lack of anything vaguely resembling a consensus over how the relationship between the four nations of the UK ought to be organised (Robert Hazell and Mark Sandford, 'English Question or Union Question? Neither has easy answers' (2015) 86 Political Quarterly 16). The Conservative Party's manifesto commitment to repeal the Human Rights Act 1998 has raised an assortment of questions about the constitutional propriety of their doing so (Colm O'Connell, 'Human Rights, Devolution and the Constrained Authority of the Westminster Parliament', UK Constitutional Law Blog, 4 March 2013 <<http://ukconstitutionallaw.org>>; Cormac Mac Amhlaigh, 'A Referendum on the Repeal of the Human Rights Act? Why not?', UK Constitutional Law Blog, 25 May 2015 <<http://ukconstitutionallaw.org>>). An election result in 2015 which saw two parties (UKIP and the Liberal Democrats) with a combined share of 20.5% of the vote gain only 1.4% of the seats has reignited a debate over electoral reform ('The Guardian view on the lessons of the 2015 election: change the voting system or break up the UK', Editorial, *The Guardian*, 1 June 2015; Andrew Grice, 'General Election 2015: Sixty per cent of people want voting reform, says survey', *The Independent*, 5 May 2015). And then there is of course the question of EU membership, on which the government has promised a referendum in 2017.

Taken together these issues highlight a lack of any widespread sense that the UK constitution is the result of the collective agency of the British people. This is clearly a problem from the perspective of the conception of political autonomy that I have outlined in this thesis. I would suggest that we need to focus on the question of which reform *process* would best energise and engage the British public so that they take their constitutional future to be in their own hands. Here the constitutional conventions recently held in Iceland and Ireland may prove a promising template. (For discussion, see Iseult Honohan, 'What can the UK learn from the Irish constitutional convention?', *Our Kingdom* <www.opendemocracy.net/ourkingdom>, 8 October 2014; Silvia Suteu, 'Constitutional Conventions in the Digital Era: lessons from Iceland and Ireland' (2015) 38 Boston College International and Comparative Law Review 251; and Alan Renwick, *After the Referendum: options for a constitutional convention* (London: Constitution Society, 2014).)

support that?). I believe that we can understand the intensity with which such attacks have been launched when we appreciate that clashes about, say, the historical record of judicial rights-protection, or about the best way to create a 'culture of rights', or about the extent to which courts can function as an arena for democratic participation, are best seen as skirmishes in a much broader conflict between competing political world-views. The explicit introduction of the symbolic dimension might help the debate generate less heat and more light.

* * *

The caveats I have mentioned might lead the reader to question the strength of my thesis. If other democratic visions are possible, then isn't my argument simply a contingent one? If so, does that not mean that the question of judicial review must be addressed on a country-by-country basis, in accordance with the prevailing understandings in each jurisdiction?²

I answer 'yes' to the first question, but 'no' to the second. My thesis is certainly contingent: there is nothing logically, conceptually or historically necessary about the constitutional imaginaries on which I have premised my argument, and there is nothing to say that all societies today inevitably share in them.³ Nevertheless, I do not believe that we can only proceed on a country-by-country basis, since I believe that our constitutional imaginaries – our notions of citizenship, representation, law, politics and so on – are sufficiently widespread and robust as to form the basis of what we might call the modern western political form of life. While there might be difficult borderline cases (Japan? Russia? Turkey?) the constitutional imaginaries I am dealing with essentially form the backdrop for political life in western democracies. Remember that constitutional imaginaries are less precise, and more fundamental,

² For an argument along these lines see Cormac S Mac Amhlaigh, 'Putting Political Constitutionalism in its Place', University of Edinburgh School of Law Research Paper Series No. 2015/02.

