

Chapter 1

Judicial review and the defence of (democratic) constitutionality A critique of the argument from disagreement

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The aim of this chapter is to offer a defence of the practice of constitutional review from the point of view of a theory of democratic legitimacy. I will develop this defence by engaging with the strongest criticism to date of the practice of constitutional review: Jeremy Waldron's and Richard Bellamy's argument that constitutional review violates the principle of democratic equality, respect for which is a necessary condition of legitimate political decision-taking in a pluralist society characterised by reasonable disagreement about rights.²

In a nutshell, Waldron and Bellamy argue as follows: A constitutional court that is exercising review over legislative decisions, by interpreting entrenched constitutional provisions, constitutes a *prima facie* violation of the principle of democratic equality. In a democracy

¹ The author would like to thank John Erik Fossum, Agustín José Menéndez, and Simon Wigley for helpful comments on an earlier draft.

² See J. Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal*, 1346; id., *Law and Disagreement* (Oxford University Press, 1999); R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007).

all citizens should have an equal say on how they are to be governed. But in a political system with constitutional review, a number of key decisions concerning how the community is to be governed are not taken by the people (or their representatives) but by a small group of unelected judges whose views exclude those of ordinary citizens. Such an arrangement would be justifiable only if we were entitled to assume that the judges on a constitutional court are more likely to arrive at substantively correct answers to fundamental questions of political morality than the people or their representatives. However, there is no good reason to make this assumption in a pluralist society whose members are committed to liberal and democratic principles but reasonably disagree about almost all questions of political morality. Hence, constitutional review is an unjustifiable practice, in light of the fact that it constitutes a *prima facie* violation of democratic equality. Even if legislative decision-taking does not necessarily offer better assurances of morally correct outcomes than judicial decision-taking, it is to be preferred on grounds of fairness since it gives every citizen an equal say.

Most defenders of judicial review try to counter this criticism by disputing the claim that a constitutional court is no more likely than the people or their representatives to arrive at morally correct decisions. The courts, in Ronald Dworkin's words, act as a 'forum of principle' and thus arrive at morally correct decisions about questions of political morality more often than legislatures. What is more, concerns about the undemocratic character of judicial review are portrayed as misplaced. Democracy, it is often argued, has no other rationale than the instrumental one of improving the substantive moral correctness of legislative outcomes. Hence, there cannot be any loss of value in adopting non-democratic procedures if they happen to be better than democratic procedures at bringing about substantively correct outcomes.³

³ This strategy is of course associated with Ronald Dworkin, but it is to be found in other key critics of Waldron's work. See R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996), at 1-38 and id., *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2002), at 184-210. For other outcome-oriented arguments for constitutional review see A. Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 *Law and Philosophy*, 451; J. Raz, 'Disagreement in Politics' (1998) 43 *American Journal of Jurisprudence*, 25, at 44-7.

Since I am uncomfortable with purely instrumental accounts of the value of democracy, I share Waldron's and Bellamy's concern with the implicitly anti-democratic character of some purely outcome-oriented defences of constitutional review. But I believe that this concern need not threaten the justifiability of constitutional review. It is perfectly possible, I will claim, to defend the practice of constitutional review on the ground that it protects the native legitimising force of democratic procedures in the face of moral disagreement.⁴ I will also suggest that the debate about judicial review would benefit from a change of focus. Judicial review is compatible with democracy in some but not in all of its possible forms. Instead of trying to offer general arguments for or against judicial review, we would therefore be well advised to concentrate on the question of what form judicial review needs to take in order not to threaten but to support the integrity of democracy.

I will proceed as follows: In the first section, I will discuss Bellamy's case against constitutional review. This discussion will show that the argument from disagreement against constitutional review is a failure if taken in its simple and unqualified form. In the second section, I

⁴ Broadly similar strategies are pursued in J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980); W. J. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge University Press, 2007); T. Christiano, *The Constitution of Equality: Democratic Authority and its Limits* (Oxford University Press, 2008), at 260-300; L. Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford University Press, 2007), at 101-75. Needless to say, there are other strategies for justifying judicial review. It has often been argued that judicial review must be legitimate wherever there is a formal constitution, since a formal constitution would be meaningless unless it subjected the ordinary democratic legislator to effective control. If the formal constitution is itself the result of an exercise of popular sovereignty, judicial review may even appear as a defence of the truly democratic decisions of the popular sovereign against the short-term thinking and partisan haggling of parliamentary parties. See B. Ackerman, *We the People 1: Foundations* (Belknap Press, 1991), at 131-62; S. Freeman, 'Constitutional Democracy and the Justification of Judicial Review' (1990) 9 *Law and Philosophy*, 327; S. Holmes, 'Precommitment and the Paradox of Democracy' in id., *Passions and Constraint: On the Theory of Liberal Democracy* (University of Chicago Press, 1995), at 134-77. I do not think that such defences go to the heart of the matter. For one thing, formal constitutions are very often not the result of genuine exercises of popular sovereignty. What is more, the interpretation of a formal constitution is typically going to give rise to precisely the problems of disagreement that drive Waldron's and Bellamy's views. To answer the argument from disagreement, then, is clearly the fundamental task for anyone who wants to defend the legitimacy of judicial review.

will proceed to outline and criticize Waldron's more carefully qualified version of the argument. Waldron's argument from disagreement is sound, but only at the price of making concessions that restrict the relevance of the argument to such an extent that it no longer supports an interesting general attack on the practice of constitutional review. In the third section, I will conclude with a few brief and tentative remarks on how my argument in this chapter might bear on the constitutional framework of the EU.

Bellamy and the unqualified argument from disagreement

Richard Bellamy's recent attack on constitutional review⁵ is concerned to evaluate the legitimacy of constitutional review in a liberal-democratic society whose members are in principle committed to the view that the state owes equal concern and respect to all citizens and who take it for granted that this commitment entails that people ought to enjoy a robust set of individual rights that protect certain basic interests. According to Bellamy, the rights which are thus acknowledged as necessary in a liberal-democratic society fall into three broad categories: A first category of rights 'offers the supposed prerequisites for individuals to make the autonomous and responsible choices that enable them to secure their livelihoods and engage in a range of meaningful relationships.' This includes rights to freedom of thought and action, as well as rights to property and welfare. A second group of rights aims to ensure equality before the law and due process. Finally, there are political 'rights entailed by a functioning democracy.'⁶

While rights of all these three types are typically acknowledged as necessary in a liberal-democratic society, a liberal-democratic society is likely to be characterised by profound disagreement concerning the interpretation of the commitment to rights. People in an open and pluralist society usually disagree about exactly what rights should be protected and how these rights ought to be understood. None of the three categories of rights listed above, Bellamy claims, is exempt from such disagreement. What is more, the disagreements in question will

⁵ See Bellamy, *supra* note 2. The argument from disagreement was first popularised by Jeremy Waldron, see *Law and Disagreement*, *supra* note 2.

⁶ Bellamy, *supra* note 2, at 18-9.

arise even among conscientious citizens who argue reasonably and in good faith.⁷ The 'burdens of judgment' ensure that any profound disagreement with regard to the interpretation of all claims of right may well, for all we know, be a reasonable disagreement, i.e. a disagreement that would remain even if factors like prejudice, bias, lack of information, etc. could be filtered out.⁸

Despite the presence of profound and reasonable disagreement about rights, a liberal-democratic society will of course have to settle on some scheme of rights. And in order to settle on one scheme or another, a society will have to decide which procedures to adopt for resolving disagreement about rights. There are two basic approaches, Bellamy argues, for evaluating procedures that might be used to settle political disagreement. On the one hand, we could adopt an output-oriented approach. According to the output-oriented approach, we ought to choose the procedure(s) that are most likely to bring about morally correct outcomes, understood as outcomes that treat all citizens with equal concern and respect. On the other hand, we could adopt an input-oriented approach to evaluating procedures for settling disagreement. According to the input-oriented perspective of evaluation, we ought to choose the procedure(s) that treat citizens as equals in the process of political decision-taking. The idea here is that if citizens are given equal powers of participation in the procedures through which laws are made, they have reason, on the ground of the fairness of the procedure, to consider legislative outcomes as legitimate even if they disagree, on a substantive level, about whether the decisions in question are morally correct or not.⁹

From here on out, the argument against constitutional review is fairly straightforward: In Bellamy's view, constitutional review is clearly unjustifiable from an input-oriented perspective, as it appears to violate the principle of democratic equality. To assign the power to choose a particular scheme of rights to an unelected and unaccountable minority is to deny that all citizens are equal in status

⁷ Bellamy, *supra* note 2, at 20-6.

