

**Constitutional Dialogues and the Myth of Democratic Debilitation:
Defusing the Countermajoritarian Tension?**

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Each time a Supreme Court issues a controversial ruling, debate ensues about the role of the judiciary in a democracy and the threat judicial power poses.¹ Whether an unelected judiciary does or should have the final power to determine the meaning of the constitution is a question that has preoccupied scholars and jurists for all of U.S political history and certainly has preoccupied Canadian scholars and jurists in the wake of the patriation of the constitution and the establishment of the *Charter of Rights and Freedoms*.

Invariably debates and criticisms of judicial review are premised on the assumption that courts are powerful actors. If courts are powerful enough to have the final say in matters of constitutional interpretation, they can threaten or at least rival the power and authority of the democratically elected branches of a government. Scholars who believe that courts are this powerful maintain that the judiciary should wield its power carefully and parsimoniously so that it does not exacerbate the so-called “countermajoritarian” tension inherent in constitutional democracies (see, e.g., Bickel 1963).

In this paper, I question two key premises on which the countermajoritarian criticism of judicial activism is based. The first premise is that courts are powerful enough to end constitutional debates. Scholars such as Ronald Dworkin, for example, believe that judicial power is quite potent and that judicial authority is final. He offers an ominous description of this power in *Freedom’s Law*:

“Our legal culture insists that judges—and finally justices of the Supreme Court—have the last word about the proper interpretation of the Constitution.... That means that judges must answer intractable, controversial and profound questions of political morality that philosophers and citizens have debated for centuries. It means that the rest of us must accept the deliverances of a majority of the justices, whose insight into these great issues is not spectacularly special.” (Dworkin 1996, 74)

In contrast, I believe that the scholarship on judicial review and the history of constitutional interpretation and development in the United States and Canada demonstrates that the judiciary simply does not have the power to truncate political or constitutional debate that Dworkin describes. While particular decisions may alter constitutional debate or the course of policymaking, it is simply inaccurate to claim, as Dworkin does, that courts actually have the “last word”. Even if one believes that courts *should* have the last word, I believe that the realities and history of the political process in the United States and Canada demonstrate that the courts do not and cannot foreclose political debate.

History supports Alexander Hamilton’s claim in *Federalist* 78 that the judiciary is the least dangerous branch of the government. Courts lack enforcement power. They are passive and can remain inanimate until and unless someone brings a case to them. When they render a controversial decision, they may seem to be quite powerful. But, they depend on the support or acquiescence of the other branches or the people for the enforcement of their decisions (see e.g., Rosen 2006; Rosenberg 2008).

This weak view of judicial power has an important impact on another key premise of the criticism of judicial review. Regardless of the potency with which courts are regarded, critics contend that judicial activism debilitates the deliberative capacity of the elected branches by erecting obstacles to free legislative deliberation. The threat of judicial review causes legislators to reconsider their policy preferences in order to avoid the possibility of judicial review (see, e.g., Thayer 1893, Tushnet 1995-96, Tushnet 2000). To the extent that it is an obstacle to unfettered and unchecked legislative deliberation, judicial activism undermines the integrity of

the electoral and legislative processes and threatens the capacity of the people to govern themselves through their elected officials.

This criticism is grounded on a very narrow definition of democracy that emphasizes parliamentary sovereignty as a core principle. Insofar as “the people” should have the last word when it comes to constitutional interpretation and insofar as the legislature embodies the people’s will, the judiciary should be loathe to engage in more than parsimonious activism. Any broader exercise of judicial power is illegitimate for two reasons. First, it exacerbates the counter-majoritarian tension. Second, as Jeremy Waldron notes, because judicial review is simply a rival decision rule for resolving policy disputes or disagreements about the scope and definition of rights. Judicial review, says Waldron, “should not be understood as a confrontation between defenders of rights and opponents of rights...” It is, instead, “a confrontation between one view of rights and another” (Waldron 2005-06 1366). Disagreements are “settled by voting among Justices—some voting for one conception... others for another, and whichever side has the most votes on the Court prevails. It is not clear that this is an appropriate basis for the settlement of [disputes] among a free and democratic people” (Waldron 2006-06, 1358; Petter 2010, 55-56).

Democratically-based criticisms such as this are grounded on one key assumption: that the legislature does, indeed embody and manifest the popular will. As Waldron notes, for example:

I assume that [the] legislature is a large deliberative body, accustomed to dealing with difficult issues, including important issues of justice and social policy. The legislators deliberate and vote on public issues, and the procedures for lawmaking are elaborate and responsible, and incorporate various safeguards such as bicameralism, robust committee scrutiny and multiple levels of consideration, debate and voting... Members of the legislature think of themselves as representative, in a variety of ways, sometimes making the interests and opinions of their constituents key to their participation, sometimes thinking more in terms of virtual representation of interests and opinions throughout the society as a whole. (Waldron, 1361)

This vision of the legislative process meets any ideal set of criteria for a robust democracy. But, is simply not the case in a nation such as the United States where the governmental structure is designed to break up and filter the popular will and manifest discrete versions of it in several different ways. There is no one clear manifestation of “the people.” Although the fusion of legislative and executive power in Canada’s parliamentary system enhances the credibility of Parliament’s claim to manifest the popular will, representation theory as well as studies of legislative behavior demonstrate that the motive of legislators do not always demonstrate a concern for the popular will or the public interest. Elected officials are as likely to engage in the practice of gerrymandering or other cartel-like behaviors (see Katz and Mair 1995; Manfredi and Rush 2007; Rush and Manfredi 2009; Ely 1980) as they are to engage in the production of public interest legislation.

