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Introduction

Is judicial review democratic or antidemocratic, constitutional or anti-constitutional? Should electorally unaccountable judges in a constitutional democracy be able to declare unconstitutional, and so overturn, the laws and decisions made through ordinary democratic political processes? At its most basic, this problem of where to place the powers of constitutional review appears to revolve around fundamental tensions between two of our most important political ideals – constitutionalism and democracy – and between various ways of realizing these ideals in political institutions and practices. If courts perform constitutional review, how can this be squared with democratic ideals? How can the people be sovereign if their direct representatives can't make the laws that the people demand? Alternatively, how can the democratic process be kept fair and regular without constitutional controls on elected politicians? Wouldn't constitutionally unhindered officials attend only to the demands of majority preferences at the expense of the rights of individuals and minorities? Can the distinction between ordinary law and the higher law of the constitution be maintained over time if elected politicians are responsible for both? Can the distinction between making law and applying law be maintained over time if judges do both in their role as expositors of the constitution? Should the constitution be a part of the political process, or an external check on that process? And, finally, who decides: who decides what the scope of constitutional law is, who decides what a constitution means, who decides whether ordinary laws violate the constitution?

One central premise of this book is that such questions are best answered in the light of a philosophically adequate and attractive theory of constitutional democracy, one that can convincingly show how constitutionalism and democracy are not antithetical principles, but rather mutually presuppose each other. Political philosophy, then, plays a crucial role in understanding and justifying the function of constitutional

review in terms of its fundamental role in a well-functioning democracy. But pure normative theory alone is insufficient to settle questions about how best to design institutions to carry out that function. Whether constitutional review is best performed as part of the normal appellate court system (as in the United States), or in independent constitutional courts (as in many European nations), or in more politically accountable branches such as parliaments (as in many British commonwealth nations) – these are questions that require judgments sensitive to the empirical conditions of institutions, politics, and law as we know them, and to the different legal, political, and historical contexts evinced in various constitutional democracies. Thus a second central premise of the book is that an adequate theory of judicial or nonjudicial review – a theory that proposes specific ways to institutionalize the function of constitutional review – needs also to be attentive to the results of legal scholarship and comparative studies of democratic institutions. The types of questions posed here – concerning the legitimacy, institutional location, scope, and adjudicative aims of constitutional review in constitutional democracies – must be addressed, then, through a combination of normative and empirical research: political philosophy, comparative political science, and jurisprudence.

More specifically, this book argues for a theory of constitutional review justified in terms of the function of ensuring the procedural requirements for legitimate democratic self-rule through deliberative cooperation. Proceeding from the premises of deliberative democratic constitutionalism, it claims further that constitutional review is best institutionalized in a complex, multilocation structure including independent constitutional courts, legislative and executive agency self-review panels, and civic constitutional fora. It proposes that such institutions would work best in a constitutional context encouraging the development of fundamental law as an ongoing societal project of democratic deliberation and decision. Recognizing that specific institutions of constitutional review should be tailored to different political and legal systems, it claims that such institutions should, in general, be oriented toward broadening democratic participation, increasing the quality of political deliberation, and ensuring that decision making is reasons-responsive and thereby democratically accountable.

A. AN OLD CHESTNUT IS ACTUALLY TWO

The central issue this book addresses then is the tension commonly felt between democracy and the institution of judicial review. Although there are many ways of formulating exactly what this tension consists in – and, of course, of formulating responses to it – two formulations in the American context stand out as canonical: Alexander Bickel's and

Judge Learned Hand's. I want now to briefly indicate what these two formulations are in order to show that they are not equivalent: they depend on different conceptions of the ideals of democracy, of democratic decision making processes, and of the relationship of judicial review to those ideals, and processes.

