Chapter V: Disagreement and the Constitution of Democracy

Perhaps we should change our focus from constitutionalized practices of democracy to democratized practices of constitutionalism. Dworkin and Perry both seek to respond to democratic objections to judicial review by relying on a theory of the legitimacy constraints of democracy itself. According to this view, on some matters, legitimate democracy requires getting the right moral answers. Thus democratic processes must be constitutionalized to ensure such right outcomes on fundamental moral matters. To the extent that judges are better positioned to engage in principled moral reasoning, the arguments continue, we ought to entrust them with ensuring the constitutionalized legitimacy conditions of democracy. I argued that this latter institutional move, however, threatened to simply revive the paternalist worries forcefully articulated by Learned Hand. Waldron’s rights-based objection to rights-based judicial review, although not dispositive, provided further warning of the moral costs of treating fellow citizens as incapable of reasoning together about the content and proper scope of the legal rights required for democracy.

An alternative strategy for justifying judicial review that this chapter investigates is to understand a constitution itself as a product of true democracy, of real popular sovereignty. It is then up to the people, exercising their constituent power at the level of a constitutional assembly, to decide what particular institutional arrangements will best carry forward their collective ideals and decisions. The specific character and structure of those arrangements—whether they are populist or elitist, deliberative or aggregative, sensitive or insulated, electorally accountable or politically independent, and so on—is then a secondary matter. What is central is that the constitutional arrangements the people decide on are, first and foremost, democratically legitimated by the fact that they are the result of authentic popular sovereignty. This second
strategy, then, focuses not on the constitutional conditions of democracy, but on the
democratic character of constitutional enactment itself.¹

A. Freeman, Popular Sovereignty, and the Possibility of a Democratic

Precommitment to Judicial Review

1. Precommitment as an Act of Popular Sovereignty

In a path breaking article, Samuel Freeman puts forth a philosophically sophisticated
account of democratic constitutionalism, starting from Rawlsian premises, intended to
show that judicial review need not be considered antithetical to democracy.²

Structurally, his account shares several features of the deliberative democratic
justifications for judicial review evinced in Perry’s and Dworkin’s theories. The
advantage of attending to his conception, however, is that he more clearly recognizes
a point I have been emphasizing throughout: “Ultimately, the case for or against
judicial review comes down to the question of what is the most appropriate
conception of constitutional democracy.”³ Not surprisingly, his account of the
normative foundations of constitutional democracy is somewhat more convincing
than theirs: less rococo than Dworkin’s, less subject to the perils of ethically
particularistic perfectionism than Perry’s. The disadvantages are almost the obverse,
as I hope to suggest by the end of the chapter. In not attending to the legal role of
constitutional provisions in on-going democratic processes, Freeman’s account misses

¹ This strategy of appealing to the constitution itself as the highest expression of popular sovereignty,
an expression then that all branches of constituted government must then abide by, is central to
Hamilton’s defense of judicial review in number 78 of Hamilton, Madison, and Jay, The Federalist
with Letters of "Brutus".

² Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review."

³ Ibid.: 331. The point is put too strongly, however. As I show with respect to Freeman below, and
will continue to emphasize throughout, the underlying normative ideals of constitutional democracy are
central to the consideration of the institutions of constitutional review, but not uniquely dispositive.
See also Chapters VIII and IX.
the central difficulties of indeterminacy and democratic disagreement that arise from the conditions of modern politics that authoritative law-making is intended to solve. First, like them, Freeman advances a critique of aggregative (what he calls “utilitarian”) accounts of democracy for being insufficiently attractive from a normative point of view. The basic idea is that any purely procedural account of democracy in terms of majority rule and equal participatory rights can only secure the values of procedural fairness, but cannot guarantee morally acceptable outcomes. “There are moral limits to the extent of the exercise of equal political rights through majority legislative procedures, and there is no assurance that these limits always will be respected by the workings of these procedures.”

Second, he advances a thicker, more substantialist account of these moral limits, an account intended to highlight the importance not only of equal political rights for democracy, but also the inextricability of equal basic rights ensuring the freedom and independence of each. The claim then is that democracy worth the name and aspiration cannot be limited to rights securing fair political procedures, but must also include such substantive rights as those to private property, freedom of conscience, rights to a fair legal process, and individual liberty rights securing a sphere of private decisional autonomy.

Third, as is clear from this richer account of democratic legitimacy, Freeman’s argument centrally contends that the justification for equal political participation rights—and the formal democratic processes of decision making they constitute—must be founded in a deeper notion of justice. The principles and values of this more fundamental notion of justice, then, explain not only the import of equal rights to political participation but also the worth of the equal civil rights necessary to
securing the freedom and independence of each. Of course, the value of whatever institutional arrangements are decided upon to secure such political and civil rights is instrumental: only to the degree to which they secure these rights are such political institutions worthy of support. In other words, Freeman’s defense of judicial review is, like Perry’s and Dworkin’s, founded upon a substantialist notion of legitimacy, one whose fulfillment is independent of the results of any actual political actions or decisions of citizens expressed through the extant legal and governmental system.

Fourth, Freeman’s theory, given the critique of aggregative democracy, the substantialist redefinition of democracy and the instrumentalist theory of political institutions it gives rise to, is then able to explain how judicial review need not be considered undemocratic. As long as judicial review functions to ensure the legitimacy conditions of civil and political rights—that is, equal basic rights securing both the private and the public autonomy of each—then it is not inconsistent with democracy. It should rather be seen as one possible way in which actual democratic processes could guarantee democratic legitimacy.  

The interesting part of Freeman’s theory is how he fills out the structure of this shared argument strategy. In particular, Freeman’s innovation is to give a much more convincing account of why we should think that the redefinition of democracy to include the central guarantees of equal basic civil rights should be considered fully democratic. The crucial move here is to follow social contractarians such as Locke,

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5 These broad features of a substantialist defense of judicial review as a central institution of democracy—or at the very least, as not undemocratic—are largely shared by many contemporary theorists. Besides Dworkin, Freeman, and Perry, a short list would also include the theories advanced by Christopher Eisgruber and John Rawls (I consider a subset of Eisgruber’s and Rawls’s claims, concerning judicial reasoning as a form of democratic deliberation, in Chapter VI). Similar strategies are employed in Fabre, “A Philosophical Argument for a Bill of Rights.”, Stephen Holmes, “Precommitment and the Paradox of Democracy,” in Constitutionalism and Democracy, ed. Jon Elster.
Rousseau, Kant, and Rawls in insisting upon a distinction between the ordinary power of an extant government to make laws, and the originary constituent power of the sovereign people to establish government in the first place. This latter constituent power—the power of free and equal consociates looking to regulate their life in common by establishing a set of governmental institutions—is that power which should be considered *popular sovereignty* proper. The legislative power, as well as the other powers of an established state, themselves gain their authority only as powers delegated by the people themselves. Democratically legitimate political authority arises, then, not from any determinate form that governmental processes and institutions might take, such as electoral representation or the majoritarian character of the legislative process, but rather from the fact that the people, in their sovereign constituent capacities, have contracted among themselves to establish those governmental processes and institutions.

In exercising their popular sovereignty through their constituent constitution-creating power, the people might decide upon various mechanisms for securing the their original freedom and equality, once they have adopted institutions forming a state. The specifically democratic character of those institutions comes not from their particular structure or the character of their on-going processes, but from the fact that they could have been unanimously agreed to in a constitution-making social contract. Therefore, the people could decide upon a constitution that gave the judiciary the power to review the constitutionality of legislation, and, since this would be an expression of their popular sovereignty, such a decision could not be labeled undemocratic. Seen in this light, judicial review

is not a limitation upon equal sovereignty, but upon ordinary legislative power in the interest of protecting the equal rights of democratic sovereignty. So conceived, judicial review is a kind of rational and shared precommitment among free and equal sovereign citizens at the level of constitutional choice. … By agreeing to judicial review, they in effect tie themselves into their unanimous agreement on the equal basic rights that specify their sovereignty. Judicial review is then one way to protect their status as equal citizens.⁶

Freeman thus understands constitutionalism in general—including the “traditional constitutional devices that limit legislative procedures … [such as] bicameralism, federalism, and other checks and balances … [and] a bill of rights, with or without judicial review”⁷—as a kind of precommitment to legitimacy-ensuring side constraints on legislative decision making, in particular side constraints that guarantee such equal basic civil rights as access to a just legal system, private property, free religious conscience, a sphere of private autonomy, and so on. Such constitutional side-constraints, and whatever institutions might be reasonably thought necessary to secure them, can then be seen as democratic because they all could have been agreed upon by free and equal consociates expressing their constituent powers of popular sovereignty at the level of constitutional choice.

2. Doesn’t Establish a Judicial Institutionalization of Constitutional Review

How strong a democratic argument for a judicial institutionalization of constitutional review is this? To begin with, as Freeman himself recognizes, the argument establishes at most the theoretical necessity of the function of the review of legislative

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⁷ Ibid.: 354.
outputs for consistency with the substantive values secured through individual constitutional rights guarantees.\(^8\) It does not specifically endorse using a judicial body to fulfill that constitution-conserving function. Rather, according to Freeman, institutionalization is a strategic question depending on whether there are good grounds for thinking that “legislative procedures are incapable of correcting themselves”\(^9\) and that courts would do a better job of ensuring the liberal conditions of democracy. In fact, Freeman argues that once one accepts the particular normative content of the constitutional precommitment to securing equal basic rights, the question about what institutions should be erected to secure the terms of that precommitment will turn entirely on context-specific matters of fact. Any actual arguments for a judicial institutionalization of constitutional review would need to be tailored to the specific “social and historical circumstances. It is a matter for factual determination whether the overall balance of democratic justice can be more effectively established in a democratic regime with or without judicial review.”\(^10\)

It seems unlikely, however, that such a determination could be a simple matter of fact, given that there are ongoing disagreements, at the very least at the level of the specification of abstract constitutional principles, about what “the overall balance of democratic justice” means over the long sweep of history and in any particular case. The “facts” which might establish the inference to a judicial institutionalization of constitutional review—facts such as that a particular judiciary in a particular country is more likely to hit upon just solutions than other possible political actors or

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\(^8\) “Final authority to interpret the constitution is a necessary power of government that is distinct from the ordinary powers of the legislative, judicial, and executive functions. … The final authority of interpretation might be seen as an institutional expression of the constituent power of sovereign citizens,” Ibid.: 357., emphasis added.

