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MORAL RIGHTS, JUDICIAL REVIEW, AND DEMOCRACY: A  
RESPONSE TO HORACIO SPECTOR \*

(Accepted 29 October 2002)

In his very interesting and provocative paper,<sup>1</sup> Horacio Spector undertakes two tasks. First, he seeks to establish a conceptual link between moral rights and the institution of judicial review. In particular, he attempts to establish that “moral rights justify the impartial and independent review of legislative acts” that judicial review involves.<sup>2</sup> Secondly, he seeks to deflate the criticism that judicial review contravenes basic democratic principles. In this second section, he argues that judicial review is as vindictive of the principles of public deliberation, self-government, and political equality as is the liberal democratic ideal.

In this response, I will examine Spector’s arguments by questioning the models of judicial and legislative decisionmaking that his paper employs, and the resulting assumptions on which his arguments rest. I will argue that the processes and products of these governmental systems are in fact far less distinguishable than Spector assumes. This will erode the justification for the institution of judicial review as a protector of moral rights. It will – perhaps paradoxically – ameliorate the assumed tension between judicial review and core democratic ideals.

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<sup>1</sup> Horacio Spector, “Judicial Review, Rights, and Democracy”, *Law and Philosophy* 22 (2003), pp. 285–334.

<sup>2</sup> *Ibid.*, p. 314.



## I. MORAL RIGHTS AND JUDICIAL REVIEW

In the opening sections of his paper, Horacio Spector seeks to establish a positive case for judicial review on the theory that judicial review is a reasonable institutional interpretation of the moral rights of individuals. The primary steps in his argument are:

- (1) If we agree that people have rights, it is natural (indeed, obligatory) that we provide an institutional setting for the assertion of those rights.
- (2) Optimally (or perhaps essentially) this institutional setting must afford an opportunity for the moral-rights holder to express claims for violations of those rights in her own voice, and to obtain a reasoned and impartial response which is capable of rectifying the violation.

In addition,

- (3) Constitutional rights can fairly be seen as the embodiment of moral rights.
- (4) The assertion of (morally based) constitutional rights in a court of law meets the requirements for effective institutional settings for the assertion of moral rights (as set forth in premise (2) above). As a result, the enforcement of constitutional rights through judicial review is justified.

The steps in this argument enjoy varying degrees of consensus. The first claim – that if one accepts the idea that people have moral rights, then there are moral reasons to look for an institutional arrangement which enables the holders of such rights to assert their claims – is a modest one with which it is difficult, in the abstract, to disagree. Although it can be argued that moral rights do not necessarily entail individually assertable claims of the type that Spector envisions, it is a reasonable assumption in most contexts that they will.<sup>3</sup> As an abstract or general matter, the claim that rights should have some setting in which they can be asserted or expressed by their holders is difficult to deny.

<sup>3</sup> See, e.g., Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press, 1980), p. 151 [“to have a right is to be in a position to make a valid claim (in accordance with a particular system of rules) that other people should do (should refrain from doing) something and to make a complaint if that claim is not satisfied”].

The second claim – that this institutional setting must afford an opportunity for the rights holder to express claims in her own voice, and to obtain a “reasoned”, “impartial”, and effective response – is more contestable. Although the ideas that moral-rights claims must be provided some setting for assertion and must receive an authentic response would seem to be entailed by our acceptance of the idea of a *right* to assert such claims, the choices that Spector makes for the further specification of these conditions are value-laden ones. Is it essential that claims for violations of moral rights be made in one’s own voice, if the claim is otherwise effectively raised? Is it essential that responses be reasoned and impartial, if they are otherwise effective in vindicating the right at stake? The answers that one gives to these questions will depend upon further refinement of one’s notions of the nature and operation of rights. In this analysis of Spector’s arguments, we will accept, as a starting point, the conception of rights that the specification of these conditions conveys.