1. The "Countermajoritarian Difficulty" with Judicial Review: Bickel

> The root difficulty is that judicial review is a counter-majoritarian force in our system. . . . When the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystical overtones, is what actually happens. . . . The essential reality [is] that judicial review is a deviant institution in the American democracy.[1]

According to Bickel's formulation, democracy is essentially rule by current majorities, and the American political system is fundamentally a democratic one. Furthermore, the current majority whose will is supposed to rule are the current citizens of the United States, and that will is most manifest and forceful as reflected in the will of the directly elected representatives of the people: elected representatives, the elected president, and all those who are directly authorized by these elected representatives. Because national judges in the United States are not elected but appointed, and once appointed serve for life terms, there is no direct electoral control over them, and precious little indirect control. When a court strikes down a legislative act or executive action as unconstitutional then, it acts in a countermajoritarian, and therefore antidemocratic, way. Thus, "judicial review runs so fundamentally counter to democratic theory . . . in a society which in all other respects rests on that theory."[2] Of course, Bickel does have a series of arguments to show that even if countermajoritarian, judicial review is nevertheless an overall good in the American political system (I discuss these arguments in the next chapter), but what I am concerned with here is the basic normative conception of democracy that underlies the countermajoritarian formulation of the objection. In short, democracy is taken to be a preeminent value of politics; the ideal of democracy is rule by present majority will; that will is effected through the democratic process of electing representatives who in turn pass laws and administer

[1] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, second ed. (New Haven, CT: Yale University Press, 1986), 16–18.
[2] Ibid., 23.

policies; judicial review of those laws and policies is countermajoritarian and so undemocratic.

2. The Paternalist Objection to Judicial Review: Hand

Although Bickel quotes approvingly Judge Learned Hand's objection to judicial review in his discussion of the countermajoritarian difficulty, I believe that the latter's concerns are of quite a different kind than Bickel's:

> For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture.[3]

To begin with, the rhetorical reference to Platonic Guardians conveys a quite specific set of antithetical attitudes towards practices of paternalism. An individual is treated paternalistically when she is forced to do something against her own will and where that something is asserted or justified as being in her own best, real, or true interests by another who claims to know better what those interests are than she herself knows. Paternalism is opposed to self-rule, to self-government, to autonomy. It is important to note here that the problem is not so much the coercion involved, or even the coercion against one's present will – although coercion is a necessary part of paternalism – but, rather, the fact that the person controlled has no significant part in the decision-making processes of the guardian even though the matter centrally concerns her own interests.

When the idea is extended into the political realm of the government of a collectivity, paternalism is opposed to democratic self-government. The individual treated paternalistically becomes the collective group of democratic citizens, who are forced to do something against their own manifest will and where that something is asserted or justified as being in their own best, real, or true interests by others who know better what those interests are than they themselves do. Clearly with the change in scale from individual to collectivity, the decision-making processes involved are more complex socially and institutionally, and it may be harder to say what exactly counts as manifesting the will of the citizenry. Yet Hand's formulation gives us crucial criteria here: democratic processes

[3] Learned Hand, *The Bill of Rights* (Cambridge, MA: Harvard University Press, 1958), 73–74.

must be those in which each citizen has an inexpungeable role in the mutual determination of collective decisions and each must be able to understand her or himself as part of a common venture of self-rule. The issue is not the impact of one's vote on the outcome – in large collectivities like modern nation-states individuals' electoral impact may well be miniscule – but, rather, the degree to which the decision-making processes accord individuals the capacity to understand themselves as collective authors of the law that each is subject to. And that self-understanding is accorded precisely where each has a role in mutual and collective processes of practical reasoning together in order to decide the terms of their common political life.[4] Finally, insofar as the decision-making processes of courts exercising constitutional review do not allow citizens to understand themselves as involved in a common venture of self-government with their fellow citizens – appointed, life-tenured judges using legal methods for decision do not generally consider the people's own opinions about where their best, real, or true interests lie – those processes are objectionable because paternalistic. On this formulation, then, the ideal of democracy concerns the self-government of a collectivity; democratic processes must somehow allow each citizen the equal satisfaction of being engaged in a common venture of self-government with others; judicial review, as it doesn't allow this, is paternalistic and so undemocratic.

