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The republican virtues of the "new commonwealth model of constitutionalism"

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Based on a republican theory of democracy as equally shared popular control, drawn from Philip Pettit's recent work, this article argues in favor of the "new commonwealth model of constitutionalism" practiced in Canada, the UK, and elsewhere. It claims that the emphasis that the new commonwealth model places on political agents in the rights-related dimensions of the legislative process corresponds with the republican account of rights as political claims but also that the constricted role played by judges under the model answers to a number of important republican concerns around contestation and the dispersal of power. In particular the article argues that the role of judges under the model can be understood as contributing to the gradual emergence of norms that are "commonly avowable" or shareable, and to the refining of those norms over time, such that it enhances the control exercised by citizens over government. In this way the role of judges under the model—in contrast to that under outright legal constitutionalism—can be understood as enhancing democracy, where democracy is understood in this republican way.

1. Introduction

To be free, on a republican analysis, is to enjoy resilient protection from domination, where domination is understood as unchecked powers of interference enjoyed by another agent.[1] Unlike in the classical liberal or utilitarian traditions (where freedom is conceived in terms of non-interference), there is, on the republican view, a conceptual connection between freedom and democracy.[2] Any other form of political relationship between power-wielder and subject—even one in which actual interference

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1 *See, generally*, Philip Pettit, Republicanism: A Theory of Freedom and Government (1997).

2 *See, generally*, Philip Pettit, On the People's Terms: A Republican Theory and Model of Democracy (2012).

through coercive law is minimal—is inimical to freedom as the subject does not enjoy ultimate control over the power-wielder and is thus exposed to an alien will. So far as the law-making process is concerned, the primary implication is that republican theory requires an elected legislative assembly as the institutional centerpiece. In those circumstances, legislative outcomes are more or less bound to account for the preferences of citizens such that they, at least in some basic sense, can be said to exercise control over the laws that govern them. It is from there that the republican debates on the value and legitimacy of judicial power over legislation begin.

The main themes in republican idealism seem to give initial support to the broader arguments both against and in favor of judicial power over legislation. On the one hand, it may be that an elected legislature, with its popular mandate, ought to stand supreme and that any power of judges to intervene, given their lack of elective credentials, would represent the intervention of an alien will.[3] Indeed the fact that republican theorists tend to reject the state-of-nature thinking that posits fundamental rights as pre-political or immutable, and to share with political constitutionalists the conception of rights as essentially contestable claims, seems to further place republican theory behind the case for parliamentary sovereignty.[4] On the other hand, the dispersion of power ideal and the concern to safeguard against majority tyranny—both well-worn republican themes—may seem to support at least some forms of judicial power.[5] It may also be supported with reference to the nature of the democratic process itself. The mere fact of periodic elections may be insufficient to render legislative power subject to democratic control. But also the individual rights necessary for the democratic process to function—such as equal rights of voting power and representation, along with rights of expression, assembly, and association—may themselves be undermined by legislation, partly because of self-interested legislators being left to control electoral processes.

It is hardly surprising then that different scholars working broadly within the neo-republican research program have reached such contrasting conclusions with respect to the value and legitimacy of judicial review. Philip Pettit follows Frank Michelman and Cass Sunstein in endorsing the institution, conceiving it as a mechanism that facilitates individualized contestation and that accordingly acts as a corrective where electoral processes bring about factional outcomes.[6] The contrary view has been

[3] This reflects the republican case made for political constitutionalism by Richard Bellamy and Adam Tomkins. *See* Richard Bellamy, Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy (2007) and Adam Tomkins, Our Republican Constitution (2005).

[4] Cass Sunstein has argued that "republicans do of course believe in rights, understood as the outcome of a well-functioning deliberative process. . . . But republicans are skeptical of approaches to politics and constitutionalism that rely on rights that are said to antedate political deliberation." See Cass Sunstein, *Beyond the Republican Revival*, 97 Yale L.J. 1539, 1579–1580 (1988).

[5] As Madison argued, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *See* The Federalist No. 47 (James Madison). On the republican concern to guard against majority tyranny, *see, e.g.*, Iseult Honohan, Civic Republicanism 219–221 (2002).

[6] *See, e.g.*, Pettit, *supra* note 2, at 216. *See also* Philip Pettit, *Democracy: Electoral and Contestatory*, *in* Designing Democratic Institutions: Nomos XLII, at 139 (Ian Shapiro & Stephen Macedo eds., 2000). It should be

pressed most influentially by Adam Tomkins and Richard Bellamy, who object to the legal constitutionalist model on the basis of its tendency to "depoliticize" constitutional questions.[7] Bellamy takes Pettit to be among those legal constitutionalists that recommend an "idealized and apolitical form of politics" to overcome what they see as the shortcomings of real politics. He argues that Pettit's endorsement of the institution is symptomatic of a wider tendency among legal constitutionalists to disregard the fact of disagreement concerning rights and as indicative of a misplaced faith in the possibility that a rational consensus can be reached in contemporary political communities where rights conflict among themselves or with broader policy preferences. Bellamy's republican case for the political constitution is made with reference to the close connection between non-domination and equality of political resources or equality of access to the public realm, which he takes to be satisfied by equal voting rights and majority rule.[8]

This article follows the trend in academic scholarship on the institution of judicial review—among both supporters and skeptics—in taking the idea of democracy as central to deeper questions concerning its value and legitimacy.[9] It works from the account of democracy as "equally shared popular control" presented by Pettit in his recent work.[10] This republican account has more in common with the values-based understanding of democracy associated with Ronald Dworkin and others who support strong judicial power than with the proceduralist "one-person, one-vote majoritarian" understanding associated with Waldron and other skeptics.[11] It takes the idea of equal citizenship as implicit in the concept of democracy and as prior to any of its particular

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noted that while Pettit regularly refers to the importance of judicial review as a contestatory mechanism that promotes non-domination, he does not comprehensively address the particular form that judicial review should take. On Michelman, *see* Frank Michelman, *Foreword: Traces of Self-Government*, 4 Harv. L. Rev. 100 (1986); Frank Michelman, *Law's Republic*, (1988) 97 Yale L.J. 1493 (1988). On Sunstein, *see* Sunstein, *supra* note 4; Cass Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29 (1985).

7 *See, e.g.*, Bellamy, *supra* note 3, at 147.

8 Bellamy argues that to satisfy the ideal of non-domination the process through which political decisions are reached must be one in which "no difference of status exists between [ordinary citizens] and the decision-makers" and in which the notion of a "correct" or "better" outcome has no role in the process of determining what political outcomes actually come about. For Bellamy, the "standard democratic process," in which each person counts as one and none as more than one, answers to the republican demand that each citizen be seen as entitled to equal status as a potential source of argument and reasonable information. *See id.* at 165. He extols the virtues of what he calls "real democracies"—by which he means systems with adversarial politics based around a party system and majority rule—as best facilitating the public reasoning, transparency, and mutual acceptability of decisions required by the idea of non-domination. *See id.* ch. 6.

9 *See, e.g.*, Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 1–43 (1996); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980); Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1986). Or, more recently, *see* Aileen Kavanagh, *Participation and Judicial Review: A Reply to Jeremy Waldron*, 22(5) Law & Phil. 451 (2003); Jeremy Waldron, Law and Disagreement (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346 (2006); Bellamy, *supra* note 3.

10 *See* Pettit, *supra* note 2.

11 For Dworkin's account, *see* Dworkin, *supra* note 9. For Waldron's account, see, in particular, Waldron, *supra* note 9.

institutional features.[12] But the implications for judicial power drawn here from this account have much in common with those that Bellamy draws from the proceduralist understanding. The article, *contra* Pettit, argues against strong form judicial review and in favor of the "new commonwealth model of constitutionalism" institutionalized in Canada, the UK and elsewhere. It claims that the emphasis that the new commonwealth model places on political agents in the rights-related dimensions of the legislative process corresponds with the republican account of rights as political claims but also that the constricted role played by judges under the model answers to a number of important republican concerns around contestation and the dispersal of power. In particular the article argues that the role of judges under the model can be understood as contributing to the gradual emergence of norms that are "commonly avowable" or shareable, and to the refining of those norms over time, such that it enhances the control exercised by citizens over government. In this way, the role of judges under the model—in contrast to that under outright legal constitutionalism—can be understood as enhancing democracy, where democracy is understood in this republican way.

