

Political Constitutionalism, Republicanism and Judicial Review: A Reply to Tom Hickey

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Political Constitutionalism (hereafter *PC*)¹ deployed the version of republican theory developed by Philip Pettit to argue against not only the liberal democratic case for legal constitutionalism and judicial review put forward by John Rawls and Ronald Dworkin, but also Pettit's own purportedly neo-republican version of a similar argument,² along with those of other writers who adopted neo-republican arguments of a slightly different kind, such as Jürgen Habermas, Cass Sunstein and Frank Michelman. *PC* contended that for all citizens to be equal under the law in a manner consistent with freedom as non-domination, the law and legal system had to be under their equal influence and control in ways that could only be achieved through an appropriate form of democracy. This form of democracy would need to possess certain constitutional qualities, such as the impartial and equitable treatment of all interested parties. In particular, it required the institutionalisation of a balance of power of a kind that encouraged both citizens and their representatives to 'hear the other side', and so be moved to decide collective policies in ways that addressed their 'commonly avowable interests' and thereby treated all citizens with equal concern and respect. I suggested that parliamentary representative democracies, involving free and fair elections between competing parties and employing a system of majoritarian voting, had many of the requisite features.

This argument has consequences for the legitimacy of constitutional judicial review. Courts and judicial review have a vital role to play in such a scheme. However, it is a subordinate role. The qualities we tend to admire in, or aspire for, courts – not least their impartiality and equity in ensuring all are equal before the law, regardless of status and position, and that the law should be equally accessible to all – derive from their being embedded within a democratic social and political system. In these respects, the 'rule of law' embodies the qualities of a democratic society. As I provocatively put it, 'the rule of law simply is the democratic rule of persons' (*PC*, 83). Only in political systems where power is shared roughly equally in ways that make individual citizens rulers and ruled in turn can one reliably expect that laws will not just be made by legislators in ways that show people equal concern and respect, but also be applied equally to all by courts that in their organisation and values come to reflect such a political system rather than, say, the partial perspective of a particular ruling class. Moreover, if the democratic process has constitutional qualities – indeed, is the source of the constitutional norms we associate with liberal democratic systems – then the last word on constitutional matters can only legitimately rest with a democratic body, such as a Parliament, that is under the equal influence and control of the citizens who are subject to, and rightfully the authors of, the constitution. Indeed, I argued the true constitution was a certain kind of democratic political process that allows the continual rewriting of the laws that form the legal constitution – hence the

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¹ Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge university Press, 2007).

² Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997).

designation of my theory as a form of *political* constitutionalism. On my account, therefore, strong form judicial review by a Supreme Court proves problematic from a republican perspective.³ Under such an arrangement, citizens are dominated through being subject to the arbitrary will of judges who lack an appropriate form of authorisation and accountability towards those who are subject to their decisions that ensures that they must take equal account of all their interests. Entrenching that position within a written constitution that requires a super majority to change simply compounds the problem.

There are two key aspects to this case for *PC*, only some of which Hickey either fully agrees or engages with. The first aspect, where I think we are in full agreement, is that democratic norms and constitutional norms overlap, with this congruence captured by the republican notion of freedom as non-domination. The second aspect, with which he seems to partially disagree but then only partially engages with, is that only a democratic system can constitute a condition of freedom as non-domination. One reason for why this is so, that he says he accepts, is epistemological. In conditions of what Rawls called ‘reasonable disagreement’ and where a collective decision is required,⁴ the only way to resolve such disagreements legitimately is via a process that is ‘content independent’ in being neutral between the different views in contention, and that treats them all fairly and impartially. As Hickey remarks, a key claim of *PC* is that democracy offers just such a process. In fact, the argument goes further to insist that because justice and rights are themselves subject to disagreement, settling our disputes about them and establishing an authority capable of enforcing a collectively acceptable view is necessarily a matter of politics.⁵ Consequently, though I fear he fails to grasp the full implications of this point, the constitution of a polity cannot but be political.⁶