\(^9\) Ibid.: 361.

\(^10\) Ibid.: 361-2., emphasis added.
institutions—are themselves normatively suffused. Taking the “fact of reasonable pluralism” seriously, we cannot expect that the judgment of such facts will be a simple empirical matter of pointing to brute states of affairs and historical details. Such judgments will, rather, be inextricably bound up with differing conceptions of the principles of justice and associated weightings of various values, and so will be complex amalgams of normative and empirical assessment.\textsuperscript{11}

The shortcomings of merely empirical judgments here point to the problem that Freeman’s argument, as he himself recognizes, merely establishes the potential compatibility of judicial review with a system of democratic sovereignty. Nothing in the argument actually necessitates support of such an institutionalization of the function of securing the sovereign people’s precommitments. From a perspective that seeks to secure reflective equilibrium between the theoretical conception of democratic justice and the everyday practices of constitutional democracy extant in the world, this agnosticism with respect to questions of institutionalization might be seen as an advantage. For it prevents the theory from being committed to the claim that a whole series of nation-states that appear to be, on balance, just as good as others at securing democratic justice without institutionalized judicial review are, nevertheless, normatively deficient precisely because of their lack of such an empowered court.

\textsuperscript{11}A rather simple way to see this point concretely is to consider the diverging conceptions of the same constitutional provision which are endorsed by different jurisprudes who adopt the ostensibly purely empirical method of constitutional interpretation called variously ‘originalism’ or ‘textualism,’ a method designed specifically to forestall the need for normative judgments on the part of judges employing the method. Are these wide divergences really simply the result of factual disagreements, and if so, why do the disagreements persist even after the relevant historical ‘empirical evidence’ has been presented? See, for example, the widely divergent conceptions of the expressive freedom protected by the First Amendment to the United States Constitution in originalist scholarship: Amar, \textit{The Bill of Rights}, 20-26 and 231-46. in contrast with Bork, “Neutral Principles and Some First Amendment Problems.” and in contrast with Scalia, “Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and the Laws,” 37-38, 45 and infra 140-48.
3. The Problem of Disagreement and Hypothetical Unanimous Consent

Even though he doesn’t present positive arguments for judicial review, Freeman does at least outline what considerations he believes might lead a specific group of constitutional contractors to consider the option should certain facts obtain. I would now like to explore a potential dilemma that arises for his contractarianism understanding of constitutional choice, a worry inspired by Jeremy Waldron’s emphasis on the persistence of reasonable disagreement on fundamental matters of justice among political consociates. In considering the strategic question of institutionalization, Freeman argues that judicial review would only be recommended in those socio-historical contexts where we could not trust ordinary legislative processes to maintain the conditions of democratic justice; where citizens, that is, had good reason for “protecting their sovereignty and independence from the unreasonable exercise of their political rights in legislative processes.” In the best case scenario, a socio-historic situation “where there is widespread public recognition and acknowledgement of the equal rights of democratic sovereignty, and where it is publicly accepted that the purpose of legislation is to advance the good of each” there would be no need for judicial review, since ordinary legislative processes could be trusted to maintain democratic justice. But, Freeman argues, “in the absence of widespread public agreement on these fundamental requirements of democracy, there is no assurance that majority rule will not be used, as it so often has, to subvert the

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12 See generally Waldron, Law and Disagreement. I have not found the specific argument I present here in Waldron’s work, though it certainly has close affinities with much that he says. A fuller treatment of Waldron’s arguments from the circumstances of disagreement to the conclusion that no form of judicial review is acceptable democratically is in Section B of this chapter, below.


14 Ibid.: 355.
public interest in justice and to deprive classes of individuals of the conditions of
democratic equality. It is in these circumstances that there is a place for judicial
review.”

The question now is, having admitted that in the world of ordinary legislative politics
there will be disagreements among representatives concerning the legitimacy
conditions of democracy properly and richly understood, how far up the levels of
lawmaking is Freeman willing to let such dissensus ascend? If there is in fact
widespread disagreement among representatives on the fundamental requirements of
democracy at the level of ordinary statutory enactment, we can probably expect a like
disagreement among citizens themselves. Furthermore, we should probably also
expect the same to obtain at the level of the specification of those constitutional
principles the people have already agreed to. After all, one of the contentious issues
with respect to statutory enactments suspected of being constitutional violations is
usually whether or not they fall afoul of one or another ‘properly’ specified
constitutional provisions. Why shouldn’t we expect a quite similar level of dissensus
about fundamental principles of democratic justice at the constitutional convention
level? But if fundamental disagreement obtains here as well, then we can not expect
either unanimous consent or anything approaching it when the people express their
popular sovereignty through exercising their constituent constitution-making power.
We should, rather, expect a quite similar range of disagreements about the meaning
and import of the basic principles of justice as is evinced in the everyday legislative
processes. But once the notion of consent (either unanimous or to whatever super-
majoritarian degree) at the level of constituent power is gone, so is the democratic
legitimacy that was supposed to accrue to whatever institutions and arrangements

15 Ibid., emphasis added.
would have been agreed to in the original social contract. Disagreement at this level threatens the contractarian legitimacy of the agreement, and therewith the democratic pedigree of whatever institutions and constraints are agreed to there.

Alternatively, the contractarian argument might be able to save the strong notion of agreement on basic principles of democratic justice—and thereby retain the notion of constitutional constraints as ‘democratic’—by theoretically hypothesizing that, at the level of their constituent power at any rate, the people collectively would agree on just that substantive conception of democratic justice that the theorist insists upon. Thus, even though the actual people appear to evince widespread disagreement on the substantive requirements of democratic justice, to judge by their actually professed beliefs in legislative contexts, the theory can assure us that they would nevertheless agree in the hypothetical contracting situation. The dilemma seems then to be this: either realistically admit fundamental disagreement all the way up to the level of constitutional choice and thereby give up the notion that whatever is agreed to there—including mechanisms of judicial review—is an expression of free sovereign, self-binding precommitment, or, unrealistically cabin persistent disagreement at the lower level of ordinary lawmaking and thereby save the democratic defense of judicial review as the outcome of consent in constitutional choice. But this second option is unrealistic precisely because it relies on a kind of overly-confident assumption on the part of liberal theory: namely that the theory is able to correctly project the specifics of the substantive content of its theory of justice into the heads of hypothetical contractors, despite evidence that some significant proportion of actual democratic consociates do not agree with the theory’s conclusions.
4. Democratic Legitimacy and Ongoing Democratic Process

Perhaps, however, the fact that Freeman’s argument doesn’t positively justify judicial review—content rather to consider certain conditions under which its use would be legitimate and might be recommended—is not an advantage, but actually a symptom of a broader problem: namely, that if the general argument for precommitment as an act of popular sovereignty is sufficient to dispel democratic worries, then the argument could be used to establish much more than envisioned or desired. To see this problem, consider what else such an argument might be taken to establish as sufficiently democratic: any number of apparently undemocratic day-to-day ordinary lawmaking mechanisms such as legislation by elected or aristocratic monarch, forms of legislative outsourcing from one nation to another’s parliament, or perhaps even day-to-day rule by a few well-trained philosophers. We don’t need outlandish examples however, for Freeman’s argument appears fully consistent with a sympathetically democratic interpretation of Hobbes’s contractarian arguments for monarchy\textsuperscript{16} and Rousseau’s for a temporary dictatorship.\textsuperscript{17} Surely in all of these cases we can describe the original constitutional choice as democratic, but I think we should have real reservations about calling the on-going workings of such political arrangements democratic. Waldron helpfully characterizes this difference as “the distinction between a democratic method of constitutional choice and the democratic

\textsuperscript{16} See especially chapter 19, 129-138 of Hobbes, \textit{Leviathan}. I say ‘sympathetically democratic interpretation’ of Hobbes’s arguments for monarchy, since Freeman insists that the kind of social contract he endorses is not a compromise among individuals competing for scarce resources, but rather a mutual endorsement of shared principles of association that the contractors intend to carry on for the indefinite future: Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review," 356. Yet it doesn’t seem outlandish to suppose that there might be socio-historical facts—for instance violent and persistent social unrest—that might make sovereign precommiters consider reducing their equal political participation rights effectively to nothing in order to secure other fundamental interests.

\textsuperscript{17} See Book IV, Chapter 6, 138-140 of Rousseau, \textit{Of the Social Contract}.
character of the constitution that is chosen."\(^{18}\) Of course, Freeman does contend that equal rights to political participation in ordinary lawmaking are an important part of the more capacious package of rights ensuring democratic justice, and so they cannot simply be dispensed with without good reason. He in fact reviews and apparently endorses four types of arguments for equal rights to political participation that are said to be based in the exact same ideals that underlie the originary endorsement of constitutional constraints on majoritarian actions.\(^{19}\) Nevertheless, such equal participatory rights, according to the broader argument, can be ‘democratically’ overridden in the design of ordinary political institutions whenever we have reasonable cause—for instance under expectable conditions of legislative disagreement about the fundamentals of justice—to fear that the exercise of those rights would lead to a lesser degree of democratic justice as the outputs of those institutions.