The remainder of the article is in three parts. Section 2 introduces the republican theory of democracy and the idea of equally shared popular control. Section 3 then relates these theoretical insights to the debates concerning the value and legitimacy of judicial power over legislation, arguing that, suitably constrained, judicial review may be understood as enhancing popular control over the legislative process. Section 4 assesses the "new commonwealth model of constitutionalism" (as it has been theorized by Stephen Gardbaum)[13] in light of the arguments developed in earlier parts, emphasizing its essentially republican credentials.

2. Republican democracy as equally shared popular control

Although its meaning and implications are contested in political theory, the idea of legitimacy—legitimacy of political institutions or of particular exercises of political power, for instance—pertains broadly to the *acceptability* of those institutions or exercises of power to those subject to them. Every time government exercises its power it will frustrate some citizens; perhaps even prompt their ire. Where government legislates—to restrict voting rights for prisoners, for example, or to put fluoride in the public water supply—there will be some whose interests, or perhaps moral commitments, are promoted and others for whom they are frustrated. Over time, all citizens will be frustrated in one way or another by legislative interference. Legislation, like politics generally, is concerned with matters that prompt disagreement but that fall to be resolved authoritatively.[14] For those resolutions to be legitimate, it must be that those who are frustrated by them can nevertheless *accept* them. In the republican imagery, a

[12] Indeed it may seem to correspond broadly with Dworkin's 'constitutional conception of democracy,' with the un-dominated free and equal citizen similarly corresponding to his idea of the citizen enjoying equal moral membership of the community, as elaborated in *Freedom's Law*. *See* Dworkin, *supra* note 9, at 19–26.

[13] *See* Stephen Gardbaum, The New Commonwealth Model of Constitutionalism: Theory and Practice (2013).

[14] Waldron refers to these as "the circumstances of politics."

slave cannot reasonably be expected to accept frustrating outcomes if they are foisted upon him by his master, nor can colonial subjects where they are imposed by a foreign regime. The prospect of acceptability emerges only in a democracy, where the relationship between government and the people is such that such outcomes are less likely to be seen as dominating impositions. Rather, at least in a broad and basic sense, they are determined by the people, or can be said to have come about on the people's terms.

Jeremy Waldron—in work that has influenced Bellamy along with many others—has related these ideas about legitimacy to the institution of judicial review, arguing that the basic fairness arguments underlying the principle of majority decision makes political decisions acceptable to those frustrated by them (and thus legitimate).[15] Where an elected legislature has full and final authority on legislation all citizens affected have as much say as possible consistent with everyone else having an equal say.[16] The same cannot be said where judges have final authority on legislation and so those frustrated by final outcomes in those circumstances, on Waldron's analysis, cannot be expected to accept them. It is this legitimacy-based objection that thus forms the core of Waldron's case against judicial review.

In his recent work, Philip Pettit presents a republican account of democracy based on a more comprehensively considered theory of legitimacy.[17] Pettit's theory is rooted in the republican tradition that, unlike in the absolutist and liberal thought associated with Hobbes and Locke, conceives of freedom as politically constituted rather than as pre-political. Those traditions imagined individuals living in a pre-political state of nature consenting to political society on condition that they would continue to enjoy their immutable and antecedent natural rights. The legitimacy of the state was therefore seen as hinging on the notion of *consent*. By contrast, republicans—pointing to the slave contract to emphasize the compatibility of consent with unfreedom—prefer the notion of *control* as the lens through which the legitimacy of political coercion is understood.[18] Just as the slave's unfreedom is explained by her lack of control over her

[15] *See, in particular*, Waldron, *supra* note 9. *See also* Waldron, *supra* note 9; Jeremy Waldron, *Judges as Moral Reasoners*, 7 Int'l J. Const. L. 2 (2009).

[16] Such a citizen, Waldron suggests, may question why a particular group of legislators had the authority to enact the legislation and may further ask why, in the procedure adhered to by the group of legislators, more weight was not given to the views of the legislators who happened to agree with her position. For Waldron, the response to the first question is that that particular group of legislators was ultimately selected by the citizens in a free and fair election in which everyone who was to be affected by the legislation had as much say in the election compatible with an equal say for every other citizen. The response to the second is essentially the same: it is a basic invocation of the fairness arguments underlying the principle of majority decision. In Waldron's words, "when we disagree about the desired outcome . . . and when each of the relevant participants has a moral claim to be treated as an equal in the process, then MD [majority decision]—or something like it—is the principle to use." He insists that citizens cannot see judicial resolution of such disagreements as legitimate in the same way, as the responses to the same two questions cannot be answered in anything like as satisfactory a manner. Although judges on constitutional courts may determine disagreements by majority decision, the fairness arguments underlying the principle cannot be invoked as judges, in that context, "do not represent anybody [and] their claim to participate is purely functional, not a matter of entitlement." *See* Waldron, *supra* note 9, at 1386–1389.

[17] *See* Pettit, *supra* note 2.

[18] *Id.* at 152–160.

own personal fate, the subject of a totalitarian regime has no control over her political fate which, in republican terms, explains such a state's lack of legitimacy.

Thus some notion of control must inform the design of the political institutions in a republican democracy, and, with the question under discussion here in mind, the mechanisms relating to the vindication of constitutional rights in the context of legislation. In contemporary political communities comprising citizens with diverse interests and moral commitments, the legitimacy of political coercion depends upon whether those citizens, considered individually, can be said to enjoy an "equal share in a system of joint control" over government.[19] This may initially seem to point back to Waldron's thesis, with each citizen holding an equal vote in a system of representative democracy, but Pettit identifies quite different implications, from which he draws several institutional conclusions, including the favoring of outright judicial supremacy. To assess whether this conclusion on judicial power is justified—or rather, to introduce the argument for a specific form of controlled judicial power—some elaboration of aspects of this idea of equally shared control is needed.

First, it must be that each individual citizen has equal access to the system of joint control and—perhaps more burdensomely—that the direction that government actually takes (in this context, the legislation that it enacts) is required to be one that each reasonable citizen[20] is minded to accept. By "acceptance" here, Pettit means that where a citizen's interests or moral commitments are frustrated by particular legislative enactments, she can attribute the defeat to something like bad luck in the circumstances.[21] That is, that in the particular instance, a different set of reasonable arguments defeated her preferred set, but that the process through which the outcome came about did not make her defeat inevitable, and that it accounted for her

[19] This is drawn from Pettit's republican account of democratic popular control. *See id.* at 166–179.

[20] The notion of the reasonable citizen here refers to the citizen who recognizes the fact of sharing a political community with a multitude of fellow citizens—perhaps many millions—and of the related impossibility that she might enjoy personal control over government. Thus she can only ever reasonably expect to share in a system of joint control; she cannot reasonably expect to herself enjoy personal control over particular outcomes, or outcomes generally. Relatedly, the reasonable citizen also seeks a polity in which she neither dominates nor is dominated: she does not aspire towards lording it over her fellow citizens by, for example, having the entire community subscribe to her set of religious or non-religious commitments. I thank the anonymous reviewer who commented on this point, and for suggesting that I give it some attention.