This point leads to an additional, if related, reason to this epistemological argument with which he fails to engage fully and perhaps disagrees. This reason has to do with the distribution of power, whereby non-domination requires an equitable division of power of a kind that only democracy provides. The reasoning here is partly intrinsic and partly instrumental. Intrinsically, as I just noted, constitutional issues are always political in character – they cannot be otherwise. If a Supreme Court resolves them, therefore, it is acting politically. Yet, arguably it lacks the requisite political qualities, which involve equal power. For such a distribution proves constitutive of a situation in which citizens regard each other as equals. Indeed, as I argue below, in acting politically a court may subvert its function as a legal body. Instrumentally, meanwhile, the likelihood is that people will only be treated with equal concern and respect, and so have their human rights recognised and upheld, in circumstances where they have an equal share of power and can insist that is the

³ On the distinction between ‘strong’ and ‘weak’ form judicial review, I follow Mark Tushnet ‘Weak-Form Judicial Review and “Core” Civil Liberties. *Harvard Civil Rights-Civil Liberties Law Review*, (2006) 41(1): 1-22

⁴ John Rawls, *Political Liberalism*, (New York: Columbia University Press, 1993), 54-8

⁵ J. Waldron, *Law and Disagreement*, (Oxford: Oxford University Press, 1999), 159-60.

⁶ Richard Bellamy, ‘Turtles All the Way Down?: Is the Political Constitutionalist Appeal to Disagreement Self-Defeating? : A Reply to Cormac Mac Amhlaigh’, *Int’l J. Const. L. (I·CON)* (2016) 14.1, 204.

case.⁷ For example, empirical assessments of the effect of international human rights conventions reveal how such legal mechanisms only have a positive impact in countries possessing effective democratic institutions.⁸

Under this second aspect, therefore, there are two reasons for regarding courts as needing to be subordinate to, if independent from, democracy. On the one hand, courts cannot appeal to superior knowledge or superior moral reasoning as the basis of their judgments. True, judges have expertise in the law and, as I note below, this can be a relevant consideration when challenging an executive decision or a new piece of legislation. But the objections they make cannot be ‘matters of principle’ *per se* given these are themselves matters of reasonable disagreement of a kind a court has no epistemological warrant to resolve. They would need to base their objections on principles that have been explicitly enshrined in law and of which the people or their duly elected representatives are the ultimate authoritative interpreters. On the other hand, although courts may have certain democratic qualities most would regard it as advantageous to the tasks we wish them to undertake that they are not democratic in the full sense of being directly authorised by and accountable to the people they serve. We want the legal and judicial system as a whole to be sufficiently democratically dependent that it reflects those norms and interests that are commonly avowable within a democratic process as reflecting equal concern and respect. However, we also want judges to be independent of democratic influence when making rulings based on such norms and interests.⁹ That independence seems necessary to ensure they perform the judicial function of applying the law in regular and non partisan ways that treat all as equal under the law, no matter how close to the government of the day, wealthy, grand or important they may be, and regardless of whether the judges personally agree with the views of one party more than another.

Putting these considerations together, we can say that courts should be subordinate to democracy in the sense that only the democratic process has the legitimate authority to author the norms and laws of the constitutional and legal system. Yet, in applying those norms and laws we need the courts to be independent of democracy so as to act impartially. Note that the very aspects of the legal process that seek to ensure its independence from democratic pressures in order to achieve the impartial application of the law are those that make courts inappropriate channels for authoring the law. In particular, success before the courts is constrained by the law – parties before the courts must have legal standing and have a case in law. Establishing standing and a case can be costly and time consuming. Of course, doing so allows for contestation under the law of the actions of democratically elected governments and other powerful agents and agencies. Yet, to be legitimate such contestations need to take the form of challenging a policy’s or measure’s consistency with already existing democratically enacted norms and laws. If that challenge shades into the court offering an alternative venue to author norms and laws, then its independence from democratic pressures becomes problematic. Insulating courts from being directly

⁷ Thomas Christiano, ‘An Instrumental Argument for a Human Right to Democracy’, *Philosophy and Public Affairs*, (2011) 39.2: 142-76

⁸ Todd Landman, *Protecting Human Rights: A Comparative Study*, (Washington, DC: Georgetown University Press, 2005) and Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, (Cambridge: Cambridge university Press, 2009).