Accordingly, to claim that judicial negation of legislation is always a threat to democratic self-government is simply not accurate or, at least, not supported by the scholarly literature. At best, the literature is divided about the extent to which the legislature manifests the true popular will. Instead, judicial review and legislation can be regarded simply as two different decision rules that are built into a particular constitutional system. Accordingly a clash between them

represents nothing more than one of many inefficiencies built into modern democracies to ensure that no one group is able to govern easily.

In this respect, my analysis is grounded upon the vision of democracy that informs Philippe Schmitter and Terry Karl's discussion their seminal article, "What Democracy is and is Not" (Schmitter and Karl 1991). Democracy is more than simple parliamentary sovereignty. By their lights, it is a system comprised of rival decision rules and competing avenues of political influence. In this regard, judicial review is merely one of many methods by which modern democracies ensure that parliamentary and majoritarian power are checked.

If we look at democracy from this broad point of view, laments about the judicial threat to or debilitation of the legislative capacity to legislate are indeed exaggerated. Legislatures have the power to respond to judicial decisions by passing new laws. Judicial decisions are buffered and filtered by the same political process that buffers and filters the impact of legislation. Accordingly, the history of constitutional development in both countries manifests what scholars such as Hogg, Thornton and Wright describe as a "dialogic" pattern (Hogg and Bushell 1997; Hogg et al 2007).

In addition, in Canada and the United States, legislatures have the constitutionally granted power to override judicial decisions (Section 33) or restrict the scope of the court's jurisdiction (Article III, section 2). Critics argue that these powers (Manfredi 2001, 4-5; Petter 2010, 60) are dead letters because their use would most certainly bear a potent political cost in the form of popular retribution. To the extent that this is so, it is clear then that the courts do not dominate political discourse. Legislatures can respond to judicial decisions. To the extent that they must explain such responses to their constituents to avoid electoral backlash, the process of responding is clearly democratic. To the extent that popular opinion would support a judicial decision instead of a legislative response to it, it demonstrates that the legislature may not, indeed be representing the popular will or acting in the public interest. In this respect, then, the countermajoritarian tension is much more of a red herring than a bona fide constitutional problem.

Judicial Power

One must wonder what happened to the judiciary between the time at which Alexander Hamilton's minimalist description and Ronald Dworkin's writings. Visions such as Dworkin's fan the flames of fear and hyperbole among the press whenever members of the United States Supreme Court retire and speculation arises concerning the impact and political disposition of the President's nominee to succeed the retiring member of the court. While concerns about Sonia Sotomayor's references to the wisdom of a "wise Latina"² fuelled speculation that she might be a biased interpreter of the U.S. Constitution, perhaps the most telling expression by Sen. Edward M. Kennedy of concerns about judicial power came in response to the nomination of Robert Bork by President Ronald Reagan. In Robert Bork's America, Kennedy said,

women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists would be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary is often the only protector of the individual rights that are the heart of our democracy. (Kennedy 1987)

This same view of judicial power led Ronald Dworkin to declare that the U.S. Court's decision in *Citizens United v. Federal Election Commission* (2010) to strike down part of the Bipartisan Campaign Reform Act "threatens democracy" (Dworkin 2010).

What Judges Say v. What Courts Can Actually Do

Judges provide critics with all the ammunition they need to fear judicial activism. The famous quip about the Warren Court, "With five votes we can do anything" (Fiss 1982, 758) manifested a judicial hubris that simply does not stand up to historical scrutiny. With five votes, a Supreme Court can *say* anything. But, the *doing* takes place after the court issues its decision.

Many decisions by the Canadian Supreme Court are peppered with assertions of supreme judicial power. One such statement by Justice McLachlin in *R v. Zundel* (1992) set the tone for judicial assertions of supremacy when it comes to constitutional interpretation. *Zundel* entailed a challenge to section 181 of the federal criminal code. Section 181 read: "Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years." *Zundel* had been prosecuted for publishing a pamphlet entitled *Did Six Million Really Die?* in which he questioned the occurrence of the Holocaust.

