Special Issue: *Constitutional Reasoning*

Constitutional Rights and Democracy: A Reply to Professor Bellamy

By W.J. Waluchow[*]

A. Rights and Constitutional Review

In his rich and thoughtful paper, Richard Bellamy sketches a theory of individual rights that ascribes to them an inherently democratic character that "is best captured by a republican view of liberty as non-domination, rather than the standard liberal account of liberty as non-interference."[1] According to this view, "rights involve an implicit appeal to democratic forms of reasoning."[2] That is, the only justifiable "foundation of rights must be some form of ongoing democratic decision making that allows rights to be claimed under conditions of political equality."[3] Bellamy uses this particular model of rights to defend a somewhat unique thesis concerning the legitimacy of judicial review under a constitutional charter or bill of rights (henceforth *constitutional review*). Many legal theorists question whether constitutional review can ever be rendered consistent with the theoretical and practical demands of democracy.[4] According to these theorists, democracy embodies a form of self-rule whereby the members of a society establish and exercise legitimate authority over themselves. But self-rule seems seriously compromised once constitutional review enters the picture. Instead of having the people and their elected representatives setting the basic terms of social cooperation, we have instead a small group of elite, unelected, and unaccountable judges performing this vital task. Constitutional review empowers these individuals, in constitutional review cases, to substitute their own contestable views and preferences with respect to the basic terms of social cooperation for the duly considered views and preferences of the people and those whom they have duly elected to represent them. This is something one simply cannot tolerate in a democracy.

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[1] Richard Bellamy, *Democracy as Public Law: The Case of Rights*, 14 GERMAN L.J. 1017 (2013).

[2] *Id.*

[3] *Id.*

[4] The most notable defender of this view is Jeremy Waldron. *See*, *e.g.*, Jeremy Waldron, *A Rights-Based Critique of Constitutional Rights*, 13 O.J.L.S. 18 (1993); JEREMY WALDRON, LAW AND DISAGREEMENT (1999); Jeremy Waldron, THE CORE OF THE CASE AGAINST JUDICIAL REVIEW, 115 YALE L.J. 1346 (2006).

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This seemingly undemocratic arrangement—constitutional review—is sometimes defended on the ground that the basic terms of social cooperation in any democratic society must include recognition of certain fundamental rights—equality, freedom of expression, and so on. These rights are not only *pre-political* (i.e. would exist in the state of nature), they are subject to manipulation and abuse by majorities and by powerful individuals and minorities bent on securing their own advantage at the expense of the less fortunate. Because legislatures are designed to be responsive to the interests and demands of majorities, and because legislators seem, in today's world, increasingly unable to resist the formidable pressures exerted upon them by powerful minorities and individuals, they are apt to succumb to the promptings of such groups and run roughshod over fundamental rights. As a means of counteracting these unfortunate tendencies, most modern democratic societies have opted for constitutional charters which recognize, and give fundamental legal standing to, a range of fundamental, pre-political rights. They have also taken the further step of placing the elaboration and protection of these—for the most part—abstractly stated rights partly in the hands of judges. Compared with legislators, unelected judges are said to be relatively immune from the harmful forces at play in unbridled democracy and are therefore better situated to offer the requisite protections. Hence, constitutional review is either fully compatible with democracy because it offers the only practical means of securing respect for a range of fundamental rights that any true democracy must recognize and protect, or it represents an acceptable compromise of democratic principle for the sake of protecting these fundamental rights. Either way, it is a fully justified practice.

Bellamy seeks to challenge this defense of constitutional review by undermining the view of rights upon which it is based. In his view, rights are, by their very nature, claimed against others. This "public face of rights" demands "the negotiation of reciprocal claims through equitable, mutual agreements, which promote publicly avowable interests that promote common rather than private goods."[5] Hence, rights "involve an implicit appeal to democratic forms of reasoning."[6] They "belong to and reflect a given social context and the public goods it provides for those who exist within and support it."[7] In short, rights are not, by their very nature, pre-political but must be democratically negotiated. But if this is so, then determining what our rights are and what they concretely require in the wide variety of circumstances in which we find ourselves in modern democratic communities cannot justifiably be left to judges. Were rights pre-political, and were judges for some reason better able than elected legislators to determine and enforce their requirements, then constitutional review might be an acceptable institutional practice within a democracy. But the "democratic" nature of rights demands that we either do away with constitutional review entirely, or we seriously limit its scope and force.