⁹ J. Ferejohn and L. Kramer, ‘Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint’, *New York University Law Review*, (2002) 77:962-1039

influenced by democratic decision-making makes them a less equal forum for citizens to express their views. Plaintiffs are deliberately constrained as to how they can put their case, while no mechanism exists to ensure judges are representative of the different interests and perspectives in play: indeed, given how small the membership of multimember courts is compared to parliaments, and the usually lengthy terms most judges enjoy, it would be hard for them to assume such a representative role in an adequate way.¹⁰ Yet, reducing the barriers to democratic pressures risks undermining the courts impartiality and independence in applying the law. Because membership of the court is so small, that makes it more prone to capture. And once captured, changing the court becomes much harder. There's a trade-off here.

I consider striking the right balance between the democratic subordination and independence of courts points in the direction of weak form judicial review.¹¹ That allows for quite broad contestation over the interpretation of norms and laws but ensures that authorship lies clearly with the democratic rather than a legal process. By contrast, Hickey and Pettit advocate a view of courts that sees them as less subordinate yet more independent and allows for strong form judicial review. I think that makes courts less impartial and more susceptible to minority capture in ways that risk turning them into a means for domination. This difference and the reasons lying behind it appear to form the nub of our disagreement.

As Hickey rightly observes, the commitment of political constitutionalism to democratic norms can be aligned to Pettit's argument that to satisfy the republican criterion of non-domination a political system must meet the 'eyeball' and the 'tough-luck' tests.¹² The eyeball test can be regarded as a heuristic for the degree a system secures public equality and the 'tough-luck' test an indication of its neutrality and impartiality. Both Hickey and Pettit also acknowledge that a system of electoral democracy based on one person, one vote and majority rule offers a prima facie embodiment of these criteria. So how come they end up adopting an argument closer to legal than political constitutionalism? The reasoning here seems to mirror pre-democratic republican concerns about the so-called 'tyranny of the majority' and other related fears about potential distortions in the political process that later liberal thinkers inherited. In such cases, they contend courts can redress the balance by offering a mechanism for 'contestation' by minorities, especially those lacking electoral clout.¹³ While, as I recognised above and elaborate below, a case exists for weak form review to address some of these concerns, that case differs in certain crucial respects from the argument of Pettit and Hickey. In particular, I believe Pettit – and following him Hickey – go too far in coming close to suggesting that the distortions of majority rule are the norm rather than the exception, making 'authorial'

¹⁰ For a fuller discussion of the various democratic qualities of courts, see Richard Bellamy, 'The Democratic Qualities of Courts: a Critical Analysis of Three Arguments', *Representation*, 49:3 (2013), pp. 333-346.

¹¹ I make this argument most fully in Richard Bellamy, 'Democracy as Public Law: The Case of Constitutional Rights' (2013) 14 (8) *German Law Journal* 1017.

¹² Philip Pettit, *On the People's Terms: A Republican theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012), 84-85, 177-79.

¹³ Pettit, *On the People's Terms*, 211-18; and for an earlier and even stronger case of this kind, see Pettit, 'Republican Freedom and Contestatory Democratization', in I. Shapiro and C Hacker-Cordón, *Democracy's Value*, (Cambridge: Cambridge University Press, 1999), especially 175-78.

democracy less likely to meet the ‘eyeball’ and ‘tough-luck’ tests than ‘contestatory’ democracy through the courts. In the process, they broaden the meaning of contestation so that it shades gradually from interpretation of the law into authorship of the law.

As I noted above, legal systems that are not embedded in democratic political systems have poor track records in upholding rights for the simple reason that the law and its agents will in such cases tend to reflect the interests of those in power.¹⁴ There is a clear theoretical and normative logic as to why majority rule should promote both equity and fairness in the granting and protection of the rights of all, with this logic being more muted in the case of courts. Sharing power more widely and equally provides the equal status required by the ‘eye ball’ test and renders it harder to ignore the views and interests of one’s fellow citizens, which together with the fairness inherent to majority rule makes it more likely that collective decisions may meet the ‘tough-luck’ test.