In declaring section 181 unconstitutionally overbroad, Justice McLachlin evinced an abject lack of faith in or deference to the capacity of the other branches to interpret laws in conformity to the *Charter*:

I, for one, find cold comfort in the assurance that a prosecutor's perception of "overall beneficial or neutral effect" affords adequate protection against undue impingement on the free expression of facts and opinions. The whole purpose of enshrining rights in the *Charter* is to afford the individual protection against even the well-intentioned majority. To justify an invasion of a constitutional right on the ground that public authorities can be trusted not to violate it unduly is to undermine the very premise upon which the *Charter* is predicated. (*R. v. Zundel*, PAGE)

More recently Justice McLachlin reasserted the privileged, supreme position of the judiciary in matters of constitutional interpretation in *Sauvé v. Canada (Chief Electoral Officer)* ("*Sauvé II*" 2002). *Sauvé* was a "second look" case³ involving challenges to parliamentary restrictions on prisoners' voting rights. In response to *Sauvé I*, Parliament had revised the Canada Elections Act in order to reduce the restrictions on prisoners' voting rights. Despite Parliament's attempts to adjust restrictions on felons' voting rights in response to the Supreme Court's concerns, Chief Justice McLachlin asserted the privileged, supreme position of the judiciary in matters of constitutional interpretation. In overruling the lower court's decision to sustain the new restrictions on prisoners' voting rights, McLachlin argued:

the fact that the challenged denial of the right to vote followed judicial rejection of an even more comprehensive denial, does not mean that the Court should defer to Parliament as part of a "dialogue". Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of "if at first you don't succeed, try, try again." (*Sauvé II*, para 17)

The Canadian Supreme Court's ruling in *Chaoulli v. Quebec* is an equally compelling example of the judiciary's belief in its capacity for unilateralism. There, the court ruled that the

Quebec Health Insurance Act and the *Hospital Insurance Act*'s prohibition of private medical insurance violated the Quebec Charter of Human Rights and Freedoms. As well, three of the four justices who voted to strike down the acts also asserted that they violated section 7 of the *Charter*.

Justice Deschamps' impatience with the political process was evident in her justification for judicial intervention in what was, according to Christopher Manfredi a debate not about section 7 rights to security, but the intricacies of health care policy.⁴ On the one hand, Deschamps seemed to appreciate the intricacies of the policymaking process

a court must show deference where the evidence establishes that the government has assigned proper weight to each of the competing interests. Certain factors favour greater deference, such as the prospective nature of the decision, the impact on public finances, the multiplicity of competing interests, the difficulty of presenting scientific evidence and the limited time available to the state. This list is certainly not exhaustive. It serves primarily to highlight the facts that it is up to the government to choose the measure, that the decision is often complex and difficult, and that the government must have the necessary time and resources to respond (*Chaoulli*, para 95).

But, her frustration and impatience with the democratic process were manifest as she explained that "care must be taken not to extend the notion of deference too far" (*Ibid.*, para. 136) Declaring that courts are "the last line of defence for citizens" (*Ibid* para. 96), Deschamps asserted that the Supreme Court could resolve the debate about health policy more effectively than the legislature:

The instant case is a good example of a case in which the courts have all the necessary tools to evaluate the government's measure. Ample evidence was presented. The government had plenty of time to act. Numerous commissions have been established... Governments have promised on numerous occasions to find a solution to the problem of waiting lists. Given the tendency to focus the debate on a sociopolitical philosophy, it seems that governments have lost sight of the urgency of taking concrete action. (*Ibid.*)

Finally, in a famous assertion of judicial supremacy in *Vriend v. Alberta*, the Canadian court not only declared Alberta's *Individual Rights Protection Act* "IRPA" unconstitutional, it went on to change the substance of the act by "reading in" new meaning to it. Delwin Vriend had challenged IRPA's constitutionality because it did not include sexual orientation as a basis for filing discrimination claim. In supporting the court's decision to read sexual orientation into the IRPA text, Justice Iacobucci condemned the Alberta legislature's "improper" democratic process and declared that the Supreme Court's role was to correct the errors that the legislative process generates.

In my view, a democracy requires that legislators take into account the interests of majorities and minorities alike, all of whom will be affected by the decisions they make. Where the interests of a minority have been denied consideration, especially where that group has historically been the target of prejudice and discrimination, I believe that judicial intervention is warranted to correct a democratic process that has acted improperly. (*Vriend*, para 176.)

Opinions by the United States Supreme Court are similarly littered with assertions of unilateral power by court members. Beginning with Chief Justice Marshall's claim in *Marbury v. Madison* that "It is emphatically the province and duty of the judicial department to say what the law is" (1803, 137) members of the American Supreme Court have frequently maintained the supremacy and finality of the court in matters of constitutional interpretation

In *City of Boerne v. Flores* (1997) Justice Kennedy asserted that when a conflict exists between a Court's decision and an ensuing congressional statute, the Court's decision will override the law. *Boerne* dealt with a challenge to the Religious Freedom Restoration Act (RFRA) which Congress had passed in response to the Supreme Court's decision in *Employment Division v. Smith* (1990). In *Smith*, the court had ruled that a state could deny unemployment benefits to a person fired for violating a state prohibition on the use of drugs, even though the use of the drug was part of a religious ritual. In this case, several native Americans had been fired for and denied unemployment benefits due to their use of peyote. In response, Congress passed the Religious Freedom Restoration Act (RFRA) which stated, in part: "Government may burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) furthers a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