⁸ See J. Rawls, *Political Liberalism* (Columbia University Press, 1993), at 55-7.

⁹ See Bellamy, *supra* note 2, at 27. The distinction between input- and output-oriented perspectives is also used by Waldron, 'The Core of the Case Against Judicial Review', *supra* note 2, at 1372-5 and Dworkin, *Sovereign Virtue*, *supra* note 3, at 185-90.

and thus entitled to an equal say as to how they are to be governed. In a system with constitutional review, the majority are subject to the domination of judges whose views need not reflect those of ordinary citizens.¹⁰ This entails, in Bellamy's view, that decisions created through a procedure that includes constitutional review cannot have any legitimacy. Citizens who disagree, on a substantive level, with the wisdom of the decisions that result from constitutional review have no reason to consider these decisions as binding, as they have not been given any say in the matter. We should conclude, Bellamy argues, that if there is a justification of constitutional review it must be one that is based on an output-oriented perspective: It must be possible to show that a procedure including constitutional review is sufficiently superior in creating outcomes that afford substantive equal concern and respect to citizens for our interest in correct outcomes to outweigh the violation of democratic equality entailed by constitutional review.

Bellamy thinks that there are two reasons to reject an output-oriented defence of constitutional review. The first is that a majoritarian procedure may well be as good as or even superior in creating substantively correct outcomes. Bellamy emphasises that almost all modern societies are pluralistic, and he takes this to imply that a government will usually be a coalition of different groups that have to compromise and accommodate each other's interests in order to acquire power. Since such coalitions are typically fragile and fleeting, as well as subject to change brought about through election, it is unlikely that any significant group is going to be permanently excluded from the opportunity to influence legislative outcomes and to extort respect for its interests. The risk of domination may therefore be lower in a majoritarian system than in a system with an entrenched constitution enforced by a politically unaccountable constitutional court.¹¹

In any case, the fact of reasonable disagreement about the interpretation of rights makes an output-oriented defence of constitutional review unavailable. In order to judge procedures by their tendency to produce correct outcomes, Bellamy argues, we need

¹⁰ See Bellamy, *supra* note 2, at 150-1, 166-7.

¹¹ See Bellamy, *supra* note 2, at 209-59.

to rely on some conception of which outcomes are correct. In the face of reasonable disagreement about questions of public morality, however, we are not entitled to rely on any particular conception of the correctness of outcomes as a yardstick for the distribution of decisional authority, especially if that distribution violates democratic equality.¹² Defenders of constitutional review assume, in blatant violation of the democratic ideal of equality, that their own conception of correctness in outcome, which they expect to be enforced in the process of constitutional review, is entitled to more consideration than the equally reasonable views of their fellow citizens who disagree.

Bellamy's overall conclusion, then, is that constitutional review (as well as constitutional entrenchment) is never justifiable as way of settling on or of interpreting a scheme of rights, at least not in a democratic political system. The institution flatly violates the principle of democratic equality, and it offers no benefits that might outweigh the violation. A democracy, then, will always be better off without a system of constitutional review.

In the blunt and unqualified form in which it is put forward by Bellamy, the argument from disagreement runs into difficulties. One problem that has been discussed elsewhere is that the argument appears to be self-defeating.¹³ Bellamy emphasizes that the interpretation of all rights which we take to be implicit in the liberal-democratic project of treating all citizens with equal concern and respect is subject to reasonable disagreement. After all, if some such rights were not subject to reasonable disagreement, there would be no reason not to entrench those rights and to provide for their judicial enforcement. But if disagreement afflicts all categories of rights, including democratic rights of participation, then disagreement cannot be limited to disagreement about the substantive correctness of legislative outcomes. It is clearly possible to disagree, reasonably and profoundly, about the right design of a majoritarian procedure that is to afford equality in the process of law-making. Such disagreement, however, may come to undermine the legitimating

¹² See Bellamy, *supra* note 2, at 93.

¹³ See T. Christiano, 'Waldron on Law and Disagreement' (2000) 19 *Law and Philosophy*, 513.

force of majoritarianism if one accepts the argument from disagreement without any qualification. As we have seen, the argument takes its force from the idea that it amounts to a denial of equal respect for a court to impose on the citizenry a particular answer to a question of political morality about which there is reasonable disagreement. But if this is the case, then it must also be a denial of equal respect to impose an answer through a majoritarian procedure the sufficient fairness of which is subject to reasonable doubt.

Bellamy's response to this problem is not altogether convincing. This point is best brought out by taking a look at his rejection of John Hart Ely's proceduralist defence of constitutional review.¹⁴ Ely argued that the institution of constitutional review does not conflict with democracy, but rather secures that it is functioning well, as long as judges on a constitutional court restrict themselves to the protection of the integrity of the democratic process.¹⁵ In the words of the famous *Carolene Products* footnote, courts are to interfere with democratic legislation if such legislation 'restricts those political processes which can ordinarily be expected to bring repeal of undesirable legislation.' According to Ely, this judicial task of protecting the integrity of the democratic process is not limited to ensuring formally equal rights of participation. Even where there are formally equal rights of participation, courts may be called upon to counteract 'prejudice against discrete and insular minorities' that tends to 'curtail the operation of those political processes ordinarily to be relied upon to protect minorities.'¹⁶

Ely's conception can be understood as a response to the problem of regress outlined above. Democratic procedures can legitimate their outcomes only if they are sufficiently fair, and this means, as long as we assume that democratic procedures can be legitimating, that framers of a constitution, as well as those who are to interpret it, must be licensed to rely on some account of what sufficient fairness

¹⁴ See Bellamy, *supra* note 2, at 107-20.

¹⁵ See Ely, *supra* note 4, at 73-104. For a similar defense of judicial review see C. S. Nino, *The Constitution of Deliberative Democracy* (Yale University Press, 1996), at 199-207.

¹⁶ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n. 4 (1938).

consists in. As a result, some (suitably limited) form of constitutional review will have to be compatible with democracy, unless we are willing to admit, as critics of constitutional review of course are not, that we cannot explain the normative authority of democratic procedure.¹⁷

Bellamy, though offering a proceduralist view himself, will have none of this. He is troubled in particular by Ely's defence of the view that a constitutional court ought to protect 'discrete and insular minorities' whose interests are not being heard in the majoritarian democratic process, even while they do enjoy formally equal rights of participation. In Ely's view, discrimination against such minorities undermines the legitimating power of the democratic process. Hence, it must be permissible for a court to strike down laws that stem from a discriminatory intention on the part of the majority. In striking down laws on this ground, Ely argues, a court is not usurping the democratic legislator's prerogative to determine legislative outcomes. It is merely protecting the integrity of democratic procedure.

Bellamy rejects this proposal for the reason that any judgment that a legislative intent is discriminatory must, pace Ely, rely on a substantive theory of correct outcomes. For instance, a policy of racial segregation through the provision of 'separate but equal' educational facilities cannot, in Bellamy's view, be classified as unduly discriminatory on the basis of intent alone. After all, one could reasonably claim that such segregation 'might actually counteract discrimination by allowing black children to be educated in an environment where nobody is intimidating them or setting inappropriate standards.'¹⁸ The judgment that a law permitting segregation is discriminatory, then, cannot be based on a finding of discriminatory intent. It must come to rest on the claim that segregation violates the principle of equal concern and respect and is

¹⁷ I do not want to claim that this is how Ely himself understood his argument. Ely tends to work with a misleading distinction between procedure and substance. Consequently, he has been accused of failing to recognise that his view can function as a regress-stopper only if it is taken to be based on a substantive theory, however modest, of the value of democratic equality. See R. Dworkin, 'The Forum of Principle' in *id.*, *A Matter of Principle* (Harvard University Press, 1985), 33-71, at 57-69; Christiano, *supra* note 4, at 263-4.