[21] On the bad luck metaphor, *see id.* at 176–177. There is an important distinction here between a citizen (or citizens generally) actually being *disposed to* accept a political decision or decisions and the idea that a citizen might be *rationally required* to do so. The former refers to that more concrete or empirical question, where the latter is more of normative significance. Pettit's work draws on the former meaning. *See, in particular*, *id.* at 170 n.34. To that extent, it may be vulnerable to the claim that even if political institutions were designed along republican lines, and a broadly republican political culture fostered, there may be—indeed, probably would be—some citizens who simply are not disposed to accept a decision or decisions. We might simply acknowledge this, and argue that such a republican state and culture would engender acceptance of outcomes among more citizens, and a more full-bodied kind of acceptance, than would be the case in a state and culture that did poorly on republican ideals. That is, the idea of equally shared popular control might represent an ideal to which actual states and cultures might aspire; the greater the approximation to the ideal, the stronger and more widespread the acceptance. I again thank the anonymous reviewer from drawing my attention to this quandary.

particular views, if not directly, at least for the general values upon which her views relied or to which they might relate. The alternative scenario—that under which the power enjoyed by government conflicts with individual freedom—is that a citizen might intuitively recognize her defeat as a dominating imposition as distinct from a non-arbitrary interference, in the manner, for example, that an eighteenth-century Irish Catholic might have seen the penal laws. The process can be attributed to the influence of an alien will.

There are obvious ways in which unadulterated one-person/one-vote majoritarian decision-making falls short of the ideal. If, for instance, periodic votes were to be held on whether to extend further and further privileges to a cultural majority, cultural "outsiders" would not be inclined towards acceptance of "defeats," (were further privileges extended, as they presumably at least sometimes would), despite those defeats having come about through a process in which, in that strict formal sense, they had as much say consistent with an equal say for everyone else.[22] They would not be inclined to see their defeats as tough luck, but rather as inevitable. Similarly, where legislative outcomes can be attributed to government parties ingratiating themselves with an influential media corporation, or exploiting power over electoral law to benefit themselves: "defeated" citizens will be inclined to not only disagree with such outcomes substantively, but are also likely to see them as having come about in virtue of an alien will.[23]

The institutional implications are considered below, but this analysis of acceptability suggests a further, related, idea: the importance to republican democracy of a politics based upon the use of "commonly avowable norms."[24] The thought here is that there are two distinct modes of politics, or, in this context, legislative deliberation. The first involves agents (whether citizens, public officials, or legislators) simply registering their policy preferences, with outcomes then determined by force of numbers. The second—the republican mode—requires that agents would present deeper arguments in favor of their preferred outcomes that might render those outcomes more congenial to others who disagree. Those others might never be persuaded of the merits of the substantive preference or the legislative outcome that it prompts; indeed they may continue to rail against the outcome. But, so long as they can recognize that there are deeper considerations with which they can identify that the preference supports, they will be more inclined towards an overall acceptance, despite their substantive disapproval. The arguments that may be adduced in support of a policy preference—the

[22] This is reminiscent of Dworkin's assertion that "rights to participate in the political process are equally valuable to people only if these rights make it likely that each will receive equal respect, and the interests of each will receive equal concern not only in the choice of political officials, but in the decisions these officials make." *See* Ronald Dworkin, A Matter of Principle 64 (1985). Although Aileen Kavanagh at times appears to present judicial review as non-democratic, this idea is similarly reminiscent of her assertion that "it is doubtful that people who possess a right to vote, but whose interests are nonetheless ignored or thwarted by an unconcerned government or majority, would actually feel like full, valued members of society, whose dignity and autonomy is (equally) respected." *See* Kavanagh, *supra* note 9, at 464.

[23] These examples are provided by Pettit, *see* Pettit, *supra* note 2, at 232–235.

[24] *See id.* at 252–269.

arguments that count as "commonly avowable"—must be such that those citizens with fundamentally different worldviews, whether religious or otherwise, can recognize as at least relevant.[25] The idea is that once an expectation emerges in a political culture that citizens relate their preferences to each other in this way, not only are certain outcomes more or less off the table (as formal apartheid would be in a modern democracy, for instance, or the penal laws would be) but, as they are applied at different settings in the context of different policy debates and as those debates reflect back on them, they develop relentlessly, becoming more sophisticated and thus more compelling.[26] This in turn makes certain policy outcomes more likely, and others less likely. It makes it more difficult for powerful groups—whether cultural majorities or rich people—to railroad their preferred outcomes through political processes, and encourages outcomes that correspond with common, non-factional, goods.

The key insight of this idea as it applies in the present context is that this approach does not exalt agreement or rely on the emergence of a "rational consensus" on political questions.[27] Neither does it call for an idealized politics that requires citizens to place the common good ahead of their own interests: the drive to identify commonly avowable norms to support their preferences may well be aimed at making their preferred outcome more likely to succeed. The approach also recognizes the fact of disagreement on political questions, including on the meaning of rights and on their implications in practical settings. It similarly recognizes that binding and authoritative resolutions to these disagreements must be established and that many citizens will be frustrated by particular resolutions and will continue to rail against them. The primary concern is with the emergence and refining of the broader norms at all of the sites of contestation and across the different domains of law and policy formation. These norms will impact in practical ways in the short term as such laws and policies are refined: the routine and regular disagreements between citizens will play out against the backdrop of these evolving norms. But their more powerful impact is over the long haul—a social practice endorsed and facilitated by multiple laws (or even by the entire legal system) in one period might become intolerable in a later period as it comes to be seen as unsupported by shareable considerations.[28] Insofar as the main background work is done by these shareable considerations then, citizens will be more likely to see particular exercises of government power as un-dominating interferences rather than arbitrary impositions. They will be more likely to see themselves as equal citizens enjoying as much democratic control consistent with equal such control for every other citizen.

[25] *Id.* at 253.

[26] *Id.* at 270.

[27] Pettit is not perturbed by the fact that disagreements in particular sites of contestation may ultimately have to be resolved through a "blunt instrument like voting," as he is satisfied that the principled nature of the process will "lay down a foundation of common ground" between those who disagree and that while "the dissensus with which they end may be a failure in one dimension [it] . . . is going to represent an achievement in another: it will secure or reinforce the norms of argument that the disagreement drives the different sides to identify." *Id.* at 261.

[28] Pettit gives an interesting account of this idea based on norms that evolved in the decades following the Great Reform Act of 1832. *See id.* at 270–275.

Finally, equally shared control must also mean control that is robustly independent, in the sense of not being subject to the indulgence of government or of any other agent. It must be that the people hold the ultimate "trump card," which they can play in the face of abuse by government of its authority. This criterion requires a virtuous and contestatory citizenry, inclined to rise up in the face of domination, but in institutional terms it is promoted by the dispersal of power across the arms of government.[29] Where power is concentrated in one arm (where government controls the legislature, for instance, and where the power of the legislature to legislate is unrestricted), government is empowered *vis-à-vis* the citizenry such that it is less resistance-averse and more likely to "close ranks and assert its authority" in the face of public discontent.[30] The idea may seem particularly instructive in respect of control over democratic processes: it must be that political power is dispersed across institutional forums such that the ultimate subservience of government to the people is promoted both in fact and in the general consciousness of the community of citizens.

3. Institutional implications

This elaboration on equally shared popular control does not make the case for judicial review of legislation; still less for any particular form of judicial review. The fact of disagreement concerning the implications of competing fundamental rights in particular practical settings, for instance, remains. Indeed the full implications of this fact are perhaps not fully drawn out by Pettit, which justifies the skepticism concerning his ultimate endorsement of strong form judicial review. But it does prompt reassessment of the legitimacy-based objection that forms part of the core of the case made by Waldron against judicial review, and relied upon by Bellamy in his republican version of that case. It suggests, first of all, that the free and equal citizen is at the center of the idea of democracy and comes prior to the practices of voting and elections (although political constitutionalists would assent to that claim). It suggests also that voting and elections, though critically important features of democracy, are contingent features; their value, along with the value of other particular institutional features, flows from that prior idea of the un-dominated free and equal citizen (again, political constitutionalists would probably assent, although this is now reminiscent of Dworkin's constitutional conception of democracy).[31] It further implies, however,

[29] *Id.* at 219–229.

[30] *Id.* at 223.