We have then two quite different formulations of the old chestnut concerning the tension between democracy and judicial review, each drawing on different conceptions of the ideals of democracy, their proper realization in democratic processes, and the relation of those ideals and processes to the institution of judicial review. Democracy as majority rule versus democracy as self-government; representative reflection of the desires of the majority versus facilitation of consociation among citizens on terms arising from the mutual exercise of practical reason; countermajoritarianism versus paternalism. In short, Bickel's objection to judicial review rests on a vision of democracy as majoritarian aggregation; Hand's on a vision of democracy as deliberative consociation. As this book moves in Chapter 2 through the traditional defenses of judicial review and into Chapters 3 to 7 through more recent defenses of and attacks on judicial review, it will be moving

[4] For those who think that this reads too much into Hand's phrases about "some part in the direction of public affairs" and "a collective venture" I would refer them to the parable of democracy he puts forward at Learned Hand, "Democracy: Its Presumptions and Realities," in *The Spirit of Liberty: Papers and Addresses of Learned Hand*, ed. Irving Dilliard (New York: Alfred A. Knopf, 1960 [1932]), 99–100, in which explicit references are made to mutual reckoning, listening to the concerns of others, and collectively consociating through the pooling of wishes. Note also that Hand's parable connects paternalistic guardianship to infantilization.

from the terrain of aggregative to deliberative conceptions of the meaning, import, and institutional bases of democracy.

3. Reopening the Chestnuts

The set of problems revolving around the relationship between judicial review and democracy make up a well-worn *topos* – in jurisprudence especially, but also in allied fields of political philosophy, political science, and comparative law. One might wonder what is to be gained from returning to that ground. There are three broad types of reasons for the thought that it is worthwhile to take up anew the questions about how to institutionalize constitutional review. First, many treatments of judicial review tacitly presuppose particular normative ideals of democracy and constitutionalism, without fully noting how much argumentative weight these particular ideals carry. When, for example, some jurisprudential treatments argue for a specific method for interpreting constitutional provisions, crucial claims and arguments often turn on foundational normative premises about how to understand constitutional democracy, rather than strictly jurisprudential concerns. Often these implicit assumptions are in fact embedded within the nationalist limitations of the theory. So, for example, although American legal academics have taken a lead role in the revival of thought about the legitimacy, scope, and methods of judicial review, they have often simply assumed that the arrangements that give the Supreme Court of the United States supreme authority to carry out the function of constitutional review are increasingly universally shared arrangements, or are at least universally justifiable. They then proceed to develop theories with universal intent that in fact are only appropriate to the contingent historical legal and political context of the United States. The sketches of the ideals of democracy and constitutionalism employed in some recent jurisprudential positions in the next section of this chapter are intended to indicate the argumentative pathologies that arise when specific normative conceptions of democracy and constitutionalism are instrumentalized to the need to justify United States arrangements for constitutional review as the best of all possible arrangements.

Second, a central claim of the book is that the complex of issues surrounding the questions concerning how to institutionalize constitutional review look quite different once one sees them from the perspective of new developments in political philosophy over the last generation. On the one hand, deliberative theories of democracy have arisen that intend to supplant older models of competitive elitism or corporative pluralism. Deliberative theories stress the normative significance, and the empirical relevance, of discussion and debate for generating convincing public reasons for collective decisions and state action. Rather than viewing

democracy as the simple aggregation of a majority's private preferences, deliberative democrats tend to see it as a way of structuring wide cooperative participation by citizens in processes of opinion formation and decision. They thereby provide, to my mind, a more compelling picture of the ideals and actual practices of democracy.

On the other hand, constitutional theory has moved away from natural law inspired accounts – those stressing the constitutional protection of a substantive list of metaphysically grounded prepolitical individual rights – and turned instead to accounts of constitutionalism as the procedural structuring of political processes, where constitutional rights are seen as one part of the procedural requirements that warrant the legitimacy of democratic decisions. I argue that a deliberative conception of democracy and a proceduralist conception of constitutionalism belong together, and that this combination – deliberative democratic constitutionalism – is, in comparison with more traditional models, both more attractive normatively and more compelling empirically in modern societies marked by deep and apparently intractable moral disagreements.