Although neither Hickey nor Pettit is explicit on this point, it appears that their arguments about courts assume them to be embedded in a democracy but not subordinate to it. However, once one explicitly asks the question of whether, and if so why, courts in aristocratic or authoritarian systems operate in different and less egalitarian ways to those in a democracy, then a whole series of other assumptions about courts – such as the virtues and limits of judicial independence – need addressing. If, as I noted above, we associate the rule of law and a well functioning judicial system with it possessing certain democratic qualities, and these qualities come about in part because the political system is itself democratic, then treating the legal system as distinct from and superior to the political system seems to ignore and even confuse cause and effect.

Nevertheless, this is precisely what Hickey, following Pettit, does when he suggests that courts provide superior incentives to democracy to adopt forms of public reasoning that address ‘commonly avowable interests’ and show individuals equal concern and respect. Hickey suggests my reasons for doubting such contentious arguments rests on my belief that courts’ claim an unwarranted epistemic superiority to democratic processes in identifying the public interest. He counters that if courts are guided by asking whether a given measure meets the eyeball or tough luck tests then this criticism is inappropriate. Courts are not claiming they are experts about which measures are best. They are simply asking whether a legal challenge to a given measure is justified according to the democratic norm that all be treated with equal concern and respect. However, this is not an uncontroversial judgment to make. It raises a host of substantive issues about which there can be reasonable disagreement – disagreements that might have been considered already in the democratic process that agreed on the disputed measure in the first place. The argument then must be why the courts have greater legitimacy as interpreters of the eyeball and tough luck tests than legislators. I think that claim can only be sustained by idealising the operation of the judicial process, so that it becomes a model of truly democratic deliberation, as Hickey and I agree both Rawls and Dworkin did and my criticisms of whom Hickey claims to share, while demonising the operation of the political process. Neither of these moves can be justified. Let’s take each in turn.

¹⁴ See Tom Christiano, ‘An Instrumental Argument for a Human Right to Democracy’, *Philosophy and Public Affairs*, (2011) 39.2: 142-76

As Hickey remarks, I criticised Pettit for doing the former in *PC* (163-68). I contended that he relied on a hypothetical form of ideal politics to ground what he considers would constitute the ‘common recognisable interests’ that a court should uphold. Yes, Pettit did not formally defend judicial review on the basis of the superior knowledge of Supreme Court judges but from their being constrained by legal constitutional considerations that lead them to treat people as equals. But given these considerations can be interpreted in reasonably different and conflicting ways, the issue arises of whether there is a way of arriving at the ‘best’ interpretation of them. Pettit suggests that the court can reach a defensible and non-arbitrary decision by only adopting reasons no body could reasonably reject.¹⁵ Yet, not only is this a highly stylised account of how judges actually decide, where we know that ideological bias offers a fairly reliable guide to how at least Supreme Court justices vote,¹⁶ but also it ignores the fact that in real politics the reasons none can reasonably reject is likely to be relatively small – even an ‘empty set’.¹⁷ So it slides into being a claim about the superiority of the judicial deliberative process that rests on rather shaky foundations.

The other move comes in here: the comparative untrustworthiness of the democratic process. Yet, how valid is this claim? The historical origins of counter-majoritarian checks are instructive in this regard. These mechanisms arose in a class divided society.¹⁸ The majority in these conceptualisations meant the social class consisting of the most people. The system of checks and balances was to defend the class that was numerically in the minority, and to protect their privileges and interests – in particular their property rights. In other words, this was a mechanism with an inegalitarian purpose. However, that purpose was defended as being in the common good. The supposed danger was that an irrational majority would be driven by a passionate envy of the rich and wealthy to redistribute their property to the detriment of the economy over all, and hence to the well-being of the poor as well. The rule of law mirrored such concerns as hanging judges meted out rough justice to poachers and trespassers until such time as juries flatly refused to convict.¹⁹ I’m not for a minute suggesting Pettit or Hickey is seeking to uphold the Black Act or its modern equivalent. But when, for example, Pettit defends this argument by citing with approval Lord Hailsham’s critique of democracy as running the risk of ‘electoral dictatorship’,²⁰ one ought perhaps to remember that the target of Mrs Thatcher’s future Lord Chancellor was the Labour Government of Jim Callaghan, hardly a model

¹⁵ P. Pettit. ‘Democracy: Electoral and Contestatory’. In I. Shapiro and S. Macedo (eds), *Designing Democratic Institutions*. New York: New York University Press, 2000, p. 108.