[31] Dworkin made his case for American-style judicial review based on his idea of the "constitutional conception of democracy," where democracy was presented as distinct from, and often as potentially undermined by, the one-person/one-vote majoritarian processes so stridently defended by Waldron. Thus Dworkin understood judicial review as a democratic institution in itself, and theorized it with the idea of democracy very much in mind. But he was not exercised concerning the fact of disagreement about how rights might be applied in concrete cases. His thesis centred on the role of judges in uncovering the "right answer" in such cases: he presented courts as "forums of principle" where judges were liberated to engage in this necessarily interpretive task. The corollary was that elected legislators could not operate based on principle due to their concern for reelection. Politics was thus an unsavoury world where pragmatism trumped principle and rights were relegated in importance. This account has much in common

that, in the name of democratic popular control, some political questions, including questions about which there will be reasonable disagreement, ought to be resolved through contestatory mechanisms that are not vote-based and majoritarian, and that others may best be resolved through mechanisms that combine vote-based electoral processes with non-vote-based processes. And it suggests that democratic institutions ought to be designed with an eye on facilitating the use and development of commonly avowable norms.

Indeed, *if* the institution of judicial review can be understood as a non-electoral contestatory forum that contributes well to the countering of alien sources of influence and to the development of such norms, it could then be understood as a democratic institution in itself, in part, because of its non-electoral character. The institution is often defended by legal constitutionalists on the basis of a prioritization of outcomes over processes or, drawing on Raz's phrase, in virtue of the elevation of the "instrumental condition of good government"[32] over concerns for democratically fair processes in the resolution of rights-based disagreements.[33] But, on this republican analysis, it might count as "constitutional" and "democratic" in complementary ways, insofar as it can be said to promote equally shared popular control overall.

So, *can* judicial review be so understood? The claim here is that, yes, it can, on the basis of two of its essential features, but that other features prompt caution and might inform the form of judicial review that might be said to count as democratic in this republican sense. The fact that it works with rights as fundamental departure points gives initial support to the argument. We might recognize, and take seriously, the fact of reasonable disagreement on how rights are to be balanced among each other and against other considerations, yet at the same time acknowledge a broader agreement on their overall importance and on how, for example, freedoms of conscience and of speech are generally, even universally, valuable. Judicial review might thus be said to operate on the basis of norms that all can recognize as at least relevant. It is also

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with Dworkin's constitutional conception of democracy. Dworkn's idea that a democratic system, by definition, treats each citizen as an equal moral member—with all that that implies in terms of substantive as well as procedural justice—broadly corresponds with Pettit's idea of the undominated citizen, capable of looking fellow citizens "in the eye." Indeed, Pettit himself would endorse Dworkin's conclusions for judicial power based on his own republican understanding of democracy. But the argument proffered here is that there are good reasons for skepticism regarding strong judicial power, both practical and theoretical, based on this understanding of democracy. *See* Dworkin, *supra* note 9, at 1–43.

[32] Joseph Raz, Ethics in the Public Domain: Essays in the Morality of Law and Politics 117 (1994).

[33] In Aileen Kavanagh's work, for example, judicial review is presented as a non-democratic (or perhaps even an anti-democratic) corrective to majoritarian processes where such processes, while understood as fully satisfying the demands of democracy, nonetheless fall short on the overall and more urgent demands of political morality. Kavanagh suggests, for example, that "in order to see why democratic government is subject to the instrumentalist condition, we should note that what is just or right or fair does not always correspond to what is voted for through democratic procedures." *See* Kavanagh, *supra* note 9, at 460. She later argues, at 482: "if it can be shown that the interests underlying participation (namely autonomy, dignity, inclusion, etc.) are better protected by having democratic government combined with judicial review, then this combination of institutional procedures should be chosen." Later again she insists that "while acknowledging the value of democratic government, I aimed to show that democratic values are not, and should not be, the whole of our political morality." *See* Kavanagh, *supra* note 9, at 451.

carried out by agents that are not concerned with reelection, and that are accordingly immune from *particular sources* of alien influence to which elected agents are vulnerable: the inclination to appeal to a populist constituency, for instance, or to placate a campaign financier.[34] To this extent at least, judges are liberated to deliberatively engage based on rights-oriented moral principle.

Thus, in the short haul sense, judicial review may seem to contribute, modestly or otherwise, to guarding against alien incursions, making particular concrete outcomes more likely to correspond with common goods. And in the long haul sense, insofar as judges grapple with concrete disagreements with rights-oriented principle at the heart of their assessments, it is likely to contribute to the development of commonly avowable norms. Just as the principles shed light on the disagreements in question, the disagreements reflect back on the principles, making for more nuanced, all-things-considered, understandings of those principles. This latter defense of judicial review would be less concerned with the particular outcomes of litigation, or with the question of whether a uniquely right answer could be identified by judges, and more with its gradual role in prompting shifts in the understanding of these norms and of what legislative resolutions they might require or, more pertinently, might exclude. These considerations might then be more efficiently deployed—while being perhaps even further refined—in other deliberative settings and sites of contestation, including political ones, where analogous policy disagreements fall to be resolved.

But there are competing arguments that seem to apply to both the short and long haul processes that might prompt caution about outright judicial supremacy, if not about some more constrained form of judicial review. First, as Legal Realist and Critical Legal scholars have argued, less principled political predilections can inform judicial reasoning, whether consciously or otherwise, just as it can ordinary legislative deliberation.[35] Its impact in the former case might well be more damaging though, insofar as judicial appraisals are taken as neutral and as commanding a certain apolitical prestige, thus insulating potentially dominating outcomes from appropriate scrutiny. Even if judicial appraisals are not determined by ideological preference, they may nevertheless be influenced by poorly thought-out understandings of liberty or equality, for instance.

A related concern is that in systems of judicial supremacy judicial rulings can in certain contexts be taken as conclusively settling a contested matter, thereby stifling ongoing deliberative assessment that might otherwise be open to new interpretations. This is concerning not only in respect of the contested question itself but also in the longer haul sense insofar as it undermines the development of shared norms that might otherwise emerge. This latter dimension may also be lessened, if not undermined, insofar as judges are more concerned with having their conclusions correspond with particular precedents than with contributing to more nuanced understandings of

[34] Pettit cites these as examples of alien incursions to which unadulterated electoral politics might be vulnerable. *See* Pettit, *supra* note 2, at 232–235.

[35] On legal realism and critical legal studies, *see* Michael Freeman, Lloyd's Introduction to Jurisprudence chs. 10, 11, and 14 (8th ed. 2010).

rights and common values. Indeed, under outright supremacy, when judges use their power to strike down legislation, very often they devote more intellectual energy to justifying their authority to do so than to principled analysis.[36] And when legitimacy-type concerns[37] prompt judicial restraint in circumstances where judges have serious rights-based concerns, the outcome might be taken as judicial approval, in practice bolstering the dubious legislation and setting back the rights-based opposition as well as the broader rights-oriented political movements behind that opposition.

This leaves two further arguments that suggest caution; one pertaining to the short haul dimension, on particular outcomes; the other relating mainly to the long haul dimension, on commonly avowable norms. First is the fact that different judges in constitutional review routinely reach different, sometimes diametrically opposed, conclusions in the same case. In those circumstances—whatever about its credentials as an individualized contestatory forum—it is difficult to escape the conclusion that where judges have the final word on legislation, the resolution of important policy disagreements can be determined in significant part by the happenstance of how many judges on the court happen to favor or disfavor a particular claim. Although the long haul dimension may seem more pressing on this republican analysis, this "immediate outcome" element cannot be ignored. It means that where outcomes frustrate particular citizens, those citizens are frustrated on two counts: both in respect of substance and of process. It may be too much to argue, along with Waldron and many political constitutionalists, that such outcomes are accordingly illegitimate. Because of the overall rights based and principled nature of the process (not ignoring the potential for unprincipled judicial incursions, but rather taking the centrality of rights as broadly outweighing that concern), along with the fact that they, or litigants representing the cause with which they identify, had "their day in court," we might surmise that a defeated citizen would be inclined to see the outcome as tough luck rather than as a dominating imposition.[38] But it ought to be at least taken into account in overall institutional design in a republican system, rather than dismissed as collateral damage in a broader war for better outcomes.