In *Boerne*, the catholic archbishop of San Antonio used RFRA to challenge the denial of a special building permit to enlarge a St. Peter's church in Boerne, TX. The City of Boerne had denied the permit because the church was covered by historic preservation laws. Speaking for the court, Justice Kennedy said that

[w]hen the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including stare decisis, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control. (*Boerne*, 536)

Even though she dissented, Justice O'Connor echoed Kennedy's assertion that the court—not the Congress—held final power when it came to interpreting the constitution "Congress must make its judgments consistent with this Court's exposition of the Constitution and with the limits placed on its legislative authority by provisions such as the Fourteenth Amendment." (Ibid., 546)

In *Dickerson v. U.S.*, for example, Justice Rehnquist maintained that the Supreme Court had the final authority to declare what the constitution means: "Congress may not legislatively supersede our decisions interpreting and applying the Constitution" (*Dickerson*, 437). Accordingly, Rehnquist and the court declared that Congress could not override the decision in *Miranda v. Arizona* in which the Supreme Court set forth rules that police had to follow before interrogating suspects.

Despite assertions of judicial supremacy by particular court members, U.S. and Canadian history are also replete with examples in which court decisions were overruled or ignored. Abraham Lincoln declared that the Dred Scot decision did not establish a precedent. Andrew Jackson continued to relocate the Cherokee despite the Supreme Court's decision in *Worcester v. Georgia* (1832). As noted above, RFRA was an attempt to reverse to a supreme court decision.⁵

More recently, reactions to controversial Supreme Court decisions demonstrate that regardless of whether the court declares a law unconstitutional, it can and does engender backlash and criticism that demonstrate the limits to judicial power. In response to the *Citizens United* decision that Dworkin said threatened democracy, Congress immediately sought to generate new legislation restricting the flow of money in political campaigns.⁶ While the court struck down a law in *Citizens United*, its decision to uphold a law that permitted a controversial seizure of private property for public use in *Kelo v. New London* (2005) engendered an equally powerful response. By July 2007, 42 states had enacted some type of reform legislation that restricted takings in response to *Kelo*.⁷ In response to the Massachusetts Supreme Court decision in *Goodridge v. Department of Health* (2003) to declare restrictions on same-sex marriage restrictions, many states sought to amend their constitutions to recognize only heterosexual marriage (CITE).

Examples such as these demonstrate that conflicts between courts and legislatures do not occur in a political vacuum or end with the sound of a gavel. They are part of a process of constitutional interpretation and development that engages a multitude of political actors. Cast in this light, judicial power is much more modest than it is in descriptions such as Dworkin's.

Constitutional Interpretation as a Dialogic or Coordinate Process

In a seminal article in 1997, Peter Hogg and Allison Bushell reached the same conclusion as they set out to assuage the countermajoritarian tension that inheres in judicial review and to counter critics of judicial activism. As they (along with new colleague Wade Wright) later argued in "*Charter Dialogue Revisited*," the *Charter* has provisions that enable "legislatures to limit, modify, or override the *Charter* guarantees" (2007, 3) and judicial declarations of unconstitutionality. After the judiciary invalidates a law, the *Charter* still grants the legislature "a range of choices as to the design of corrective legislation--legislation that would accomplish the same objective, or nearly the same objective, as the law that was struck down." Accordingly, they argue, the *Charter* does not and, therefore, the judiciary *cannot* "[raise] an absolute barrier to the wishes of the democratic institutions" (Ibid.) The authors conclude that Canada has "a weaker form of judicial review that rarely had the effect of actually defeating the purpose of the legislative body" (Ibid., 4).

The authors insisted as well that their dialogic vision was descriptive—not normative (26). They did not mean to endorse or encourage judicial activism. Nor did they intend to offer a theory of or justification for judicial review (28). Instead, "What "*Charter Dialogue*" demonstrated was not that judicial review was good, but that judicial review under the *Charter* was weaker than is generally supposed" (28).

The assumption that judicial review is "weak" is a vital aspect of the authors' argument. Critics such as Christopher Manfredi and James Kelly (1997; 2001) responded that the notion of dialogue is 'flawed' because it suffers from an unresolvable contradiction. On the one hand, the authors maintain that the court is weak. On the other, they assume that the court holds a monopoly on correct interpretation. Yet, they maintain that and argue that legislatures are equally legitimate interpreters of the constitution. Despite the court's power, "the final form of [a] law... will be the responsibility of the legislature" (2007, 13). Insofar as the *Charter* contemplates judicial review of legislation and insofar as this gives the judiciary a key role in constitutional interpretation, the authors state that

The key issue, in our view, is not whether the legislative and executive branches do, and should, interpret the *Charter* (they do and should), but whether they should *act* on

an interpretation of the *Charter* that conflicts with an interpretation provided by the courts. In our view, where the interpretive task does not take place against the backdrop of a prior relevant judicial decision, the legislature and the executive may act on their interpretation of the *Charter*. Why? Because, in doing so, they would not be doing (or refraining from doing) something that the courts have said would unjustifiably infringe the *Charter*. (2007, 33)

In this respect, the legislature is free to act within the broad confines established by the judiciary's interpretation of the constitution.