¹⁶ Jeffrey A. Segal and Albert D. Cover. 1989. ‘Ideological Values and the Votes of the U.S. Supreme Court Justices.’ *American Political Science Review* 83 (2): 557–65.

¹⁷ Henry Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy*, (Oxford: Oxford University Press, 2002) p. 53

9. D. Wootton, ‘Liberty, Metaphor, and Mechanism: “Checks and Balances” and the Origins of Modern Constitutionalism’ [http://www.ucl.ac.uk/spp/download/seminars/0203/22Check Bal.doc](http://www.ucl.ac.uk/spp/download/seminars/0203/22Check%20Bal.doc)

¹⁹ Douglas Hay et. al., *Albion’s Fatal Tree: Crime and Society in Eighteenth Century England*, 2nd ed., London: Verso Books, 2011.

²⁰ P. Pettit, ‘Republican Freedom and Contestatory Democratization’, in I. Shapiro and Casiano Hacker-Cordón, *Democracy’s Value*, (Cambridge: Cambridge University Press, 1999), p. 176.

of dictatorship electoral or otherwise. By contrast, Lord Hailsham - with the full backing of the British courts - went on to drastically curtail the right to strike and to be a member of a trade union along with other workers' rights as part of a government that oversaw a dramatic increase in wealth inequality.²¹ So against the danger of majoritarian tyranny one must place the worry of minority tyranny, and the possibility that a group might use the courts to 'dominate others: that is, may impose a form of treatment on those others that is indifferent to perceived interests that have just as good a call to be heeded as their own.'²²

One way in which a powerful minority may do this is by characterising what Pettit calls the dangers of 'majoritarian interest, majoritarian passion, or majoritarian righteousness' as instances of popular 'myopia' and 'irrationality',²³ while reifying its own interests as rights that any reasonable legal system should uphold. This was precisely what happened in the so-called Lochner era in the US,²⁴ when between 1885-1935 the Supreme Court struck down some 150 pieces of labour legislation (*PC* 34-36). It was also true of Lord Hailsham's critique of the Labour Party's alleged period of 'elective dictatorship' in the 1960s and 70s, and informed Margaret Thatcher's Trade Union Act of 1984 and the Employment Act of 1988,²⁵ which built on the common law reasoning of the courts in such matters.²⁶ What both these periods have in common is the characterisation of freedom of contract as involving equality of rights between the employer and potential employees, while treating strike action as a breach of contract that undermines that freedom – not least by denying non-striking workers the 'right to work'. In other words, here we have the use of a putative 'eyeball' test that appeals to the formal legal equality of the parties while ignoring the background inequality in their bargaining power. Indeed, it was deployed to maintain that inequality by subverting the very mechanism whereby workers might have secured equal power: namely, freedom of association within trade unions. Moreover, courts largely constructed and legitimised such arguments by transposing the language of individual rights protection against majorities into labour law.

It might be countered that the Lochner era was some time ago, and that Lord Hailsham failed to deliver on his defence of a UK bill of rights once his party gained power, so that the Thatcher-era cases were decided before anything like the Human Rights Act (HRA) came into force – although some were tested before the European Court of Human Rights.²⁷ Yet, as the US Supreme Court moves ever more to the

²¹ Keith Ewing and C. A. Gearty, *Freedom Under Thatcher: Civil Liberties in Modern Britain*, (Oxford: Oxford university Press, 1990).

²² Pettit, 'Republican Freedom and Contestatory Democratization', p. 176 on the dangers of majority tyranny.

²³ Ibid

²⁴ *Lochner v. New York* 198 US (1905)

²⁵ Sandra Fredman, 'The New Rights: Labour Law and Ideology in the Thatcher Years', *Oxford Journal of Legal Studies*, Vol. 12, No. 1 (Spring, 1992), pp. 24-44

²⁶ Lord Wedderburn, 'Industrial Relations and the Courts', 1980, 9 ILJ 65.