The obverse, in Freeman’s argument, of the celebration of constitutional constraints as specially democratic is the comparative belittlement of the workings of representative legislatures as democratic only in a derivative sense, as it were. Following Locke, he describes the process of statutory lawmaking as an ordinary power of government, on a par with all of the other powers in terms of its democratic value: legislative authority, like all governmental authority, is a merely fiduciary

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\(^{18}\) Waldron, *Law and Disagreement*, 256.

\(^{19}\) Freeman contends that the arguments employed by aggregative conceptions of democracy in favor of equal rights to political participation coupled with majority rule—those from the fairness of equal decisive impact on decisions and from an equal weighting of individual preferences—are insufficient to dispel worries about the possible infringement of the freedom and equality of each through majority rule: Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review," 340-41. The four argument types he apparently endorses are that equal rights to political participation 1) ensure the equal voicing and consideration of each individual’s interests in legislation, 2) promote the self-respect that comes from the political community’s recognition of individuals’ capacities and goals, 3) expand individuals’ social capacities and broadens their moral sentiments, and, 4) foster self-rule through requiring coercive laws to be backed up by reasons that individuals could endorse for themselves even
power delegated by the sovereign people.\textsuperscript{20} Although this is true as far as it goes—as far, that is, as we are considering the democratic character of the originary constitutional choice situation—left at that, the generalization about fiduciary powers cannot make any apparent distinctions with respect to democratic value between various institutions erected to carry out the constitutional design, distinctions that seem rather easy to make from the ordinary perspective of assessing various political arrangements for the degree to which they are democratic or not.\textsuperscript{21}

The reason such distinctions, between for instance populist and elitist lawmaking institutions, seem easy to make is that it is part of our democratic ideals to insist upon a deep internal connection between the legitimacy of political institutions and the character of the procedures they use to generate decisions. Thus the worries I’ve just expressed about the overly-broad institutional reach of Freeman’s argument and its concomitant diminution of the democratic role of legislative processes can both be seen as applications of a general point I have been emphasizing throughout.

Democratic legitimacy cannot be severed from the ongoing existence of robust democratic processes of opinion-formation and decision-making.\textsuperscript{22} For if we restrict as those laws fundamentally shape individual’s lives and choices: Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review," 343-46.


\textsuperscript{21} The point about sovereign constituent power as the power of the people to authorize the various branches of government is also true to Locke’s theory, but that theory is distorted by the construal given by Freeman. For not only did Locke think that legislative power was given on fiduciary trust by the sovereign people, he also claimed that once that legislative power was legitimately operating, it is the supreme power in the state, and should have no explicit constitutional constraints on its power—certainly no other ordinary organ of government could substantially limit its powers through something like a power for the substantive review of its handiwork. For a clear elucidation of this point in contrast to Freeman’s reading of Locke, see Jeremy Waldron, "Freeman's Defense of Judicial Review," \textit{Law and Philosophy} 13 (1994): 33, footnote 13.

\textsuperscript{22} Its not the case that Freeman is wholly insensitive to the potential damage to the democratic character of political processes posed by judicial review: "Judicial review limits the extent of the exercise of equal rights of political participation through ordinary legislative procedures. … Since it invokes a non-legislative means to do this, it may well be a constitutional measure of last resort," Freeman, "Constitutional Democracy and the Legitimacy of Judicial Review," 353. Nevertheless, the logic of his argument pushes toward the possibility of severing the internal connection between democratic constitutional choice and on-going democratic political processes.
responsive democracy only to the level of constitutional choice, it will be impossible to fulfill the Rousseauian condition for democratic autonomy: namely, that I am only free to the extent to which I can understand the laws binding me as, in some sense, self-given laws. And I can only understand myself as simultaneously the author and addressee of those laws to the extent to which, even when I disagree with the concrete proposal and vote against it, I can nevertheless understand those laws as the results of a legally constituted political process of argument and reason-giving in which I had some prospect of actually participating in on equal terms with my fellow citizens. Finally, this legitimacy condition applies equally at the level of constitutional choice and ordinary statutory legislation. As Freeman emphasizes, it is surely true that constitutional choice must be understood as the most fundamental form of the exercise of popular sovereignty. This does not entail, however, that such democratic choice is sufficient for carrying the burden of democratic legitimacy.

5. Democracy and Constitutionalism: Co-Constitutive

Although Freeman employs the language of precommitment, I believe that this is not his central or most important idea. Rather, Freeman’s contribution is to have refocused the debate concerning judicial review, away from the jurisprudential terrain of the problem of legal interpretation of indeterminate clauses, and back to the fundamental normative questions of how to conceive of constitutional democracy. His central idea here is to envision constitutional constraints as potentially legitimate

23 Waldron, both in his review of Freeman’s argument in particular (Waldron, "Freeman's Defense of Judicial Review."), and in his broader consideration of “precommitment” arguments for judicial review (Chapter 12, 255-281 of Waldron, Law and Disagreement.) pays a great deal of attention to the significant disanalogies between individual precommitment—where we think the idea of self-binding may be a paradigmatic form of autonomous action—and precommitment in the context of the constitutional choice of political institutions among common citizens. As I emphasize in the text, this seems somewhat to miss the general point that Freeman is focusing on: that of the democratic character of the choice of constitutional constraints in general.
exercises of democratic sovereignty at the level of constitutional choice. In this basic point, I think he is correct. But his next step of claiming that popular sovereignty at the level of constitutionalism is thereby sufficient to dispel worries about the democratic character of the on-going workings of the processes established by that precommitment seems false. Freeman is surely correct to emphasize the need to understand the establishment of a constitution and its on-going refinement through amendment as the most basic acts of popular sovereignty of a people, and to emphasize this point against those who would see a constitution as a fundamentally anti-democratic instrument intended to ensure the protection of principles of natural law, principles correctly discerned by a few (Founders) of exceptionally good judgment: “For it is now our constitution; we now exercise constituent power and cannot be bound by our ancestors’ commitments. Only our intentions, as free and equal sovereign citizens, are then relevant in assessing the constitution and assigning a role to the document that bears that name.”

Nevertheless, the democratic nature of originating constitutional actions, even by our own generation, is not sufficient to establish the democratic character of the institutions, arrangements, and practices that are agreed to in such originary actions. Our account of constitutionalism and democracy needs to comprehend the constitutive relationships not just between democratic popular sovereignty and constitutional enactment, but also between established constitutional structures and the on-going practices of democratic political practice they make possible. In other words, we need to understand the co-constitutive interconnections between constitutionalism and democracy.

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25 See section C of this chapter, and Chapter VIII.
B. **Deliberative Majoritarianism and the Paternalism of Judicial Review:**

**Waldron**

Freeman meets the countermajoritarian objection to judicial review by redefining democracy as, most fundamentally, the exercise of popular sovereignty at the level of constitutional choice, and the subsequent choice of constitutional structures that would guarantee the substantive liberal legitimacy conditions of the equality, independence, and autonomy of each citizen. I have argued, however, that such a substantivist theory of constitutionalism still fails to meet the paternalist objection to judicial review, in large part because it failed to respect the expectable, and deep disagreement of citizens under the conditions of modern pluralism. Perhaps then, under conditions of modern pluralism, the practice of constitutionalism, and in particular the counter-majoritarian features of constitutional constraints on majoritarian decisions are in fact fundamentally undemocratic and unsupportable. This is at least, one of the central claims of Waldron’s work, to which I now turn. Waldron promises a formal argument from the fact of such persistent disagreement to the illegitimacy of any form of constitutional constraint on majoritarianism. If his argument is successful, it would leave pure parliamentary sovereignty, unconstrained by any forms of constitutional review however institutionalized, as the sole legitimate form of democratic decision making in the circumstances of contemporary politics. I hope to show that such an argument is not successful, leaving the door open, rather, to a proceduralist defense of constitutional review institutionalized in an independent judiciary.
1. The Theory of Deliberative Majoritarianism and Anti-Constitutionalism

In order to understand the force of Waldron’s formal argument against judicial review—whether justified and understood on substantialist or proceduralist grounds—it will help to first clearly reconstruct his theories of democracy and constitutionalism. By using the analytic developed in Chapter III—considering first the aspects of democratic legitimacy, democratic process, institutional legitimacy and accountability, and then the four elements of constitutionalism—I hope to be able to show exactly why Waldron defends an anti-constitutionalist theory of pure parliamentary sovereignty.

Waldron’s brief against judicial review—in fact, against any form of political institution or political decision procedure beyond the supremacy of multi-member, representative legislative assemblies deciding exclusively through majority rule—begins from what he calls “the circumstances of politics.” On the one hand, political consociation presents a coordination problem whereby each recognizes that certain goals and goods can only be realized by deciding upon and adapting a common framework for action. On the other hand, precisely such a decision on a common framework seems threatened by the persistent and deep disagreement on fundamental moral and political issues evinced in contemporary pluralistic societies. Insisting however, that we should not pathologize such disagreement as the result of either intellectual failings or deviant motivations on the part of some consociates, Waldron points to what Rawls calls the “burdens of judgment” to explain the divergence of citizens’ good faith beliefs about the correct framework for collective action: the issues to be decided upon are complex, people’s different experiences and social positions will give rise to reasonable differences in their perceptions and
judgments, and the multiple values involved can be reasonably weighed and prioritized in different ways. Thus the conditions of politics are twofold: the need for coordinating collective decisions, in the face of reasonable and expectably persistent disagreement on substantive values and their proper realization.