Spector’s third claim – that constitutional rights may fairly be seen as the embodiment of moral rights – is a careful claim which relies upon a reasonable assumption. Constitutional rights, in their content and function, can certainly be seen as implementing or “mirroring” the moral rights of individuals.<sup>4</sup> Individual constitutional rights are generally seen as entrenched guarantees of individual freedom against possible oppression by majoritarian government. There is, as Spector writes, a striking similarity between the analysis of moral rights as valid claims and the republican understanding of a free individual as an independent, non-dominated, citizen.<sup>5</sup> “Moral rights grant people moral powers to question the exercise of force threatening those rights, thus guaranteeing their status as autonomous and independent agents.”<sup>6</sup> Individual constitutional rights – which, in content, guarantee particular freedoms – can be seen as performing the same function. Constitutional constraints can be seen “as a good interpretation of the

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<sup>4</sup> Spector, p. 295.

<sup>5</sup> *Ibid.*, p. 296.

<sup>6</sup> *Ibid.*, p. 297.

idea of individuals possessing moral rights affording them a status of independence and non-domination.”<sup>7</sup>

Thus, we can establish fairly easily that constitutional rights, as restraints on majoritarian government, can be seen as an institutional implementation of the moral rights of individuals. However, the conclusion that individuals should be protected against the loss of freedoms that constitutional rights involve does not, of itself, dictate how that protection should be accomplished. Spector’s next claim – that the enforcement of constitutional rights through judicial review is justified – requires more. For instance, the constitutional rights of individuals could be implemented by legislatures as well as by courts. Even if we agree that constitutional restraints are a good interpretation of the idea that individuals possess moral rights, we must still establish that courts are a superior institutional setting for their protection if judicial review is to be justified. If legislatures are an equally effective institution for the assertion and enforcement of constitutional (moral) rights, we have not proven (on this basis, at least) that judicial invalidation of legislative enactments is justified. We must, in short, establish the *special competence* of courts.

In an effort to establish the special competence of courts, Spector draws most heavily upon an idea set forth in the premise (2) above, namely, that the moral- (or constitutional-) rights holder is entitled to an impartial response to her asserted claim. “[A] morally justified judgment”, Spector states, “ought to be interpreted as an impartial one.” Critical to impartiality is the principle of *judex in causa propria*, or that no one can be a judge in her own cause.<sup>8</sup>

The kinds of bias or partiality under which government actors might operate are several. First, the actor might be seen as an incidental beneficiary of the decision that he makes, since the decision will affect the public generally and he (as a member of the public) is thereby affected as well. Spector rejects this as the kind of bias or partiality that he intends,<sup>9</sup> and rightly so. All government actors are affected by their own decisions in this sense – it is an unavoidable feature of government service. In addition, if we are attempting to evaluate the case for judicial review, identifying “public member-

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<sup>7</sup> Ibid., p. 297.

<sup>8</sup> Ibid., p. 298.

<sup>9</sup> Ibid., p. 301.

ship” self-interest in government decisionmaking does not help, since it is equally true of judicial and legislative outcomes.

In rejecting “public membership” self-interest as the appropriate focus, Spector gives us a more pointed indication of what the bias or partiality of concern might be. A government actor is “deciding her own cause”, he writes, “when the benefits [to that actor] . . . of a possible decision in the controversy are so important that there is a *special* risk that she will have a partial, biased stance in the situation.”<sup>10</sup> In order to distinguish this from simple “public membership” bias, this must mean that there is a particular risk that the actor desires to act in her own personal self-interest (or in the self-interest of others whom she selects) – and, furthermore, that (as an institutional matter) she is allowed to do so.<sup>11</sup>

If a judge or legislator acts to further self-interest in this way, and if that self-interest is – for whatever reason – congruent with the decision that the judge or legislator *should* make (all things considered), then there is, quite obviously, no problem with bias or partiality in the sense that Spector intends. It is not the simple congruence of self-interest with the actor’s decisions, or – I would argue – even her awareness of or desire to implement that self-interest, that causes the problem with which Spector is concerned. Rather, it is when that self-interest *compromises what that actor should otherwise do* in the proper execution of her government function that a legitimate concern with partiality or bias arises. In other words – and to place this within the context of the particular issue before us – we are concerned when self-interest *subverts* the implementation of individual moral rights or other conceptions of the public good.