¹⁸ Bellamy, *supra* note 2, at 117.

therefore a substantively mistaken outcome. But if there is reasonable disagreement, as we should expect, on whether a law permitting segregation is substantively mistaken, Bellamy goes on to argue, the matter must be left to the democratic legislator. Of course, one can still believe that racial segregation is unjust. But if one were to deny the legitimacy of a democratically enacted segregationist law on the basis of that belief, one would, in Bellamy's view, undermine the integrity of democracy instead of protecting it.

Not content to reject the idea of review for discriminatory intent, Bellamy goes on to reject the other part of Ely's conception, the view that a court can, without violating the principle of democratic equality, work to ensure that all citizens have equal access to democratic procedure. Bellamy acknowledges, in attacking Ely, that such a demand must fall to the argument from disagreement if we reject any restriction on its scope:

[Y]ou cannot judge whether the process is fair without a view of what counts as a fair outcome, and one cannot judge a fair outcome without referring to some account of fundamental values. [...] As a result, the distinction between substantive and procedural approaches to judicial review collapses.¹⁹

Since the choice between competing accounts of fundamental values is subject to reasonable disagreement, Bellamy concludes, it must be left to the democratic legislator.

In other words, Bellamy simply bites the bullet when it comes to the problem of regress. He commits to the claim, in effect, that democratic procedure can legitimate its outcomes even where some of those affected by its decisions reasonably claim that it violates basic fairness:

Whatever the inevitable flaws of any [democratic] system, it retains an authority and legitimacy that is independent from the rightness or wrongness of the policies it is employed to decide – including those about democracy itself.²⁰

¹⁹ Bellamy, *supra* note 2, at 110-1.

²⁰ Bellamy, *supra* note 2, at 140-1.

If we accept Bellamy's view, the term 'democratic system' will apparently have to be interpreted in a rather permissive sense. We might no longer be entitled, it seems, to claim that a system is not democratic if it disenfranchises women, practices racial segregation, or is based on some exclusive ethnic homogeneity.²¹ Any such claim, as Bellamy himself emphasises, would have to apply some interpretation of the ideal of equality that tells us who is entitled to participate in legislative decisions. We therefore either have to admit that a system of procedures can justifiably claim to be democratic only if it passes muster with some substantive standard of equality or we have to be willing to call just about any system in which people hold regular elections of some sort a democracy. If we choose the first option, Bellamy's attack against Ely falls flat since we can no longer invoke the argument from disagreement to show that it would be undemocratic for a court to enforce the standard in question. Hence, Bellamy must be committed to the second of the two options.²²

But at this point, we are clearly entitled to ask why one would believe that *any* democratic system (in the permissive sense of the term) will have authority and legitimacy. Bellamy's discussion of the point starts out by admitting that 'if the democratic system is imperfect, then surely any decision will be tainted by its imperfection.'²³ One wonders why Bellamy thinks he is entitled to make such a remark. Clearly, he must be relying on the kind of substantive standard here that he thinks judges mustn't use lest democracy be destroyed. Be that as it may, he goes on to explain why we should discount the flaws as follows:

²¹ This may strike some readers as an uncharitable interpretation. But Bellamy repeatedly claims that enfranchisement (of women, people of colour) has typically been achieved through political and not judicial action, and this claim seems irrelevant to the legitimacy of judicial review unless one holds that this is how problems of enfranchisement ought to be solved.

²² To be sure, Bellamy sometimes talks in ways that would seem to commit him to the first option. See for instance Bellamy, *supra* note 2, at 146, where he claims it is an 'underlying value' of democracy to treat all 'human beings with equal concern and respect' or *ibid.* at 219 where he says that citizens 'cannot be ruled without giving equal consideration to their interests.' But if this is the case, then many democracies will fall short of the threshold of legitimacy and review cannot be inherently undemocratic because it purports to enforce substantive values.

²³ Bellamy, *supra* note 2, at 140.

As with any democratic decision, people can distinguish acceptance of the legitimacy of the democratic procedure from agreement with the policy that emerges from the procedure. Just as I can prefer politician A to politician B, but still regard a majority vote as the legitimate way of choosing between them even if I know most people will opt for B, so I can believe that PR is better than the current plurality system yet acknowledge that the only legitimate way of instituting PR would be by the prevailing system. My preference for PR will be a substantive, results-based view, but I can still acknowledge that there are valid arguments against such a system. As a matter of practical politics, therefore, it will be necessary to defer to some procedure to decide the issue, and as a democrat an imperfect democratic procedure through which citizens have some chance of having their say can be reasonably preferred to one that has fewer democratic credentials.²⁴

The problem with these remarks is not that they are wrong, it is that they are plainly irrelevant to the point Bellamy apparently seeks to establish, namely that any democratic system in the permissive sense has authority, including authority about how to understand democracy. Of course, people can believe that they should accept a politician who has been voted into office as legitimate even if they would have liked to see someone else win the election. But the reasonableness of such an attitude is rather obviously dependent on the assumption that the elections were sufficiently fair, it presupposes a substantive standard of democratic equality.

The example about PR is equally irrelevant. It is true that it might be reasonable for someone to accept the legitimacy of a democratic decision not to use PR even though he believes that the system would be a more perfect democracy if it were to use PR. However, it is reasonable to take such a stand only on the condition that the democratic process in question is already sufficiently fair to legitimise the legislative choice of what one considers to be a morally suboptimal voting system. Hence, the example doesn't generalise to

²⁴ Bellamy, *supra* note 2, at 140.

all decisions 'about democracy.' We obviously cannot justify Jim Crow-laws in quite the same way.

Finally, it is perfectly true that, as a matter of practical politics, it is necessary for members of a political community to defer to some procedure for taking collective decisions. This Hobbesian requirement, however, can be satisfied even by completely non-democratic systems. Hence, it doesn't support the authority of democracy in any way. It is true as well that an imperfect democratic procedure might be preferable to one that has 'fewer democratic credentials'. But of course, whether it is or not will depend on the circumstances of the case. History shows that it is perfectly possible for minorities to find themselves in situations where some form of imperial protection is preferable to victimisation at the hands of a democratic majority. And there is very little reason to think that a formally democratic procedure could not be afflicted by such grave deficiencies as to make the option of constitutional protection look very attractive.

To conclude: Bellamy offers us no good reason to accept the sweeping claim that any democracy in the permissive sense of the term has normative authority and legitimacy. But if we admit that democratic procedure must pass muster with a substantive threshold-standard of some kind to have legitimising force, we cannot justify a wholesale rejection of constitutionalism and constitutional review by invoking the argument from disagreement. To do so leaves us without any resources to explain the normative authority of democracy itself.

Bellamy's failure to address the self-defeatingness objection is, I believe, indicative of a more general mistake about the notion of democratic legitimacy. I do not think it is helpful to think about democratic legitimacy in terms of a hard and fast distinction between input-oriented and output-oriented evaluative perspectives or to associate the concept of legitimacy exclusively with the input-oriented perspective. Any adequate theory of democratic legitimacy will have to combine both perspectives and it is a mistake to jump to

the conclusion that such combination is incoherent or unworkable too quickly.²⁵

To illustrate the point, let me return to Ely's defence of constitutional review. Remember that Ely argues that we cannot limit a constitutional court's competence to the function of guaranteeing fair and equal access to democratic procedure. Discrete and insular minorities need additional protection against legislative majorities, in the form of constitutional review that will strike down legislation with discriminatory intent. Bellamy's point that Ely cannot avoid implicit reliance on some form of outcome-orientation in determining discriminatory intent is certainly plausible. But we should not be too quick to jump to the conclusion that this observation dooms the kind of justification of judicial review Ely is interested in.