³ C.f. Dworkin, *Justice for Hedgehogs*, p 161: 'It is at least an open interpretive question... whether the concept of democracy alive in the rhetoric of liberal societies is the same concept as the one deployed in so-called people's democracies.'

then constitutional *theories*. It is true that the prevailing constitutional theory in many modern western democracies holds, contrary to what I have argued here, that judicial review is not damaging to democracy. This thesis challenges such theories head on, by putting forward a competing interpretation of the *same* practice, premised on the *same* constitutional imaginaries.

An example may serve to illustrate the prevalence and robustness of shared understandings about constitutional forms. Take the changes in the French constitution that occurred in the second half of the twentieth century.⁴ According to orthodox French constitutional theory, *le droit* (legal rights, obligations and principles) is the servant of *la loi* (positive law), so that the aim for a legal code is to cover for all eventualities and thereby to reduce the role of the judge to that of 'operator of a machine'.⁵ The idea that vague constitutional provisions could be taken to represent a 'higher law' and thus be used to invalidate particular *lois* was therefore traditionally anathema. Within this orthodox picture, there were nevertheless two competing constitutional traditions. The governing tradition in the First, Second and Third Republics was Jacobinism, according to which the representative legislature is the embodiment of the democratic people and is therefore capable of amending the constitution by simple majority vote. Jacobinism thus opposed any form of constitutional review, whether undertaken by the judiciary or by a non-judicial body. During the Napoleonic periods, however, a form of non-judicial constitutional review existed. Bonapartist ideology was based on the supremacy of the *president*, and thus did not oppose the placing of limits around *legislative* authority.

The Constitution of the Fifth Republic was intended to institute a kind of neo-Bonapartism, by shifting power from Parliament to the executive.⁶ It made a

⁴ I take my account of this history from Alec Stone, *The Birth of Judicial Politics in France: the Constitutional Council in comparative perspective* (New York : Oxford University Press, 1992), chaps 1-4.

⁵ John Henry Merryman, *The Civil Law Tradition: an introduction to the legal systems of Western Europe and Latin America* (3rd edn, Stanford: Stanford University Press, 2007), p 47.

⁶ Didier Maus, 'La Constitution Jugée par sa Pratique: réflexions pour un bilan' (1984) 43 *Revue Française de Science Politique* 875.

distinction between *la loi* and *le règlement*, with the province of Parliament restricted to the former. A Constitutional Council was set up to police the settlement, with the intention that it would be a 'watchdog on behalf of executive supremacy'.⁷ The Constitutional Council was initially seen as a political body rather than a judicial one. There is no requirement that members have any legal training, and it was originally composed entirely of politicians supportive of the government. From 1959 to 1970, the Council basically served the executive's wishes as against Parliament, granting Prime Ministers effective ability to block Parliament's power of initiative.⁸ This began to change following 1971, when, in a landmark decision, the Council first took the view that it was empowered to examine whether bills submitted to it are compatible with constitutional rights, despite the lack of any clear constitutional mandate to do so, or even any enumeration of rights in the 1958 Constitution.⁹ Thereafter the Council cast off its overt deference to the executive and began to conduct a robust system of constitutional review.

The interesting point to note here is that the Council's growth in confidence coincided with a shift in elite perception of the Council, with the view that it is a *political* entity being replaced with the opinion that it is a kind of *court*. According to the traditional French paradigm, all courts [*juridictions*] must be composed of judges and engaged in settling concrete disputes brought by real-life litigants and following fixed, legal procedures – features which the Council lacks.¹⁰ Yet by the end of the 1970s, consensus had been reached among public law specialists that the Council ought to be considered a court.¹¹ The old paradigm was swept away: the term *juridiction constitutionnelle* came to specify an institution charged with the power to determine,

⁷ Jack Ernest Shalom Hayward, *Governing France: the one and indivisible republic* (London: Weidenfeld and Nicolson, 1983), p 139; see also Didier Maus (ed), *Textes et Documents sur la Pratique Institutionnelle de la Ve République* (Paris: La Documentation Française, 1978).

⁸ *The Birth of Judicial Politics in France*, p 64.