[5] Bellamy, *supra* note 1.

[6] *Id.*

[7] *Id.*

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Bellamy argues for the second option, endorsing a two-pronged strategy for ensuring that constitutional review is harnessed in a way that renders it compatible with "real democracy." We must, he argues: (1) Restrict the grounds on which legitimate constitutional review can take place; and (2) weaken the constitutional force of a court's decision that an unwarranted constitutional infringement has taken place.

The first prong of Bellamy's strategy emerges when he outlines two acceptable grounds for judicial interference in the processes by which legislatures fulfill the task of "authorial democracy," i.e., the "on-going legislative enactment of rights in the democratic terms required to justify and legitimately realize rights claims."[8] Courts may legitimately be called on to "apply notions of equity and procedural fairness."[9] Decisions based on these two grounds are characterized as ensuring "that litigants are treated impartially with regard to the settled norms of the law." Bellamy further suggests that courts are well suited to adjudicate on these two grounds because they "are highly attuned to adjudicating on the issue" of whether a party to a dispute has been given an adequate hearing or whether "the norms governing a case have been interpreted even-handedly to all parties."[10]

Ideally, it would seem, Bellamy would prefer that all issues concerning the creation and interpretation of contentious constitutional rights be dealt with in "democratic" forums.[11] It is only here, he believes, that all members of the democratic community enjoy "their 'right' to author their rights."[12] But of course we live in a less than ideal world and so he is prepared to license constitutional review only on the above-mentioned grounds. But beyond this he is not prepared to venture. Despite the acknowledged tendency of electorates and legislatures to "act myopically or be misinformed,"[13] it would be wrong to allow courts the power to substitute their own views on other contentious issues involving constitutional rights. This would be wrong for a host of reasons, among them the ones

[8] *Id.* Bellamy draws on Philip Pettit's distinction between "authorial" and "editorial" democracy. *See* Philip Pettit, *Democracy, Electoral and Contestatory*, *in* DESIGNING DEMOCRATIC INSTITUTIONS, NOMOS XLII (Ian Shapiro & Stephen Macedo eds., 2000).

[9] Bellamy, *supra* note 1.

[10] *Id.*

[11] Bellamy seems to contrast courts with "democratic" forums, thereby suggesting that a true democracy finds no place for courts possessing any sort of authorial function, even a very limited one. But this understanding of democracy is contentious at best. It may even beg the question against defenders of constitutional review. In order to avoid this result, and because the democratic forums upon which Bellamy focuses are legislatures, I will instead continue to refer mainly to legislatures, leaving it open whether this is the only legitimate democratic forum.

[12] Bellamy, *supra* note 1.

[13] *Id.*

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touched upon above: That judges would end up exchanging—for a legislative decision that is reflective of and appropriately responsive to the full gamut of relevant information, interests, claims, and views found within the wider democratic community—a judicial decision that is grounded in the much narrower range of factors inevitably deemed appropriate within the context of legal adjudication, is therefore less responsive to the full range of competing claims, views, and "consequences for the public at large,"[14] and is more likely to express the particular moral and political predilections of judges.

> The superiority of real democratic systems over courts lies in their providing a mechanism for identifying the legislative embodiment of rights most likely to track the commonly avowed interests of citizens by treating them with equal concern and respect. It achieves that result through providing a means for citizens to reach agreements in conditions of political equality.[15]

The second prong of Bellamy's strategy for ensuring that constitutional review is kept consistent with democratic ideals is to set up our public institutions so as to ensure that legislatures always have the final say on whether the products of their efforts are compatible with constitutional rights. This is a strategy pursued in a host of countries, including Canada, the UK, and "Nordic countries like Finland and Norway."[16] In other words, we can, if we choose to have some form of constitutional review, opt for what is commonly called *weak form* review, a mechanism that denies courts final say on questions of constitutional compatibility.[17] This form of review contrasts with the *strong(er) form* found in the United States, where the Supreme Court is generally acknowledged to have the last word on all constitutional questions—most notably and contentiously on whether the relevant legislature has in some instance complied with its responsibility not to infringe constitutional rights.