Chapter 2 schematically presents variations on the traditional model of constitutional democracy employed in the United States – what I call majoritarian democracy constrained by minoritarian constitutionalism – and indicates some of the normative and empirical deficiencies of the model, deficiencies that motivate a move beyond it. Chapters 3 through 7 then present a series of competing conceptions of deliberative democracy and constitutionalism, using the specific arguments presented by each conception for and against judicial review as a way of focusing attention on the interactions between normative ideals and considerations about appropriate political institutions. This examination supports the conception of deliberative democratic constitutionalism I put forward by drawing on the insights, and avoiding the deficiencies, of the various competing conceptions.

Third, I argue that the resulting conception can helpfully guide and inspire the design of responsive and competent institutions for realizing the function of constitutional review. Political philosophy alone, however, is insufficient to carrying out such design tasks: we need rather to combine the insights of normative theory with productive directions in recent empirical, comparative, and legal scholarship. In a sense, the result of the arguments in Chapters 3 through 7 is a robust conception of deliberative democratic constitutionalism that can provide a strong justification for the *function* of constitutional review, but not for any particular way of *institutionalizing* that function. It is the task of Chapters 8 and 9, then, to try to mediate between the ideal and the real, between norm and fact, by proposing a series of reforms in current institutions that carry out constitutional review. Only by attending to the burgeoning fields of scholarship focused on courts, political institutions, constitutional design, and

democratic deliberation can one properly support particular institutional designs. The relationship between normative and institutional issues is not a one way street however. Not only do normative ideals help shape appropriate institutional designs, but the differences in performance manifested by various arrangements in the world of politics, law, and institutions as we know it in turn help to specify the determinate content of, and thereby support the cogency of, the normative ideals – that is, the ideals of deliberative democratic constitutionalism. In the worlds of politics and law, good ideals and institutions are not drawn from some conceptual heaven, but are the determinate results of historical learning processes and reflections on such.[5]

B. PATHOLOGIES OF *AD HOC* TRIANGULATION

Part of the motivation for reopening the old chestnuts is a certain dissatisfaction with the normative conceptions of democracy and constitutionalism that underlie much of the most interesting recent work in American constitutional jurisprudence. Many of the impressive insights in this scholarship – concerning, for instance, the historical transformations in American judicial doctrines of constitutional construction, what current doctrinal innovations could plausibly carry forward worthy political ideals while fitting together with existing doctrinal touchstones, what kinds of structural and institutional innovations could improve democracy in the United States, what interpretive methodologies judges should adopt, the proper role of the Supreme Court in relation to other branches and subnational regional governments, and so on – are simultaneously accompanied by political philosophical conceptions that distort democracy or contort constitutionalism. The speculative thesis I explore here briefly is that these distortions and contortions are, in an important sense, determined by the argumentative context faced by American legal academics. The idea is that such scholarship must triangulate between three types of argumentative constraints: the normative ideals of constitutional democracy, the facts of how constitutional review is institutionalized in the United States, and the relations between firmament and favorite Supreme Court precedents. Because some of these constraints are more constraining than others – in particular, as the ideals of democratic

[5] Said differently, the best one could hope for methodologically is a merely analytic separation between the justification of a normative political scheme and the institutional designs intended to put that scheme into practice, as the two are dialectically interconnected. For, in actual fact, our considerations of what general normative schema is most justifiable is formed against a background sense of what kinds of institutional realizations have and have not been successful over time and in various contexts. Reciprocally, institutional innovations can change our sense of what the real meaning and import of the various general principles and values are that are normatively schematized.

constitutionalism are most open to contestation – the variable elements end up getting instrumentalized to the more fixed constraints. To make this speculation clear, I first explain briefly what the three types of constraints are, before turning to some selective examples of the argumentative pathologies that arise from them.

