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I. Introduction

There are conflicting views on whether a constitution should be understood, for better or for worse, as a limit on self-government, or as providing a framework for self-government; and whether the constitutional protection of rights is desirable, or necessarily undermines self-government. This issue comes sharply into focus in debates on the legitimacy or desirability of constitutional judicial review. The aim of this chapter is to consider if and how ‘strong judicial review’—the power of judges to strike down legislation as unconstitutional—is compatible with republican freedom and self-government. What is involved in dealing with this question is not the simple application of republican principles, but, as the editors put it in the introduction to this volume, an attempt to improve our understanding of those principles themselves.

Many republicans agree in seeing self-government as requiring a deliberative politics in which the common goods of citizens are realized. While this is not identical to democracy *tout court*, republicans have to take seriously the principal objection to judicial review, that it is anti-democratic. Moreover, one of the central concerns of judicial review is the protection of rights, and the question whether and how this can be reconciled with the republican concern for the promotion of the common good and civic virtue needs to be addressed.

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1 I am grateful to the participants in the IVR workshop at which an early version of this chapter was presented, in particular to Samantha Besson and José Luis Marti for their extensive comments; and for comments and suggestions from Camil Ungureanu and Attracta Ingram.
In fact judicial review is a matter on which republicans are quite divided. When republicanism was first extensively debated in legal theory in the late 1980s and early 1990s, its leading proponents understood constitutional judicial review as entailed in, or at least compatible with republicanism.\textsuperscript{2} Since then republican thought has developed considerably among political theorists, in particular with the elaboration of the strand associated with the idea of freedom as non-domination.\textsuperscript{3} This, it is argued, has different implications for legal and related political concerns from those following from the idea of freedom as participation in self-government.

It should be noted that many advocates of republican self-government identify it less with widespread popular participation than with elected representative institutions.\textsuperscript{4} Thus republicans disagree on the appropriate extent of citizen participation as well as on the relative powers of representative legislatures and judicial institutions. It has become almost commonplace to distinguish civic (or neo-Roman) republicanism, based on non-domination, and attributing only instrumental value to political participation, from civic humanism (or neo-Athenian republicanism), attributing intrinsic or ultimate value to such participation. My argument here relies on an account of republicanism in which non-domination and self-government are more closely related than the civic republicanism/civic humanist distinction suggests, and participation is understood as both instrumentally and intrinsically valuable, which may be seen as drawing on a more nuanced neo-Athenian account along the lines identified by Besson and Marti in the Introduction to this volume (above).

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In Pettit’s account, republicanism, rather than giving primacy to electoral politics, is taken to require the depoliticization of many areas and issues, and to be realized in institutional frameworks of constraint that include judicial review, and emphasize contestatory rather than electoral democracy.\(^5\) In contrast, Jeremy Waldron, characterizing republicanism as participation in self-government with an orientation to the common good, has argued that judicial review is un-republican in principle and practice, and that courts should be subordinate to legislatures, in which the people are authors of the laws through their representatives.\(^6\) Thus we see a radical contrast between two understandings of republicanism: one for which judicial review is one of a number of guarantees of non-domination, and one that rejects it outright in the name of self-government.\(^7\)

The puzzle from which this paper starts is that neither position—the depoliticization strategy and the rejection of judicial review—seem necessarily to flow from a republican understanding of freedom and self-government. It is not clear that non-domination

\(^5\) While Pettit has elaborated the constitutional restrictions entailed by non-domination in some depth, he has also clarified the consequentialist nature of this position: ‘I have not said anything on whether there should be a written as distinct from an unwritten constitution; on what the exact scope of a constitution should be or on whether there should be room for judicial review on the American model, for the sort of review associated with European constitutional courts, or for some other mode of policing the government’s conformity to the constitution. All such questions are matters that can be resolved only in the light of empirical research and empirically informed modelling of constitutional arrangements. Nothing is a matter of sacred, democratic writ. Pettit, P., ‘Two Dimensional Democracy and the International Domain’, (conference presentation, NYU Law School, Oct 2002 available at: SSRN: http://ssrn.com/abstract=871732).

\(^6\) Waldron is not generally identified as a republican, but his short critique of judicial review in the name of republican self-government presents important and clearly-focused arguments.

\(^7\) Positions on the role of judicial constitutional review within republicanism do not break down clearly on non-domination/civic humanist lines; those who identify themselves as non-domination republicans are also divided on whether republicanism is realized best through constraints on popularly elected government in the tradition of ‘mixed government’ (Pettit, Republicanism, (above, n. 3)) or through the pragmatic balance achieved in a process of politics focused on popularly elected legislatures (Bellamy, ‘Republicanism, Democracy and Constitutionalism; Bellamy, Political Constitutionalism above, n. 4).
necessarily requires a high degree of de-politicization and restricting the political role of citizens to contestation; nor that self-government entails the broad rejection of strong judicial review.