Ely's demand for extension of judicial protection is embedded in a more general theory about the purpose of democracy. In Ely's view, majoritarian democracy is an attractive mode of collective decision-taking not least for the reason that it typically protects citizens against state-sanctioned oppression.²⁶ This idea is of course thoroughly traditional. It is based on the assumption that a policy that is supported by a majority of all citizens is unlikely to fail to express a plausible conception of the common interest, as well as on the assumption that if it does, it is likely to be corrected. A more moderate and perhaps more plausible version of the same assumption might claim that a policy that is supported by a majority of all citizens is at least highly unlikely to be nothing more than an expression of a merely partial or sectional interest. In other words, democracy solves the traditional problem of tyranny: it disables an autocrat or a small minority to lord it over the rest and to make laws in their private interest without giving due consideration to the interests of ordinary people. It also disables an autocrat or a small minority from identifying their own interest with the common good in uncritical, unreflective, or self-serving ways.

²⁵ For a similar view see C. Brettschneider, *Democratic Rights: The Substance of Self-Government* (Princeton University Press, 2007), at 136-59.

²⁶ See Ely, *supra* note 4, at 77-8.

Someone who is drawn towards the view that democracy is valuable because it has a tendency to prevent oppression needn't deny that there are other, additional reasons for valuing democracy. Perhaps there could be a non-democratic constitutional order that would be as effective at preventing oppression. If so, we would, I assume, still reject it as failing to pay equal respect to all citizens in denying them participation in the legislative process. What I would like to claim, however, is that it would, in any case, be unreasonable to expect some social group to accept unrestrained majoritarian democracy as authoritative if it patently failed to give that group adequate protection against state-sanctioned oppression.

I should admit that I am not sure how to argue for this claim against someone who would like to deny it in any other way than to ask that person to put himself in the shoes of a member of a minority that suffers from oppression: Would he think that he has a duty to obey the laws of the majority, out of respect for the principle of democratic equality, for the reason that he has enjoyed a formal right to vote? To take a slightly different example that would seem to arise from an embrace of a permissive conception of democracy: Would he think that he ought to accord authority to the law for the reason (if we find ourselves in a democracy with restricted franchise) that the majority of those who have the right to vote might come around to give it to him at some point in the future? If the answer to such questions is negative, then democracy cannot have authority over those it fails to protect from oppression, and it would appear that the protection against oppression which majoritarian democracy affords to some ought to be extended to all, by the extension of the franchise and, if necessary, through the judicial invalidation of manifestly oppressive laws. To reject these extensions is to prevent democracy from fulfilling one of its essential purposes.

To put the point slightly differently: The demand that someone ought not to be subjected to oppression expresses the view that his good, as he understands it, counts for something and that it would therefore be wrong to treat him like a slave, as a mere instrument of someone else's good. To acquiesce in someone's oppression, on the other hand, amounts to a denial of equal status. It makes no sense, therefore, to claim that someone should have to accept the authority of democracy if he is not given a vote. And it makes no more sense to give him the

vote, for the reason that it would be wrong to deny him equality of status, but to withhold judicial protection from majoritarian oppression. To deny someone the right to vote is a public invitation to oppress him, and so, under certain circumstances, is the refusal to allow him access to judicial protection against an abusive majority.

Bellamy is not free to dismiss such considerations, as he defends the idea that democracy has authority because it prevents the standing threat of oppression.²⁷ In the constructive part of his book, Bellamy argues for the traditional theory of pluralist democracy, which claims that the balance of power between different social groups, as well as the need to form coalitions, is likely to prevent the oppression of any one group at the hands of a majority in a democracy, whereas he interprets judicial review as a disruption of that balance that might enable oppression.²⁸ But if interest group-pluralism is to be recommended on the ground that it prevents oppression, it seems that we must, after all, have a capacity to recognise that certain outcomes are undoubtedly oppressive.

This assumption, however, undercuts the claim that Ely's call for judicial protection of 'discrete and insular minorities' is to be rejected because it is outcome-oriented in an objectionable way. It is true that we cannot determine discriminatory intent without relying on intuitions about what outcomes are substantively oppressive. But Bellamy's argument for pluralism must be outcome-oriented in exactly the same way as Ely's argument for judicial review. We will not be in a position to claim that interest group-pluralism is a better mechanism for preventing oppression than judicial review if we are not allowed to characterise at least some outcomes as substantively oppressive. It therefore makes no sense for Bellamy to claim that a constitutional court trying to protect discrete and insular minorities from oppression would itself be an oppressive institution because there will always be reasonable disagreement about whether some policy is substantively oppressive. As a result, Bellamy's rejection of constitutional review ultimately appears to boil down to the empirical claim that the kinds of oppression against which the kind of review Ely envisages is directed simply do not occur in pluralist

²⁷ See Bellamy, *supra* note 2, at 154-75.

²⁸ See Bellamy, *supra* note 2, at 221-39.

majoritarian systems, or at least not with sufficient frequency to make it worth our while to bother with constitutional review. I will leave it to the reader to judge whether this is a plausible assumption.²⁹

The more important point is that the simple argument from disagreement must surely fail if it is possible for us to recognise at least some outcomes as oppressive. The simple argument from disagreement, to recall, claims that we are not entitled to prefer one procedure over another for being more likely to give substantively correct outcomes unless we agree on a conception of what outcomes are substantively correct. But this line of reasoning overlooks that an outcome-oriented argument for choosing one procedure over another can get off the ground on a much less demanding basis. If we can recognise at least some outcomes as being so obviously wrong as to count as oppressive, we are entitled to prefer one procedure over another for the reason that it blocks obviously oppressive outcomes or significantly reduces their likelihood. Such a choice can be made even where we continue to disagree profoundly over the question which among the outcomes that are not obviously oppressive are better and which are worse.³⁰

²⁹ One might argue that Bellamy's approach to constitutional theory is not sufficiently concerned with the possibility of constitutional pathology and crisis, as it has little to say about how a constitution should provide for and react to the kind of breakdown of a system of parliamentary democracy so perceptively analysed in C. Schmitt, *Legality and Legitimacy*, translated by J. Seitzer (Duke University Press, 2004). Bellamy would likely retort that an excessive focus on the extreme case might carry the danger of restricting collective self-determination too much in the situation of normality. But even apart from the possibility of extreme crisis, Bellamy takes a rather optimistic view about the progressive potential of democratic majoritarianism. He goes to great lengths to argue that progressive achievements and effective protection of individual rights are much more likely to result from the rough and tumble of democratic politics than from exercises of judicial review. See Bellamy, *supra* note 2, at 209-59. A comprehensive discussion of Bellamy's evidence for this claim is beyond the scope of this chapter. But it should be noted that the discussion is very heavily biased towards British and American examples, while there is little attempt to engage with other constitutional traditions. Bellamy's optimism about this also does not seem to sit too well with very recent political history. In the 'war against terror' courts have generally been more willing to protect individual rights against legislative overreach than parliamentary majorities.

³⁰ It has been pointed out by other critics that the simple argument from disagreement fails even on grounds of correctness. We frequently have reason to assume that a procedure designed in a certain way is more likely to produce substantively correct outcomes even while we do not know or reasonably disagree

There is little reason, moreover, to think that we need detailed advance knowledge of the strategies of legislative oppression an unrestrained legislator might attempt to pursue in order to design procedures that will reduce the likelihood of oppressive outcomes. Legislative strategies of oppression come in many forms, and what form they are likely to take in a particular social context is typically going to be difficult to anticipate. It is precisely for this reason that equal rights of participation for all those affected by the legislative process usually provide the best procedural protection against oppressive outcomes. We don't have to be able to anticipate all possible oppressive outcomes, and much less do we have to have a ready-made and agreed-upon theory of the substantive moral correctness or moral optimality of outcomes, in order to know that oppression is much more likely where significant groups of citizens are excluded from equal participation in the legislative process and are deprived of an effective voice.