Given the need for a decision combined with persistent, expectable disagreement as the circumstances of politics, Waldron argues for majoritarian aggregation of equally weighted votes as the most justifiable democratic process. He is concerned, however, to answer the traditional charge against majority rule that it is an arbitrary decision mechanism. He does this, in part by emphasizing that what are counted in voting are not the pre-political preferences or private interests of each voter, but rather the good-faith opinions of each individual concerning what is the best course of collective action among the choices available. Thus, rather than a method for an utilitarian aggregation of private and independent utiles, majority rule counts the preponderance of public opinion on the issue. Thus, Waldron’s conception of democratic process is an interesting combination of elements from the opposition I stylized in Chapter III: like Locke, he believes that the uniquely appropriate democratic process is majoritarian aggregation, but like Rousseau, he also believes that what counts are opinions, not interests or satisfactions. Hence his conception of democratic process is essentially deliberative, differing only from some deliberative democrats in

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26 For explication of “the circumstances of politics,” see Waldron, Law and Disagreement. 11-12, 55, 73-75, and 112-113.

27 Recall that this is the charge forcefully put by Dewey that I referred to at the end of Chapter II. Note also Waldron’s nice point against those who would over-stylize a contrast between the arbitrary decision methods of majority rule adopted in general elections and legislatures, and, the non-arbitrary reasoning-giving decision methods characteristic of courts. After all, as Waldron astutely notes, multi-member courts (such as constitutional courts) invariably adopt a majoritarian decision rule under their own internal conditions of disagreement. Thus, if the disparager of legislative majority rule is right that “voting yields arbitrary decisions, then most of constitutional law is arbitrary.” Ibid. 91. I return to the contrast between legislative voting and judicial reasoning in Chapter VI below.
emphasizing ineliminable dissensus and insisting on the theoretical distortions introduced by the idealization of consensus.\textsuperscript{29} A complete answer to the charge of the arbitrariness of majoritarianism can only come, however, with some normative defense of the legitimacy of majority rule. Here Waldron has recourse to his basic justificatory framework of respect for individual rights, and the ascriptions of equal autonomy to each that underlie that respect.\textsuperscript{30} The idea is simply that majoritarianism is the only decision procedure that is fully respectful of the equal autonomy of each citizen. On the one hand, given that consensus on complex political issues is not to be expected, majority rule respects the worth of each as a thinking, intelligent, co-citizen, endeavoring in good faith to give her or his considered opinion on the proposal under discussion. Under conditions of disagreement, majority rule does not try to turn away from the diversity of citizens’ beliefs, but respects equally the opinions of each, even if not all opinions can become directive of the state’s power. On the other hand, majoritarianism respects the equal worth of each citizen, consistent with a like respect for all others: it is the only procedure equally fair to each. So, perhaps surprisingly, given the usual association of rights-based normative theories with counter-majoritarian side-constraints on majoritarianism, Waldron’s rights-based theory endorses the principle of majority rule as the only way of taking the rights of each individual to fair and equal political participation seriously. Respect for individual

\textsuperscript{29} For a particularly lucid account of this distinction in terms of Bentham and Rousseau, see Waldron, "Rights and Majorities: Rousseau Revisited." 394-400.

\textsuperscript{29} Waldron’s brief and vague dismissal of “proponents of ‘deliberative democracy’” apparently hinges on the twin contentions that they see consensus on political matters as the legitimacy criterion for democracy, and that anything less than consensus is to be explained away as a pathological failure of the deliberative process (for instance, of the motivations of some of the participants), Waldron, \textit{Law and Disagreement}. 90-93. Conceding that “the very best theories of deliberative democracy are characterized by their willingness to accept [persistent, reasonable disagreement] and incorporate it into their conception of deliberation,” (93) Waldron nevertheless gives virtually no more attention to such theories.
rights in his hands leads, then, to a proceduralist rather than a substantialist account of democratic legitimacy as following only from majoritarian political decision processes.

Perhaps Waldron’s most important contribution consists in elaborating a clear defense of the intrinsic worth of legislative assemblies, of rescuing the ‘dignity of legislation’ from theoretical oversight in both jurisprudence and political philosophy. The idea here is that there are good normative reasons for the fact that large, multi-member representative assemblies oriented towards producing statute law exist “in almost every society in the world.”

Given the complexity of coordination issues that law needs to resolve and given the inherent plurality and diversity of complex societies where we should expect persistent disagreement, legislatures are the form of law-making body best situated to deal with that complexity while simultaneously respecting the equal autonomy of citizens. First, the diversity and large number of representatives in an assembly reflect the spread of popular opinions extant within society on major issues. Second, the formal procedures and structural properties of assemblies are oriented towards organizing deliberation and decision making in such a way that authoritative decisions can be reached without univocity. Third, perhaps most importantly, majority rule is a non-arbitrary way of respecting the opinions of each.

In short, Waldron’s detailed analysis of the features of legislatures and the process of legislation is intended to show that multi-member representative assemblies oriented towards producing statute law exist “in almost every society in the world.”

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30 See the discussion of Waldron’s rights-based critique of the argument for judicial review as the best way of protecting rights in Section C of Chapter IV.
31 Waldron, Law and Disagreement. 10
32 For Waldron’s rich account of these features of parliamentary legislatures and their relation to a normative theory of parliamentary sovereignty, see especially Chapters 2-5 of Ibid. He explores the same ideas about the appropriateness of legislatures through a resuscitation of underdeveloped themes concerning legislative law-making in the history of political philosophy, specifically in Aristotle, Kant, and Locke, in Jeremy Waldron, The Dignity of Legislation (New York: Cambridge University Press, 1999). I return to Waldron’s discussion of legislation below in this chapter, and in Chapter VIII.
assemblies are not just contingently useful political devices that could be discarded with should better ways be found of reaching desired political outcomes. In fact, given the argument from disagreement for majoritarian proceduralism, there could be no theoretical access to the correct procedure-independent political outcomes in the light of which we could judge legislatures as instrumentally worthwhile or not.

The upshot from these arguments should not be surprising for the last axis of democratic analysis: Waldron clearly favors a governmental structuring of power that is at the populist end of the accountability spectrum, and he is strongly suspicious of any more expertocratic allocation of power. In fact, he seems to regard most forms of extra-legislative governmental power as regrettable reflections of an anti-egalitarian and anti-democratic bias against ordinary citizens. Thus, for instance, any legal theory that attempts to analyze the increased efficacy of judicial decisions in some governmental areas or the heightened capacities of the judiciary is immediately suspected of harboring “one of ‘the dirty little secrets of contemporary jurisprudence’ … ‘its discomfort with democracy’.”

And while Waldron always focuses on the elitism of legal decision making by unelected judges (never apparently considering that many judges in many nation-states are subject to repeated electoral control), he has almost nothing to say about the executive branch and the substantial increase of administrative law-making powers. The contrast is insistently between popularly-accountable legislators and unaccountable judges.

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34 At the one point in Law and Disagreement (pages 49-50) where Waldron gives any consideration to the executive branch of government, his bias towards a British model of pure parliamentary sovereignty leads to very strange, putatively universal, claims: “Almost everywhere, legislatures are assemblies rather than individuals, and assemblies of anything from fifty to almost three thousand members, not assemblies of cabinet size. No doubt we should qualify this by observing that subordinate legislation is often made by single individuals or by very small rule-making agencies. But this should not distract us: such individuals and agencies always derive their authority from a
What then does Waldron think of constitutionalism understood as a practice of intentionally structuring governmental processes and powers through law in order to realize the benefits of some or all of the four basic elements constitutions are often thought to secure? To put it briefly, it’s not immediately clear what Waldron’s position is here.

Given that Waldron’s basic normative framework is that of the fundamentality of equal liberal rights, it would be hard to imagine him rejecting the baseline platitudes of the rule of law, such as that like cases are to be treated like. But beyond this and allied generalities (e.g., no ex post facto laws, no offense in the absence of an applicable law, rules must provide effective conduct guidance)—generalities which can’t be expected to do much concrete work of sorting violations from fulfillments of the rule of law at that level of abstraction—Waldron would seem to suggest that the persistence of fundamental disagreement over the proper conception of the rule of law should put the lie to the idea that it could be furthered through the practice of constitutionalism. In fact in an article where he argues that the rule of law is an essentially contested concept, Waldron seems to claim that the idea of government bound by fundamental or higher law—that is, one of the elemental ideas of constitutionalism—is itself one of the contesting conceptions of the complex concept of the rule of law. Given that the rule of law is itself subject to persistent

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sovereign legislature that comprises hundreds of members,” 49 (emphasis added). This passage simply ignores both the popular authorization of the executive branch through elections independent of legislative elections in presidential systems, and the popular authorization of all of the branches of government thought to be effected through constitutional ratification and so independent of legislative authorization through representative elections in explicitly constitutional democracies.

35 Recall the distinction introduced in Chapter III between the descriptive sense of ‘constitution’—where it refers to the particular configuration of governmental power extant in any political community—and the practical-normative sense of ‘constitutionalism’—where it refers to the intentional organizing of the organs of government according to a set of higher laws oriented toward structuring and limiting the exercise of state power. Obviously, my question in the text employs the second sense.

disagreement leading to radically antithetical readings of its proper realization—“litigation or self-restraint, judicial supremacy or judicial deference, rules or standards, mechanical judgment or reasoned discretion”\textsuperscript{37}—it seems unlikely that Waldron could, then, recommend constitutionalism in the name of furthering rule of law values.