And second, the potential of ordinary electoral and parliamentary politics to facilitate discourses oriented around commonly avowable norms should not be overlooked. The use of openly factional arguments in contemporary political debate in any setting is likely to be unsuccessful; even highly partisan proposals are more compelling when made with reference to arguments that all citizens can recognize as relevant. And, as Bellamy argues in his case for the political constitution, political parties engaged in an ongoing struggle to win popular approval are institutionally bound to bring together broad coalitions of interests which in turn obliges them to make their proposals relatable to citizens with different interests and commitments (similarly, in parliamentary

[36] Using the US Supreme Court decision in *Roe v. Wade* as an illustration, Waldron makes an argument along these lines. *See* Waldron, *supra* note 9, at 1383.

[37] Whether they might themselves be uncomfortable with the legitimacy of their own power, or whether they might be concerned that an adverse ruling would be perceived as an undemocratic incursion.

[38] Again, the fact that not all citizens are in practice likely to so accept should not be overlooked. *See supra* note 21 on this point.

systems encouraging coalition government, they are institutionally encouraged to make their policy commitments relatable to officials within, and supporters of, other political parties).[39] The idea of a politics based on shareable norms might seem to correspond with this analysis.

With this in mind, ordinary parliamentary oversight of legislation might similarly promote these republican goals, in both the short and long haul senses.[40] One of the key implications of the overall idea of equally shared control is that those who hold sway over the legislative process (government, in other words, at least in systems adhering to the Westminster model) cannot enjoy the power to push through legislation regardless of its implications but rather must be subject to constraints, including rights-based constraints, that facilitate individual contestation. Hence a parliamentary committee dedicated to rights-based scrutiny of legislation, insofar as is independent of government, would seem to fare well in a comparison with an independent judiciary enjoying constitutional supremacy. It may be comprised of elected officials, which prompts concerns about the risk of the particular kinds of alien interventions previously mentioned. But by the same token, the resolutions of such a body on rights-based policy disagreements cannot be attributed to the happenstance of how many of its members favor or disfavor a particular outcome, but rather can be explained with reference to their representative credentials. Also, given its independence from government (and thus from the victors in the majoritarian contest), it may seem to bring to bear the perspectives of those citizens who see themselves as having lost out in the electoral contest. And the contestation will occur more routinely than in judicial settings; they will not rely on there being a perceived egregious rights-breach, or on there being an individual or group with the financial resources, as well as the standing, to bring a claim.

On the whole then, while the presence of some form of judicial review might in certain ways enhance the reasoning used in non-legal settings on rights-related disagreements, or bring different deliberative considerations to the table, it is not plausible to argue that elected parliamentarians are incapable of engaging in such forms of reasoning. An independent parliamentary committee dedicated to the scrutiny of legislation based on constitutional rights might thus be an effective institutional font of pressure through which government can be forced, in full public glare, to justify its legislative initiatives in terms of commonly avowable norms. This might especially be the case were the deliberations of such a parliamentary forum to be informed by the rights-based deliberations of a non-electoral contestatory forum, such as a constitutional court. The best institutional format for the protection of rights, based on the

[39] Bellamy argues that the competitive party system obliges citizens to "relate their concerns to those of others as part of a comprehensive set of policies for the people as a whole" thus promoting an overall "regulation by a set of public rules, reasons and conventions." *See* Bellamy, *supra* note 3, at 232. *See also* Richard Bellamy, *Political Constitutionalism and the Human Rights Act*, 9(1) Int'l J. Const. L. 86, 92 (2011).

[40] For a case supporting the principled, rights-based deliberative credentials of parliament, in the context of the Westminster Parliament, *see* Tomkins, *supra* note 3, at 126–130. For a case outlining the value of the Joint Committee on Human Rights, again in the context of the Westminster Parliament, *see* Adam Tomkins, *The Role of the Courts in the Political Constitution*, 60 U. Toronto L.J. 1 (2011).

republican conception of popular control, might thus combine judicial and parliamentary contestatory forums in some way.

4. The republican credentials of the "new commonwealth model of constitutionalism"

In light of the earlier analysis, the salient question is what form judicial review might take if it is to promote popular control over the legislative process—while avoiding unwarranted judicial interference over legislative choice—where popular control is understood along republican lines. The debates around judicial review of legislation in recent decades have taken place mainly in the context of the two neatly contrasting constitutional arrangement that are most familiar: US-style judicial review, with its entrenched bill of rights enforced by a Supreme Court with a "final word" over the constitutionality of legislation, on the one hand, and the old British model of parliamentary sovereignty, on the other. While these models may be seen as opposites on a spectrum of possible constitutional systems, strong-form judicial review has generally prevailed in the post-World War II period—perhaps in large part in light of the experience of Hitler's "democratic" rise to power and his "tactic of legality"—with the traditional orthodoxies of legislative supremacy having been effectively discarded in most European democracies in particular.

The key argument here is that the republican justification for judicial review lies not in any claim that judges are better-placed to resolve disputes concerning rights, or that a rational consensus in such instances might be reached, but rather, that—at least in some forms—it may offer a forum of contestation in respect of legislation that counters the threat of alien incursions and that contributes, perhaps in a modest way (and as part of a much wider suite of democratic mechanisms), to the refining of commonly avowable norms. Conceived along these lines, it may be understood as promoting the likelihood that ordinary citizens would be inclined to accept legislative outcomes generally, despite their often being frustrated by those outcomes. The "new commonwealth model of constitutionalism,"[41] developed in Canada and more recently adopted in New Zealand and the United Kingdom, represents something of an intermediate position[42] between the two traditional extremes that does much better

[41] Stephen Gardbaum is the leading figure in scholarly arguments favoring this model of constitutionalism. *See* Gardbaum, *supra* note 13.

[42] Many, including Gardbaum, take the model is an intermediate between the two extremes of judicial and legislative supremacy in respect of fundamental rights. It may well be better characterized simply as an enhanced form of political constitutionalism, with parliament more efficiently scrutinizing legislation on the basis of rights than before (and still retaining final authority) and judges appropriately constrained in their use of § 3. Bellamy, for example, gives a persuasive defense of the compatibility of the UK Human Rights Act with political constitutionalism, arguing that §§ 19 and 4 enhance Parliament's rights-based scrutiny of legislation as well as its supremacy over courts in respect of rights generally. He claims that the § 3 provision represents a weak form of judicial review whereby courts defer to (or at least, could or should defer to) the legislative "scope" as determined by Parliament, and only have discretion in respect of those matters, such as due process and overall fairness, that fall into their own "sphere." *See* Bellamy,

than either legal or purely political constitutionalism in respect of popular control understood in this way. In this model, a codified bill of rights is enforced by way of pre-enactment, *political* review along with post-enactment *judicial* review. However, it stops short of giving judges powers to invalidate legislation, and thus, of conceding the "final say" to judges in respect of rights issues. In particular, this model has the advantage of establishing public forums for contestation as to the meaning (and "balancing") of fundamental rights, neither excusing the legislature from the obligation to account for its rights-based appraisals, nor, however, positing courts as unassailable authorities on constitutional-rights issues. To an extent, it simply brackets the question of whether judicial or political institutions are best positioned to reconcile competing rights claims, focusing instead on the value of inter-institutional dialogue in this domain.