²⁷ See for example the British Rail Case of 1981 - *Young, James and Webster v UK* (1981) 4 EHRR 38 . The ECHR also followed the British courts in condoning the unprovoked withdrawal of trade union rights from employees at GCHQ (*PC* 247) on grounds of national security (*Council of Civil Service Unions v UK* (1988) 10 EHRR 2)

right, few suppose the legacy of the post-Roosevelt, Warren Court era to be sacrosanct. Moreover, the post-*Lochner* shift in the Supreme Court resulted from a unique period when the US system reflected majority opinion due to the massive and sustained electoral success of a highly popular and charismatic President and his party in a time of national emergency, these circumstances making it possible to overcome that system's many counter-majoritarian checks. Outside such exceptional moments, the system becomes locked into a given world view that proves hard to shift. Indeed, that was precisely the attractiveness of a bill of rights for Hailsham back in 1978.²⁸ Such mechanisms have always tended to appeal when political elites fear they cannot guarantee success at the ballot box and get rejected by them once they win.²⁹ Hence the critique of the HRA, introduced by Tony Blair's first Labour administration, by the current Prime Minister and other members of the Conservative party, including their appointees on the UK Supreme Court, such as Lord Sumption, who regard it as biased towards the **progressive** views of a European judicial elite.³⁰

Of course, republicans of a liberal and social democratic disposition may see that as a good feature if the main fear is the tyranny of a right-wing populist majority. Yet, what happens when these forces capture the courts? Even if the Constitution embodies liberal and social democratic values, the empirical record indicates that courts will only consistently uphold them if political pressure exists for them to do so, and judicial decisions are backed by appropriate government legislation.³¹ Otherwise, the legal channel can prove not only a 'hollow hope' for progressive activism,³² but also a distraction as attention moves to capturing or defending the Court rather than informing public opinion. Again, minority tyranny can ensue.³³

Courts can be a venue of contestation for 'discrete and insular minorities' lacking electoral clout,³⁴ though this group is perhaps smaller than recognised (*PC* 255-57). However, it would be wrong to assume they will be moved ineluctably by the very nature of legal reasoning towards adopting forms of Socratic contestation

²⁸ Lord Hailsham, *The Dilemma of Democracy: Diagnosis and Prescription*, (London: Collins, 1978)

²⁹ R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge, M.A.: Harvard University Press, 2004.

³⁰ For a discussion of Lord Sumption's views that distinguishes them from political constitutionalism, see Richard Bellamy, 'The Limits of Lord Sumption: Limited Legal Constitutionalism and the Political Form of the ECHR' in N. Barber, R. Ekins and P. Yowell (eds), *Lord Sumption and Human Rights*, (Hart, 2016), Ch. 11, pp. 193-212. That said, the track record of the British courts post-Human Rights Act in the areas of workers rights and the rights of terrorists suspects has been mixed to say the least. See on each, K D. Ewing, 'The Human Rights Act and Labour Law', *Industrial Law Journal*, Vol 27, No.4, December 1998 275 and 'The Futility of the Human Rights Act' [2004] *Public Law* 829.

³¹ R. Hirschl, and E. Rosevear, 'Constitutional Law Meets Comparative Politics: Socio-economic Rights and Political Realities', in Campbell, T., Ewing, K. D. and Tomkins, A. (eds) *The Legal Protection of Rights: Sceptical Essays*, Oxford: Oxford University Press, 2011, pp. 207-228

³² Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, Chicago: Chicago University Press, 1991

³³ M. Tushnet, *Taking the Constitution Away from the Courts*, Princeton NJ: Princeton University Press, 1999.