On the allied questions of whether Waldron supports the practices of constitutionalism that revolve around the entrenchment of higher law on the one hand, and the structuration of political institutions on the other, the answers are again ambiguous, but this time since its unclear how far Waldron takes his defense of majoritarian decision procedures to reach. For, arguing simply from the demands of fairness to each that Waldron takes the ideal of liberal rights to lead to, it would seem that any higher constitutional law would require unfair super-majorities to change, unfair since only bare majoritarianism doesn’t bias the outcome in favor of or against the status quo. Further, it seems that like considerations would apply to any constitutional organization of political organs that would require super-majoritarian procedures to change. Yet surely this cannot be the whole story, considering that, to begin with, Waldron appears in favor of some form of entrenchment of multi-member representative legislative assemblies, and in favor of such bodies to the exclusion of other forms of institutionalizing legislative power. In addition, he also endorses (albeit intermittently) certain political procedures such as federalism and super-majoritarian requirements for some legislative proposals that can only be considered as anti-majoritarian decision procedures. Its hard to see, however, exactly how either the entrenchment of legislatures or such constitutional “slowing-down devices” can be made consistent with the overriding principle of majority rule that results from the

\textsuperscript{37} Ibid.: 144.
combination of fairness to each as a rights-bearer with the circumstances of politics. Therefore, it's difficult to say exactly what Waldron's overt commitments to constitutionalism are with respect to the higher law/lower law distinction and the issue of the entrenchment of determinate forms of and organs for the organization of political power.\textsuperscript{38}

Finally, it is surely clear that he endorses neither the constitutionalization of fundamental individual rights, say in a bill of rights, nor the empowerment of an independent judiciary to ensure those rights against legislative processes.\textsuperscript{39} Waldron would prefer that moral rights be protected, if they can and are to be legally protected at all, through legislative means, in particular through the pervasive influence of a spirit of rights in both legislatures and the electorate at large.\textsuperscript{40} Thus, in sum, Waldron decisively rejects one of the elements of constitutionalism, and appears at the very least, suspicious towards the other three.

2. Waldron's Democratic Argument against Judicial Review

Here is one possible reconstruction of Waldron's formal argument against any form of judicial review of legislation for its constitutionality, whether understood and justified on substantialist or proceduralist grounds:\textsuperscript{41}

\begin{enumerate}
\item The commitment to democracy is centered on a commitment to respecting the ideal of the equal autonomy of each citizen as a moral rights-bearer
\item Disagreement over the identification, prioritization and specific appropriate application of substantive political values, including rights, is
\end{enumerate}

\textsuperscript{38} The question of Waldron's commitment to constitutionalism is discussed further in subsection 3 below.

\textsuperscript{39} See Section C of Chapter IV and below for a reconstruction of his arguments.

\textsuperscript{40} I take it that this is the upshot of the discussion of Locke and Mill that ends the book: Waldron, \textit{Law and Disagreement}, 306-12.

\textsuperscript{41} Other reconstructions emphasize different aspects: e.g., Christiano, "Waldron on Law and Disagreement," 534., or, Fabre, "A Philosophical Argument for a Bill of Rights," 94-95.
persistent, expectable and not pathological under conditions of societal complexity and value pluralism

(c) Collective decisions on a common framework of action are needed, despite disagreement, in order to secure some political goods

d) The authority/legitimacy of political decisions within a polity must then be procedural, that is, independent of any of the particular substantive conceptions of political value that are subject to reasonable contestation

e) Respecting each as an equal rights-bearer demands fairness in political decision procedures, and in two ways: 1) equal respect for the good faith opinions of each concerning proposals for collective decisions, and, 2) equal decisive power for each in the decision procedure

f) Given both the pressure for collective decisions and the problems of political complexity and scale, fairness (aspect 1) is best achieved in elective, multi-member representative legislatures whose members make decisions even as they represent the diversity of political opinions extant among the citizenry

(g) Fairness (aspect 1) is violated by judicial review, since the opinions listened to are not representative of the citizenry, but are those of a few unelected judges

(h) Majority rule is the single decision procedure that fulfills fairness (aspect 2), since only it gives a maximal decisional weight to the opinion of each consistent with an equal weighting of the opinions of others

(i) Any constitutional rules, structures, or procedures (including judicial review) that restrict the reach and decisiveness of majoritarian legislative power will violate fairness (aspect 2) as counter-majoritarian

(j) Therefore, judicial review is non-authoritative/illegitimate and ought not be employed in a democracy

It is important to note here that, although Waldron’s argument is couched in the language of ‘majoritarianism’, his objection to judicial review should not be understood as a reprise of Bickel’s ‘counter-majoritarian’ concerns, concerns which were rooted in the notion that majoritarianism is justified through its utilitarian aggregation of private interests. In contrast, Waldron’s argument centers the justification of majority rule in the notion that it is the singular decision procedure consistent with respect for each as an autonomous agent. Said another way, derogations from majority rule are objectionable precisely because they are heteronomous substitutions of the will of some for the will of all, even against the fairly expressed wishes of all. Any infringement on democratic self-rule—such as
allowing a small number of unaccountable judges decide matters of basic rights—is, for Waldron, objectionable as a paternalistic infringement on the equal right of each to have his or her say with respect to matters needing collective political decision. The counter-majoritarian character of judicial review is, for Waldron, objectionable because its paternalistic.

It should also be noted, however, that because it is the counter-majoritarian character that is objectionable about judicial review, due to the electoral unaccountability of constitutional court judges, if Waldron’s formal argument is successful, it simply doesn’t matter whether judicial review is understood and defended on substantialist or on proceduralist grounds. In either case, it will embody a counter-majoritarian decision procedure, one objectionable because it counter-majoritarian procedures are paternalistic, and so cannot be seen as democratically legitimate.42

3. Fairness, Majoritarianism, and Democratic Legitimacy

To begin to consider the strength of this argument, it will help first to focus on the issue of disagreement; specifically, concerning at what level and to what extent we should expect reasonable persistent disagreement between democratic consociates. Taken at a very deep level and understood to be quite wide-ranging, such disagreement in fact would seem to show Waldron’s argument to be self-defeating.43 For, if the disagreement arises concerning the quite general but foundational normative claim at step a), then the very concept of democracy as aimed at respecting the equal autonomy of citizens cannot be used to support either the account of

42 Those who are perfectly content with the anti-democratic character of judicial review—perhaps on the grounds of a rights-based fundamentalism—of course won’t be disturbed by this inference. But for them, Waldron also puts forward a rights-based critique of the institution; see Section C of Chapter IV.
43 Several commentators point out the self-defeating character of Waldron’s democratic argument against judicial review from the premises of disagreement. See Christiano, “Waldron on Law and
legitimate authority at step d) or the account of fairness as realizing that respect at step e). A foundational argument subject to uncertainty about the proper identification of its normative basis because of disagreement cannot then provide grounds for normative recommendations of certain political values or arrangements.44

On the other hand, if there’s general agreement on the proposition that democracy is bound up with respecting the equal autonomy of citizens—a proposition that Waldron considers “basic” to rights-based theories of democracy45—then the self-defeating objection disappears at the most fundamental level. However, it is only displaced to the next level up. For now we should wonder whether in fact Waldron’s dual-aspect conception of fairness is really the best or only way to capture the democratic ideal of respecting the equal autonomy of each. Shouldn’t we expect this less abstract conception to be the subject of reasonable disagreement, thereby debarring the use of it in a justification for the singular democratic appropriateness of legislative majoritarianism?

Disagreement,” 519-22, Fabre, ”A Philosophical Argument for a Bill of Rights,” 93, Kavanagh, ”Participation and Judicial Review,” 467-68.

44 It is important to note here that I am not making a meta-ethical claim here about the self-refuting character of relativism, but rather a claim about the self-defeating character of the practical recommendations the formal argument is taken to support. For, the disagreement about normative content that drives Waldron’s argument does not entail a relativistic rejection of the objectivity of values or the cognitive content of value claims. The point is rather one about the circumstances of politics: though each of us might be firmly committed to such objectivity and/or cognition, nevertheless, none of us has unimpeachable access to that by which we could identify our preferred value candidates as the indisputably correct ones. This is the general point of Chapter 8 of Waldron, Law and Disagreement, nicely entitled ”The Irrelevance of Moral Objectivity.” “The idea of objective values … is an idea with little utility in politics. As long as objective values fail to disclose themselves to us, in our consciences or from the skies, in ways that leave no room for further disagreement about their character, all we have on earth are opinions or beliefs about objective value,” Ibid.: footnote 62, 111.

