The republican core of the case for judicial review: A rejoinder to Richard Bellamy

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The case I make for judicial review avoids what I, among others, see as the basic flaw in most of the justifications that have been offered previously.[1] It does not rely on the notion that judges are more enlightened than legislators in respect to the resolution of rights questions. It does not hold that *judicial insight* is such that, with judicial review, outcomes are more likely to treat individuals with equal concern and respect. This means that the "fact of reasonable disagreement on rights" objection cannot be leveled at my case in the way that it can be leveled at legal constitutionalist cases. The republican understanding of democracy upon which I build my case not only accounts for this fact of disagreement, it relies quite heavily on it. In turn, my case relies on that fact of disagreement.

I don't think that Richard Bellamy addresses this aspect of my argument satisfactorily in his response. In fact, I think he effectively denies it and that he thereby mischaracterizes my republican case for judicial review. The clarification as to *how*, I suggest, helps illuminate two important and related points about my case. First, that on Bellamy's own account of political constitutionalism it is a "political constitutionalist" case for judicial review: it cannot be dismissed as just another legal constitutionalist case. Second, while Bellamy's and Waldron's important insights on rights and democracy must fundamentally inform questions about judicial power and institutional design (as they fundamentally inform the case I make), they don't make a case against judicial supremacy *in principle*.

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Thanks to Geoffrey Sigalet for very helpful comments.
[1] *See, e.g.*, Alon Harel & Adam Shinar, *Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review*, 10 INT'L J. CONST. L. 950 (2012).

To understand Bellamy's account of my argument, consider his take on my use of Pettit's "eyeball" and "tough luck" tests. He says that I suggest that courts, when exercising powers of judicial review, ought to be "guided by asking whether a given measure meets the eyeball or tough luck tests" which—in his depiction of my analysis—would mean that courts would then "not [be] claiming they are experts about which measures are best" but would "simply be asking whether a legal challenge to a given measure is justified according to the democratic norm that all be treated with equal concern and respect."[2] Courts, he says, would be interpreting what the eyeball and tough luck tests require; he wonders why courts would have greater legitimacy as interpreters of those tests than legislators.

Bellamy is certainly right to point out that such a theoretical defense of judicial review would raise "a host of substantive issues about which there can be reasonable disagreement." He is probably right that it could only be sustained "by idealizing the operation of the judicial process, so that it becomes a model of truly democratic deliberation . . . while demonizing the operation of the political process."[3] But these arguments apply against a different theoretical defense of judicial review than the one I present. They apply to Dworkin's defense, for instance: he supported judicial review on the basis that judicial insight on matters of principle is such that, with judicial review, outcomes are more likely to secure "equal moral membership" for all citizens in a democratic community.

They don't apply to mine because I don't use the eyeball/tough luck tests in respect to the judicial review question in the way that Dworkin uses his "equal moral membership" test. There is nothing in my analysis of how judicial review might do well by the eyeball/tough luck tests that suggests that I have judges interpreting what is substantively required by those tests. There is nothing that has judges imposing their interpretations of what outcomes might be best (or

[2] Richard Bellamy, *Political Constitutionalism, Republicanism and Judicial Review: A Reply to Tom Hickey*, 17 INT'L J. CONST. L. Xxx (2019)
[3] *Id.*

might count as "enlightened") by some supposedly pre-political conception of justice. Rather, the reasons I suggest it might do well on those fronts follow from features of the practice of judicial review that have nothing to do with qualities that may or may not attach to judges.[4] Most of those features pertain to its attentiveness to individual grievances. They include that it works on the initiation of individuals who are most heavily burdened by a coercive measure; that it binds the coercing agent into a process in which it has to justify the coercion to such an aggrieved individual; that it forces that agent to justify the measure as it applies to the individual's particular circumstances; that it forces re-consideration of the impugned action/inaction in light of the particular grievance.[5] Relatedly, that the proportionality framework tends to facilitate aggrieved individuals in pressing the coercing agent into clarifying the aims of the impugned measure; that it binds them into defending the means used to achieve the aims: into showing that those means are necessary to achieve the aims even where they damage individual interests in the process, or, if they cannot show them to be, to soften the means, and so on. As I point out in the article, this emphasis on individual grievances resonates with the republican conception of the citizen as worthy of being given reasons.

Although I think Bellamy overlooks the fact that this is the basis upon which I make my case in the first place, I also think he mischaracterizes the case I build from that basis. He imputes a cynicism about electoral politics to my argument largely on the basis of the conflation of Dworkin's ideas with Pettit's and indeed with mine. Yet, drawing on Pettit's work, I suggest that electoral mechanisms are going to play a pivotal role on the eyeball/tough luck fronts and so must be at the very heart of any democratic system. There is just no sense in

[4] Geoffrey Sigalet's ideas on "constructive dialogue" between courts and legislatures might speak to the argument insofar as they seem to leave open the possibility that contestatory norms of dialogue could indirectly promote non-domination over the long haul, independently of judges' epistemic virtues. *See* Geoffrey Sigalet, *On Dialogue and Domination*, *in* CONSTITUTIONAL DIALOGUE: RIGHTS, DEMOCRACY, INSTITUTIONS (Geoffrey Sigalet, Gregoire Wéber, & Rosalind Dixon eds., 2018).
[5] Harel & Shinar, *supra* note 1.

my argument of politics being subordinate to law or indeed of courts representing "an alternative venue to *author* norms and laws. . . ."[6]

Related to this, Bellamy overlooks something that is critical to my overall case, including to its political constitutionalist credentials: the idea of a two-speed mode of politics, comprising short- and long-haul dimensions. Applying the idea to judicial review, I suggest that those "individual grievance"-oriented features are such that its very presence inclines political actors toward sensitivity to such potential grievances which translates into likely effects over both the short and longhauls: day to day, as power-wielders take care to soften the effects of their measures where they might otherwise do unnecessary damage to individual interests, but more importantly over the decades, as that concern permeates the broader discourse, gradually facilitating outcomes that, despite endless disagreement, tend to give individual citizens reason to think of themselves as sharing equally in a system of joint control.

That long-haul lens also helps us conceive of how that democratic contestation of coercive measures —that is so critical to the idea of political constitutionalism—can play out in such myriad different ways and *over time*. It means that at the level of abstract principle we can accept "strong form" judicial review and maybe even embrace it in its milder forms: that aspects of coercive measures that can be traced back to such review can themselves be broken down over time by dissenting citizens.[7] It similarly suggests that the democratic significance of distinctions between "weak" and "strong" form systems of judicial review can be exaggerated: that the republican reasons Bellamy presents for his support of the former might instead be understood—in line with my overall argument—to inform a republican case, in principle, for either.[8]

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[6] Bellamy, *supra* note 2, at xxx (emphasis added). My arguments on this front essentially correspond with Bellamy's "balance of power" idea—an aspect of his political constitutionalism that he says I overlook.

[7] I don't suggest that my theory would rigidly require any one form of judicial review for all democratic states, nor would it preclude tweaks over time in the forms it might take in any given state. For the record, I don't think the US version is likely to fare well by the lights of my argument.

[8] Bellamy is right when he suggests that I think "strong review can only be justified if weakened sufficiently to allow for democratic contestation of judicial decisions," although further exploration of that idea is

needed, not least in respect to what "weakened" might imply in practice and, relatedly, what might count as "democratic contestation." Jeff King's ideas around a "contextual institutional approach" to judicial restraint are illustrative of what might count as "weakened" by this republican analysis. *See* Jeff King, *Institutional Approaches to Judicial Restraint*, (28)(3) OXFORD J. LEGAL STUD. 409–441 (2008).