³⁴ *United States v Carolene Products Co.* 304 US 144 at 152 n. 4 (1938),

that mirror a situation where all parties had to deliberate on the basis of equal power and address the commonly avowable interests of all concerned. As the cases above indicate, such reasoning can be deployed as easily to weaken the rights of the majority in ways that enhance inequality. Tom Hickey endorses Matthias Kumm's Socratic defence of judicial reasoning, and in the area of LGBT rights that Kumm uses to defend his thesis there is indeed evidence that ECtHR rulings have incentivised the adoption of suitable reforms in the contracting states.³⁵ Yet, that does not mean that legislatures have not managed to address such issues in a deliberative manner that is attentive to minority concerns. For example, if one looks at the UK Parliamentary debates on the abolition of the death penalty of 1965 and on the legalisation of abortion and homosexuality of 1967, one finds discussions that are arguably even more Socratic than those in the judicial arena ever can be because they were not limited to those moral reasons admissible in law but considered a wider range of moral concerns, including those that relate to custom and tradition that may give rise to legitimate expectations or render certain valuable practices possible, such as respect for the law and much legal process. Likewise, intensity of feeling is not always out of place. Victims of entrenched structural injustices often need to express a justified rage. For example, racism and sexism have often been barely recognised or treated with indifference not only by the most egregious perpetrators but also the broader public, judges included. Only by expressing outrage are attitudes likely to change in such circumstances. Again, it may be not only easier but also only possible to express such emotions in political rather than legal forums, but by no means inappropriate to do so. Moreover, courts no less than legislators may be not so much an enlightened vanguard as reflecting a general societal change – a product of their democratic subordination and embeddedness that has given their decisions popular legitimacy.³⁶ Indeed, sometimes the public's views prove in advance of key sections of both judges and politicians – as was arguably revealed in Ireland in the 2015 referendum on gay marriage and the 2018 referendum on abortion, both of which were informed by discussions in a citizens' assembly that produced more radical proposals than many politicians had believed would be electorally sustainable. Either way, courts and legislatures need to work in tandem. Even in areas where popular prejudices have been assumed, often wrongly, to run counter to liberal rights, such as same sex marriage, legislatures have as frequently led the way as followed courts,³⁷ and – as I noted above – without appropriate legislation and government support favourable judicial decisions will be unable to affect general change.

³⁵ L. R. Helfer and E. Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe', *International Organisation*, 68, 1, (2013), 77-110.

³⁶ As R. A. Dahl established some 60 years ago in his classic 'Decision-making in a Democracy: The Supreme Court as a National Policy-Maker', *Journal of Public Law*, 6 (1957) 279-95, courts follow the polls, or at least sustained, national majorities. However, that trend has gradually become upset by the gradual partisan capture of the Court by Conservatives since 1981. In other words, it rested on the democratic balance of power. See William Mishler and Reginald S. Sheehan, 'The Supreme Court as a Counter-majoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions,' *American Political Science Review*, Vol. 87, No. 1 (Mar., 1993), pp. 87-101

³⁷ D. Gallo, L. Paladini, and P. Pustorino, eds. *Same-Sex Couples before National, Supranational and International Jurisdictions*, Springer-Verlag, 2014

None of the above, therefore, is to suggest that courts play no distinctive and valuable role, or that role may not complement in important and vital ways what elected legislatures and governments do. No complex political system can avoid a division of labour between those who make and those who apply the law, while equity and fairness require a degree of independence between the two functions. In performing the latter function, courts have two advantages over legislatures. First, they are focussed upon and experts on the law, and can therefore spot inconsistencies between different legal measures, not least if the executive seeks to act in a way that previous legislation deems to be *ultra vires*. Second, and perhaps even more importantly, they deal with individual cases. In framing the law, executives and legislatures tend to deal with generalities, and can only anticipate its potential effect on individuals to a limited degree. There will always be instances they will not have foreseen and that courts can call attention to. This argument seems to be in line with the points made by Dixon and Harel and Shinar cited by Hickey, which relate especially to the second. For both these reasons, a system of ‘weak review’ seems warranted, whereby courts enter into dialogue with legislatures and ask them to consider their proposals again.³⁸

Like Hickey, I have already argued on republican grounds for a certain version of what is sometimes called the ‘commonwealth’ model of judicial review for just these reasons in the pages of this journal.³⁹ However, Hickey now goes further and suggests republicans should endorse strong form review. Yet, his reasons seem to be that strong review is (or could be) weaker than is sometimes claimed, for example if the term limits of judges were shorter or a referendum could overturn their decisions, and that in any case weak review can often be quite strong, for example if, as under the HRA, courts have wide powers of interpretation that allow them to avoid striking down many measures explicitly. However, both these observations seem to me to point in the direction that strong review can only be justified if weakened sufficiently to allow for democratic contestation of judicial decisions.