Here it will be instructive to outline the essential features of Canadian and UK versions of this model. The former is based around the Canadian Charter of Rights which became supreme law in Canada as Part I of the Constitution Act 1982.[43] The courts can invalidate legislation but cannot be said to have "final word" as § 33 of the Charter empowers parliament to make a declaration that a statute will apply "notwithstanding" that it conflicts with the rights protected by the Charter (as those rights have been interpreted by the courts), with such declarations being effective for indefinitely renewable five-year periods. The pre-enactment political rights review of legislation centers on the requirement that the Minister for Justice formally examine all government bills and report any Charter-inconsistency to parliament.[44]

As it has worked in practice, at least, the Canadian version leans closer than the UK version to the judicial supremacy model. Although the pre-enactment political review element has prompted the establishment of dedicated rights-reviewing forums at both executive and legislative levels, its effectiveness is seen as being undermined by various problems, including those flowing from executive dominance.[45] Moreover, the

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supra note 39. Tomkins also claims that parliamentary sovereignty continues to flourish following the Human Rights Act, arguing that "the new powers of our courts . . . have generally been exercised in a manner that seeks to supplement the political constitution, not to undermine it." *See* Adam Tomkins, *What's Left of the Political Constitution?*, 14(12) German L.J. 2276, 2290 (2013). Many others see the new constitutional order ordained by the Human Rights Act as a shift towards a legal constitution. *See, e.g.*, Aileen Kavanagh Constitutional Review under the Human Rights Act (2009); Tom Hickman, Public Law After the Human Rights Act (2010). Both Bellamy's and Tomkins's arguments may be vulnerable insofar as they seem to hinge on whether judges actually use the powers under the Act in ways that remain within what they themselves, as political constitutionalist scholars, approve. Thus judges, on their thinking, may seem to enjoy dominating power but do not generally exercise it (i.e., domination-without-interference, in republican terms). But that is parenthetical. The general argument here is not aimed against political constitutionalism. In fact, it favors a particular kind of political constitutionalism and, drawing on republican insights on political constitutionalism, disfavors legal constitutionalism.

43 Gardbaum provides a helpful overview of the historical development and the operation of the Canadian model. *See* Gardbaum, *supra* note 13, at 97–110.

44 This element required under the Department of Justice Act 1985, § 4(1) rather than the Charter itself. *See* Peter Hogg, Constitutional Law of Canada 26 (5th ed. 2007).

45 Gardbaum suggests that the relative ineffectiveness of the pre-enactment parliamentary reviewing element is explained by "the dominance of the government in the House of Commons . . . the relatively

§ 33 override has come to be understood as a nuclear option, whereby a government deployment would be perceived as a conscious and forthright ousting of human rights rather than as the exercise of a mechanism whose purpose is to facilitate appropriate resolution of reasonable disagreement between judges and legislators.[46] The prevailing practice is that the courts use their invalidating power and that the legislature responds with withdrawal or amendment of the legislation.[47] Gardbaum points out that the legislature, when so responding, often openly expresses its disagreement with judges concerning their interpretation of rights or endorses a dissenting judicial opinion, yet still avoiding the use of the override provision.[48]

Therefore, insofar as the Canadian version more or less concedes judicial supremacy in practice, it seems to lack the republican virtues that may be associated with "new commonwealth model of constitutionalism." It may be that the "dialogue" would work both more efficiently and more legitimately if the § 33 facility were understood and used more as a political "final word" on the interpretation of rights (and in considered response to the positions of the judges on the question) rather than seen as a mechanism to supersede rights altogether. Or it may be that the particular design of the Canadian version fails to capture the republican virtues of the general model.

The UK version developed with the enactment of the Human Rights Act 1998, which gave the European Convention on Human Rights "further effect" in domestic law.[49] The

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weak parliamentary committee system generally . . . and the lack of warning and information, given the absence of any ministerial reports of inconsistency combined with the secrecy and confidentiality of the executive rights-vetting process." Gardbaum, *supra* note 13, at 104. *See* Janet Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 Mod. L. Rev. 7 (2006).

46 Gardbaum reports that it has been used on seventeen occasions since 1982, and last in 2000, all by provincial legislatures and never by the federal Parliament. *See* Gardbaum, *supra* note 13, at 109.

47 *Id.* at 102–110.

48 *Id.* at 108–110.

49 After committing in its election manifesto to replacing the Human Rights Act with a "British Bill of Rights," the Conservative Party won an overall majority in the Westminster election in May 2015. Some might argue that this points to a weakness of in model of constitutionalism by comparison with a system with an entrenched constitution. But it is notable that the objection of the Conservative Party is to the influence of non-British ("European") judges in Britain, and not to the overall model of constitutionalism, as such. (The argument here defends the model in the abstract, rather than any particular instantiation of it). In any case, although the Westminster Parliament remains sovereign in strict terms, it is naïve to think that it can simply repeal the Human Rights Act. Indeed, this may be confirmed by the fact that the new Conservative Government rowed back on the issue on winning office, announcing a "consultation" in the Queen's Speech, less than a month after the election. *See* Nicholas Watt, *Threat to Exit Human Rights Convention Must Be Dropped, Tories Tell Cameron*, The Guardian, May 27, 2015, *available at* http://www.theguardian.com/law/2015/may/27/threat-exit-human-rights-act-convention-dropped-tories-cameron. The practical and legal complications include the following. First, repealing it without withdrawing from the European Convention on Human Rights regime would seem absurd: it would simply mean that individual litigants would have to go to Strasbourg for the remedy that they could previously secure before domestic courts. Also, the devolution arrangements, and particularly the Sewell Convention, would make it difficult, both practically and as a matter of constitutional law, for the Parliament at Westminster to repeal the Act without the consent of the devolved authorities in Belfast, Cardiff, and Edinburgh. On this point, *see* Mark Elliott, *Could the Devolved Nations Block Repeal of the Human Rights Act and the Enactment of a New Bill of Rights?*, Public Law for Everyone (May 12, 2015), http://publiclawforeveryone.com/2015/05/12/could-the-devolved-nations-block-repeal-of-the-human-rights-act-and-the-enactment-of-a-new-bill-of-rights/.

pre-enactment political review element involves a mandatory ministerial statement on the compatibility (or incompatibility) of any proposed legislation with the Convention,[50] which has prompted the establishment of dedicated rights-reviewing forums at both executive and parliamentary levels.[51] These pre-enactment elements are complemented by provisions that give judges more powers over legislation than the traditional model permitted, to an extent that has led many to decry (or celebrate) the (alleged[52]) diminution of parliamentary sovereignty.[53] Section 3 requires that "so far as it is possible to do so," legislation—regardless of when enacted—must be "read and given effect in a way which is compatible with the Convention rights."[54] Where judges deem that it is impossible to interpret the legislation in such a manner—that is, when the wording and thrust of the legislation is straightforwardly at odds with the Convention—§ 4 empowers them to make a "declaration of incompatibility." There is provision in § 10 for the relevant minister to respond to such a declaration by amending the legislation through a remedial "fast-track" order as a speedier alternative to the ordinary legislative process.

So far as judicial power is concerned, much hinges on the distinction between the § 3 "interpretive" and the § 4 "declaration of incompatibility" provisions, with the former seen as the primary remedy and the latter as a measure of last resort.[55] The judicial approach has settled towards a consensus since the *Ghaidan v. Godin-Mendoza* decision in which the majority judgments emphasized that § 3 could be used to depart from the intention of Parliament up to the point where such interpretations could not be said to depart from a "cardinal principle" or a "fundamental feature" of the legislation.[56] The § 4 remedy has been used on several occasions with all but one resulting in a government or legislative response by way of amendment or repeal of the offending provision.[57]

[50] Section 19 of the Human Rights Act requires that the minister sponsoring the bill must make a statement before the second reading to the effect that either the bill is compatible with Convention rights or that 'although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the bill.' This latter provision—notably in the light of the general argument—was used on one occasion where the government argued that its interpretation of freedom of expression, in the circumstances, was superior to the Strasbourg court's interpretation. That analysis was later upheld by the Judicial Committee of the House of Lords in R (Animal Defenders International) v. Secretary of State for Culture, Media and Sport [2008] UKHL 15.

[51] The parliamentary forum is the Joint Committee on Human Rights (JCHR). It scrutinizes § 19 statements and prepares reports on the compatibility of the legislation with the Convention. Its reports also inform parliamentary debates at subsequent stages of legislation.

[52] On the debate, *see supra* note 42.