Here I argue that constitutional judicial review can be understood as forming a part of republican self-government, even if we place a greater emphasis on citizen participation than these other positions. On the one hand, skepticism about the role of the judiciary can be replicated with respect to legislative politics, and, on the other, the deliberative credentials of the process of judicial review can be reevaluated.

In order to focus on the specifically republican arguments, I do not engage at length here with wider debates on judicial review among legal theorists, nor with Waldron’s broader critiques of judicial review in the name of democracy. In addition, the argument is intended to establish some general republican principles on this matter; thus I do not address specific national constitutional constellations in detail, or attempt to propose a particular institutional form of judicial review.

I begin by arguing that, rather than the two conceptions of freedom as non-domination and as self-government leading to two opposed accounts of republican government, these are in practice mutually complementary dimensions of freedom (Section 2). Moreover, the idea of republican political autonomy accommodates a particular conception of rights. It entails an institutional framework that requires participatory institutions and multiple public spheres of deliberation, rather than focusing on a representative legislative assembly. These institutions include judicial review, which can be seen not only as defending the basis of republican self-government but as part of the process of self-government itself (Section 3). Finally I bring these conclusions to bear on the specific arguments against judicial review that Waldron addresses in the name of republicanism (Section 4).

II. Republican Freedom: Non-Domination and Republican Political Autonomy
1. Republican freedom as non-domination

The republican conception of freedom has been influentially defined as *non-domination*. This may be seen as a missing middle term in the negative-positive distinction of non-interference and self-mastery: being neither interfered with *nor* master. On this view it is not interference that is the main threat to living freely, but domination—the threat of interference which cannot be prescinded. To be free it is more important *not to have* a master than to *be* master. In political terms non-domination can be established by replacing the arbitrary will of a king or monarch with the rule of law. It does not necessarily require that the citizens are the lawmakers.

The political implications of such a conception of freedom are a system of laws that provide guarantees against illegitimate interference, so that citizens may be able to act independently. Laws provide security in non-interference, or resilient protection from domination. Freedom is a status, recognized by all, which receives institutional support. On this understanding, the State is not a necessary evil, providing security at the cost of some freedom, positively promotes freedom as non-domination.

On the non-domination view, freedom is not an external consequence of the laws, but is *constituted* by the institutions of rights and accountability and the recognized legal status that gives immunity from interference rather like antibodies in the blood.

Non-domination requires institutional safeguards, and takes account not only of public domination by the State but also of areas such as work and the family that have often been understood as private and non-political. This account of freedom identifies a wider range of threats to freedom than the negative account, emphasizes the importance of establishing freedom securely, and provides a degree of recognition of equality. It recognizes how the

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8 Pettit, *Republicanism*, (above, n. 3), 22.

9 Ibid., 108.
capacity of individuals to be independent and self-directing is distorted when they are subject to the will of others. It makes freedom a common good, which cannot be enjoyed unless others do. Yet this account is still closer to the negative than to the positive conception of liberty. It is more concerned with consolidating non-interference than establishing a fuller notion of freedom.

We shall see that this account awards legitimacy to extensive democratically-supported legislative activity. It provides, however, no intrinsic connection with participation in political life or the authorship of collective institutions and laws.

2. Republican freedom as political autonomy

In contrast, freedom as autonomy is an ideal of self-direction. To be autonomous a person must act according to purposes she endorses. This defines freedom in terms of realization rather than opportunity. The notion of autonomy has developed from Rousseau’s idea that freedom lies in obeying a law one makes for oneself. A fuller definition defines autonomous persons as those who ‘adopt personal projects, develop relationships, and accept commitment to causes through which their personal integrity and sense of dignity and self-respect are made concrete.’

Pettit maintains that non-domination is compatible with personal autonomy and that republican institutions facilitate this indirectly. But he argues that personal autonomy does not have to be a concern of republican politics: ‘people can be trusted to look after their own

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12 Pettit, P., Republicanism (above, n. 3), 82.
autonomy, given that they live under a dispensation where they are protected from domination by others.\textsuperscript{13}

But if personal autonomy is understood as an ideal of a self-directed life, led according to purposes a person can endorse, the chances of being autonomous will be affected by many factors apart from domination. We must accept that no one can ever be completely master of their life, so freedom may be better understood as being the ‘part-author’ of one’s life.\textsuperscript{14} Autonomy may be understood both as a capacity and as an achievement, and is therefore a matter of degree, not an absolute.\textsuperscript{15} To achieve autonomy, individuals need social practices within which to develop their projects and relationships. Personal autonomy is affected by our vulnerability to one another. It is promoted when people can co-ordinate to achieve objectives beyond the capacity of one individual. It is reduced when they fail to do so. We may argue that autonomy is enhanced if people can have a say in shaping the practices through which they pursue their lives in society. Thus political autonomy can be seen as a natural extension of personal autonomy.\textsuperscript{16}

There may indeed be dimensions of personal autonomy that cannot be politically guaranteed. But if we accept that personal autonomy is deeply reliant on social frameworks, then we may see autonomy as more closely connected with political participation in shaping the collective life, not just being secured from domination.