If this is a valid rationale for democratic legislation, it is hard to see why one should reject Ely's attempt to extend this rationale so as to justify (some form of) judicial review. Unless we flatly (and implausibly) deny that pure majoritarianism may give rise to oppression of discrete and insular minorities, there seems to be no good reason to deny that the institution of constitutional review may have an oppression-inhibiting effect. If a discrete and insular minority has the right to appeal to an institutionally independent third party empowered to overturn oppressive outcomes enacted by the majority, the legislative process is much more likely to accommodate the minority's interests and to give it a genuine voice. What is more, if the minority is nevertheless subjected to oppression, the likelihood that a court will provide a remedy is probably going to be higher than the likelihood that the oppressing majority will. The institution of judicial review, then, can reasonably be expected to reduce the danger of oppression.

what outcomes are correct. See Kavanagh, *supra* note 3, at 460-5. David Estlund has argued that it would be impossible to justify democratic authority without the assumption that democratic decision-taking exhibits this feature. See David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press, 2008), at 65-116.

To sum up: we cannot reject the view that judicial review can be justified as a means to protect the integrity of the democratic process simply on the ground that arguments to this effect are implicitly based on outcome-oriented considerations. Any plausible conception of democracy that aims to justify the view that democracy has legitimising powers will have to make room for outcome-oriented considerations of a weak and modest kind. Ultimately, this is a straightforward consequence of the fact that no political system that is oppressive, not even a democracy that offers formally equal participation in the legislative process, can have authority over those it oppresses. Of course, to employ this insight in constitutional argument is to assume that we can recognise oppression when we see it (or at least when we are forced to see it by provisions that allow the oppressed to voice their concerns). But if the argument from disagreement were to undermine our confidence in this capacity, it would also undermine the possibility of the kind of constitutional theorising Bellamy takes himself to be engaged in.

Bellamy is right to emphasise that one of the major attractions of democracy consists in its capability to allow us to take legitimate collective decisions in the face of reasonable disagreement about what outcomes of the legislative process are substantively correct or morally best. A theory of democratic legitimacy claims that democratic procedure confers legitimacy on its outcomes, irrespective of the content of those outcomes. In other words, democratic laws have normative authority because they were created in a certain way, and this entails that a citizen ought to respect them even in cases in which he thinks that the law in question is substantively incorrect.

Bellamy fears that the theory of democratic legitimacy will fall into incoherence if it includes any form of output-orientation, however modest. If we are interested in democratic legitimacy, we are committed to a purely input-oriented perspective. This assumption draws its undeniable plausibility from the fact that certain strong forms of outcome-orientation would indeed undermine a theory of democratic legitimacy. Let us assume we are in possession of a complete theory of correct outcomes, and take ourselves to be entitled to rely on it to answer questions of institutional design. In such a case, we would choose our procedure with a view to its capacity reliably to produce the outcomes we take to be substantively correct. The best

procedure would then be the procedure, of all possible or practically feasible procedures, most likely to produce those outcomes.

According to a view of this sort, procedures can only have a very limited power to confer legitimacy or normative authority on their outcomes. Whenever a procedure produces a substantively mistaken outcome, this will give us a reason to change our procedure so as to make it more reliable at bringing about correct results (as opposed to the procedure giving us a reason to attribute legitimacy to the outcome in virtue of its procedural pedigree), at least if it is still possible to enhance the reliability of our procedure through amending it. Strong outcome-orientation of this kind would of course reduce a theory of democratic legitimacy to near pointlessness, while telling us little about how to go on under conditions where we lack a complete and uncontroversial theory of correct outcomes.

But as should be clear by now, I believe it is mistaken to assume that strong outcome-orientation is the only interesting or relevant form of outcome-orientation in the evaluation of procedure, and that our only other option is to adopt a purely input-oriented account of democratic legitimacy committed to the wildly implausible claim that all decisions taken by all forms of democracy in the permissive sense must, by definition, be legitimate. The reasonable expectation that the institution of constitutional review will have an oppression-inhibiting or oppression-remedying effect is an outcome-oriented consideration for integrating it into our democratic procedures. But it remains valid in the absence of an uncontroversial comprehensive theory of correct outcomes. What is more, it does not undermine the view that the democratic credentials of decisions confer legitimacy on those decisions, in the face of reasonable disagreement over correctness, as long as the decisions in question are not manifestly oppressive.

A plausible theory of democratic legitimacy has to make room for a weak form of outcome-orientation that acknowledges the limits of majoritarianism's moral authority without undermining that authority. The real work of democratic constitutional theory is in determining the right balance between output-oriented and input oriented-considerations, and preferably to do so in a way that provides at least some guidance to those who actually have to take judicial decisions and that allows concerned citizens to criticise them

if they go astray. Views that are built on a hard and fast distinction between output-oriented and input-oriented considerations and that privilege one of these perspectives to the exclusion of the other are unlikely to be of much help in the defence of democratic constitutionality.

Waldron and the qualified argument from disagreement

The argument from disagreement was first popularised by Jeremy Waldron.³¹ While some of Waldron's earlier work on the topic may have been vulnerable to the objections I have levelled against Bellamy's version of the argument, the same cannot be said of Waldron's more recent restatement of the argument from disagreement.³² This restatement carefully avoids the most serious problems of the simple argument from disagreement. However, this insulation comes at a cost. Waldron has qualified his argument in such a way that it no longer amounts to a general challenge against the practice of constitutional review. In its current form, Waldron's version of the argument from disagreement shows little more than that we can coherently imagine an ideal society with a purely majoritarian democracy whose democratic functioning would not be improved by the introduction of formal constitutionalism and constitutional review. This result is too weak to establish that constitutional review ought not to form part of the constitutional practice of most real democracies.

In his recent essay 'The Core of the Case Against Judicial Review' Waldron admits that the argument from disagreement against judicial review applies only to political systems that live up to a number of background conditions: The existence of well-functioning democratic institutions, the existence of a well-functioning system of courts, the existence of a social commitment to individual and

³¹ See Waldron, *Law and Disagreement*, *supra* note 2.

³² My discussion in this section is based on Waldron, 'The Core of the Case Against Judicial Review', *supra* note 2, and *id.*, 'Do Judges Reason Morally?' in G. Huscroft (ed.), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press, 2008), 38-64. For an important and stimulating critique of Waldron's argument see R. H. Fallon, 'The Core of an Uneasy Case for Judicial Review' (2008) 121 *Harvard Law Review*, 1693.

minority rights, and the existence of persistent disagreement as to how to interpret individual and minority rights.³³ Satisfaction of these four conditions, Waldron believes characterises the 'core cases' of democracy to which the argument against review applies. For the purposes of our discussion, the first and the third condition are most relevant, since they are introduced precisely to deal with the problems of the simple argument from disagreement that we discussed previously.

According to the first condition, the argument from disagreement will apply only to political systems that have democratic 'legislative institutions in reasonably good working order' and these institutions, in turn, must be embedded in a democratic political culture. The institutional part of the assumption requires 'a broadly democratic political system with universal adult suffrage' and a 'representative legislature to which elections are held on a fair and regular basis.' The legislature is assumed to be a 'large deliberative body, accustomed to dealing with difficult issues [...] of justice and social policy.' The legislative process has to be 'elaborate and responsible' and to include several stages of debate which are embedded in a wider context of public debate. The second, cultural component of the condition requires that political debate is 'informed by a culture of democracy, valuing responsible deliberation and political equality.'³⁴ The presence of an egalitarian political culture is assumed to ensure that the procedures of legislation and the political institutions are subject to constant public scrutiny on the basis of the ideal of equality and that the legislature will take the initiative to reform procedure and institutions if fall short of the ideal of political equality.

The third condition that must be satisfied for the argument from disagreement to apply is a further characteristic of political culture. The society in question is assumed to have a strong commitment to the 'idea of individual and minority rights.' This commitment to rights, according to Waldron, entails that people believe that 'individuals have certain interests and are entitled to certain liberties that should not be denied simply because it would be more

³³ See Waldron, 'The Core of the Case Against Judicial Review', *supra* note 2, at 1359-69.

³⁴ *Ibid.* at 1361-2.

convenient for most people to deny them.’ Furthermore, it implies that people believe that ‘minorities are entitled to a degree of support, recognition, an insulation that is not necessarily guaranteed by their numbers or political weight.’³⁵ Finally, respect for individual and minority rights is assumed to be more than a matter of mere belief. The conviction of the importance of rights must have the motivational power to ensure that voters and legislators will respect rights even if doing so comes at a certain cost to their own interests.