To a certain extent, Hogg, Bushnell and Wright's vision resonates with Alexander Hamilton's vision of the judiciary as the "least dangerous branch" of government. Yet, critics contend that the dialogic vision of constitutional development is inaccurate and does not account for the realities of judicial behavior. Manfredi cites *Sauvé II*, as an example. Insofar as McLachlin rejected the "try, try again" model of dialogic constitutional development in that case, Manfredi concludes that the dialogic vision inaccurately depicts the relationship between the courts and the legislature.

Criticisms of the dialogue such as Manfredi's are grounded on too narrow a time frame. The unwillingness of the court or individual justices to be solicitous of legislative motives and explanations in particular "second look" cases manifests a reality of the process of constitutional development that is evident in the United States and Canada.⁸ Sometimes the "dialogue" between courts and legislatures takes place over many years involves many cases. As well, it clearly is more than a dialogue; it is a colloquy that includes provinces, states, lawyers, litigants and interest groups. So, regardless of whether a court declares several laws unconstitutional (in second and third or nth-look cases) or whether the court engages in a dialogue and defers to the legislature, these other players in the political process will not simply close up shop and retire when the decision is rendered. Thus, looking through the lens of 225 years of American constitutional history (as opposed to 25 years of Canadian *Charter* history), it is clear that constitutional interpretation and development are dynamic processes, and judicial decisions—whether they embody assertions of judicial supremacy or not—seldom end constitutional debates or development. They are simply part of an ongoing dialogic process.

From Weakness to Debilitation?

While the judiciary may not be powerful enough to have the *final* say all the time when it comes to constitutional interpretation, critics maintain that the mere fact that courts can have a palpable and sometimes substantial impact on the policymaking process poses important concerns for democratic theory. Judicial review remains a countermajoritarian force and a threat to the capacity of the elected branches (and, by extension, the citizenry) to engage in the deliberative process of democratic government.

The debilitation hypothesis was perhaps first set forth by James Bradley Thayer. Thayer emphasized two points. First, the judiciary should exercise restraint because it is no better at resolving policy issues or interpreting the constitutional text than the legislature. In fact, it is, in some ways worse than the legislature because it is fewer in number and it is not electorally accountable. Second, the courts should exercise restraint because judicial activism provides an incentive for the elected officials to shirk their responsibilities and use the courts to provide cover for controversial policy decisions. In both cases, Thayer emphasizes that activism

undermines the judiciary's legitimacy because it threatens the integrity of the deliberative process of policymaking.

Writing in 1893, Thayer lamented that the American doctrine and practice of constitutional law had clearly diminished the quality of legislative deliberation. Insofar as legislators looked to the courts for the resolution of constitutional questions, they tended to be less preoccupied with questions of justice and right than their counterparts in countries without written constitutions. Legislators' minds were filled with "thoughts of mere legality" (as defined by the judiciary) instead of the public interest.

Worse, said Thayer, the existence of and recourse to judicial review naturally instilled a lack of responsibility in the legislature. "If we are wrong," the legislators say, "the courts will correct it" (Thayer 1893, 155-56). Thayer feared, then that the practice of judicial review harbored a "great range of possible harm and evil:" "The checking and cutting down of legislative power, by numerous detailed prohibitions in the constitution, cannot be accomplished without making the government petty and incompetent" (Thayer 1893, 156).

Thayer acknowledged that constitutional development was indeed a dialogic process. But, it was one in which the judiciary should play a carefully measured role—"merely fixing the outside border of reasonable legislative action" (148)—so that the legislature was left free to deliberate and make mistakes from time to time.

Thayer argued that the constitution's meaning was neither fixed nor clear. Accordingly, the responsible exercise of judicial authority (which, Thayer believed was potent enough to truncate political debate) required deference to the legislature. "With regard to the great, complex, ever-unfolding exigencies of government," he said:

much which will seem unconstitutional to one man, or body of men may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a wide range of choice and judgment; and in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice... (144)

Insofar as Thayer obviously believed that the judiciary could foreclose political debate, he believed that within a broad universe of constitutional meaning and statutory construction, the policy preferences of the majority of an unelected court were no better than those of a majority of both house of a the congress and president (or a state legislature and governor). But, whereas Waldron (2005, 1358) argued that this rendered judicial review illegitimate, Thayer simply lamented that it was debilitating: too much judicial review would, then, diminish the legislators' capacity or desire to engage in lengthy and tedious process of debate.