Thus Habermas sees private and public autonomy as ‘equiprimordial’: ‘It is not a matter of public autonomy supplementing and remaining external to private autonomy but rather of an

\textsuperscript{13} Ibid.

\textsuperscript{14} Raz, \textit{The Morality of Freedom}, (above, n. 11), 155.

\textsuperscript{15} Ibid., 156 and 373; Dagger, R., \textit{Civic Virtues} (Oxford: Oxford University Press, 1997), 38.

\textsuperscript{16} This differs from Dagger’s approach, which combines autonomy as a right with a separately grounded republican theory of civic virtue (Dagger, \textit{Civic Virtues}, above, n. 15). Although Raz sees freedom in terms of autonomy, he resists this step, seeing politics as too divisive and State power too threatening to give the State a major role in promoting autonomy (Raz, \textit{The Morality of Freedom}, above, n. 11).
internal, that is, conceptually necessary connection between them.'\textsuperscript{17} Habermas advances a theory of political autonomy as part of collective self-government, seeing it as parallel to private autonomy as two irreducible dimensions of freedom. ‘Political autonomy is an end in itself which can be realized not by the single individual privately pursuing his own interests, but only by all together in an intersubjectively shared practice.’\textsuperscript{18}

If freedom is understood as an ideal to be promoted, rather than a constraint to be observed, this appears to point beyond non-domination, not to full mastery, but to participating in determining the conditions of social life in ‘republican political autonomy,’ understood as that part-authorship which alone is possible in politics.

Republican political autonomy means that citizens engaged in practices follow purposes that they can endorse as theirs, insofar as they have a say in shaping and sustaining them.

This does not require full self-realization, but entails a closer connection between freedom and political participation than non-domination theorists allow. Whereas non-domination is secured by having a government that tracks the interests of citizens, autonomy can only be realized by people acting themselves. Here one dimension of citizens’ freedom \textit{is} participating in self-rule, not an external consequence of so doing. This does not depend on seeing participation as either definitionally identical to freedom nor as of ultimate value.

\textbf{3. Realizing republican political autonomy}


\textsuperscript{18} Habermas, J., \textit{Between Facts and Norms}, trans. W. Rehg. (Cambridge: Polity Press, 1996), 498. Habermas identifies republicanism with the Aristotelian/Rousseauian tradition of free self-legislating citizens. He adopts a critical stance to contemporary republicanism as a communitarian or ‘ethical’ realization of pre-existing common goods. But his own theory shares an emphasis on (more or less direct) participation in self-government as a part of autonomy, in which common goods are as much to be constructed as discovered.
How can freedom as participation in mutual self-government be realized and different contributions be combined so that people may still act according to purposes they can endorse? If participation and freedom are to be connected, it must be in some way that maintains personal freedom and political equality of individuals while allowing for collective self-government.

Any process of collective self-government needs to be accompanied by the close scrutiny of the dynamics of non-political relations that non-domination implies. A system of collective decision-making without guarantees against domination may merely translate the will of those in positions of dominance into political effect. But critics of participatory republicanism have overemphasized the dominating propensities of collective participation, because they tend to assume a holist conception of popular self-government that is not essential to republican political autonomy. We need to recognize the limitations as well as the possibilities of political autonomy and its collective realization under conditions of plurality.\(^{19}\) It is not to be thought of as issuing in an authoritative unitary popular will expressed either through direct democracy or a representative institution.

But it is also not just a matter of aggregating preferences. While republicanism allows for greater state activity, this is within the aims of promoting non-domination and self-government in the common good. This will not always entail implementing whatever happens to be the electorally most popular choice at any time. This approach to democracy aims to avoid both the tyranny of the majority and the capture of even democratically elected legislatures by special interests. This creates a role for other institutions that promote non-domination and the realization of the common good.

\(^{19}\) Republican political autonomy is different from the strong notion of autonomy that cannot be fulfilled in an intersubjective context. I am grateful to James Bohman for the suggestion that this needs to be clarified.
The power entrusted to government to realize common goods gives rise to the danger that the State may reflect, or even amplify, the asymmetries of power in society. Thus republicans need to establish counterweights in the political process.

Republican political autonomy suggests the need to limit the power of government as much as of individuals and groups so that it does not overreach itself, diminishing rather than promoting the autonomy and common goods of citizens. Thus we may set limits to (even democratic) State action where it seriously damages the ability of citizens to be politically autonomous. Legislative action may not always track the interest in non-domination or autonomy. Certain *fundamental interests* may be identified which must be taken into account. These may be established as legal rights, though, in the republican view, they will not be formulated in terms of absolute boundaries.