Even a society that lives up to these conditions, Waldron argues, will still experience ‘substantial dissensus as to what rights there are and what they amount to.’ Such dissensus is neither merely interpretive nor is it restricted to marginal questions of application that do not affect the core understanding of rights. People disagree about what rights there are and they disagree fundamentally about how they are to be understood. Such disagreement comes to the fore most conspicuously, Waldron claims, in ‘watershed-issues’ of political morality, that ‘define major choices that any modern society must face.’³⁶ Waldron lists as typical examples of watershed-issues the abortion, affirmative action, the legitimacy of government redistribution, the extent of free speech, or the precise meaning of religious toleration.

If these conditions are satisfied the argument from disagreement can proceed in the familiar way. However, the argument is now self-consciously restricted to so-called ‘core cases’ of democracy. It applies only to societies that possess well-functioning democratic institutions and procedures, that are endowed with an egalitarian political culture that secures equal access to and fairness of the political process (and we should add: that is publicly seen to do so), and that exhibit a commitment to rights capable of motivating legislators and citizens to respect other people’s rights even where this hurts their self-interest. In these circumstances, Waldron argues, the institution of judicial review is an unnecessary and illegitimate way of dissolving disagreement about watershed-issues of political morality. This result does not rule out the possibility that constitutional review may be justified in some formally democratic countries ‘in which

³⁵ Ibid. at 1364-6.

³⁶ Ibid. at 1366-8.

peculiar legislative pathologies have developed.’ However, those who put forward such justifications for their own country, Waldron demands, ‘should confine their non-core argument for judicial review to their own exceptional circumstances.’³⁷ In other words, judicial review is an appropriate institution for morally corrupt societies that lack the necessary virtue to practice true democracy.

In what follows, I want to offer two criticisms of Waldron’s restatement of the argument from disagreement. The first derives from my earlier claim that it is wrong to draw a hard and fast distinction between input-oriented and output-oriented perspectives of evaluation, for the reason that the authority of majoritarianism itself depends on a modest outcome-orientation. On the surface, Waldron’s restatement still operates with a hard and fast distinction between the two perspectives,³⁸ but his introduction of the restrictive conditions in effect amounts to an admission of the claim that majoritarianism will lack authority if it fails to block oppressive outcomes. The first and the third condition are clearly supposed to enforce precisely the kind of limits of democratic authority that Ely was concerned with.

If Waldron admits that a majoritarian democracy would lack normative authority if it failed to prevent oppressive outcome, why does he continue to reject the justifiability of constitutional review that enforces the integrity of the democratic process? Granted, we can imagine a society in which judicial enforcement of the integrity of the democratic process is unnecessary. But Waldron needs to argue something stronger, namely that it would be a violation of the principle of democratic equality for the integrity of the democratic process to be enforced by a court. It seems difficult to make sense of that stronger claim, given the admission that the normative authority of majoritarian democracy is inherently limited. If a constitutional court strikes down a piece of legislation that lacks authority since it is oppressive and thus oversteps the limits of democratic legitimacy, it will no longer make sense to claim that the court is violating the principle of democratic equality, since that principle, as Waldron seems implicitly to admit, cannot be invoked to license oppression. It

³⁷ Ibid. at 1386.

³⁸ See *ibid.* at 1372-6.

is hard to see, therefore, what harm it would do to democracy to introduce a system of constitutional review designed to defend the conditions on which democracy's authority depends.

Waldron's answer to this query, I suspect, is that a well-functioning democracy without constitutional review is a better democracy than a democracy that relies on constitutional review to function well and that it would therefore be wrong to introduce judicial review where it is not necessary to make democracy function well. For a people to enforce the limits of democratic legitimacy without the help of a court best expresses the ideal of democracy: A society capable of such self-restriction is a society in which the values of freedom and equality that ought to be realised by a society as a whole are realised in a special way, namely through voluntary decisions flowing from shared fraternal attitudes, and not merely through a clever system of constitutional mechanisms of enforcement that allows even a confederacy of knaves to govern itself reasonably well.³⁹ The point, then, is not so much that a system of review would necessarily violate the principle of democratic equality. Rather, the point is that a system that relies on the institution of review fails to realise the highest and most valuable form of collective self-determination. Where such excellence is realised, or where it could be realised, the institution of a constitutional court is not just unnecessary but harmful, as it prevents the full realisation of the ideal of democracy.

I do not want to argue for a wholesale denial of the attractiveness of Waldron's apparent ideal of democracy. But I think that its relevance to any general assessment of constitutional review is fairly limited, for both factual and moral reasons. This brings me to my second criticism of Waldron's restatement: To what extent, I now want to ask, do the restrictions on the argument from disagreement introduced by Waldron's conditions undercut the argument's force as a general case against constitutional review?⁴⁰

³⁹ An analogous idea drives G. A. Cohen's criticism of Rawls's theory of justice. See G. A. Cohen, *Rescuing Justice and Equality* (Harvard University Press, 2008), at 27-86.

⁴⁰ Waldron's argument is subject to further limitations which I will not discuss, in particular the focus on 'watershed-cases' and the distinction between weak and strong judicial review. For a critical discussion see D. Dyzenhaus, 'The Incoherence of Constitutional Positivism', in *Expounding the Constitution*, *supra* note 32, 138-60, at 140-54.

Waldron himself provides two slightly different answers to this question. At times, he claims that the conditions are best interpreted in a rather non-demanding way and that we should think of them as being fulfilled by most, though perhaps not by all, formally democratic political systems. Under this reading, the term 'core case of democracy' would refer to typical or average instantiations of democracy while formally democratic systems that fail to satisfy the assumptions would have to be considered as untypical and exceptional.⁴¹ At other times, however, Waldron appears to imply that the term 'core cases of democracy' should be given a rather more restricted reference. Waldron suggests, for instance, that the US is one of the political systems afflicted with legislative pathologies that might justify constitutional review and thus not a core case of democracy.⁴² However, if the US does not qualify as a core case of democracy, questions could without a doubt be raised about many other democracies. Under this more restricted reading, then, the idea of a core case of democracy does not designate the average instantiation of democracy but an ideal to which formal democracies ought to aspire, even while many formal democracies fail to realise that ideal.

The best way to understand this vacillation on Waldron's part, I suspect, is to treat the narrow understanding of core cases as a kind of fallback position. It seems plausible to assume that the argument from disagreement will turn out not to be directly applicable to a considerable number of actually existing formally democratic political systems, for the reason that many actually existing democracies fail to satisfy Waldron's conditions. In that case, judicial review would be justifiable in a considerable number of actually existing democratic constitutions. But the argument from disagreement would still provide us with an important insight into the nature of democracy, namely the insight that the institution of constitutional review is alien to political systems that fully instantiate the ideal of democracy. If a democratic constitution contains the implicitly autocratic institution of constitutional review, it has not yet

⁴¹ See Waldron, 'The Core of the Case Against Judicial Review', *supra* note 2, at 1366, where the argument is described as being applicable to 'countries like the United States, Britain, or Canada'. This seems to me to suggest that the argument is taken to apply to most states that we would normally consider to be fully established democracies.

⁴² See Waldron, 'The Core of the Case Against Judicial Review', *supra* note 2, at 1386.

fully realised its own nature, since it does not yet allow free and equal citizens to exercise full collective self-determination. In order to make the democracy in question what it ought to be, the institution of constitutional review should in principle be abolished, though existing pathologies may justify the institution for the time being.