It is important to note that Thayer was not quixotic. He acknowledged that the relationship between the judiciary and the legislature was one between equals—not between a superior and inferior branch. Accordingly, his fears about the debilitating impact of judicial review were animated as much by his observations of legislative behavior as they were by what some might call a judicial will to power.⁹ He noted, for example, that the judiciary should be wary of legislative attempts to shirk responsibilities. Citing Daniel Webster's argument for the plaintiff in the landmark Charles River Bridge case,¹⁰ Thayer noted that "members of the legislatures sometimes vote for a law, the constitutionality of which they doubt, on the consideration that the question may be determined by the judges" (146). Thayer applauded the fact that "the court did not yield to this ingenious attempt to turn them [the judges] into a board for answering legislative conundrums" (Ibid.).

Even if judicial review does not cause the legislature to shirk its responsibilities, Mark Tushnet shows that the mere existence of judicial review imposes a real cost on the legislative process. Tushnet, like Thayer, assumed that the judiciary is powerful enough to terminate constitutional debate. Accordingly, he argues, the threat of judicial review causes legislators to defend against the threat of judicial review by choosing “policies that are less effective but more easily defensible than other constitutional alternatives” (1995-96, 250).

Tushnet rejects arguments made by Hogg, et al. that legislatures have the power to respond to or engage in a dialogue with the judiciary. For example, Tushnet argues that recalcitrant Court could make Congress’s use of its jurisdiction-stripping power quite difficult (1995-96, 285). With regard to section 33 of the *Charter*, Tushnet echoes Manfredi’s criticism that political pressures render it a dead letter.

Essentially, Tushnet argues that the dialogue metaphor overestimates the legislature’s capacity to regroup and respond to a negative judicial decision with a newly crafted law. Whereas scholars such as Hogg et al suggest that legislative failure to override controversial judicial decisions can be dismissed as legislative acquiescence, agreement or simply a failure or refusal to work with competing political interests, Tushnet argues that that nature of the legislative process undermines such an explanation. To the extent that a sizable legislative minority agrees with the court or to the extent that that law was passed by a fragile legislative coalition that it would be difficult to remobilize, a lack of legislative response does not indicate legislative agreement: “it could as easily result from a structurally induced legislative paralysis as from agreement” (Tushnet, 2003, 97)¹¹

Accordingly, the judicial power is amplified to the extent that it can be wielded more easily than the legislative power. Marshalling five votes out of nine on a court is much easier than re-marshalling hundreds of legislative votes in response to an adverse judicial decision. This argument, however, is hardly a unique basis on which to criticize judicial review or defend the legislature’s efforts. The same argument can also be made about any litigant that seeks to use any part of the judiciary to resist legislation. We can make the same claim in the United States about presidential vetoes, presidential signing statements, filibusters, the bicameral structure of the Congress and other constitutional structures (such as staggered federal electoral terms) that hamper or divide national popular majorities. Similarly, the federal structure of the United States and Canada operates at the expense of parliamentary sovereignty and majority rule. In fact, one might argue that U.S. presidential vetoes and signing statements are more counter-majoritarian because overriding the former requires a two-thirds vote in both houses and there is nothing technically to “override” in the latter because it accompanies presidential approval of legislation.

The debilitation argument would be more compelling if judicial review were the one, unique rival to legislative power in a democracy. But it is not. It is one of many manifestations of the popular will in a modern democratic system of government. Cast in this light, judicial review is more than just a decision rule that is inferior to that which characterizes the legislative process (See Waldron 1995-96, 1358). It is, simply, one of the many different decision rules that comprise a modern democracy as described by Schmitter and Karl. Judicial review, like interest group behavior, filibusters in the Senate, executive vetoes, separation of powers, federalism and the instruments of direct democracy are all parts of modern democratic system that are designed to ensure that parliaments are not sovereign.

Accordingly, in a modern democracy, judicial review poses no unique threat to the legislature’s power and, therefore, no unique threat to the people’s or the majority’s ability to

govern. The judiciary is one of many hurdles to unfettered legislative power. Competition with rival political actors such as courts and interest groups may debilitate the legislature to the extent that it forces legislators to behave strategically. But, in this respect, democracy can be regarded as a process of mutual debilitation—checks and balances.

A Threat to Democracy More Ominous than Debilitation: Legislative Malfeasance

From this broad democratic perspective, I believe that the debilitation argument actually does more to justify judicial activism than it does to undermine its legitimacy. Tushnet acknowledges that a negative court decision might simply serve as an injection of additional energy into an otherwise unstable and possibly dynamic political debate:

[an] invalidated statute [may] represent[t] a momentary compromise among competing values, a compromise that might have been struck differently few days or weeks later, and the new statute represents a compromise that might have been reached when the statute was initially enacted. The Court has substituted its own balance of interests for the legislature's, but the Court's substitute is politically acceptable. The result is not troubling to a democrat, but it is not clear whether a true dialogue has occurred between the legislature and the Court. (2003, 98)