[53] For general analysis, *see, e.g.*, David Feldman, *Extending the Role of the Courts: The Human Rights Act 1998*, 30 Parl. Hist. 65 (2011); Kavanagh, *supra* note 42; Hickman, *supra* note 42.

[54] For a good account, *see* Timothy Endicott, Administrative Law 75–84 (2d ed. 2011).

[55] *See id.*

[56] Ghaidan v. Godin-Mendoza [2004] UKHL 30. *See* Endicott, *supra* note 54, at 79–80. Kavanagh has argued that the test is not really one of "possibility" but rather of overall appropriateness bearing in mind the general questions around judicial and legislative law-making. *See* Kavanagh, *supra* note 42, at 90.

[57] The exception is notable insofar as it seems to point to the *political* rather than technical nature of rights and their resolution: it concerns interpretative disagreement between legislators and judges in respect of the compatibility of legislation banning convicted prisoners from voting with provisions of the Convention relating to free elections. The European Court of Human Rights decided in an earlier

Although this article does not propose to empirically measure the performance of the various mechanisms, some broad assessment may illuminate the broader argument. The § 19 provision in particular was conceived with the aim of promoting a 'rights culture' at policy-making level.[58] The preference that each government department would be responsible for rights-based scrutiny of its own legislative initiatives—rather than concentrating expertise and responsibility in a single department—was aimed at having "human rights . . . run in the bloodstream of each department."[59] In her interview-based assessment of governing under the Human Rights Act, Janet Hiebert claims that this has made for both a larger role for government lawyers in the policy process and—strikingly, in the light of the overall argument here—a "widespread incorporation of judicial norms into legislative decision-making."[60] Despite initial reluctance on the part of government, Cabinet Office Guidelines now instruct departments to provide the justifications for their conclusion that legislation is Convention-compatible in the explanatory notes accompanying bills, thus facilitating a more informed scrutiny once the bill is assessed at parliamentary level by the Joint Committee on Human Rights (JCHR).[61] The guidelines advise departments that it is "clearly advantageous if the JCHR reports favourably early in the Bill's passage" and that departments accordingly "should attempt to identify areas likely to concern the Committee and prepare briefing ahead of time, if possible."[62] This suggests that any assessment of the overall arrangements should go beyond merely counting amendments to legislation that might reasonably be attributed to pressure brought on by the JCHR scrutiny, but must also account for the likelihood that dubious provisions that might otherwise have been in proposed Bills never make it because of the anticipation of JCHR criticism.

Although it is an isolated case, the study carried out by Adam Tomkins on the process leading up to the Counter Terrorism Act 2008 sheds some light on the effectiveness of the JCHR.[63] Perhaps the most troubling element of the initial Bill was the

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case that such a ban conflicted with the Convention, but in a later case that a ban limited to those sentenced to three years or more fell within the margin of appreciation (and thus did not conflict with the Convention). *See* Gardbaum, *supra* note 13, at 174–175. The example supports the arguments around rights being contestable and essentially political claims.

58 The Home Secretary at the time of its enactment, Jack Straw MP, argued that the Human Rights Act would help create a "culture of rights and responsibilities in the UK" and that "Parliament itself should play a leading role in protecting the rights which are at the heart of a parliamentary democracy." Jack Straw, *Building a Human Rights Culture*, Address to Civil Service College Seminar, Dec. 9, 1999, *cited in* Janet Hiebert, *Governing under the Human Rights Act: the Limitations of Wishful Thinking*, Public L. 27, 28 (2012).

59 Quotation from unnamed civil servant, as referred to by Jeremy Croft, *Whitehall and the Human Rights Act*, The Constitution Unit, UCL, Sept. 2000, *available at* http://www.ucl.ac.uk/spp/publications/unit-publications/61.pdf, *cited in* Hiebert, *supra* note 58, at 34.

60 *See* Hiebert, *supra* note 58, at 34.

61 Cabinet Office, *Guide to Making Legislation*, *cited in* Hiebert, *supra* note 58, at 37.

62 *Id.*

63 Adam Tomkins, *Parliament, Human Rights, and Counter-Terrorism*, *in* The Legal Protection of Human Rights: Sceptical Essays 13 (Tom Campbell, Keith D. Ewing, & Adam Tomkins eds., 2011).

proposal to increase pre-trial detention for terror suspects from twenty-eight to forty-two days (where it had been seven days under the Terrorism Act 2000). The approach of the JCHR was to emphasize the importance of evidence, and to place pressure on government to justify the provision on the basis of necessity.[64] After obtaining and analyzing the data on the use of the twenty-eight-day limit by the police, the committee heard submissions from the Commissioner of the Metropolitan Police, who concluded that there was "currently no direct evidence to support an increase in detention without charge beyond 28 days."[65] The Head of the Crown Prosecution Service gave evidence along the same lines, as did the Director of Public Prosecutions and a former Attorney General.[66] This pressure led the Government to change tack by claiming that concerns around a potential increase in terrorist activity, rather than any previous experience of dealing with terrorism, had prompted it to propose these new powers. Again though the JCHR emphasized the need for evidence and, based on its scrutiny of ministerial and police submissions, found the claims around an increased threat unsubstantiated.[67] Tomkins suggests that the particular episode illustrates two advantages of rights-based parliamentary scrutiny over courts.[68] Courts, perhaps in virtue of how they are set up and operate, tend to defer to governments on issues such as assessment of the level of threat of terrorism, whereas parliamentary committees can call on evidence in less restricted ways, and so are better equipped to scrutinize, and thus less likely to defer, on such questions. In similar vein, parliamentary bodies can return relentlessly to a particular issue, as the JCHR did on this issue, whereas courts are reliant on an issue being brought by a litigant and can address it only then. In the event, the work of the JCHR fed into broader public debate on the necessity, and thus proportionality, of the forty-two-hour detention provision, keeping the issue alive over a prolonged period. Although the legislation passed through the House of Commons, as many as thirty-six Labour MPs defied the whip to vote against it, with many of them citing issues raised in the JCHR reports.[69] It was subsequently defeated in the second chamber—again with heavy citing of the JCHR reports—but so decisively that the Government abandoned the forty-two-day policy entirely.[70]

It is important not to overstate the effectiveness of these mechanisms. No matter what the institutional arrangements, there will always be rights-based concerns about enacted legislation.[71] Although Hiebert cites "independence from Government" and a "general absence of overt partisanship" as among the factors that make the JCHR "impressive by many of the measures of what can be reasonably expected from a

64 *Id.* at 25.

65 Joint Committee on Human Rights, 19th Report of 2006–7, *28 Days, Intercept and Post-Charge Questioning*, HL 157, hc 396, July 30, 2007, *cited in* Tomkins, *supra* note 63, at 25.

66 Tomkins, *supra* note 63, at 25.

67 *Id.* at 26.

68 *Id.* at 27.

69 *Id.*

70 *Id.*

71 In part because of the fact of reasonable disagreement on the implications of rights in concrete circumstances.

parliamentary committee,"[72] she later points to the general problem of executive dominance as a reason for skepticism, as it would seem to be under the Canadian version.[73] This in turn might seem to render the republican defense of the overall model conditional rather than absolute. But the argument here is not that any instantiation of the model is bullet-proof; merely that, overall, it seems to answer well—and better than the more established alternatives—to the republican account of democracy. It might thus represent an archetype to which particular versions might approximate. We might provisionally suggest that the UK version better realizes the republican virtues of the model than does the Canadian version, but at the same time recognize that no version will ever be beyond criticism, either in general terms, or in respect of the republican ideal.