⁹ Constitutional Council Decision No. 71-44 DC, 16 July 1971.

¹⁰ *The Birth of Judicial Politics in France*, p 96.

¹¹ See Marcel Waline, 'Préface', in Louis Favoreu and Loïc Philip (eds), *Les Grandes Décisions du Conseil Constitutionnel* (2nd edn, Paris: Sirey, 1991), p xi-xx.

in a definitive manner, the content and applicability of constitutional law – thus embracing the Constitutional Council perfectly.¹²

Armed with this new understanding as to its status, the Council began to justify its expanding role by stating, in its decisions and elsewhere, that its work was judicial and not political in nature.¹³ At the same time, the Council's output became more 'legalistic' in nature: its decisions lengthened and developed into a more technical jurisprudence. Stone has interpreted this as a deliberate strategy on the part of the Council to entrench its new-found position as guardian of the Constitution.¹⁴ Deliberate or no, it seems to have had a strong legitimating role in the eyes of the French political establishment.¹⁵ Legal scholars have rallied to the defence of the Constitutional Council, presenting its decisions as based on legal and not political reasoning.¹⁶ Elite attitudes to judicial review have accordingly shifted, from 'unmitigated hostility to virtually unanimous support'.¹⁷

The example of the French Constitutional Council shows the strength of the notions of *law* and *court* in the modern constitutional imaginary. By associating itself with the

¹² *The Birth of Judicial Politics in France*, p 96-7.

¹³ In Decision No. 74-54 DC, 15 January 1975, the Council stated that 'la Constitution ne confère pas au Conseil constitutionnel un pouvoir général d'appréciation et de décision identique à celui du Parlement, mais lui donne seulement compétence pour se prononcer sur la conformité à la Constitution des lois déferées à son examen' (para 1); and in Decision No. 85-197 DC, 23 August 1985 it stated that 'l'objet de ce contrôle est non de gêner ou de retarder l'exercice du pouvoir législatif mais d'assurer sa conformité à la Constitution' (para 20). Most dramatically, in August 1986 it released a press statement in response to attacks made on it by government ministers, in which it publicly asserted its political neutrality: 'The Constitutional Council, having taken notice of the recent declarations concerning it, recalls that it possesses according to the constitution the judicial mission to verify the constitutionality of laws which have been referred to it. It refuses therefore to participate in the present debate, which is inherently political.' (quoted in *The Birth of Judicial Politics in France*, p 100 (Stone's emphasis)).

¹⁴ 'These statements are evidence that the Council recognised and actively sought the legitimating power of legal discourse and judicial function.' (*The Birth of Judicial Politics in France*, p 100).

¹⁵ As evidenced by the constitutional amendment of 23 July 2008 which significantly broadened the potential role of the Constitutional Council, by allowing it to conduct *a posteriori* review of legislation upon referral from the Court of Cassation or Council of State.

¹⁶ See, for example, the comments of Robert, Vedel and Favoreu cited by Stone, *The Birth of Judicial Politics in France*, p 104.

¹⁷ *Ibid.*, p 115.

trappings of law, the Council was able to gain widespread acceptance of its review functions. The remarkable thing is that the idea of law as non-political, impartial reason was able to legitimate the practice of constitutional review in the absence of any express constitutional mandate and *even in a political culture traditionally hostile to the idea of judicial review*. Modern constitutional imaginaries provided a familiar point-of-entry for arguments in favour of an expanded role for the Council. But in order to take advantage of such arguments, the Council had to present itself as an apolitical court. It is doubtful whether it would enjoy the popular legitimacy to carry out its expanded role were it still widely viewed as a political body. The French example shows, I believe, that even where constitutional *theories* that are opposed to judicial review are prevalent, broader constitutional *imaginaries* are such that placing formal limits around the power of the legislature will be apt to project judicial supremacy and the negative conception of constitutionalism. It was the strength of the symbols of law and the courts that rendered non-judicial constitutional review an unstable arrangement.