Thus freedom requires a strong institutional structure of accountability and transparency within which even democratic government exercises its power. This does not undermine the principle of collective self-government, but means that the way that self-government is assured is through the ensemble of government institutions, not only through an apparently mandated legislature or executive of a unitary people. The separation of powers between the elements of government plays a role in constraining parts of government, and balancing one against other.

### III. The Institutional Implications of Republican Freedom: Rights, Participation and Constitutional Constraints

#### 1. Rights and Republicanism

In the republican tradition individual rights have not received the same central emphasis as in the liberal tradition. Republicanism is not essentially rights-based, and it does not conceive of rights in the sense of absolute, individual, natural, pre-political, or moral constraints of
individuals against a secondary political order. But there are other ways of understanding and
grounding rights, and a political account of rights can ground them in autonomy.\textsuperscript{20}

Whether constitutional rights can find a place in republican politics is a further question.
Republicans are critical of the use of individual rights in contemporary politics to pre-empt
debate about the validity of claims, since debates in terms of rights are no less contentious
than debates over substantive goals.

The role of rights as a limit on power can be justified in republican terms on the basis of
citizens’ interests in self-rule, and the social and economic preconditions for equal citizenship.
Rights convey the social recognition of individuals and offer legal guarantees of non-
domination and access to the public realm. A system of rights may itself be regarded as a
common good—available to all citizens as citizens and depending on the State for its
realization.\textsuperscript{21} The notion of freedom as participation in collective self-determination itself can
be a strong criterion for which rights are important.\textsuperscript{22}

In republican theory, rights are constituted and protected politically rather than seen as natural
attributes of individuals. For Sunstein, ‘[r]epublicans do of course believe in rights,
understood as the outcome of a well-functioning deliberative process; hence republicans
enthusiastically endorse the use of constitutionalism as a check on popular majorities. But

\textsuperscript{20} Ingram, A., \textit{A Political Theory of Rights} (Oxford: Oxford University Press, 1994). That republicanism is not a
rights-based theory does not determine the status of judicial review. It has been rightly pointed out by Waldron and
others that support for, or rejection of, constitutional judicial review does not flow directly from a valuation of
rights. Even if rights are seen as central, it may be argued that they are better supported by a political culture (as
Waldron does). Likewise judicial review may be based on principles other than individual rights.


Republicans are skeptical of approaches to politics and constitutionalism that rely on rights that are said to antedate political deliberation.  

On this view, certain rights are defended as a precondition of the possibility of political participation. Matters that are guaranteed on private grounds in liberalism are justified here as the basis of equal citizenship. A right to free speech, for example, may be defended on the grounds that it makes possible the political debate and deliberation on which citizenship depends.

Republican rights are those of citizens interacting in society, and they set limits to what can be done to, or demanded of individuals. But the list of rights and how they are interpreted will be somewhat different from their liberal counterparts. Because they are not natural and absolute, but politically constructed and guaranteed, rights can evolve in the light of conditions for self-government through deliberation. Yet the idea of constitutionally-protected rights is not intrinsically at odds with the idea of popular self-government. Some rights may be given constitutional status in the light of their importance in assuring republican participation in self-determination rather than by virtue of being natural or absolute.

Rights can then be justified on the basis of republican political autonomy. This does not rule out disagreement on interpreting the fundamental rights, and practical conflicts between rights and the common good, just as there are conflicts between different rights, and the rights of different people. In both cases deliberative arbitration is needed. Rights will need to be deliberatively defined and balanced against other rights and fundamental interests in courts and political institutions.

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25 Raz, ‘Rights and Politics’, (above, n. 21), 42:

26 This approach is more clearly represented in the European Court of Human Rights than in the US Supreme
2. Institutions and political autonomy

We have seen that republican political autonomy is realized not through the expression of a unitary popular will, but through institutions that allow the deliberative participation of citizens in their own self-government as ‘joint authors’ in a more articulated way.

While republicans are concerned with self-government in the common good, moral and cultural diversity means that the political determination and contestation of what constitutes such common concerns or goods is central. The equality of citizens requires that all can contribute to fundamental decisions. There needs to be an expanded public realm of deliberation.

If the principle of non-domination is taken to be the core of republican politics, it may seem that ensuring the contestability of all decisions is the most important guideline for designing deliberative institutions. Thus, for Pettit, the main thing is that government should track the common interests of citizens, and thus that all institutions should be accountable. Among other provisions, representatives should be chosen by a wide electorate; power should be dispersed between a legislative body with two chambers, each elected on a different basis, and a strong judiciary maintaining constitutional rights.27

The argument from republican political autonomy emphasizes a broader and more articulated process of participation in deliberation.

On the one hand, unless citizens participate, governments will not reliably follow their interests. Secondly, the citizens will value common goods, and be more strongly motivated to

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27 Pettit, Republicanism, (above, n. 3), 193. Note that it has also been argued on non-domination grounds that the best way to realize this is through the balances and compromises of ordinary electoral and democratic politics (Bellamy, ‘Republicanism, Democracy and Constitutionalism’, above, n. 4).
act in a public-spirited way when they are involved in making the decisions that shape society. Finally, in participating citizens express themselves, and may gain the recognition of their peers.