This passage is quite important. In contrast to Waldron's more benign view of the legislative process, Tushnet acknowledges that a particular piece of legislation may not bear the stamp of popular support or embody the popular will or interests. Insofar as a law may be a mere momentary compromise that manages to get a majority vote or that a court's input may change the preferences of some legislators (or, perhaps, reflect their true preferences), it is difficult to allege that judicial review is "countermajoritarian." A law may be a product of strategic or at least insincere voting by the legislature. It may, as Thayer noted, be designed with the hope or intention that the judiciary will strike it down.¹²

This undermines an important premise of the countermajoritarian criticism of judicial review. By definition, judicial review presents a *countermajoritarian* threat *only* if we can assume or conclude that a negated law really does embody the interests or will of a majority of the people (as expressed through their elected officials). If, however, we acknowledge that legislation is or can be the product of strategic, self-serving or some other legislative motive not associated with the public interest, then the judicial negation of a law does not, by definition, embody a countermajoritarian threat. It represents elite judicial disagreement with elite legislative behavior. If we cannot argue that the legislature has *a priori* democratic legitimacy, we cannot claim that judicial review poses a counter-democratic threat.

Amidst the countless criticisms of judicial review, the issue of the legislature's legitimacy is seldom given much attention. Yet, political science literature is replete with analyses that indicate that legislative behavior is not always in the public interest. Devins (2001-02) documents several examples of congressional legislation designed not to ensure judicial review, but seemingly with the hope of judicial negation. During the New Deal, Senate Judiciary Chair Henry Ashurst said that "we reasoned from non-existent premises and, at times, we seemed to accept chimeras, phantasies and exploded social and economic theories as our guides" (Ibid., 438). In response, Justice Harlan Fiske Stone lamented the "general sloppiness" of legislation and hoped that Congress would change its ways and "do its job" (Ibid, 438-39). Some 60 years later, Justice Scalia offered a similar criticism when he stated "if Congress is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the

Constitution...perhaps the presumption of Congress acting constitutionally is unwarranted” (Ibid., 440).¹³

Most recently, Justice Kennedy made a similar admonishment of the Congress in *Citizens United v. Federal Election Commission* (2010). Despite claims by critics that the decision “threatens democracy,” a closer look indicates that it is an attempt by the court to force Congress to “do its job” and carefully draft legislation that reflects the public interest and does not require or invite judicial divination of congressional intent. The lack of clarity in the Bipartisan Campaign Reform Act (BCRA) created the possibility that “Congress could ban political speech of media corporations” (2010, 905). Kennedy rejected the possibility that the Court should seek to clarify statutory language that raised such possibilities: “any effort by the Judiciary to decide which means of communication are to be preferred...would raise questions as to the courts’ own lawful authority” (890). As a result, it is not for the judiciary to clean up sloppy legislation:

Though it is true that the Court should construe statutes as necessary to avoid constitutional questions, the series of steps suggested would be difficult to take in view of the language of the statute. In addition to those difficulties the Government's suggestion is troubling for still another reason. The Government does not say that it agrees with the interpretation it wants us to consider. (892)

Viewed from this perspective, *Citizens United* was an exercise of judicial restraint: Kennedy and the majority were unwilling to add the substance and clarity to BCRA that Congress had chosen to omit.

Critics such as Dworkin nonetheless contend that the decision threatened democracy by removing the constraints on corporate spending. But sober reading of the decision indicates that this is not accurate. The court was unwilling to uphold sections of BCRA that were written broadly enough to threaten the media and which, in sum, muffled the voices of many of the actors that rival the power of the legislature in the political process.

The censorship we now confront is vast in its reach. The Government has “muffle[d] the voices that best represent the most significant segments of the economy.” And “the electorate [has been] deprived of information, knowledge and opinion vital to its function.” By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. Factions will necessarily form in our Republic, but the remedy of “destroying the liberty” of some factions is “worse than the disease.” Factions should be checked by permitting them all to speak, and by entrusting the people to judge what is true and what is false. (907)

In this respect, the decision affirms the broad version of democracy that informed the *Federalist* and which rejects the notion of parliamentary (or congressional) sovereignty.

Thus, while a decision such as *Citizens United* can be regarded as an activist threat to democratic government because it declared legislation unconstitutional, the court’s reasoning indicates that the threat to democracy in this case came from the failure of Congress to live up to the legislative ideal described by Waldron. BCRA is an example of a law drafted in a manner that invited judicial revision and clarification. Instead of engaging in such legislative tasks, the court declared the challenged sections of BCRA to be unconstitutionally vague and challenged Congress to do a better, more responsible job of lawmaking. As demonstrated by the evolution

and development of the DISCLOSE Act, it is clear that Congress is up to the task and capable of responding to a judicial rebuke.¹⁴

Judicial Review and the Countermajoritarian Tension in the Broader Democratic Context

This criticism of the legislature's claim to democratic legitimacy does not discount the fact that judges can and do overestimate their power. The examples of judicial hubris that I note in this paper demonstrate that. But, I believe it is clear that criticisms of judicial review based on claims of countermajoritarianism or deliberative debilitation are hardly as strong in reality as they are in theory. We may prefer to promote an admittedly imperfect process of legislative deliberation and protect it from the potentially debilitating impact of judicial review. The legislative process may be flawed but, it may be a more perfect decision rule for a democracy than that embodied in decisions by a much smaller, electorally unaccountable judiciary. Nevertheless, this is a weak basis on which to claim that judicial review debilitates the capacity of the legislature to do its job.