1. Three Argumentative Constraints

The first constraint involves the need to refer favorably to the ideals of democracy, constitutionalism, and constitutional democracy, and to refer to them as preeminent or superordinate political ideals. In modern Western societies these are powerful ideals, and in the United States they play a particularly salient role in citizens' sense of their collective identity, as the collective members of a particular nation-state. In United States legal contexts – not only in the legal academy but also in political and judicial arenas – they have an especially pronounced salience. To put it another way, it would be seriously beyond the pale for a legal elite – whether a judge, a politician, or a law professor – to put forward a substantive claim or theory that outright rejects democracy, constitutionalism, or constitutional democracy as ideals government ought to live up to. Changes in the intellectual milieu also have intensified attention to the ideals of democracy, in part because of the demise of a felt consensus on substantive principles of justice tied to the tradition of natural law, and in part because of the rise of attacks on the American judiciary – as an antidemocratic imperium – in the wake of tumultuous social changes and legal adaptations to them after the end of World War II. However, because these abstract political ideals can be considered essentially contested concepts, they provide a great deal of maneuvering room in jurisprudential argumentation.

The next constraint – what might be called institutional panglossianism – is, by contrast, much more fixed. The idea here is that the established institutions and practices of the United States political system are to be accepted as, in the main, unchangeable social facts, and that any comprehensive constitutional jurisprudence should be able to justify their main structures and features as being close to "the best, in this the best of all possible worlds." In the context of constitutional law, this tendency is particularly pronounced with respect to the peculiar American system for the institutionalization of constitutional review. A theory of constitutional jurisprudence that seriously doubted the basic legitimacy, for instance, of the role of the Supreme Court of the United States in interpreting the constitution or in producing a body of controlling constitutional doctrine through the development of case law, would be a theory destined to have little impact where it matters for the legal academy: both among other academics and among judges engaged in that precedential development.

Surely theories are allowed to raises questions around the edges – perhaps concerning different ways of amending the constitution or ways of changing ordinary political structures or jurisprudential strategies in order to alter the balance of power between courts and other political organs – but the basic legitimacy of the Court and a great deal of its actual work product must be accepted as facts of American political life, and as unavoidable facts for constitutional jurisprudence.[6] To be relevant and influential, a theory must accept these facts; to be comprehensive it must further offer some way of justifying it from the point of view of the theory's preferred normative conceptions. Michael Perry nicely encapsulates the fact-value amalgam of institutional panglossianism, putting the point explicitly as a question of patriotism:

> Judicial review has been a bedrock feature of our constitutional order almost since the beginning of our country's history. Nor is it a live question, for us [the people of the United States now living], whether judicial review is, all things considered, a good idea. It would be startling, to say the least, were we Americans to turn skeptical about the idea of judicial review – an American-born and -bred idea that, in the twentieth century, has been increasingly influential throughout the world. For us, the live questions about judicial review are about how the power of judicial review should be exercised.[7]

[6] One might object here by pointing to a number of recent works in jurisprudence that facially challenge the legitimacy of judicial review as currently practiced in the United States – two of the most prominent are Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004), and Mark Tushnet, *Taking the Constitution away from the Courts* (Princeton, NJ: Princeton University Press, 1999). I am not claiming that such positions are literally an intellectual impossibility, or that they have not actually been defended. The claim is rather that, to the extent that a constitutional jurisprudence seriously questions current American institutions and practices of judicial review, it risks becoming irrelevant and uninfluential. Clearly this is a predominately sociological claim that I cannot empirically support here. Indirect evidence is found in the rhetoric of the opening lines of a review of Kramer's book in a preeminent legal journal: "Larry Kramer has written an awesome book, and we mean 'awesome' in its original and now archaic sense. *The People Themselves* is a book with the capacity to inspire dread and make the blood run cold. Kramer takes the theory *du jour*, popular constitutionalism (or popular sovereignty), and pushes its central normative commitments to their limits. *The People Themselves* is a book that says 'boo' to the ultimate constitutional authority of the courts and 'hooray' to a populist tradition that empowers Presidents to act as 'Tribunes of the People' and has even included constitutional interpretation by mob," Larry Alexander and Lawrence B. Solum, "Popular? Constitutionalism? A Book Review of *the People Themselves* by Larry D. Kramer," *Harvard Law Review* 118, no. 5 (2005): 1594.

[7] Michael J. Perry, "What Is 'the Constitution'? (and Other Fundamental Questions)," in *Constitutionalism: Philosophical Foundations*, ed. Larry Alexander (New York: Cambridge University Press, 1998), 120.