But the argument that citizens are lacking in competence, information, or interest in determining the common good has often been used to support a division of labour in which decisions are left to representatives who are seen as more knowledgeable, or more civic-spirited. This assumes that these officials are more insulated from particular interests and bias than citizens. But we know that professional politicians are exposed to all kinds of pressures that dilute the deliberative consideration of the common good. We do not have to believe that representatives are concerned only to further their private interests, merely to believe that they experience similar tensions between particular interests and the common good as other citizens. Thus this particular danger of popular participation is not overcome by its substitution by representative legislatures.

A second problem with the emphasis on participatory deliberation in specific contexts is that it might be thought to be at odds with the principle of ‘the empire of laws, and not of men’. To some this principle suggests stronger constraints on all government action in specific cases. But formal procedures cannot predetermine all cases; laws must evolve to deal with different circumstances, and those who are affected by laws should have a say in how they are formed. Political autonomy does not require either a rigid constitutionalism or a process that responds to arbitrary preferences. Republicanism has never been identical to pure procedural democracy. Deliberation itself implies that laws should not be made or changed arbitrarily on the basis of few voices or without reference to those they affect.

The prevailing model of contemporary politics is a kind of formalized adversarial interaction in parliamentary and legal deliberation focused immediately on authoritative decision-making processes in a single public realm. But deliberative politics can operate at two distinct levels in what have been come to be described as ‘strong’ and ‘weak’ public realms: those oriented
directly to policy-making and the authoritative State;\textsuperscript{28} and other less sharply bounded, less formal spaces of discourse where opinions are to be exchanged in comparatively open-ended ways. Thus no single assembly or hierarchy of assemblies is envisaged. The formal, State public needs to be paralleled by vigorous informal publics of discussion. In this way decisions and actions are better informed and more reflective of citizens’ serious convictions.

Publicity, deliberation and accountability, and the connection of informal social interaction with the political decision-making process are essential elements in the republican argument for expanded public spaces.

Even at the level of decision making forums, freedom as non-domination and participation require the dispersion of power, traditionally referred to as ‘mixed government’. Such checks, often seen as undemocratic, are not un-republican, since we are not talking about a definitive ‘people’s will’ that has to be expressed through a single institution. Counterposing institutions may help to limit the domination of policy by powerful sectional lobbies, which present as great a threat to the common good as intense majorities.

While this approach does not support continuous direct democracy in which every decision is subject to majority decision, it does make publicity and deliberation crucial. Not all stages of all decisions have to be made in completely open forums. There may be areas that need to be depoliticized at certain times, insofar as they seriously impair the autonomy and fundamental interests of citizens. But government activity must aim to be transparent, and decisions should be subject at some stage to wide-ranging deliberative scrutiny.

Thus a more positive view of the possibilities of participation is not incompatible with seeing a role for judicial review. The point here is less to counter the danger of majority tyranny or popular participation, as to provide multiple spheres of deliberation in face of the uncertainty and disagreement about what the common good requires. Judicial review constitutes a distinct

\textsuperscript{28} Fraser, N., ‘Rethinking the Public Sphere: a Contribution to the Critique of Actually Existing Democracy’, in Calhoun, C. (ed.), Habermas and the Public Sphere (Cambridge, MA: MIT Press, 1992), 134.
deliberative forum; rather than a constraint on popular self-government, it may be an element of deliberative self-government.

**IV. Judicial Review: Legal Republican Arguments For and Against**

We now turn to examine further republican legal arguments on judicial review. Again, what is at stake here is ‘strong’ legislative judicial review, the power of courts to strike down legislation as unconstitutional, rather than more consultative ‘weak’ judicial review, or the review of administrative action. But strong judicial review is to be distinguished from the rigidity, or severely limited possibility of amendment, of the constitution.29

In a number of articles in legal theory in the 1980s and early 1990s prominent legal theorists such as Sunstein and Michelman defended a view of republicanism as participation in self-government with an orientation to the common good; they argued for the compatibility of judicial review with a more or less substantial notion of republican self-government. But a wider range of positions has emerged in contemporary republican discussions of judicial review.