To close out the article, we turn back, then, to that abstract claim. Why is it that this model, rather than the model of judicial supremacy favored by some republican scholars, does best on that republican account of democracy? First, for popular control to be equally shared, it must be that democratic channels remain equally open to all and do not become clogged by factional interests or alien influences. This means that non-electoral contestatory mechanisms are required to supplement ordinary vote-based mechanisms, but it is too simple to conclude that judicial supremacy is required by the ideal of non-domination. The more constrained form of judicial review under the new commonwealth model might be said to achieve all that the strong version achieves under judicial supremacy. It operates as an individualized forum of contestation, as well as of participation, for those who might lack clout in ordinary political channels. In the longer haul sense, it contributes, just as it does under the alternative model, to the development of commonly avowable norms. Indeed, it may be said to work better on that front under this model insofar as judges are liberated from concerns about the legitimacy of their own authority and can focus more forthrightly on the rights-based elements: they are thus likely to better draw out and refine the relevant considerations that can then be deployed more cleanly in other settings.[74]

Unlike judicial supremacy, the model appropriately caters for the fact of reasonable disagreement concerning rights because, in the event of competing interpretations between judges and legislators, it privileges the interpretation preferred by the agent that is answerable both in the parliamentary and the electoral forums. It thus answers to the republican understanding of rights as particularly important, but contestable, political claims. Unlike pure political constitutionalism, it so caters in a way that ensures there is an independent contestatory facility that will bring moral and institutional pressure to bear on the resolution, but not one that relies on a theory that judicial insights are necessarily "right" or superior.[75] Even a requirement that a

[72] *See* Hiebert, *supra* note 58, at 38.

[73] *Id.* at 42.

[74] It might additionally be argued, along with many political constitutionalists, that while judges possess technical and analytical skills that legislators may lack, they decide the fate of legislation in the context of a particular set of facts and often in the face of unhelpful or distorting legal precedents. *See, e.g.*, Waldron, *supra* note 9, at 1383–1384.

[75] Rather, when assessed under the republican lens, its rationale is that courts represent a principled forum *independent* from electoral considerations, thus countering the important concerns around majority

legislature formally repudiate a judicial interpretation of rights will likely prompt a degree of public dialogue or at least scrutiny in respect of the relevant issue.

The pre-enactment political review features of the model should also be understood as feeding into the broader norm-development process. They require policy-makers and legislators to engage forthrightly with the rights implications of proposed legislation—where their deliberations are informed but not governed by judges—thus appropriately catering for concerns around both electoral/political and non-electoral/judicial sources of domination.[76] The more the parliamentary committee element operates independently of government and the greater the role of representatives from opposition and smaller parties, the more efficient it is likely to be in including in the legislative process norms that citizens from across the political spectrum endorse or might recognize as "theirs." The upshot is that citizens who may be frustrated by certain legislative outputs will be more likely to accept them, as they will be more inclined to see their defeat as a matter of bad luck than as having been inevitable in virtue of a process skewed in their disfavor.[77]

And what then of the other criterion of republican democracy: that of *unconditioned* or independent popular control. This element requires that the people's control over government is not contingent on either "democracy-supporting" judges, under judicial supremacy, or on the virtuous self-restraint of political power-wielders under pure political constitutionalism. But the new commonwealth model supports this republican goal in a particularly concrete way. With its pre-enactment political/post-enactment judicial/post-litigation political rights-reviews, it disperses rights-related powers among the three arms of government whereas both of the other models tend towards

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tyranny or under-enforcement of rights. To this extent, the overall argument is reminiscent of that made in favor of strong form judicial review, in the name of republican theory, by Iseult Honohan. Honohan, based on a theory of freedom in which non-domination is combined with "political autonomy," argues that "legislative action may not always track the interest in non-domination or autonomy" and that it is therefore necessary to "set limits to even democratic state action where it seriously damages the ability of citizens to be politically autonomous." She thus defends strong form judicial review "as one of multiple deliberative institutions in the process of republican self-government," insisting that republican self-government is assured 'through the ensemble of government institutions . . . [rather than] through an apparently mandated legislature or executive of a unitary people." *See* Iseult Honohan, Republicans, Rights, and Constitutions: Is Judicial Review Compatible with Republican Self-Government?, *in* Legal Republicanism: National and International Perspectives 83, 100–101 (Samantha Besson & José Marti eds., 2009).

[76] The model also requires this deliberation to take place prior to enactment and thus in a more flexible format that is amenable to greater input from multiple perspectives compared to the adversarial setting of litigation.

[77] This model may thus provide some of the institutional devices that Marco Goldoni, in his defense of political constitutionalism, has argued are needed in order to broaden the notion of "the political sphere" beyond the "electocracy" that he associates with contemporary political constitutionalists. Goldoni has argued that "democratic sovereignty . . . must be conceived in a way that can explain the idea that the citizenry do not delegate everything on the day of the election, but they retain the power to investigate, judge, and control their representatives . . . ." Yet he shares with political constitutionalists the objections to strong form judicial review based largely on the fact of disagreement concerning the meaning and application of rights. *See* Marco Goldini, *Two Internal Critiques Of Political Constitutionalism*, 10(4) Int'l J. Const. L. 926, 942 (2013).

the concentration of such powers in either the judiciary or the executive/legislature. Indeed it actively consigns power over rights, and thus responsibility for them, to each of the three arms of government—thereby enhancing overall rights-consciousness and opening rights-debates to wider deliberative inputs—while at the same time constraining those powers as required by republican theory. The key point in respect of this particular republican criterion is that the distribution of power supports Pettit's notion of a "resistance-averse" government: power over legislation is dispersed and so the capacity of government to "close ranks and assert its authority" is countered. Rather than it offering a concrete opportunity for the people to rise up against an oppressive government, it represents a more abstract framework of popular control such that the subservience of government to the people is understood on a deeper level. The idea reverberates through the political community in question such that government is more likely to answer to common interests.

5. Conclusion

Central to the overall argument is that when democracy is conceived along the republican lines of equally shared popular control over government, the power of judges over legislation, so long as it is appropriately constrained, can be understood as an inherent component of democracy itself rather than as a dirty little secret, or as a kind of necessary constitutional evil required to save democracy from itself. The counter-majoritarian element should not be seen as "difficulty"—necessarily at least—but rather, when appropriately constrained, as a critical feature, required in order for the *demos* to enjoy the kind of *kratos* required for freedom as non-domination to prevail.[78]

Another important argument is that the idea of equally shared popular control prompts a re-assessment of one of the two central pillars upon which contemporary political constitutionalism rests: it calls into question the force, if not the essential coherence, of the fairness argument behind one-person, one-vote majoritarianism so far as it applies to the legitimacy of judicial review. It does not defeat the case for majoritarian decision-making; its value remains and for control to be equally shared it must play a prominent, indeed central, role in the legislative process and in the democratic system overall. But the rigid application of that norm by some political constitutionalists in making the case against judicial review may be softened in light of this republican account of legitimacy. The other central, and related, pillar of the case for political constitutionalism—the fact of disagreement concerning the meaning and application of rights—is not at all diminished in itself. It, above all, undermines the case made, both generally and in republican terms, for outright judicial supremacy. But it is accommodated under the new commonwealth model of constitutionalism that is taken here as corresponding with the republican account of democracy.

But perhaps the pre-eminent argument is that the new commonwealth model is likely (and more likely than the alternatives) to produce legislative outcomes that are

[78] The "counter-majoritarian difficulty," a phrase initially attributed to Alexander Bickel, is widely used in connection with a perceived tension between judicial review and democracy. *See* Bickel, *supra* note 9.

more in line with common goods than with factional interests. It is more likely to bring about those outcomes in both the short haul and long haul senses. The pre-enactment political rights review elements bring a formalized and regularized rights-consciousness to the law and policy making forums. The post-enactment judicial review element brings a rights-focused contestatory forum that is immune from *certain kinds* of alien influences to which political agents are subject. And the post-judicial review political "final word" leaves final resolution to political agents but in the context of the earlier rights-based judicial deliberation. It thus facilitates the emergence of certain relevant considerations in a forum that is independent from the electoral process, while leaving the further refining of those considerations, as well as the "final" resolution of rights conflicts, for the political domain. The model therefore captures the important contestatory dimensions that are called for under the republican account of democracy as equally shared popular control but without the cost of elevating judges into kindly masters.