* * *

There are numerous moving parts in this thesis, and so some recapitulation might be useful. Firstly, the strength of my claim about the symbolic significance of institutions should be emphasised. My claim is not merely that symbolic factors affect the actions of political actors, or the beliefs of citizens (although these are important phenomena). It is deeper than that: symbolic factors affect the very *meaning* of political actions. It is only because of what political institutions symbolise that their actions are capable of being the kind of actions that they are.

The symbolic significance of political institutions is deeply embedded within a shared vision of political life. This vision draws upon certain conceptual schemata that we take for granted, schemata which I have labelled our 'constitutional imaginaries'. Our constitutional imaginaries provide us with the vocabulary upon which our very ability to have meaningful discussions about constitutional matters depends. This vocabulary is inextricably linked to the institutional forms with which we are familiar;

one does not, for example, have a sufficient grasp of what legislation is unless one knows what a legislature is. Political institutions are thus a constitutive element of our political world.

Note that my references to symbolism should not be taken as suggesting either futility or manipulation. The idea that, say, parliamentary debates are 'symbolic rituals' might be thought to imply scepticism (they don't really achieve anything) if not an outrightly critical stance (they are a side-show designed to divert attention away from where the real action lies). But that would be to overlook the fact that, in Holmes words, 'we live by symbols'.¹⁸ Although we might criticise an empty gesture, or a rigged election, as 'purely symbolic', the criticism attacks not symbolism *per se*, but only the attempt to use symbols in a disingenuous, fraudulent way. The meanings symbolically expressed by political practices have genuine significance for our lives, just as do the meanings expressed in a round of applause or a chilling silence, a thoughtful gift or a missed anniversary, a kiss or a slap in the face, a promise, an apology, a word of forgiveness, a spell in the pillory, sexist abuse on Twitter and an award of the degree of Doctor of Philosophy. To point to the symbolism of an event or practice is not to downplay its significance.

Of course, it is not enough that we merely point to the fact that democratic practices and political institutions carry symbolic resonance; in order to understand democracy we must have a sense of precisely what it is that democracy symbolises. I have proffered the idea that democracy honours *political autonomy*, by enabling citizens to view one another as engaged in a joint project of self-government while expressing respect for each individual's capacity to render political judgments. This conflicts with the classical view that democracy is to be associated with government by consent, although, I have argued, it is a view that may be broadly be accepted by mainstream political philosophers after the 'deliberative turn',¹⁹ whether they are on

¹⁸ Oliver Wendell Holmes Jr., 'John Marshall', in *Collected Legal Papers* (rpt, New York: Peter Smith, 1952), p 270.

¹⁹ See John S Dryzek, 'Introduction: the deliberative turn in democratic theory', in *Deliberative Democracy and Beyond: liberals, critics, contestations* (Oxford: Oxford University Press, 2000).

'team L' (taking their lead from some form of neo-Kantianism), or 'team C' (deriving inspiration from Aristotle and/or Hegel).²⁰ The shift from a focus on consent to a focus on judgment explains, I believe, the widespread preference for representative over plebiscitarian democracy even among those, such as Waldron and Habermas, who fiercely oppose any kind of epistemic paternalism. Respecting each citizen's capacity for judgment requires an inclusive politics, but this should not be confused with the simplistic idea that political decisions should follow 'the will of the majority'. No such will exists, and if it did, we should treat it as an object of suspicion, not celebration.