45 For Waldron’s methodological account of a rights-based theory and the justificatory role of basic judgments, see Ibid., 214-17. It is crucial to his argument here that the foundational nature of rights in a normative theory does not necessarily imply the need for either legal or constitutional rights to protect them: “We cannot infer much about the practical recommendations of a normative theory from the character of its fundamental premises,” 216-217. This is a way of uncoupling the easy inference from a rights-based normative theory to the endorsement of constitutional rights protected by judicial review.
We might think that the worry is less pronounced than this, however, on the supposition that there is in fact much less disagreement at the most general levels about what democracy entails and what broad kinds of rights a democratic regime should respect.\footnote{That is to say, general agreement among those committed to democracy in some form or another—after all, the objections to judicial review and constitutionalism in general being considered here are non-starters for anti-democratic theories.} We might be willing to agree, for instance that democratic regimes generally evince significant degrees of popular accountability, legal regularity, and respect for private autonomy, features in fact secured through a relatively stable, universal set of rights categories: rights to equal individual liberties, membership rights, rights to legal actionability, political participation rights, and rights to a sufficiently equal opportunity for the exercise of rights.\footnote{That is to say, general agreement among those committed to democracy in some form or another—after all, the objections to judicial review and constitutionalism in general being considered here are non-starters for anti-democratic theories.} Then our concerns about disagreement would probably be limited to those which originally motivated the jurisprudential debates about judicial review: given the indeterminacy of rather abstractly characterized rights, who or what organ within the polity should be empowered to specify and appropriately apply these general guarantees to more specific situations and controversies, and with respect to what kinds of methods and standards? If we have agreement at least on the general categories of democratic rights, however, there can be no democratic objection proceeding from the ineliminability of disagreement at that level, then, to the establishment of a bill of rights intended to entrench these categories of rights against infringement, contra the claim at step i). The remaining objection is, at most then, to judicial supremacy in the final specification and application of those rights in controversial cases, as opposed to pure parliamentary sovereignty for interpreting the bill of rights or some other arrangement outside of the range of the court-parliament dichotomy.
Hopefully such considerations indicate that the depth and degree of expectable and persistent disagreement amongst those already committed to democracy cannot be judged by theoretical considerations alone. It is, rather, largely an empirical question, though not an easy one to settle for that, given the obvious inextricability of normative judgments from the criterial question of which regimes even count as democratic. As one set of empirical indicators, we might think about the direction of constitution writing and the degree of democratic ratification over time. My sense of the history of the explicit practice of written democratic constitutionalism, barely over two hundred years long, is that constitutions have been increasingly subject to more scrupulous democratic ratification over time, as previously disenfranchised groups are increasingly recognized as deserving of equal participatory rights and included in both ordinary democratic and constitutional political processes. At the same time, remarkably, constitutional specificity has increased—just consider the increasing length of actual constitutions over time—indicating that there is more and more agreement on the core elements of the constitutional conditions of democracy. The problem then arises just where the jurisprudens focused: namely in the specification and application of broad constitutional generalities to particular problems and controversies. If this thumb-nail historical judgment is accurate, then Waldron’s argument from disagreement cannot be directed at the anti-democratic character of a constitution or a bill of rights, but rather only at a placement of the more-or-less final power of constitutional specification in a judiciary insulated from popular accountability.

47 The list follows the categorization of rights found in Habermas, Between Facts and Norms, 122-31. I discuss this further in Section B of Chapter VII.  
48 Lijphart, Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries, is a particularly ambitious but succinct study of the varieties and similarities of democratic regimes.
Presuming that Waldron could meet the self-defeating objection at the general level of
the normative considerations of his argument, he might object to softening the anti-
constitutionalism of his position by pointing to the notion of majoritarian fairness.
Surely, he might say, constitutional constraints that restrict the reach and finality of
legislative majoritarianism violate the second aspect of democratic fairness: equal
decisional weight for each. Of this I have no doubt, but I also doubt whether this
aspect of the notion of fairness is one we should endorse in the first place, or whether
even Waldron can really endorse it fully.
In Waldron’s explicit defense of majority rule as fulfilling the criterion of fairness in
terms of equal decisional weight (step h)), he contrasts majority rule only with a
random coin-toss decision procedure and a decision procedure ceding all power to
one member of a group.49 The argument here begins with the consideration that, in
contrast to the coin-toss, an actual vote gives some minimal decisive weight to the
actual opinions of the consociates, thereby respecting them as autonomous. Secondly,
bare majority rule is better than the appointed decider method, since it gives decisive
weight, and equal weight, to the opinions of all of the consociates rather than those of
just one. That apparently is the end of the positive argument for majoritarianism as
uniquely fulfilling the criterion of fairness (aspect 2)! In fact, he acknowledges that it
only establishes the compatibility, but not the necessity, of simple majority rule with
fairness as the realization of equal respect. But after a brief rejection of Mill’s
argument for plural voting for experts—after all, the identification of who are the
experts at specifying rights will be subject to reasonable disagreement—Waldron
merely reiterates his support for the unique fairness of simple majoritarianism: “I
suspect (though I doubt that one can prove) that majority-decision is the only
decision-procedure consistent with equal respect in this necessarily impoverished sense—is impoverished because, of course, richer senses of equal respect are subject to political disagreement. He does not consider, however, any of the other decision rules beyond bare majority, such as unanimity or various levels of super-majoritarianism, the kinds of decision rules often associated with constitutionalism. Yet it seems clear that both unanimity and various stringencies of super-majority rules do in fact meet both of his stated criteria for decisional fairness. On the one hand, the actual opinions of the consociates have minimal decisional weight—they are actually counted—and, on the other, the opinions of each have an equal weight in the final tally—they count equally. What distinguishes bare majoritarianism from these latter rules is simply the degree to which the status-quo-ante is favored, and this is an issue quite distinct from that of fairness as equal decisional weight for each.

If central practices of constitutionalism—such as entrenchment in higher law, political structuration, and a bill of rights—can be understood precisely as favoring the status quo by requiring super-majoritarian procedures for amendment, then Waldron has failed to give an argument from fairness (aspect 2) to the rejection of constitutionalism: premises h) and i) are unsubstantiated. However, even if Waldron would be willing to say good riddance to super-majoritarian procedures on the

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40 See Waldron, *Law and Disagreement*, 113-16.
41 Ibid., 116., emphasis added.
51 Apparently at one time, Waldron did think that any super-majority rules violated fairness in those cases where consociates voted their interests (not their good-faith opinions) and the status quo favored the interests of some. "On any issue where views align themselves with interests, people are not symmetrically situated in super-majoritarian decision-procedures. The only decision-procedure that situates them symmetrically is the one that stipulates, in a binary dispute, that the status quo is to survive if and only if more than half of the voters support it and that the proposed alternative to the status quo is to be implemented if and only if more than half the voters support it," Waldron, "Freeman's Defense of Judicial Review," 40-41. I failed to find anything resembling this passage in *Law and Disagreement* which "embodies portions" (vii) of the article. I speculate that it is not surprising that the exclusivist defense of bare majoritarianism didn’t survive since it embodies an image of interest-based voting the rejection of which is central to the project of recovering the dignity of legislation.
grounds of decisional fairness, its unclear how he could endorse the political arrangements he apparently does. For instance, he seems to endorse forms of legislative representation that skew the direct numeric proportional equality between the number of assembly members and their constituents, such as bicameralism with one house representing the diversity of geography or other forms of federalism at the level of national legislatures. In one of the only passages directly addressing issues of constitutional design, Waldron appears, in fact, to endorse super-majoritarian requirements:

There are a variety of ways in which a democratic constitution may mitigate this inconstancy [of rapid legislative reversals and re-reversals on rights]. The legislative process may be made more complex and laborious, and in various ways it may be made more difficult to revisit questions of principle for a certain time after they have been settled. (Such ‘slowing-down’ devices may also be supported in the political community by values associated with the ‘rule of law’.) None of this need be regarded as an affront to democracy; certainly a ‘slowing-down’ device of this sort is not like the affront to democracy involved in removing issues from a vote altogether and assigning them to a separate non-representative forum like a court.

But the problem of endorsing the pre-emptive character of majoritarianism would be deeper than this for Waldron, since it would in fact seem to lead to a rejection of representative assemblies in the first place, leaving directly democratic votes amongst

52 This may be incorrect, but I take it that such legislative arrangements would naturally follow from the notion that legislative assemblies are recommended precisely because they mirror extant social complexity, and from the interesting discussion given to feudal forms of federalism at Waldron, Law and Disagreement, 56-68. “Though in the modern world we associate the legislature’s character as an assembly with the idea of democratic representation, in an older understanding—an understanding which may enrich democratic jurisprudence rather than simply being an elaboration of it—law-making was associated with a process that related a legislative proposal to the complexity and multiplicity of persons, regions, relations, and circumstances, with which the proposed law would have to deal,” Ibid., 55.

53 Ibid., 305-06. Note also the characteristics he builds into an ideal-typical model of legislative assembly: “members of the assembly represent not only different interests and regions, but come from completely different backgrounds, ethnic and cultural, as well as representing whatever political differences divide them,” 73.
the entire citizenry on statutes (and constitutional provisions) as the only
democratically legitimate option. Recall that the argument for majoritarianism is
motivated by the combination of the circumstances of politics with the normative
requirement for scrupulous fairness towards each and respect of the opinions of each
thinking individual qua individual. However, any individual elected representative
must represent significant numbers of electoral constituents—primarily in terms of
their numerous and diverse opinions, rather than their interests—but as a single voter
in the representative assembly, he or she can’t possibly do justice to the variety of
opinions on the matter which their constituents are bound to have—even if they are
all members of single party or ideological faction. According to Waldron, ideally
considered, “the modern legislature is an assembly of the representatives of the main
competing views in society, and it conducts its deliberations and makes its decisions
in the midst of the competition and controversy among them.”54
Perhaps Waldron could respond that multi-member representative assemblies at least
represent this diversity better than electorally unaccountable judges serving on a high
constitutional court with very few other members—and solving their own internal
court disputes by a bare majority rule to boot! Thus, the effects of the de-
individualization and homogenization of the citizens’ diverse opinions in a legislative
assembly could then be seen as a pragmatic response to a problem of scale and
manageable complexity.55 But, I think, this response misses the force of the original
objection. The problem is that Waldron’s formal argument relies, at least at steps h)

54 Ibid., 23. This conception of the diversity of assemblies as mirroring the diversity of opinion and
disagreement amongst the electorate is emphasized throughout the book, for instance at 10, 23-24, 27,
73-75, 99, 145, and 309. I return to this theme below.
55 This is the approach Waldron seems to endorse in considering how to democratically conceptualize
collective decision-making among millions: Ibid., 108-10.
and i), on a stringent and preemptive notion of majoritarian fairness. If that stringent notion is not sufficiently preemptive to delegitimize the apparent disrespect to individuals’ claim to equal decisive power evinced by representation, then it cannot also retain its preemptive force as a democratic objection to the legitimacy of counter-majoritarian decision procedures. Put alternatively, why should we prefer only the stringent formulation of democratic equal respect in terms of majoritarian fairness, given the reasonable possibility of other conceptions of democratic equal respect?