Although Hickey politely avoids mentioning it, as I remarked above *PC* involves an argument against constitutional entrenchment as well as strong judicial review. However, the two are often linked, the one justifying the other, and his argument appears to assume that courts are somehow constrained by a legal constitution that has been politically formulated. The standard argument here is that courts will not be acting arbitrarily so long as they are bound by a constitution that has itself been democratically endorsed as part of a self-binding process. Such self-binding supposedly gets around the objection that a constitutive process cannot avoid being political and renders the role of a constitutional Court legal and non-political. Pettit explicitly adopts this sort of argument, and Hickey’s core case implicitly appeals to something like it – or I at least cannot see how he can avoid adopting some such argument. Pettit remarks that a pre-commitment strategy, such as when someone seeking to control their drinking instructs a friend not to give them the keys to the drinks cabinet for 24 hours, is not dominating because the friend is not acting not on his or her arbitrary will but under instructions from the agent.⁴⁰ However, the parallel

³⁸ For a full argument, see Bellamy, ‘Democracy as Public Law: The Case of Constitutional Rights’ (2013) 14 (8) *German Law Journal* 1017.

³⁹ R. Bellamy, ‘Political Constitutionalism and the Human Rights Act’, *International Journal of Constitutional Law (I-Con)*, 9, (2011), 86-111

⁴⁰ Pettit, *People’s Terms*, 57-58.

between constitutional rules and such a pre-commitment strategy is false. What electoral rules and rights best treat individuals as equals, as well as which interpretation of them, are all matters of reasonable disagreement. A constitutional pre-commitment instructing judges to uphold a given view does not necessarily preserve a sober, rational decision against possible irrational decision-making by a future drunken majority. It enshrines one view, which very probably was at the time reasonably contested by some, and constrains reasonable reflection on its continued suitability later on, when people may have come to regard the earlier decision as misguided (*PC* 134-36). Entrenchment combined with strong judicial review neither meets the eyeball nor the tough luck test, therefore. It establishes a status quo bias whereby losers may be very unlucky, never having the possibility of establishing change. Meanwhile, strong review by a Supreme Court may well hinder rather than support equality enhancing measures if minority interests capture it, as decisions favouring corporate interests such as *Buckley v. Valeo* and *Citizens United v FEC* indicate.

An attractive feature of Pettit's republicanism, for me at least, is its focus on institutional design and the normative value of different sorts of procedures in constituting the conditions under which citizens can enjoy freedom as non-domination. However, I consider his (and Hickey's) advocacy of counter-majoritarian checks, such as strong judicial review, as belonging to a pre-democratic era inconsistent with a contemporary republicanism that rejects ascribed status. Far from upholding political equality against a potentially tyrannous majority, they risk enshrining minority tyranny, creating what might be called a counter-minoritarian difficulty for equality promoting, majoritarian politics. Above all, it misses where the action lies – in promoting equal power among those subject to the law. That proves the only effective way to ensure government policies do indeed reflect their commonly avowable interests. It might be objected that democratic politics in the era of Trump, Erdogan and Orban, to name but three countries, is in poor shape. Yet, so is judicial review in these countries. One cannot save democracy by non-democratic means: as the Conservative take over of the US Supreme Court amply demonstrates, that merely compounds the problem. Rather, the constitutional character of democratic processes themselves needs to be improved. Weak review certainly offers one possible improvement, but so can many other measures more directly related to the democratic process, such as stronger regulation of campaign finance, certain forms of proportional representation, the use of citizen juries – measures popular majorities have introduced in some countries but that get regularly blocked by the US Supreme Court. No set of measures can be determined as working best *a priori* – much depends on the prevailing social circumstances. However, for that very reason, the core of republicanism needs to be a political constitutionalism in which democratic politics takes precedence over judicial review and allows for politically legitimate constitutional adaptation and reform.