Bellamy combines the aforementioned two ways of harnessing judicial review, thereby endorsing what he calls "a weak form of contestation" which "allows courts merely to question the compatibility [of legislation with constitutional rights norms] on the fairness grounds [(a) and (b)] listed above and to force reconsideration by the legislature."[18] On this

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] The term *weak form judicial review* is closely associated with the work of Mark Tushnet. *See*, *e.g.*, Mark Tushnet, *Weak-Form Judicial Review and "Core" Civil Liberties*, 41 HARV. C.R.-C.L. L. REV. 1 (2006).

[18] Bellamy, *supra* note 1.

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option, a legislature must, in the end, remain the sole author of all rights-creating and rights-enforcing norms within a truly democratic society. This authorship extends not only to the abstract constitutional rights norms one finds in instruments like the UK's Human Rights Act of 1998, the Canadian Charter of Rights and Freedoms, and the Basic Law for the Federal Republic of Germany, but extends to the wide variety of other norms created within the give and take of ordinary, everyday politics. Many of these (e.g. anti-discrimination laws, or laws governing restrictions on freedom of the press) are, in effect, democratically negotiated, concrete *specifications* of the meaning and import of these more abstract constitutional rights (e.g. the right to equality and freedom of expression) for the particular community in question.[19] Furthermore, when a democratically legitimate legislative body creates a constitutional rights document, it thereby endeavors to "ensure its current legislation is compatible with such rights norms and to mark when it seeks, for reasons it deems legitimate, to depart from them."[20] In other words, in a society with a democratically created or endorsed constitutional rights instrument, ordinary acts of legislation are normally passed with the following tacit or express understandings: (a) That said legislation concretely specifies certain rights upon which we collectively agree, through the actions of our elected representatives in conditions that respect political equality, and are to be given effect within our democratic community; and (b) that said legislative specifications are, at the very least, fully compatible with our democratically recognized and endorsed constitutional rights. In those presumably rare cases where this latter understanding, (b), is not present, the relevant legislation is passed with the tacit or express understanding, (c), that it does indeed infringe one or more previously recognized constitutional rights but does so for some compelling reason (e.g. national security) that is sufficient to warrant taking this serious step. In Bellamy's view, courts should never, as they can in systems with strong form constitutional review, be allowed to substitute their own contestable view on whether the legislature has lived up to its responsibilities on these fronts (a-c). On the contrary, they can only "dispute whether [the legislature] has done this sufficiently thoroughly and ask the legislature to reconsider—though how and when remains the prerogative of the authorial branch of democracy."[21] On Bellamy's preferred model, then, the Courts are restricted to "offering a supplementary function as an editorial alarm bell."

There is much in this rich and interesting paper upon which I have not touched. There is also much in what I have just sketched upon which I will not be able to comment. Instead, I will focus on the theory of constitutional review that Bellamy attempts to build on the

[19] For an elaborate and sophisticated defense of this proposition, and for an analysis of the Thomistically inspired notion of *specification*, see GREGOIRE C. N. WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS 116 (2009).

[20] Bellamy, *supra* note 1.

[21] *Id*.

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foundation of his democratic theory of rights offering up a few observations and points of criticism. My first observation is this: The precise scope of the form of constitutional review for which he argues is not at all clear. There would appear to be two options. On either one, however, we seem left with a form of constitutional review that is far too anemic to serve the important role this institution is capable of playing in modern constitutional democracies. My second observation is this: Bellamy's arguments against constitutional review and in favor of more "democratic forums" of rights specification rest on a limited picture of the possible contributions courts can make to the sensible development of rights specifications within a constitutional democracy. More specifically, it seems to rest on a false dichotomy between (a) having fundamental constitutional rights specified solely within so-called "democratic forums" (on the ground that rights are the product of "democratic forms of reasoning") and (b) having them specified solely by judges in the exercise of constitutional review. There is little reason to think that it couldn't be a little bit of both. Or so I shall argue.

B. The Scope of Constitutional Review

Professor Bellamy is by no means unaware of the obvious fact that legislatures do not always succeed in granting all members of the democratic community full access to their right to participate in the authorship of rights. Access is sometimes denied, he remarks, to "asylum seekers, prisoners, the mentally ill, immigrants and other unpopular or isolated minority groups, with limited if any access to the democratic sphere."[22] It is here, he thinks, that constitutional review can legitimately be invoked "to ensure that [such individuals] are treated impartially with regard to the settled norms of the law."[23] In cases where a litigant can demonstrate that she has not been given an adequate hearing or that the settled norms governing her case have not been interpreted or applied even-handedly, courts are justified in intervening. It is not clear, however, what Bellamy means here. There would appear to be at least two possibilities.