4. Distortions in Democratic Processes of Representation

Up to now, I have been focusing on the issue of democratic legitimacy, in particular on Waldron’s account of the relationship between the normative ideals of democracy, the conditions of political consociation, and the authoritative character of decisions made in the light of democratic procedures. But it is also worth exploring his account of democratic processes, for I believe that the force of the moves from e) through j) largely derive their force from an unconvincing account of how legislative assemblies carry out their representative functions. Thus I’d like to turn from internal tensions in Waldron’s account of majoritarian legitimacy, to certain shortcomings in his account of the democratic process, shortcomings which should cause us to call into question the second main prong of his formal argument against judicial review from the notion of fairness (aspect 1).

First recall Waldron’s ideal-typical account of why we have multi-member legislative assemblies:

[56 Here I have found Christiano’s discussion and criticism of Waldron’s claim to the pre-emptive character of majoritarianism particularly helpful: Christiano, “Waldron on Law and Disagreement,” 523-33.]
I believe it is no accident that in almost every society in the world, statutes are enacted by an assembly comprising many persons (usually hundreds) who claim in their diversity to represent all the major disagreements about justice in their society, and whose enacted laws claim authority in the name of them all, not just in the name of the faction or majority who voted in their favour.\textsuperscript{57}

The point of a legislative assembly is to represent the main factions in the society, and to make laws in a way that takes their differences seriously rather than in a way that pretends that their differences are not serious or do not exist.\textsuperscript{58}

The problem with this account is simply that it assumes that the legislature is largely a transparent mirroring of the demos: the diversity of opinions and ideas, and their statistical distribution of support, evinced in the legislative chamber or chambers will, according to Waldron’s assumption, largely mirror the diversity and statistical distribution of the same throughout the population of citizens.\textsuperscript{59} This seems unrealistic at best and a potentially dangerous idealization at worst. It means that the theory will be largely blind to any structural mechanisms that impede—perhaps chronically impede—this easy correspondence between public and legislative opinion.

\textsuperscript{57} Waldron, \textit{Law and Disagreement}, 10.
\textsuperscript{58} Ibid., 27.
\textsuperscript{59} F. R. Ankersmit, \textit{Aesthetic Politics: Political Philosophy Beyond Fact and Value} (Stanford, CA: Stanford University Press, 1997). captures this problem in an interesting way by emphasizing the significant differences between a mimetic and an aesthetic conception of political representation. In the former conception—a conception apparent in Waldron’s assumptions—the goal of representation is a faithful mirroring of the citizenry, whether of their interests, opinions, or both. The aesthetic conception, by contrast, not only recognizes the persistent difference between the original (the citizenry) and its copy (in the legislature), but takes this difference as constitutive of the very kind of political representation involved. According to Ankersmit, the political theorist of democracy, like the aesthete, should not only think a faithful mimicking of the original is impossible to achieve, but undesirable as well. However helpful this contrast, I don’t mean to endorse the rest of Ankersmit’s aestheticization of politics.
This is not, however, a mere lacuna in the quest for a complete political theory, as Waldron seems to imply where he recognizes the deficiency. For, precisely this characteristic inattention to the structural difference between democratic governmental institutions and the citizenry also, it seems to me, plays the central role in vitiating his formal argument against Ely-style justifications for judicial review as a referee of representative processes. Let me explain by first noting a few peculiarities of how the issue is framed. At the beginning of the book, Waldron claims that the issue concerning the legitimacy of judicial review involves only three terms: “rights, courts, and legislation.” That is, the question is about the power of making laws, including laws concerning individual rights, in a democratic polity, and what we face is a simple dichotomy on who is to choose and specify rights: either legislatures or courts. But this is a false dichotomy, as I argued in Section B of Chapter IV with respect to Perry’s search for excellence in moral judgment only among courts and legislatures.

At the end of his book, Waldron emphasizes that taking rights seriously is largely a matter of the ideas that citizens and governmental officials have about individual rights, that is, largely a matter of political culture. In support, he cites as examples Locke’s political theory, where a strong natural-law defense of individual rights is understood to be effectuated entirely through the self-understanding and self-restraint of legislators alone, and Mill’s defense of individual liberty as oriented primarily to encouraging a set of moral convictions on the part of citizens that would promote a

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60 “Note for reviewers: one of the glaring defects of this book is that it does not include an adequate discussion of representation,” Waldron, Law and Disagreement, footnote 60, 110.

61 “If there is to be judicial review of legislation in the name of individual rights, then we should understand all three elements—rights, courts, and legislation—in a way that respects the conditions of disagreement that lie at the heart of our politics,” Ibid., 16. and again on 20.
spirit of liberty. As salutary as such inspiring appeals to individual moral attitudes may be, and as much as I would not like to deny the important role political culture plays in the actual functioning of constitutional democracies, there appears to be something institutionally shortsighted about faith in such moral ideas alone as sure guides to a well-functioning set of political institutions. Surely all those who have labored at constitutional conventions believe themselves to be doing something more than encouraging a spirit of liberty among their fellow citizens: they believe themselves to be tackling some well-known problems of political structuration by using well-adapted institutional designs.

Another way to see this point more concretely is to focus on Waldron’s persistent disregard of the manifold opportunities and possibilities open to ostensibly accountable governmental officials for self-dealing in such a way that they are more or less insulated from electoral pressures. Of course, it is precisely these kinds of procedural manipulations that Ely’s specific argument for judicial review was tailored to: namely, those that distort the transparent mirroring of electoral and official opinion

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62 Ibid. 307-311.
63 Thus, surprisingly for someone who takes seriously the actual institutional structures of some governmental institutions—namely, the internal structures of legislative assemblies)—I detect in Waldron’s arguments a short-sighted form of the moral a-priorism driving a distorting abstraction from institutional reality that I warned against at the end of Chapter I. Said another way, I wish that Waldron’s had more fully followed his own warnings about the de-differentiating effects of “the pretensions of general jurisprudence;” pretensions “that there are important philosophical tasks to be performed at the level of general jurisprudence—that is, jurisprudence addressing the very ideas of law and legal system, apart from the institutional peculiarities of particular jurisdictions. … I suspect this quest for institutional neutrality in legal theory is largely misguided. … After a while, the pay-offs would begin to evaporate in the heady realms of such abstraction, and we would be overwhelmed by the distortions introduced by a theory that insisted that one size fits all,” Ibid. 45-46
64 This disregard is also a bit puzzling for such an astute student of Rousseau’s political theory, the latter of which, after all, hangs much on the fundamental distinction between the sovereign and the government, and then attends to the institutional distortions possible in translating sovereign will into governmental action: not only on tracing the three different wills potentially operative in officials’ actions (the sovereign will of the people, the officials’ own particular wills, and the corporate will of their governmental institution), but also on designing the structure and interrelations of different kinds of governmental bodies according to certain contextually-specific expectations about which of these wills might be favored or prominent at any time. See On the Social Contract, especially Book III, chapters 2-8, and his worries about illegitimate assemblies in Book III, chapter 13.
It seems that the way to get smoothly from the specification of fairness as respect for the opinions of each at step e) to step f) endorsing representative legislatures and condemning judicial review at step g) as a paternalistic substitution of the ideas of a few for the ideas of all is to gloss over the fact that legislatures can be said to effect the same substitution under certain well-know conditions distorting representative processes. But it is only on condition of maintaining the idealizing mirroring assumption of legislative representation, that Waldron can sustain the formal argument against all justifications for judicial review: those based both upon the maintenance of substantive values, as well as those based upon the maintenance of legitimacy-conferring democratic processes. Consider, for instance, his confidence in the bulwark of well-established traditions of political culture in the United States and Great Britain as alone sufficient to secure the individual rights of minority dissent in the face of bare majoritarian legislation.65

Rather surprisingly, Waldron does not take direct issue with Ely’s actual arguments for judicial review, preferring either to lump them with Dworkin’s quite different kind of argument for the judicial securing of the substantive conditions of democracy,66 or simply to impugn the supposed motivations of unnamed theorists who are attracted to Ely’s view.67 The closest he seems to come to confronting Ely’s arguments is in considering the claim (unattributed to any theory or theorist) that judicial review is

65 Waldron, Law and Disagreement, 280-81.
66 Ibid., 285.
67 Ibid., 295. In Waldron, "Rights and Majorities: Rousseau Revisited," there is a brief one-paragraph recapitulation and rebuttal of Ely’s defense of judicial review, but the same conflation of the people and their legislative representatives is evident there as well, in that case driving a false dichotomy between judges on the one hand, and the people and their representatives on the other, as the only two parties to choose from when considering how to police the procedural pre-conditions of representative democracy: “It is true that the processes of democracy must be sustained and policed, but this is something with which citizens and their representatives should be concerned. … A concern for the fairness and integrity of the process is something that Rousseau’s citizen will exhibit along with everything else. He does not need a judge to do it for him.” (418)
supported by the principle that no one ought to be a judge in her or his own case.