It is this deeper kind of partiality or bias with which Spector is concerned. It is, furthermore, the danger of this kind of bias or partiality that Spector argues will most truly distinguish legislative and judicial functions. In legislative decisionmaking, the danger of this kind of bias or partiality is high. Legislatures operate, essen-

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<sup>10</sup> Ibid., p. 301.

<sup>11</sup> See, e.g., *ibid.*, p. 299 (“The real threat to impartiality appears when the agents of a certain group of individuals ascertain a power whose exercise means furthering the interests of the group and setting back the interests of other individuals.”)

tially, as “market[s] of sectional interests and political bargaining.”<sup>12</sup> Legislators are but “advocates [of] and parties” to the causes they determine.<sup>13</sup> Indeed, the *very idea* of electoral accountability – in which legislatures, as institutions, are grounded – anticipates (indeed, commands) that neutral principles (including moral principles) will be sacrificed to the personal interests of constituents. Although a judge is required by her office to detachedly appraise competing viewpoints in light of impersonal reasons and values, a legislator is bound to attend to the interests of constituents, and implement the personal desires of those whom she represents.

The validity of this analysis of judicial and legislative bias depends upon a critical assumption which Spector readily acknowledges. It assumes a particular model for legislative decisionmaking – one in which legislators are mere conduits for the viewpoints of their constituents. In fact, whether “the idea of the public interest” as implemented by legislators is something apart from simple aggregations of individual claims and preferences is a matter of intense debate.<sup>14</sup> Powerful arguments can be made that this “aggregative” view of the public interest fails to capture crucial legislative concerns. For instance, the interests that government actions implicate often transcend jurisdictional and temporal boundaries. Legislative decisions routinely affect the interests of individuals in other states or nations, and they may affect not only the interests of living persons, but of our posterity as well. It can be persuasively argued that legislators should be permitted – indeed, *required* – to consider the effects of their decisions on current and future non-constituent groups. In addition, legislators might be obliged – on moral or other grounds – to recognize interests that only a minority of current voters share. For instance, legislators might well feel bound to decide that children who are particularly vulnerable to toxins should be protected from environmentally deleterious

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<sup>12</sup> Ibid., p. 302.

<sup>13</sup> Ibid., p. 300.

<sup>14</sup> See, e.g., Edgar Bodenheimer, “Prolegomena to a Theory of the Public Interest”, in Carl J. Friedrich (ed.), *Nomos V: The Public Interest* (New York: Atherton Press, 1962), p. 205; Gerhard Colm, “The Public Interest: Essential Key to Public Policy”, in *ibid.*, p. 115; Gerhart Niemeyer, “Public Interest and Private Utility”, in *ibid.*, p. 1; J. Roland Pennock, “The One and the Many: A Note on the Concept”, in *ibid.*, p. 177.

actions, even though that action is not supported by the majority of their constituents. Obedience to transcendent moral or community values, the need for political stability, the need to harmonize conflicting voter preferences or policies, sensitivity to long-range strategies, and other considerations might well require the implementation of decisions that defy an idea of simple obedience to today's majorities. There is no reason to assume that legislators are oblivious to such considerations, or that they feel bound to subordinate them to constituents' preferences. Even the legislator who is concerned with her popularity alone is aware that public polls change and what is the expressed sentiment today may not be the expressed sentiment tomorrow. The idea that legislators are mere conduits for constituent or sectional interests is only one model of legislative lawmaking and, I would argue, a radically incomplete one.

For the sake of argument, however, let us assume that legislators act as brokers for their constituents' interests (or other interests) in the proper execution of their legislative roles. Does this create a "special risk" that they will have a "partial, biased" stance in a way that judicial actors do not?