First, he might have in mind cases where the question concerns the actions of an official who has applied relevant settled law to a complainant's case. Alternatively, he might mean cases where what is being questioned is not the fair application of settled law to an individual's case, *but the settled law itself*. An example of the first type of case is where the question is whether a parole board's application of the Canadian Corrections and Conditional Release Act[24] to an incarcerated individual was done in a fair, even-handed way. Perhaps the Act was interpreted in a way that reflects a bias against a particular racial group, economic class, or political movement of which the prisoner is a member. Here the

[22] Bellamy, *supra* note 1.

[23] *Id*.

[24] Corrections and Conditional Release Act, S.C. 1992, c. 20 (Can.).

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norms of natural or procedural justice would, presumably, play the leading role. A prime example of the second type of case is *Charkaoui v. Canada (Minister of Citizenship and Immigration)*.[25] Here the focus was on the Immigration and Refugee Protection Act,[26] under which permanent residents and foreign nationals in Canada named in security certificates were rendered inadmissible to Canada and subject to deportation. Two conditions were specified in the Act: (a) The government must be satisfied that there is sufficient evidence that continued presence in Canada constitutes a threat to national security; and (b) a federal judge must confirm the reasonableness of issuing the certificate, given the evidence at the government's disposal. But not only could the hearing before the federal judge be conducted upon the government's request *in camera* and without the named person present, but some or all of information on which the government based its case before the Court could lawfully be withheld from the named person and his/or her lawyer. It was up the presiding judge to determine whether non-disclosure was warranted for reasons of national security. Mr. Charkaoui successfully argued that the Act, as it then stood,[27] violated several provisions of the Canadian Charter of Rights and Freedoms: Section 7 (right to life, liberty, and security of the persons and the right not to be deprived thereof except in accordance with the principles of fundamental justice); section 9 (right against arbitrary detention); section 10 (right to prompt review of detention (*habeas corpus*)); section 12 (right against cruel and unusual punishment); and section 15 (the right to equal protection and equal benefit of the law). In *Charkaoui*, then, the main question was whether *the law itself*, not its particular *application* to Mr. Charkaoui, violated the relevant constitutional norms.

So there are two ways of reading Bellamy's proposal regarding the scope of constitutional review. He is either endorsing its use to question the constitutional validity of "settled law" (*Charkaoui*), or suggesting that it be used only to challenge the particular application of "settled law" to a particular set of facts involving a particular complainant (our incarcerated prisoner). These are, of course, very different from one another and raise very different issues. The importance of the latter kind of case cannot, of course, be underestimated. Judicial review of decisions by administrative bodies such as parole boards, media licensing commissions, refugee boards, and zoning commissions is of vital importance in a thriving democracy. It is one way to help ensure the protection and promotion of the rule of law. But it's not this kind of review that concerns those who question the democratic bona fides of constitutional review. What troubles critics of constitutional review is not that it permits democratically unaccountable judges to challenge the fairness of administrative decisions under settled law. Rather, it is that form

[25] Charkaoui v. Canada, [2007] 1 S.C.R. 350 (Can.).

[26] Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Can.).

[27] The Immigration and Refugee Protection Act was amended several times. For the latest version, see *id.*, *available at* http://laws-lois.justice.gc.ca/eng/acts/I-2.5/FullText.html.

of constitutional review that allows democratically unaccountable courts to challenge the validity of duly enacted laws, that is, override law-creating decisions by democratic accountable legislatures. So it's the former kind of case (*Charkaoui*) upon which we should be focusing and with which Bellamy must be concerned.

But if this is so, then the following question naturally arises: If Bellamy is prepared to allow judicial challenges to the constitutional validity of legislation on certain rights grounds, why does he restrict judges to the two he mentions—equity and the right to procedural fairness? What distinguishes these from the much wider range of rights grounds typically included in constitutional rights instruments: rights to equality, freedom of expression, religion, association, security of the person, etc.? What possible reason could there be for denying judicial challenges to constitutional validity on these further grounds? Bellamy's answer seems to be that courts are "highly attuned to adjudicating on the issue of whether a given party to a dispute has been given an adequate hearing or if the norms governing a case have been interpreted even-handedly to all parties."[28] But surely this is not enough—especially when one considers the fairly narrow range of cases in which legislation can seemingly be challenged on these limited grounds.[29] All we seem left with are cases involving legislative irregularities, e.g., vote fixing and perhaps cases where the question is whether some person or group has been given an adequate hearing in the democratic processes leading up to the adoption of the relevant piece of legislation, or whether his or their interests have been given due consideration by legislatures. There are no doubt cases like this, cases like *Citizens United*,[30] where the central question was whether preventing those with deep pockets from exerting undue influence in elections via campaign contributions, seriously compromises the "means for citizens to reach agreements in conditions of political equality."[31] But such cases are relatively rare. Much more common are cases invoking the much wider list of rights mentioned above—equality, freedom of expression, and so on. If judges are permitted to adjudicate on questions of equity and fairness, it is not clear why they should not be permitted to adjudicate on these other grounds as well.