The "debilitating" impact of judicial review is hardly a unique obstacle to legislative freedom in a robust democratic system. The democracy described by Schmitter and Karl embodies multiple, ongoing checks to legislative freedom between elections. Freedom of speech, interest group activity, separation of powers, executive vetoes, procedural rules such as filibusters that favor political minorities, the tools of direct democracy and litigation all ensure that a democracy is more than mere competition for office in a sovereign parliament. Cast in this broad sense, democracy is supposed to be an inefficient governmental process characterized by multiple and sometimes conflicting decision rules. The judiciary is merely the embodiment of one of those decision rules.

In conclusion then, notions of judicial power and legislative debilitation are exaggerated or miscast. Courts are powerful to the extent that they have in impact on the policymaking process. But, they are one of many actors who do so. The same actors that check the legislature also buffer the impact of judicial decisions. Accordingly, while courts may *affect* the political process, they cannot be said to have the power to dominate it or foreclose constitutional debate.

As well, when they do disagree with the legislature, it can hardly be regarded as any more of a debilitating threat to popular self-government than those posed by the other checks on the legislature that exist in a robust democracy. Insofar as laws may embody more (or less) than the public's interest, we cannot argue that the legislature always speaks for or embodies the popular will. Therefore, the notion that judicial review is a threat to democratic self-government is weakened. To the extent that legislatures seek judicial "resolution" of difficult political questions or act in their own interest (not the public's), they forsake their claims to democratic legitimacy and, as a result, render the counterdemocratic challenge to judicial review conceptually nonsensical.

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Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) (USA)
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Sauvé v. Canada (Chief Electoral Officer) [2002] 3 S.C.R. 519 (Canada)
Vriend v. Alberta [1998] 1. S.C.R 493 (Canada)
R. v. Zundel, [1992] 2 S.C.R. 731 (Canada)

¹ There are numerous examples of such outcry. Most recently, see Dworkin 2010. See also *First Things* 1996, *Commentary* 2003

² See, e.g., “Writing Reveal Sotomayor’s Controversial ‘Wise Latina’ Remark Not Isolated.” Fox News. 4 June 2009. Available: <http://www.foxnews.com/politics/2009/06/04/writings-reveal-sotomayors-controversial-wise-latina-remark-isolated/> Remarkably, similar statements about the importance of his Italian heritage by Judge Samuel Alito during his nomination hearings received very little media attention. For a humorous analysis of this inconsistency, see “Neutral Man’s Burden. The Colbert Report. 16 July 2009. <http://www.colbertnation.com/the-colbert-report-videos/238783/july-16-2009/the-word---neutral-man-s-burden> .

³ The first case was *Sauvé v. Canada (Attorney General)* [1993] 2 S.C.R. 438

⁴ See Manfredi and Rush 2009a at 131.

⁵ See generally, the works of Louis Fisher. These references are drawn from the discussion in Fisher and Devins 2001, 1-23.

⁶ Refer to Schumer-Van Hollern; DISCLOSE

⁷ See “State Legislation following *Kelo v. New London*.”

http://en.wikipedia.org/wiki/Kelo_v._City_of_New_London#State_legislation_following_Kelo_v._City_of_New_London

⁸ See, e.g., Louis Fisher, “Interpreting the Constitution.” *Extensions: A Journal of the Carl Albert Congressional Research and Studies Center*, 15-20 (Fall 2008); Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process*. Princeton: Princeton University Press 1988; Neal Devins and Louis Fisher, *The Democratic Constitution*. New York: Oxford University Press 2004.

⁹ See the symposium in *Commentary* 2003.

¹⁰ *Charles River Bridge v. Warren*

¹¹ See also Andrew Petter, “Taking Dialogue Theory Much too Seriously (Or Perhaps *Charter* Dialogue isn’t such a Good Thing After All.” (2007) 45 *Osgoode Hall L.J.* 147, 161: “while legislatures have de jure powers to override courts under section 33, the political inability of legislatures to exercise such powers gives courts de facto final say over the constitutional acceptability of legislative objectives.”

¹² Thomas Keck (2009) makes this point when he notes that a nontrivial number of legislators who vote in support of legislation restricting LGBT rights change their positions after courts strike the laws down.

¹³ Citing Stuart Taylor, Jr., “The Tipping Point,” 32 *Nat’l. Law J.* 1810. 10 June 2000.

¹⁴ See, e.g., Famam, T. W. “The Influence Industry: Disclose Act could deter involvement in elections.” *The Washington Post*. 13 May 2010. Last Accessed 25 May 2010.