In order for this fallback position to make sense, however, the argument from disagreement must at least be indirectly applicable to systems that Waldron classifies as non-core cases. In other words: the status of a Waldronian core case of democracy must at least be practically attainable for typical or average democracies that as yet fall short of that status. It must normally be possible, in societies whose political system as yet falls short of the full realisation of Waldron's ideal of democracy, to take effective action towards a social condition that satisfies Waldron's assumptions and gives them their intended effect; be it through economic development, redistribution of wealth and opportunities, political education, institutional reform, or perhaps, if nothing else helps, a redrawing of boundaries. If a democratic system were, for some reason, not open to effective reform towards a social condition that satisfies Waldron's assumptions and gives them their intended effect, it would appear to be wrong to devalue and condemn the system in question for a failure to live up to the Waldronian ideal of democracy or to continue to claim that it ought to be committed to the realisation of that ideal in virtue of being committed to (some form of) democracy. And if something like this were true of a significant number of democratic systems that presently do not realise Waldron's ideal of democracy, the argument from disagreement would no longer support general claims about how democracies ought to be organised.

What is more, even if the kind of social change that is needed to achieve satisfaction of Waldron's assumptions and give them their intended effect could be brought about in some society, we have to be attentive to the possibility that there might be moral costs to the necessary reforms that may not be worth incurring, especially if a version of constitutional democracy with judicial review (and perhaps other power-sharing, anti-majoritarian features) is also available for the society in question. This possibility is not as remote as it seems. As I will argue below, Waldron's first and third assumption are quite obviously more likely to be satisfied and to have their

intended effect in socially and ethnically homogenous societies. Hence, there may be perfectly respectable reasons for members of a society to decide that they do not want to be the kind of society that could function without constitutionalism and judicial review.

So what are the reasons for thinking that Waldron's ideal may fail to be indirectly applicable to a large number of democratic polities? The point of Waldron's first and third assumption is that their joint satisfaction is taken to entail that everyone has reasonably fair access to the political process, that the process is genuinely representative and adequately deliberative, and that it will not lead to outcomes that are patently oppressive. This, in turn, is meant to sustain the view that outcomes of that process have authority irrespective of their substantive content. The satisfaction of the narrowly institutional aspect of the first assumption is probably always to be considered feasible. Formally democratic procedures, I will assume, can always be deliberately introduced. But of course, formally democratic procedures alone do not necessarily possess the oppression-inhibiting force that is required for democracy to maintain its normative authority. They do not protect against a majority that is bent on using its formal power in abusive ways or that is too insensitive to exhibit sufficient concern and respect to minority-interests.

The weight of Waldron's case, then, rests on the assumptions about political culture: the egalitarian ethos, the commitment to rights, as well as the motivational force of both. Whether a society satisfies the requirements of political culture that are needed to make sure that pure majoritarianism will not become oppressive, it would seem, must ultimately be a matter of civic virtue. The argument from disagreement, then, would be relevant to all democracies on the assumption that a lack of civic virtue is always in principle remediable.

In order to assess whether a lack of civic virtue is always in principle remediable, it will be necessary to give a brief description of the kind of civic virtue that is needed to make judicial review dispensable. The crucial thing to keep in mind here is that Waldron needs a form of civic virtue that consists in more than just a shared abstract belief that one ought to treat one's fellow citizens as equals and to respect their basic rights. For one thing, citizens need to be able to trust one

another not to exploit majoritarian power for sectional purposes. A momentary minority needs to be able to count on a momentary majority to make a continuing good faith-effort to pursue the common interest, to try to respect everyone's rights, and to abide by norms of procedural fairness. If citizens cannot have this trust, they cannot reasonably be expected to attribute normative authority to democratic procedure, and are likely to behave in ways that defeat democratic legitimacy. This requirement of trust does not rule out deep disagreement in particular cases over what it means to respect people's rights or to pursue the common good. But trust can only be maintained if there are publicly acknowledged paradigms of what it means to treat people with equal respect or to observe the norms of procedural fairness, and it will be easier to maintain the more such paradigms there are.

A second important aspect of a Waldronian conception of civic virtue is that it requires a high degree of social solidarity. Waldron assumes that citizens will not just abstractly acknowledge that other individuals and groups have a (yet to be determined) number of basic rights. They are assumed to be willing to sacrifice their private interest in honouring those rights. What is more, they are assumed to be willing to sacrifice their private interest in honouring those rights under conditions of association characterized by the absence of a prior agreement even on what basic rights there are and in which those rights may well be defined by the majority in a way that strikes them as wrongheaded or even unjust. Such willingness is unlikely to obtain unless citizens have a strong tendency to see their own well-being as being connected to that of all of their fellow citizens and to adopt a strongly fraternal attitude towards all of their fellow citizens (as well as to count on other citizens to be doing the same).

If Waldronian civic virtue requires trust and solidarity of this kind, it cannot possibly be understood as a simple function of the individual moral virtue of a society's members. It clearly requires a shared history or tradition which furnishes collective habits and conventions that form adequate paradigms of trust and that provides an emotional basis for a strong identification with the community. Other things being equal, Waldronian civic virtue will be aided by factors like shared culture, ethnicity, language, and it is likely to suffer where such forms of homogeneity do not exist. People can only agree to

disagree and subject themselves without any reservations to the unbridled verdict of the majority if it is publicly understood that they share a way of life and a strong concern for each other.

Waldronian civic virtue might well turn out to be a good thing where it exists. But there is reason to think that its absence in a society will often not be easily remediable. If we look at cases where it might now be taken to exist, we will find that there is no standard way in which it comes to exist. The way in which it came to exist in this or that society typically does not provide a blueprint for creating it in other societies. We will also find in some cases that civic virtue came to exist through homogenising policies that we would now find morally problematic and that in some cases did more harm than good. Moreover, there is no reason to think that a society's members must necessarily be wrong if they decide that they prefer to live under different conditions of association that put stronger limits on the power of the political community over individuals and groups than a Waldronian conception of civic virtue seems to allow for, especially if a society lacks the cultural unity implicitly presupposed by Waldron. There are social ideals that might well be considered more attractive, under conditions of great cultural diversity, than the strongly fraternal society Waldron seems to long for.

What is more, even if Waldronian civic virtue did exist in a society, its presence might not guarantee that all democratic outcomes will stay within the limits of democratic legitimacy. As Thomas Christiano has convincingly argued, even a majority whose members are willing to act on a *bona fide* conception of the common good and to make individual sacrifices for the realisation of that conception may come to act oppressively through insensitivity to the interests of discrete and insular minorities. Such insensitivity is likely to result from a number of unalterable features of human nature that make it difficult for us to cognitively and emotionally appreciate and to give proper weight to the interests of those who are different from us.⁴³ And this problem, needless to say, may well be worse in an otherwise rather homogenous society.

⁴³ See Christiano, *supra* note 4, at 56-63.

Finally, Waldron's discussion, much like Bellamy's, is heavily biased towards the American and British constitutional experience, and it runs the danger of elevating historical contingencies into timeless truths about the workings of political institutions. Waldron confronts an idealised reading of the classical Westminster-model with what he evidently sees as pathologies of an unduly legalistic American constitutionalism. It is therefore none too surprising that formal constitutionalism and judicial review appear to Waldron as implicitly anti-democratic institutions. After all, the constraints on simple majority rule in the American constitution, of which the system of judicial review is only one, indeed seem to have been designed to ward off a perceived danger of excessive populism,⁴⁴ while the democratisation of the British constitution indeed took the form of reform through parliamentary legislation. Someone who focused exclusively on America and Britain might well be inclined to think that democratisation and constitutionalisation are different and potentially conflicting processes.

But it is unclear, to say the least, whether the British and American examples ought to be recognised as paradigmatic. In many European political traditions, the processes of democratisation and of formal constitutionalisation were rather intimately connected, since the fight for constitutional protection against the vestiges of absolutism tended to overlap with the fight for political participation and an extension of the franchise. Hans Kelsen's influential argument for judicial review, for instance, which regards the introduction of judicial review as the completion and fulfilment of a democratic constitutionalism, is a clear expression of this perspective.⁴⁵ The claim that formal constitutionalism and democracy are potentially opposed to each other would, I suspect, strike many Europeans as rather odd.⁴⁶

⁴⁴ See A. Hamilton, J. Madison, and J. Jay, *The Federalist with Letters of Brutus*, Cambridge Texts in the History of Political Thought (Cambridge University Press, 2003), at 305-12.