Now consider the effect of combining this restriction on acceptable grounds for review with the second prong of Bellamy's strategy for reducing the role of constitutional review: Preventing courts from doing anything more than requesting reconsideration on the part of the legislature, a request that, theoretically at least, the legislature is free to ignore.

[28] Bellamy, *supra* note 1.

[29] Remember that we are talking here about cases where "the settled law" is in dispute, not its *application* to a particular set of facts in a particular case.

[30] Citizens United v. Fed. Election Comm'n, 558 U.S. 50 (2010).

[31] Bellamy, *supra* note 1.

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Why, if this is the limited role of courts are to serve in constitutional review, should they be narrowly restricted to commenting only on questions of equity and procedural fairness?

Here's one reason that might be offered. In reality, legislatures tend not to ignore requests on the part of the judiciary for reconsideration on constitutional grounds. In most modern constitutional democracies, judges are held in relatively high esteem—relative, at least, to politicians and used car salesmen. Furthermore, courts are generally viewed as much less affected by the malignant forces (and nastiness) at play in modern, partisan politics.[32] Few governments will therefore wish to risk going head to head with judges whose views on constitutional rights are likely to be viewed—by the public—as more reliable, even-handed, and fair-minded. Hence, in reality, weak form review tends, ultimately, to lead to strong form review. Democratic legislatures end up feeling obliged to defer to the "requests" of judges in constitutional rights cases. And so if we permit judges to pronounce on the wider set of issues that come to the fore when constitutional rights are in play (issues beyond equity and procedural fairness), then we will end up with strong form review and judicial decisions made on grounds upon which judges have no business adjudicating.

Tempting as it might be for them, Bellamy and his fellow critics of constitutional review would be well advised to avoid this line of reasoning. And the reason is quite simple: The argument cuts both ways. It may (though I have my doubts) offer some support for the view that judges need nothing more than an advisory role in order for us to reap the professed benefits of constitutional review. But it provides no less support for the thesis that members of modern constitutional democracies are much more comfortable having their fundamental constitutional rights dealt with by courts as opposed to legislatures. And what does this say about our supposed commitment to the kind of democracy heralded by Bellamy and his democratically inspired critics of constitutional review?

C. The Possibilities of Partnership

Let me begin by pointing out something upon which, I believe, Professor Bellamy and I are in full agreement. Even if fundamental rights to free expression, assembly, equality, religion, and so on are in some sense pre-political, putting such rights into practice within a particular society with its own unique social, political, economic, historical, and cultural circumstances requires a good deal of specification.[33] What must be specified, in many

[32] One must be careful here. In light of cases such as *Bush v. Gore*, 531 U.S. 98 (2000), many view the U.S. Supreme Court as no less susceptible to undue political influence than Congress.

[33] In Europe the "margin of appreciation" doctrine was developed partly in recognition of this fact. For example, appeal was made to the doctrine in the case *Otto-Preminger Institut v. Austria*, 19 Eur. Ct. H.R. 34, para. 50 (1994), where the European Court of Human Rights observed: "As in the case of "morals" it is not possible to discern throughout Europe a uniform conception of the significance of religion in society . . . even within a single country such conceptions may vary. For that reason it is not possible to arrive at a comprehensive definition of