The contrast, as we have constructed it, appears great. Legislators (under our stipulated model of representative democracy) are beholden to their constituents. Judges, on the other hand, operate with independence and detachment from the contestants before them. They seek "to realize the ideal of impartial and reasoned justice in an institutional setting designed to discuss the objective merits of cases."<sup>15</sup> They "are expected to attend to the public good alone."<sup>16</sup>

Indeed, Spector states at one point that the judicial ideal that he has in mind is that of a Cokean, "morally committed judge."<sup>17</sup> If one posits a legislator who implements constituents' immediate preferences, on the one hand, and a judge who implements moral principles, on the other, the conclusion that moral rights of individuals are safer with the latter is not difficult to draw. The question

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<sup>15</sup> Spector, p. 303.

<sup>16</sup> Anthony T. Kronman, *The Lost Lawyer* (Cambridge, MA: Harvard University Press, 1995), p. 119.

<sup>17</sup> Spector, p. 334.

is: is this model of judging what judicial review – as an institution – really involves?

Let us begin with the idea that judges are detached from the interpersonal and political forces that conflict with an abstract notion of the public good (and which detrimentally mold the actions of legislators). Are not elected judges keenly aware of their constituents, and the need to obtain their favor if those judges are to survive the next election? Are not lifetime appointees keenly aware of their political philosophies, political agendas, and the need for public acceptance of their decisionmaking? I would say that the question is not really one of institutional independence and detachment from contestants – the question is one of independence and detachment from political forces and political ideologies that undermine recognition of individual moral rights. Regarding this question, are judges really as “independent” and “detached” as this model assumes?

Indeed, the vision of judges as champions of individual or minority rights against the oppression of the majority is contradicted by much of our social and political history. Although one can point to Supreme Court cases in which the Court rescued the rights of the weak, unpopular, or disenfranchised from legislative trampling, one can also point – for instance – to the first decades of the twentieth century, when Supreme Court justices struck down legislative efforts to protect women,<sup>18</sup> adult workers,<sup>19</sup> the right to unionize,<sup>20</sup> and more. Are we so influenced by an historical accident – the Warren Court years – in the judicial models that we assume, that we have elevated this to an *institutional* characteristic? Consider the Court’s decisions in more recent times, in which it struck down the Violence Against Women Act,<sup>21</sup> the Religious Freedom Restoration Act,<sup>22</sup> and the rights of individuals to sue states for violations of federal

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<sup>18</sup> See, e.g., *Morehead v. New York ex. rel. Tipaldo*, 298 U.S. 587 (1936) and *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923) (minimum wage laws for women).

<sup>19</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (daily and weekly maximum hours for bakery workers).

<sup>20</sup> See, e.g., *Coppage v. Kansas*, 236 U.S. 1 (1915) and *Adair v. United States*, 208 U.S. 161 (1908).

<sup>21</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>22</sup> *Boerne v. Flores*, 521 U.S. 507 (1997).

laws.<sup>23</sup> In fact, the argument that judges are different, in this regard, is weak in recent experience. One could persuasively argue that Congress has in fact been more attuned to individual rights in recent years than has the Supreme Court.

There are, in addition, other assumptions about the nature of judicial decisionmaking in this perceived difference between judges and legislators which need to be illuminated. The idea that judges implement “the public good” assumes that there is “X” – a “public good” or “moral right” – that judges can implement (and in fact do implement) in the course of constitutional decisionmaking. This may describe some constitutional decisionmaking, but not much. First, many important or difficult constitutional cases dealing with individual rights involve conflicting individual rights – the right to a fair trial vs. the right to freedom of expression, the right to religious free exercise vs. the right to equal protection of the laws, the right to equal protection in the method used to tabulate votes vs. the right to have one’s vote counted, and so on. In all of these cases, the decisionmaking process involves far more than the implementation of a recognized moral right.