⁴⁵ See Vinx, *supra* note 4, at 145-75.

⁴⁶ The German *Bundesverfassungsgericht*, for example, is an exceptionally strong constitutional court. And yet, there is no real debate about the legitimacy of constitutional review. One would think that examples like this are rather embarrassing to Waldron: His argument seems to imply either that Germany doesn't qualify as a 'core case' of democracy or that he must be wrong to argue that the ideal of democracy excludes formal constitutionalism and judicial review.

Waldron's implicit focus on the US and Britain also tends to veil the fact that judicial review can be organised in many different ways, some of which may be better than others at making sure that those who exercise judicial review exercise their powers with a view to the protection of the integrity of the democratic process. The *Canadian Charter of Rights and Freedoms*, for instance, provides for the possibility of a 'constitutional dialogue' between parliament and the Supreme Court, by authorising parliament explicitly to override a judicial invalidation of a law enacted by parliament. So far, the results seem to have been positive: The need to deal with increased public attention and to meet a higher threshold of public justification has proven to be a very effective deterrence against parliamentary overrides of judicial decisions and has frequently forced parliament to find legislative solutions that better protect equality. But the court, likewise, has to tread carefully, given the possibility that the public may approve of a parliamentary rebuke to the judges.⁴⁷

Let me conclude: There is good reason to think that there are many societies in which the realisation of the Waldronian ideal of purely majoritarian democracy is either practically infeasible or undesirable, for reasons that needn't signal civic corruption or political pathology. And if we shouldn't hold the democratic practices of such societies to Waldron's ideal, we shouldn't confuse that ideal with *the* ideal of democracy. It follows that we should also reject the view that constitutional review is inherently undemocratic since it doesn't figure in Waldron's ideal.⁴⁸

The bottom line of my criticism of Waldron's current version of the argument from disagreement, then, comes to this: Waldron is right to claim that there can be well-functioning democracies without

⁴⁷ See P. W. Hogg and A. A. Bushell, 'The Charter Dialogue between Courts and Legislatures' (1997) 35 *Osgoode Hall Law Journal*, 75.

⁴⁸ To accept Waldron's ideal of democracy, I'm inclined to add, will put us on the slippery slope to something like Carl Schmitt's view of democracy. Schmitt essentially claims that the 19th century ideal of parliamentary democracy (that, in Schmitt's portrayal, bears a striking resemblance to Waldron's ideal) presupposes an ethnic and social homogeneity that should, if necessary, be re-constituted through extra-legal sovereign violence. If one holds on to a Waldronian ideal, despite the fact that it's based on bad political sociology, one runs the danger of inviting the thought that such violence might be democratic.

constitutionalism and judicial review, and that some democratic systems would arguably not be improved but worsened by the introduction of constitutionalism and review. But such cases are neither typical nor are they normatively paradigmatic. Rightly understood, the qualifications that Waldron recently made to the argument from disagreement therefore imply that the argument no longer amounts to an interesting general challenge to the practice of constitutionalism and judicial review.

By way of conclusion: a tentative remark on Europe

I have argued that the argument from disagreement fails to establish that the institution of constitutional review necessarily violates the principle of democratic equality and is therefore always undemocratic. In its unqualified form, which focuses exclusively on the input into the legislative process, the argument undercuts the authority of majoritarian democracy itself. In its qualified form, on the other hand, the argument, while in principle sound, fails to amount to an interesting general challenge to the institution of constitutional review. It is applicable only to a limited number of cases that do not express a universal ideal of democracy. It would seem to follow that there is nothing inherently undemocratic about constitutionalism and constitutional review. This result should not occasion surprise. After all, constitutional review forms part of a large number of seemingly well-functioning democratic systems. In the absence of a convincing argument to the contrary, we should therefore assume that constitutional review is in principle compatible with democracy.

The argument of this chapter does not establish that all possible forms of constitutional review would be compatible with the principle of democratic equality. My criticism of the argument from disagreement is meant to leave room for the view that legislative decisions are entitled to judicial deference as long as they do not overstep the limits of democratic legitimacy. I have argued above that a purely instrumentalist conception of democracy characterised by a strongly output-oriented evaluative perspective would undermine the idea of democratic legitimacy, as would a constitutional court that is taken to have the power to enforce a particular comprehensive conception of the substantive moral correctness of legislative

outcomes. I think we should avoid such undermining, for the reason that a non-democratic mechanism of decision-taking will indeed fail to respect disagreeing citizens as equals if it is employed to settle questions that democratic procedure can legitimately settle in one way or another. In order to be compatible with democracy, in order to provide a defence of *democratic* constitutionality, constitutional review will have to be restricted to enforcing the limits of the normative authority of democracy.⁴⁹

Of course, this defence of judicial review raises a problem. Where, exactly, is the boundary between legitimate judicial review that protects or enhances the integrity of the democratic process on the one hand and undemocratic judicial meddling in legislative affairs on the other? In order to answer this question, we need a fully developed constitutional theory for democratic states, including an account of the separation of powers, and we need to be able to apply that account to particular constitutional traditions with sufficient sensitivity.⁵⁰ There are many open questions here that I have not even tried to address. But they are questions that we cannot and should not avoid by relying on the argument from disagreement or on a purely instrumental account of the value of democracy. It would be fruitful, it seems to me, for debate about judicial review to concentrate less on abstract attempts to prove that the institution is always illegitimate (or that it is always a good thing) and more on the question of how review can be made to work well and to support democracy in specific constitutional contexts.

Let me close by offering a brief and tentative reflection on how the results of this chapter might bear on the constitutional framework of the EU and the legitimacy of the activity of the ECJ. These reflections will start out from the assumption that the ECJ is clearly a constitutional court, in the sense that is relevant to debates about the legitimacy of constitutional review: it is the final interpreter of a body of legal norms that have constitutional character.

⁴⁹ A full defense of this view in Christiano, *supra* note 4 and Vinx, *supra* note 4.

⁵⁰ For an impressive example see A. Brudner, *Constitutional Goods* (Oxford University Press, 2004).

The central observation I would like to make is that we ought to dismiss criticisms of EU-constitutionalism that are based on nothing more than the view that formal constitutionalism and judicial review are inherently undemocratic. As I have tried to show, the strongest argument for that view is a failure. To establish that judicial review exercised by the ECJ is democratically illegitimate (or to defend it), one would therefore have to offer an argument that engages with the specifics of the European constitutional framework and with the ECJ's role in that framework. To do so is beyond the scope of this chapter and also beyond my competence as a philosopher. However, two general observations might nevertheless be appropriate.

I have claimed that judicial review will be democratically legitimate as long as it protects the integrity, and thus the legitimating force, of the democratic process. Judicial review can help safeguard the integrity of the democratic process by protecting those from oppression who either do not have a voice in taking decisions by which they are affected or whose voice tends to be overheard. In the European context, political decisions taken on a national level will often affect people who are not members of the national political community in question. Judicial review on the European level would therefore appear to be well-suited, at least in principle, to serve the purpose of making sure that such exclusion does not lead to oppressive results. What is more, at least for the time being, legislative decisions taken on the European level are subject to less stringent control by a democratic public than decisions taken by national legislators. The European arena seems to be an example of a polity, in other words, that does not fulfil the conditions that could make judicial review dispensable. The case for judicial review on the European level may thus be even stronger than the case for judicial review on the national level.⁵¹

However, the argument offered here also suggests that judicial review will not be democratically legitimate if it starts to do more than to protect the integrity of the democratic process. In particular, there are problems of democratic legitimacy once a reviewing court,

⁵¹ I adopt this suggestion from Agustín José Menéndez, 'The European Democratic Challenge: The Forging of a Supranational *Volonté Générale*' (2009) 15 *European Law Journal*, 277.

perhaps against the will of the majority of those who are affected by its rulings, starts to enforce a particular comprehensive conception of a well-ordered society. If it is true, as some observers have argued, that the ECJ's interpretation of economic freedoms is open to that challenge, we would have to conclude that some of the ECJ's recent decisions do raise a problem of democratic legitimacy.⁵²

⁵² See *ibid.* at 301-2.