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instances through acts of legislation, are the following: Who exactly has that right, against whom it is held, and what precisely it requires of those who shoulder the corresponding duties.[34] Someone has to take charge of specifying our rights. I take it we are also in agreement on the following: A *legitimate* constitutional democracy, whatever its form, must respect what we might call the *principle of popular sovereignty*. According to this principle, the people have, and can never relinquish, sovereignty over their government and its actions. Among the important implications of this principle is the following: Government actions are legitimate within the context of a constitutional democracy only if it is possible, in some way and to some degree, to ascribe those actions to the people themselves. It must be possible, in other words, for us to see those actions and the decisions leading up to them, as *our* actions. We must, in short, be able to take and maintain *ownership* of the relevant decisions and the resultant government actions. And all this applies as much to rights specifications as it does to decisions about how best to promote economic prosperity and a safe environment. Where Bellamy and I begin to part company, however, seems to be over the conditions, observance of which is necessary for maintaining democratic ownership. He seems to think that all "authorial" decisions must remain irrevocably with the people and their elected representatives. The negotiations required in order to specify rights must be guided by "democratic forms of reasoning." I, on the other hand, am happy to assign a significant, though limited, authorship role to judges deciding constitutional cases. Let me explain.

It is never a good idea to forget that the means through which ownership of rights-specifying decisions are secured in modern democracies are almost always *indirect*. In other words, it's important never to lose sight of the fact that "the people" do not themselves actually *make* most of the decisions to which they rightfully claim ownership. More often than not, other people make the relevant decisions affecting the fundamental social arrangements under which we lead our lives, presumably on our behalf. So the only real question is: Who can legitimately make those decisions and take those actions on our behalf? And on what basis are their decisions to be made? In many cases, of course, the relevant decisions are made by legislators, most of whom are elected to do so—though as we know this is not always the case. As we also know, legislators do not always act for the right reasons. But the thing about legislators is that they are more often than not selected or chosen by us to represent us, that is, to decide on the basis of our interests, wishes,

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what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feeling of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference."

For discussion of this doctrine and its impact on the idea of constitutional rights for the European Union, see W.J. Waluchow, *Constitutionalism in the EU: Pipedream or Possibility?*, *in* PHILOSOPHICAL FOUNDATIONS OF EU LAW 189 (Julie Dickson & Pavols Eleftheriadis eds., 2012).

[34] I am assuming here that the right in question is a Hohfeldian claim-right with its correlative duties. But much the same points apply to liberties, immunities, and so on.

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values, and preferences. Furthermore, legislators are expected, in making the decisions they do, always to be *responsive* to these considerations. How they are to do this is a contentious issue. Some legislators believe that their job is to act as the majority of their constituents demand or would have them act on the question at issue, as revealed, say, in a public opinion poll; others think that what is called for is their personal judgment in respect of the considerations I just mentioned, even if that judgment is at odds with what most constituents might want or think best. Despite these complications, and bearing in mind the fact that legislators do not always act for the right reasons, it seems reasonably easy to view ourselves as maintaining ownership of *legislative* decisions even though we ourselves do not actually make them. Nor, in most instances, do we in any meaningful way actually *participate* in the process leading up to the decisions made.

So how does all this bear on the question of constitutional review in a democracy? The answer is this. Once we realize that: (a) The people themselves seldom make, or even participate directly in the making of, political decisions; (b) legislative decisions are legitimate only insofar as, and the degree to which, they respect and reflect popular sovereignty; (c) the principal way in which popular sovereignty is respected is when, and if, those called on to make the relevant decisions are responsive to and make decisions which reflect the wishes, expectations, values, and interests of those in whose name those decisions are made; and (d) in complex modern societies an awful lot of such decisions are made by individuals other than elected legislators—e.g., by members of an ever increasing array of administrative and regulative bodies—then the question naturally arises: Why should we not suppose that individuals in addition to elected legislators might legitimately serve the role of helping to specify the underdetermined rights found in constitutional rights documents? Why not, for example, judges?

I have little doubt that at this point the following reply will be made. It is one thing to have one's wishes, expectations, values, and interests *respected*. It is another thing entirely to *participate* in the actual *making* of decisions based on those factors. But then the point to be made is one I've already mentioned: Most of us do not in fact participate in the legislative process in any meaningful way. True, some of us participate by helping to elect the officials by whose direct actions legislation is introduced.[35] And those of us who do not do so at the very least have the right to do so. But if this is all that's meant, then one begins to wonder whether participation is actually of paramount value here. Perhaps our principal concern should instead be *responsiveness* and *accountability*, with participation by way of elections, in addition to other forms of political activity (e.g., writing letters to