Respecting citizens as political agents requires paying honour to their capacity to render judgments, not merely their capacity to will; the former capacity being deeper than the latter. Acts of will possess a certain bruteness: they are synchronic, occurring in a particular moment in time, and do not permit of qualitative variation. Judgments, on the other hand, are essentially diachronic, they do not simply occur in a *scintilla temporis* but flow continually, and are scalar in nature, permitting of different depths. A theory of democracy that respects citizens as agents capable of political judgment cannot, therefore, concern itself only with static mechanisms whereby consent is given (i.e. voting), rather it must attend to the dynamic processes of judgment-formation. Arguments for plebiscitarian as well as interest-group theories of democracy tend to overlook the will/judgment distinction. Once it is noted, arguments in favour of a representative democracy as a first-best democratic option begin to look persuasive, if we see the legislature as a body oriented towards the pooling of the judgment of citizens from different sections of society through a deliberative reasoning process. Here Waldron's recognition of the 'dignity of legislation' should lead him to question the static, vote-centric methodology he employs to attack judicial review.

The idea of self-government presupposes the existence of a political community that can act in concert. Government by the people requires the joint action of the people, in a sense that cannot be reduced to some function of the actions of each individual

²⁰ See Taylor, 'Cross-Purposes', in *Philosophical Arguments*, p 181.

citizen. This is not as mysterious a notion as it might sound. Examples of irreducibly collective action abound in everyday life: two friends take a stroll together, a group of decorators paint a house, a back four play the offside trap, a pair of lumberjacks saw a log, an orchestra plays a symphony. In none of these cases can the behaviour of any individual be explained without reference to the behaviour of the others with whom he is engaging. The most obvious political example is the vote. Yet, in order for citizens to feel that they are engaged in an ongoing *project* of self-government, the political community must transcend any given instance of collective action. Again, we need to see democracy as a dynamic process: what goes on in between elections is equally important as the elections themselves.

This sense of democratic self-government can only thrive when citizens adopt a particular attitude towards politics. They must aim not merely to maximise satisfaction of their individual preferences, but to pursue a common good. In this respect political communities are like families and friendship groups, which also transcend particular collective actions by virtue of shared solidaristic attitudes. Dworkin takes this principle as the basis of an argument in support of judicial review: since a failure to treat members of the community with equal concern and respect will tend to corrode the bonds of citizenship, judicial review, by guarding against such failures, can help to maintain the democratic community as such. But once we appreciate the symbolic role that political institutions play, we cannot satisfy ourselves with examining only whether judicial review or legislative supremacy is likely to lead to more just decisions. While judicial review might effectively guard against certain kinds of inegalitarian decisions, legislative supremacy might nevertheless be more effective at promoting a democratic civic ethos. Here Habermas' recognition of the way in which the relationship between citizens is shaped through the practice of politics is instructive. Yet we need to go beyond Habermas' approach of viewing constitutional design as a means for translating the 'communicative power' of citizens into the 'administrative power' of government. As well as allowing for the transmission of rational arguments, our institutional design also projects an ethical message: it tells us something about the kind of association that our political

community is. Through inclusive and reasoned elaboration of a public opinion that is oriented towards a common good, legislatures can project the idea that the political community is collectively self-governing.

The question of judicial review is important, then, not so much because of the empirical factors at stake, but because of what a system of judicial review symbolises. If the political agency of the people is represented by the deliberations and enactments of the legislative assembly, then judicial review will signify a set of limits being placed around that agency: limits imposed by a law which is in a sense 'pre-political'. This conception of constitutional law presents constitutionalism and democracy as standing in essential conflict, as if the 'will of the people' were some organic force which needs to be contained within safe boundaries.

There is a more attractive vision of self-government available to us. This vision recognises that the political community does not exist prior to the constitutional structures through which it expresses itself, and hence that these structures serve to generate, and not simply to limit, political power. It believes that democracy requires paying respect to citizens' judgment, which means not unleashing wild and dangerous forces, but constructing institutional forms through which wisdom and insight can be pooled. Of course constitutional design is not everything, and there are plenty of potential pitfalls that might stand in the way of realising the values implicit within our institutional system. But in looking to avoid these pitfalls, we should not lose sight of our ideals. Wrapped up in our practice of democracy we can find an ambitious vision wherein an autonomous people rules over itself. This vision is obscured by the juridification of the constitution that is inherent in judicial review.

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