Michelman directly linked the activity of judges engaging in judicial review with the process of self-government in a context where actual participation by the mass of the people is no longer possible.30 He argued that the tradition of freedom as self-government in a modern republic such as the United States requires not that the citizens should continuously participate, but rather that they should be able to endorse the fundamental laws of their country. The ideal of a self-governing citizenry is expressed in the constitution and is to be understood as guiding the deliberations of the US Supreme Court. For Michelman positive republican freedom, acting

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29 Sinnott-Armstrong, W., ‘Weak and Strong Judicial Review’, *Law and Philosophy*, 22 (2003), 381. It is also distinct from judicial supremacy, the idea that the courts are the sole interpreters of the constitution. Waldron, J. ‘The Core of the Case against Judicial Review’, *Yale Law Review* (2006), 1346.

according to reasons that are one’s own, is achieved by citizens whose political system is directed towards the common good. Because of the plurality of citizens, the process of self-government needs to relate or mediate between particular and general, concrete and abstract, similar and different, and it may not be practically possible for the whole citizenry to practice self-government. Rather than applying general law to individuals or protecting radically individual rights, it is the community’s possibility of self-reflective transformation, which takes place in many spheres that is authoritatively expressed in Court judgements. The model for these judgements is dialogical, based on the capacity of citizens to engage in communicative dialogue, to reflect on original desires and values, and progressively to expand the range of those who are included. The Supreme Court provides the deliberative forum that the size of modern democracies makes impossible to operate; thus its power is a quasi-democratic one, sustaining ‘jurisgenerative’ popular engagement.31

Sunstein’s position is more complicated. He argues for making space for more participation in self-government: ‘Republican thought . . . sees political liberty in collective self-determination; while it does not regard political participation as the sole good life for human beings, it attempts to provide outlets for citizen control and local self-determination.’32 However, for him one of the key features of the republican political process is that it aims not just to aggregate private interests, but to promote the common good through deliberation. He is critical of the capacity of both the market and electoral institutions to realize republican ends, and recommends institutions that favour the emergence of deliberative preferences, rather than short-term preferences or the will of powerful interest groups. He has characterized the US constitution as a pre-commitment strategy, through which self-ruling citizens bind themselves to their considered intentions. Thus he has cautiously defended judicial review.

There is an apparent anomaly in relying on principles of Madisonian republicanism as a basis for a vigorous judicial role. Those principles are rooted in a conception of politics which does not easily


32 Sunstein, ‘Beyond the Republican Revival’, (above, n. 23), 1569.
accommodate judicial intrusions. But those intrusions become defensible when they are based on constitutional and statutory provisions whose purpose and effect are to improve a political process that amounts in the circumstances to lawmaking by powerful private groups.  

For Sunstein the low quality of political debate and practice has made it necessary for the courts to take over the function of deliberation. ‘Some of the deliberative tasks no longer performed by national representatives have been transferred to the courts.’ This does not amount to a defence of extensive judicial activism. Sunstein advocates an idea of judicial minimalism: in making judgments, judges should speak for ‘one case at a time’ rather than seeking to determine policy more broadly. However, this is an argument precisely against a certain kind of judicial activism, not against judicial review itself.

Thus judicial review was defended in the context of republican self-government, though, it must be said, a rather thin notion of self-government with respect to citizen participation.

1. Waldron on republican self-government and judicial review

Much stronger reservations about the compatibility of republican self-government and judicial review have been advanced by Waldron. He has argued that in a reasonably working democratic society in which people, although broadly committed to individual and minority rights, may disagree about what these rights are and how to implement them, these disagreements should be settled by legislative, not judicial institutions. While Waldron has

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34 Ibid., 79.
developed extensive arguments against judicial review on broader grounds, here I focus on the specific arguments he advances in the name of republicanism.  

For Waldron, what is distinctive about republicanism is the way it combines the commitments that government should be democratic and that it should be oriented to the common good. Republicanism is a demanding approach to politics that requires us to take risks in the name of self-government. So far so good. Moreover the size of modern societies requires representation and institutional division of labour. However, there are certain basic requirements for equality among citizens. ‘A republican theorist can defend specialization and even functional inequality; but the defence must be that such structures represent the best way of articulating and applying the background ideal of self government by citizens who are to treat one another as equals, in the circumstances of a modern crowded state.’

He denies that judicial review meets these conditions. Strong judicial review gives too much power to an unelected institution, and undermines the basic equality of citizens. He addresses what he takes to be the three most substantial arguments why judicial review might be compatible with republicanism. First, that it appears to represent the view of the people as to how their self-government should be conducted. Second, that it improves the quality of debate on matters of principle. And third, that it is necessary to secure the basic republican framework. He maintains that each is important, but threatens to betray the idea of republican government in the light of popular sovereignty, scholarly culture, and procedural respectability respectively.

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38 I address this argument here because it is specifically based on republican self-government rather than non-domination. The detailed argument advanced by Bellamy based on a non-domination account has many parallel practical conclusions (Bellamy, ‘Republicanism, Democracy and Constitutionalism’, above, n. 4).