In addition, even when one individual right (alone) is at stake, the constitutional norms involved are generally very debatable issues. Whatever we may say about the practice of constitutional law in our courts, it is often not much different from the policy judgments of the legislative or executive branches. We need only consider, for instance, the difficulties which the Court has been forced to confront in balancing a woman’s right to terminate her pregnancy and the state’s interest in fetal life, the contours of permissible free speech, the meaning of unreasonable search and seizure, or the limits of personal privacy, to appreciate that this decisionmaking is far closer to judicial policymaking than the implementation of an abstract notion of moral rights.

There are other arguments advanced for the superiority of courts. For instance, judges have an obligation to participate in a dialogue; judges do not control their agendas or choose to whom they will

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<sup>23</sup> See, e.g., *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (barring suits against states under the Age Discrimination in Employment Act); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999) (invalidating federal remedy for patent violations).

listen; judges have an obligation to articulate and justify their decisions (on the basis of “objective” and “impartial” reasons); and so on.<sup>24</sup> These do, indeed, identify differences in the two processes in question. However, do these differences really make the decisions of judges of a “higher quality”, or necessarily more attentive to moral rights? Or can these be as easily finessed by judges as they are by legislators or executive branch officials?

The idea that courts protect individual moral rights more strongly is a deeply ingrained social and political idea. Indeed, the existence of this idea may itself tend to pressure courts to implement this result. However, we must be wary of the extent to which our models may be driven by unjustified assumptions. In short, do we have an overly romanticized view of the judiciary (and an overly negative view of the products of other branches of government) when it comes to the protection of individual moral rights – something that is more the result of recent historical accident than any real, *necessary* institutional difference?

We can assume models that ensure the point: that is, we can assume models of decisionmaking in which legislators have no independent idea of the public good, and in which judges are morally committed individuals who implement moral rights without regard to political (electoral) realities. This will, of course, ensure that courts are superior institutions for the enforcement of moral rights. However, it will also ensure that legislators are – as an institutional matter – absolved from fealty to moral ideals; and that judges are – as an institutional matter – absolved from deference to the products of democratic governance. The first may cripple our ability to preserve moral rights; the second may present an insuperable collision with democratic principles. It is to this second problem that we now turn.

## II. JUDICIAL REVIEW AND DEMOCRATIC GOVERNANCE

In the last three sections of his paper, Horacio Spector defends judicial review against the “democratic charge”. The “democratic charge”, he argues, can be understood as a cluster of largely consequentialist arguments which are alleged to support democratic

<sup>24</sup> See, e.g., Spector, pp. 304, 312–314, 319–320.

governance, and which provide implicit arguments against judicial review. These assert that democracy is valuable because it “facilitates and enshrines public deliberation”;<sup>25</sup> because it is an expression of the political equality of citizens; and because it implements the value of individual autonomy.

Regarding the first claim, Spector begins by discussing the work of writers who maintain “that democratic deliberation provides the best feasible setting for impartial collective decision making.”<sup>26</sup> Discussing the work of Jeremy Waldron,<sup>27</sup> Carlos Nino,<sup>28</sup> and others, Spector attacks what he identifies as a foundational assumption of deliberative democrats – namely, that deliberative democracy involves concern with (and, presumably, implementation of) the public good. In order to mimic the procedural features of moral discourse, democratic deliberation must satisfy certain formal requirements, such as generality and impartiality.<sup>29</sup> In fact, Spector argues, majoritarian decisions are often characterized by bias against particular individuals and minority groups. Although we might subscribe to the idea of democratic deliberation founded in the general good, “the kind of impartial public debate these theorists cherish presents insurmountable problems of institutional implementation.”<sup>30</sup> The failure of democratic assemblies to consider all viewpoints, the fact that public interest rhetoric can easily be used to defend any position, and the inhibition of public discourse due to complex political, economic, and social realities all combine to make the deliberative democratic ideal more theoretical than real.<sup>31</sup>

Spector is certainly correct that the deliberative democratic idea is, indeed, that – an *ideal*, one that may be useful in critiquing democratic functioning but is far from providing a descriptive account of the functioning of democratic institutions. When comparing the degree to which moral rights are institutionally

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<sup>25</sup> Ibid., p. 314.