[35] It is worth bearing in mind that voter participation rates in modern democracies are, in many instances, nothing short of shocking. For example, in the last Canadian Federal election of May 2, 2011, only 61.1% of eligible voters cast a ballot. On October 7, 2011, less than half—49.02%—of eligible voters in the Ontario provincial election managed to cast a ballot, the lowest level since 1867. 2009 Parliamentary elections in Germany had a voter participation rate of 64.61%, while the German participation rate in the 2009 EU Parliamentary election stood at 39.53%.

the editor, participating in protest marches, and so on) being only one means of trying to bring these about. That is, so long as (a) the decisions made on our behalf are responsive to our wishes, views, expectations, values, and interests, and (b) we maintain final say on the legitimacy of the constitutional arrangements under which such decisions are supposed to be made, then whether or not we actually participate directly in their making may be of little consequence.

Now if responsiveness and accountability should be our primary concern, then the next crucial question becomes: Who is in the best position to exhibit these properties in their decisions and resultant actions? There is reason to think that judges might be in a very good institutional position to do so in relation to our constitutional commitment to observe fundamental rights—rights which can too easily be set aside for the sake of the less than benign forces by which elected legislators will too often be influenced. If concerns about accountability remain, then there are, as Bellamy acknowledges, ways in which these might be addressed. We might insist on a form of constitutional review that denies judges final say, as in the UK where judicial pronouncements on constitutional rights have only an advisory role—though as we have seen, that role often turns out, in practice, to grow into something much stronger than might initially have been envisioned. Yet another alternative is to include, in the relevant constitutional instruments, a robust reasonable limitations clause such as one finds in section 1 of the Canadian *Charter of Rights*, perhaps in tandem with a fully effective override clause like section 33.[36]

D. Concluding Thoughts

Perhaps I can sum up my worries about Bellamy's theory of constitutional review in the following way: I wonder whether it places too heavy an emphasis on the value of democratic participation at the expense of democratic responsiveness and rights protection. I also wonder whether it rests on a far too rosy picture of the extent to which democratic participation, in conditions of political equality, is what brings about satisfactory rights specifications. Among the strongest reasons for having an entrenched charter or bill of rights is to protect us from illegitimate government action, including illegitimate legislative action. An entrenched charter, and the judicial decisions taken under

[36] The reasonable limitations clause, found in section 1, states that the Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Canadian Charter of Rights and Freedoms, Part I § 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.). This provision was intended to leave Parliament, at the federal level, and the provincial legislatures considerable room to pursue valid social objectives without the looming threat of judges thwarting their legitimate efforts out of an inflated concern for the protection of individual rights. The notwithstanding or override clause provided an even greater safety valve. Section 33 provides that, "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter." *Id.* at § 33. The override is both effective for five years and renewable.

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it, can help provide this protection insofar as and to the extent that they make it difficult for government actors, most notably legislators and members of the executive, to engage in conduct that threatens the fundamental rights we deem worthy of entrenched, constitutional protection. Given reasonable disagreement about the requirements of such rights, *and* the political forces governing electoral politics that often incline elected governments, intentionally or not, to pursue courses of conduct that appear to threaten them, it seems prudent to place significant institutional impediments in the way of legislatures and executives. Entrenched constitutional rights allow us to do this. Yet if such impediments to rights violation are to be at all effective, it must not be easy for the very bodies against whom they are to serve as protection to avoid or overcome them. Constitutional rights must not, in other words, be such as to be easily ignored, infringed, or defined away by ordinary acts of legislation. I can't help but wonder whether this is precisely what we'll end up with if we follow Bellamy's lead and assign legislatures the *exclusive* role of defining what those impediments shall be taken to be for our communities. Do we not, in pursuing this option, render our community's fundamental constitutional rights commitments far too vulnerable to the rough and tumble of day-to-day electoral politics? To allow these constitutional commitments to be shaped exclusively by that process may render them hostage to the very forces against which they are intended to serve as protection.[37]

[37] For further reasons in favor of opting for a "partnership" between legislatures and courts in rights specification and protection, see W.J. Waluchow, A COMMON LAW THEORY OF JUDICIAL REVIEW: THE LIVING TREE (2007). There I draw on the advantages of viewing abstract constitutional rights as analogous to notions of "reasonable use of force" and "negligence" as these have been developed over the years, in an incremental, case-by-case manner, by common law courts. The virtues of this mode of constitutional rights specification when compared with what I refer to as the "top-down" method characteristic of general legislation are highlighted and defended. These virtues are cited in my attempt to justify a modest form of constitutional review.