40 Ibid., 162.

41 Ibid., 164.
a) Popular support for judicial review may be seen as an endorsement of its republican credentials. Waldron challenges this view on the grounds that it could make dictatorship, for example, a republican form of government. Although Waldron is right to distinguish between the content of self-government (open to determination by popular deliberation) and its form (constrained by the nature of republicanism), this does not dismiss this point. Dictatorship is clearly opposed to citizen self-government in a way that is quite different from the practice of judicial review by an institution limited by a body of law and precedent, which is just one part of the political process. The fact that judicial review is popularly assented to at least meets the objection that it is a wholly elitist institution. But this is a rather weak argument in favour of judicial review. The mere fact that it has popular approval is not conclusive. It does not necessarily involve the engagement of citizens in deliberation on the common good.

b) A more significant argument is the claim that judicial review makes public debate more deliberative, and in this way contributes to citizen self-government. There are two issues here; one is the quality of judicial deliberation, and the other the quality of wider debate. The quality of judicial reasoning itself is held up to criticism, challenging the deliberative credentials of the judicial process. Waldron also rejects the argument put forward by Dworkin and others that judicial review may improve the quality of public debate beyond the courts. He compares the quality of debates on homosexuality and abortion in the United States unfavourably with those in Britain and New Zealand in the absence of constitutional judicial review.

But this comparison alone is not decisive. There are many other differences between political culture and legal practice in these countries. Within judicial deliberation itself, a number of specific features may influence the basis and quality of deliberation: for example, the age of the texts, historical traditions of interpretation, absolutist understandings of rights, and so on.

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All of these will make a difference to the extent to which judicial review proceedings are likely themselves to be deliberative, and to contribute to the quality of wider public debate.

The question in any particular system has to be whether the presence of a constitutional judicial procedure tends to improve the quality of debate in that context, or leads to the dominance of legal discourse and the pre-emption of political self-government by legal processes that critics have identified. This is at least in part an empirical question that requires more consideration of other cases to examine whether or not the process of judicial review contributes to wider debate.

Waldron suggests that judicial intervention has led to the decline in legislative debate in the United States, and led politicians to act less seriously and more irresponsibly. But (as we have seen) it can be argued that the reverse is the case—that the judiciary has filled a vacuum left by the legislature.

The argument here does not depend on a belief that judges are better placed because distant from politics, or that they are inherently more rational or more virtuous than citizens in general (which would be to make the same mistake as others have about legislators). We may recognize that judges, even if not elected, are not wholly isolated from politics and public opinion, and that they can be divided among themselves. What is important is the capacity of judicial review to provide a different kind of forum or public space. This is one which has more time and resources to consider issues, is insulated from certain factors, such as the need to be re-elected, is used to dealing with complex applications and interactions between general provisions and particular cases, and has to take considerations, such as precedent, that are not central to other processes. This means that it can take account of different deliberative considerations from legislative politics.

We do not have to claim that courts invariably provide the right answers or better outcomes. What we can suggest is to suggest that courts offer a wider range of considerations and an
additional forum in which certain issues and people may be better able to have their claims heard than in contemporary electoral politics.\textsuperscript{44}

Support for judicial review need not reflect a discomfort with democracy, but a discomfort with contemporary electoral and legislative politics. In contrast with these, the practice of judicial review may be seen as compatible with and at least sometimes helping to sustain republican self-government.

c) Waldron sees as more plausible the argument that judicial protection of rights is necessary to support the conditions of republican government, but he rejects this also.

He recognizes that legislatures may sometimes undermine the structures of democracy. But he argues that if elected representatives cannot be trusted, this shows the impossibility of republican government in an unalloyed form—not that the idea of republican self-government comprises the practice of judicial review.\textsuperscript{45} He admits that there must be some rights that are fundamental to the legitimacy of republican decision-making. But because people disagree about the range of rights, their application, what republican self-government means, and its conditions, it cannot be seen as part of republican self-government for the courts to overrule what emerges from legislative politics on the basis of a single interpretation of these in any one case.\textsuperscript{46}

But more needs to be said here. Even where there is no overall consensus, in order to provide in some way for these fundamental rights essential to self-government, we may think of them


\textsuperscript{45} Waldron, ‘Judicial Review and Republican Government’, (above, n. 4), 172.

\textsuperscript{46} He also rejects the idea that constitutional constraint may operate as a kind of collective pre-commitment, on the grounds that the individual-collective analogy is misleading here, and that the current population of citizens are not the authors of the constitutional constraint (Waldron, ‘The Core of the Case against Judicial Review’, above, n. 29).
as provisionally embodied in the constitution, while subject to future and more inclusive formulations and reconciliation with other rights and values. If it is the case that the courts, even in the context of disagreement, provide for conditions of political equality among citizens, and preserve the democratic process against legislative action, judicial review may be seen as a procedure that can be more open to the background concerns of self-government than legislative politics in practice.