<sup>26</sup> Ibid., pp. 314–315.

<sup>27</sup> See, e.g., Jeremy Waldron, *Liberal Rights* (New York: Cambridge University Press, 1993).

<sup>28</sup> See, e.g., Carlos Santiago Nino, *The Constitution of Deliberative Democracy* (New Haven: Yale University Press, 1996).

<sup>29</sup> Spector, p. 315.

<sup>30</sup> Ibid., p. 316.

<sup>31</sup> Ibid., pp. 316–317.

implemented, it is fair – as Spector argues – to compare the deliberative functioning of democratic *institutions* with the deliberative functioning of the *institution* of judicial review. On this score, the contest is best described as a draw. Although the judicial process presumably involves a more explicitly mandated consideration of individual constitutional (moral) rights, it “is only apt to guarantee impartial treatment of parties to the process, while legislative deliberation considers the interests of all citizens affected by . . . law.”<sup>32</sup> When one considers the actors involved in the two deliberative processes, the superiority of one over the other in the protection of moral values is (as I have argued above) also far from clear-cut. Just as it is an error to see legislators as necessarily engaged in what we would call the ideal of democratic governance, so it is an error to see the detached, impartial, morally committed judge as a description of the members of state and federal judiciaries. Both institutions, as an actual matter, have deliberative aspects; both may, in fact, consider moral questions; neither is free of the perceived and unconscious biases and prejudices which affect its actors. Thus, while I agree with Spector that the deliberative value fails to privilege the legislative process, I demur from his conclusion that the judicial forum necessarily provides a more adequate setting for that process.

The second ground for the “democratic charge” to judicial review centers upon the idea of political equality. As framed by Spector, the idea of democracy is that all citizens enjoy “an equal role . . . in the collective decision-making process, and every citizen has an equal right to hold office.”<sup>33</sup> Spector writes that “[t]hese are the two fundamental principles of the ideal of political equality that has become associated with the system of representative democracy since the triumph of equal voting rights.”<sup>34</sup> The question is whether a (purely) representative democratic system better implements this value than a constitutional (representative) one.

If political equality is understood in a formal sense, neither system is superior to the other in the implementation of this value. In both systems, all citizens are endowed with the right to vote and

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<sup>32</sup> Ibid., p. 316.

<sup>33</sup> Ibid., p. 329.

<sup>34</sup> Ibid., p. 329.

all votes are counted equally. Political equality in the sense of equal political participation is, thus, guaranteed by both.

Political equality could, however, be understood quite differently. It could be understood to command political equality not only in a participatory sense, but in a substantive sense – a command, in effect, that each citizen be equally empowered (in a personal sense) to determine what actual governmental outcomes will be. If political equality is seen in this way, Spector observes, an indictment of judicial review could follow, since “[i]t might be argued that when one disables the Congress or other representative institutions one is treating justices [of the reviewing court] . . . as superior to the ordinary citizens and their representatives.”<sup>35</sup>

Spector rejects this interpretation of political equality, and I think rightly so. Political equality in the sense of equality of personal, substantive powers is a feature of no representative democratic system – pure, constitutional, or otherwise. There is, furthermore, no reason to believe that the inequality in substantive power that exists (for instance) between citizens and their senators is any less troubling for this ideal than the inequality that exists between citizens and judges. This is not a valid ground for establishing the superiority of a (pure) representative democratic system over a constitutional (representative) one. We do not pretend – under either system – that there is equality at the “operative” level of government, or that such would be desirable even if it could be achieved.

The last “democratic charge” requires that we consider whether constitutional restrictions (enforced through judicial review) “run afoul of the ideal of autonomy or self-government, which democracy is commonly assumed to realize.”<sup>36</sup> Spector’s attack on this charge is along the following lines. “Whereas individual autonomy means that we govern our own lives, collective or political autonomy means that we rule . . . [through] political community.”<sup>37</sup> If that collective decisionmaking is made on anything less than unanimous consent, the exercise of individual autonomy is necessarily curtailed. Since individual autonomy is – thus – lost under *any*

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<sup>35</sup> Ibid., p. 329.