After contending plausibly that the principle *nemo iudex in sua causa* sweeps too broadly when we are considering the basic decision procedures of collective government—after all, everyone in the nation-state will be affected by the decision—Waldron claims that at least no one is excluded when procedural rights are determined collectively.

It seems quite inappropriate to invoke this principle in a situation where the community as a whole is attempting to resolve some issue concerning the rights of all the members of the community and attempting to resolve it on a basis of equal participation. There, it seems not just unobjectionable but right that all those who are affected by an issue of rights should participate in the decision (and if we want a Latin tag to answer *nemo iudex*, we can say, ‘*Quod omnes tangit ab omnibus decidentur*’).68

To begin with, the argument from *nemo iudex* is structurally different than Ely’s referee claim: while the former insists that a second, impartial party (courts) are needed where a first party (the majority) is trying to decide in its own case (concerning the powers of the majority), the latter insists that in a dispute between two parties, a third impartial party may be needed if one of the parties can easily manipulate the settled rules of interaction.

But if the principle of *quod omnes tangit* is supposed to be an answer to Ely’s claim that we need an impartial referee to see both that the channels of electoral change are kept open and that legislative processes are kept fully representative, then it rather astonishingly begs the central question. After all, the procedural rights being decided on here are *not* being decided on by “the community as a whole” or “*all* the members of the community” but by a very few *legislative representatives* of the community.
who may be able to change the procedures in such a way that they are no longer representative (if they ever were to begin with). When we are worried about self-dealing manipulations of the rules of the game by elected officials to the detriment of the democratic process which is supposed to ensure the authority/legitimacy of the laws made, it is simply beside the point to invoke *quod omnes tangit* and say that the people as a whole should be able to decide the political procedures that apply to the people as a whole. Well, of course—but this is irrelevant to the situation we face: the ineliminable structural difference between representative governmental institutions and the citizenry as a whole whose opinions they are supposed to represent.

Waldron’s final consideration with respect to proceduralist justifications of judicial review revolves around the contention that respect for the equal autonomy of each citizen requires taking seriously their opinions not just about the shape and character of substantive rights that law should afford, but also about the procedural rights that structure that law-making process. The idea here is that the same faith that underwrites confidence in the competence of democratic citizens to think seriously and debate in good faith about issues of substance must also underwrite confidence in their capacities to think about how to structure political procedures.

Working in this [Enlightenment-inspired, rights-based] tradition of political thought, we will not get very far with any argument that limits the competence of popular self-government and stops it short at the threshold of political procedure, assigning questions about forms of government to a body [such as a court] of a different sort altogether. Democracy is in part about democracy: one of the first things on which people demand a voice about, and concerning which they claim competence, is the procedural character of their own political arrangements.69

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68 Waldron, *Law and Disagreement*, 297-98., emphasis original.
69 Ibid., 296.
Here I am inclined to entirely agree with Waldron, for it seems correct to say that, at the level of constitutional choice, the people express their ultimate sovereign authority, an authority which be can legitimately be used to structure and authorize both constitutional substance and procedure. So the question here is not about whether we can trust ordinary people to think procedurally, or whether we should rather trust a few wise lawyers and judges to think procedurally, as Waldron would have it. For Ely’s proceduralist understanding of judicial review insist that its point is not to write the constitutional procedures of democracy, but rather to preserve the popular sovereignty expressed in the constitutional structuring of the rules of ordinary democratic politics against whatever advantages might be gained by representative institutions through distorting those rules in the first place. Said another way, the ‘distrust’ motivating Ely’s case for judicial review does not concern the capacity of citizens to think procedurally, but the realistic distrust of representative institutions to make themselves unrepresentative by altering the constitutional structures that are intended to ensure representation. The proceduralist defense of judicial review may well depend on a kind of distrust, but it is not distrust of the thinking capacities of fellow citizens, but rather a distrust of certain predictable consequences of the structural features of representative democratic institutions.

To summarize a long discussion, recall that I laid out Waldron’s account of democratic legitimacy and majoritarian democratic process in order to reconstruct his formal argument from democracy against any forms of judicial review. I then claimed that his account of democratic legitimacy might be self-defeating if good-

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70 Recall also the discussion in Chapter III, Section A, where I argued that, in fact, at the level of constitutional design substantive rights can often have procedural justifications and that many
faith disagreement among citizens was to reach too deep and be too broad reaching. I
also suggested, however, that there was some empirical evidence from the historical
development of practices of democratic constitutionalism to ground the hope of more
agreement on democratic institutions and the rights needed to ensure them, at least at
a general level. I then argued that, since the case for the unique legitimacy and pre-
emptive character of bare majoritarianism is both over-demanding in its requirements
and inconsistent with Waldron’s own preferred forms of democratic decision-making,
it could not be used (as in steps h) and i)) to support parliamentary sovereignty and
deligitimize judicial review in the name of equal decisional weight for all citizens.
I then developed concerns about the unrealistic picture of democratic processes that
the other prong (steps f) and g)) of Waldron’s argument depends upon, specifically
whether we should think that elected legislative assemblies are always representative
of the opinions of the citizenry in the way required for the argument. In considering
what was left out of this picture—namely, the foreseeable structural deformations that
might make a political process undemocratic and non-representative—I argued that
the formal argument did not then reach to or adequately refute the concerns
motivating proceduralist defenses of judicial review. I also raised concerns about the
realism of hopes for a political culture of rights as sufficient to forestall democratic
troubles, and about the misplacement of the anti-paternalist complaint of disrespecting
people’s capacities for thinking procedurally when directed at Ely-style defenses of
judicial review.

apparently purely procedural guarantees in fact are intended to guarantee substantively justified
principles.
C. **Upshot: We need not just a theory of Democracy and Theory of Constitutionalism, but a Theory of Democratic Constitutionalism**

Freeman’s defense of judicial review as a possible choice open to a sovereign democratic people at the level of constitutional choice rightly emphasizes the originary nature of popular sovereignty at the level of constitutional choice. I argued, however, that it failed in overlooking the internal connection between the legitimacy of democratic constitutional choice and the on-going democratic character of politics established by those choices. In a sense, Freeman offers a defense of judicial review that is content to maintain democratic legitimacy at the originary level of establishing a polity, while establishing substantive constitutional checks on the outcomes of ordinary democratic political processes. In doing so, he offered an account of constitutionalism that succumbed to paternalist worries motivated by the reasonableness of ineliminable disagreement among citizens about the particular shape, entailments, and specific applications of democratic rights. He seems to have severed the internal connection between the democratic legitimacy of constitutional choice and the on-going democratic specification and realization of the constitutional structures chosen.

In contrast, Waldron’s convincing insights into the internal deliberative structure of modern legislative assemblies, and into the way in which the fact of reasonable disagreement forces political theory to proffer a results-independent account of democratic legitimacy, alerted us to the paternalistic perils of substantivist understandings of judicial review. However, his account of majoritarian fairness as the uniquely legitimate decision procedure led to an unconvincing repudiation of constitutionalism *tout court* in favor of pure parliamentary sovereignty. And his attack on proceduralist defenses of judicial review relied on an overly-idealized
account of legislative representation that appears institutionally insensitive to structural deformations in representative processes themselves. Waldron seems then, to have severed the internal connection between the on-going democratic specification and realization of rights and the maintenance of the constitutional structures that ensure the legitimacy of such democratic processes. In a sense, we seem to be vacillating between a democratic defense of constitutionalism and an anti-constitutionalist defense of democracy. But are the principles of constitutionalism and democracy as antithetical as Freeman’s and Waldron’s arguments seem to imply? Perhaps it is time to get off the see-saw by trying to conceive of democracy and constitutionalism as co-constitutive principles. I suggest that one way to do this—while retaining fealty to the insights both into the need for a structuring of democratic processes and the need for taking reasonable disagreement seriously—is to adopt Cass Sunstein’s suggestion that we think of constitutionalism as a practice intended to structure and make use of disagreement as a creative resource, as far as possible, and to limit its destructive capacities when not.

In any democracy that respects freedom, the process of deliberation faces a pervasive problem: widespread and even enduring disagreement. A central goal of constitutional arrangements, and constitutional law, is to handle this problem, partly by turning disagreement into a creative force, partly by making it unnecessary for people to agree when agreement is not possible.71

The normative question then becomes, not why should we have democracy or why should we have a constitution, but rather, why should we have constitutional democracy? I argue that Habermas’s account of deliberative democratic constitutionalism presents the most convincing normative account of the co-

constitutive character of constitutionalism and democracy in Chapter VII. Following Habermas’s and Sunstein’s lead in Chapter VII, I take up some of the particular ways in which commonly accepted constitutional structures and democratic institutions can be seen as a result of such a co-constitutive view, before returning to the question of how to institutionalize the function of constitutional review.

Before turning to those issues, however, I take up in Chapter VI one form of defense of judicial review that deliberative democrats in particular seen particularly attracted to. It can perhaps be thought of most easily as attacking the claim Waldron makes that the opinions considered by a constitutional court are not fully representative of the opinions of the citizenry, or at least not as representative as those considered by legislatures (see step g)). The idea here hangs, as I will show, on an idealization of the structure of judicial reason-giving and the claim that the special characteristics of juridical discourse make it more fully representative of the people’s principles than can be achieved in legislatures, where decisions are driven by the unprincipled struggle and bargaining over competing interests. I also claim, against such an argument, that the special characteristics of juridical discourse, at the least in a common-law system of adjudication are strikingly inappropriate to the kinds of principled moral deliberation such arguments depend on constitutional courts to produce.