Again here, a wider look at the empirical evidence provides instances where courts, despite their insulated character, have been significant in supporting the political rights of citizens against the legislature acting in ways that, while not necessarily corrupt in the narrow sense, failed to take account of the considerations needed for political deliberation.47

For republicanism understood as a theory of freedom as self-government oriented to the common good, the points advanced against judicial review by Waldron are not as compelling as they may first appear. While his argument is directed at constitutional judicial review in general, it may be that this critical view particularly reflects the predominant place of the constitution and practice of judicial review in the USA in contemporary legal debates. Many of the criticisms made of the judicial process are linked to that specific constitution and its problems of textual issues, and originalist interpretation; the identification and ranking of specific rights, the absolutist understanding of these rights, and other factors.

Although Waldron warns against dodging his criticisms by searching out exceptions, and adopts a more comparative approach than many other critics of judicial review, looking at other models may be more to the point than he allows. As well as operating on different deliberative models, strong judicial review may be practiced differently, and may operate

47 Notable examples in the Irish case alone are the rulings that the government must provide equal financial support to publicize arguments for and against the proposals in government sponsored referendums; and that a referendum of the people is required to confirm changes in the EU treaties.
within different constitutional contexts. On practice, it should be noted that republicans recognize that institutional design cannot determine everything, and that the success of self-government depends on the development of civic virtue among citizens and officials alike. Just as with citizens and politicians, we have to rely on, and if possible educate judges to reason deliberatively and to exercise restraint. A republican constitution, and by extension judicial interpretation, need not see rights as absolute; but can recognize that decisions must be made balancing one against another or against the common good. While it may give the ‘the last word’ to the courts over the legislature in interpretation of the constitution, this process is less radically anti-democratic in a context in which the constitution is less rigid. The rigidity of the constitution is a separate matter from the question whether the judiciary has ‘the last word’ over the legislature or in determining the meaning of the constitution as it currently stands. A combination of judicial review and more flexible amendment (not necessarily by legislature alone), whatever its flaws, may be more compatible with republican self-government than judicial review in the context of more rigidly restricted constitutional amendment.

V. Conclusion

The ideal of republican self-government and political autonomy is one of participation in collective self-government, where citizens can aim to be ‘joint authors’ of collective decisions, rather than achieving self-mastery, individual or collective. The fact that republican self-government is a demanding ideal provides grounds not for legislative supremacy, but for a more articulated polity, in which institutions are balanced against one another, and there are multiple spheres of deliberation. At the same time, if it means taking risks on people’s ability

48 Colin Farrelly has pointed to the ‘dialogic’ model of judicial review in the Canadian constitution, (which may be seen as strong, despite the ‘notwithstanding’ clause), which may be more compatible with citizen self-government. Farrelly, C., ‘Civic Liberalism and the “Dialogical” Model of Judicial Review’, Law and Philosophy, 25 (2006), 489.
to govern themselves, this argues for expanding popular participation at least as much as legislative power.

We have seen that Pettit and Waldron, though holding different positions on judicial review, both assume limited popular participation in electoral and representative politics. While Pettit argues for limits on electoral and representative institutions, Waldron defends the effective supremacy of legislatures against judicial review in the name of popular self-government. This defence, even if not excessively optimistic about legislative politics and current political practice, does not seem to take sufficient account of their more deep-seated problems.

While republican political autonomy may involve a higher level of popular participation and respect for citizens as political actors than at present, it does not imply popular majoritarianism. In particular it holds no brief for the supremacy of legislators. The concern is not only the tyranny of the majority, but the problems of domination and corruption whether of majorities or elites.

Republicans are always concerned with the fragility of republican institutions and the potential for corruption of political actors, whether citizens, professional politicians or judges. They have to recognize the risks involved in self-government and to accept that no legal or political guarantees against its corruption are available.

It is not necessary here to catalogue the weakness of contemporary liberal democracies, in which it is difficult to see the people as joint authors or editors of political decisions in any effective sense. It is not clear that the representative system alone is adequate to defend the interests of citizens. If republicanism is concerned for freedom as self-government, this needs to provide for ways in which citizens might be able to participate more actively and deliberatively in their own self-government. But even if legislatures were more accountable, the republican concern with corruption tells against a final unitary forum for the expression of the popular will.
Thus, a defense of strong judicial constitutional review of legislation, rather than being less respectful of republican values, is compatible with arguments for a more participatory republicanism, and for more political as well as legal accountability of governments. The claim is not that judges are superior in every way, but have particular skills and orientations that make judicial review one of multiple deliberative institutions in the process of republican self-government. Judicial review should be seen as a constraint less on the people than the legislature, less on popular sovereignty than on legislative sovereignty. For those who fear the finality of judicial review, it must be remembered that in practice, the ‘last word’ of the judiciary on the constitution is ultimately a part of a wider political process,\textsuperscript{49} and that legal and political constraints are less radically distinct in practice than in theory.

This is not to foreclose on the possibility of developing other institutional forms of constitutional review and rights protection, but to suggest that judicial review can provide a broadly appropriate institutional framework.\textsuperscript{50} Without adopting an over-optimistic view of either legislatures or of judiciaries, we may conclude that strong judicial review can provide one element of the institutional realization of republican non-domination and self-government.