<sup>36</sup> Ibid., p. 323.

<sup>37</sup> Ibid., p. 323.

system of less-than-unanimous democratic governance, the particular criticism of a constitutional democratic system on this ground is not a valid one.<sup>38</sup>

Most of the discussion in this section of Spector's paper involves the establishment of his major premise, namely, that individual autonomy is lost under a regime of representative democracy. He argues that efforts of democratic theorists to overcome this observation are unsuccessful or, in the alternative, that the strategies that democratic theorists use to reconcile representative democracy with individual autonomy can be used to justify constitutional restrictions as well. For instance, social contract theory offers a way of reconciling majority rule with individual liberty by suggesting that majority rule rests upon the consent of those who are governed. Since constitutional restraints on majority rule are likewise part of this voluntary social contract, they are justified (on this ground) as well.<sup>39</sup> Whatever problems may plague such theories (such as whether individuals "consent" to a governmental system over which they have no effective veto), those problems undermine the justification for a (pure) representative system as well as the justification for constitutional restraints.

Furthermore, Spector argues, even if we agree that autonomy is preserved (to some degree) by a (pure) representative system, it is not obvious that a constitutional (representative) system is not equally vindicative of this ideal. Through constitutional restraints, individuals "might predict a net gain of autonomy by getting . . . insurance against potential autonomy violations resulting from the application of majority rule."<sup>40</sup> Indeed, "[r]ational individuals might . . . think that establishing constitutional limitations and entrusting a constitutional court with their application are, on balance, the best institutional arrangement to maximize [individual] liberty . . ."<sup>41</sup>

Let us examine this second argument more closely. When we attempt to compare the preservation of autonomy under these governmental systems, two separately identifiable issues are involved. First, there is the question of whether there is a quanti-

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<sup>38</sup> *Ibid.*, pp. 323–324.

<sup>39</sup> *Ibid.*, pp. 325–326.

<sup>40</sup> *Ibid.*, p. 327.

<sup>41</sup> *Ibid.*, p. 327.

tatively demonstrable difference in the preservation of autonomous values when the products of a (purely) representative system and the products of a constitutional (representative) system are compared. Spector's claim that the products of a constitutional (representative) democracy may, in fact, be equally or more solicitous of these values is difficult to refute. Clearly, there is no reason why the decisions of judicial actors will be necessarily less influenced by the desire to preserve this ideal than are decisions by their legislative counterparts. Indeed, since we have already stipulated that a "conduit" theory of legislative decisionmaking will be used in our analysis, the idea that the products of constitutional system might in fact be more solicitous of the ideal of individual autonomy (of minority group members, in particular) seems an entirely plausible one.

There is, however, a different way in which the exercise of autonomy could be conceived in this context which we must consider. Individual autonomy is conceivably concerned with not only the *products* that a particular system produces, but also with the ability of individuals to hold decisionmakers *accountable* to the wishes of those individuals. In other words, the question is not simply whether the decisions that government actors make are congruent with the abstract ideal of autonomy (for instance, whether they are congruent with freedom of speech, freedom of religion, and so on) – but whether the *choices* and *desires* of citizens are honored.

Superficial analysis of this question might point to the clear superiority of the (purely) representative democratic system. Legislators are, after all, directly elected by the people, and are – through the threat of subsequent electoral defeat – subject to some degree of control by them. If judges are elected, then equivalent control is clear. But if judges are appointed – indeed, as in the federal system, for lifetime terms – the ability of citizens to hold them accountable seems much more problematic. Indeed, lifetime tenure and other securities of federal judicial office were designed to place these actors beyond political control.

When we consider the broader aspects of the question, however, the picture become considerably more muddled. What is the "product of representative government" which citizens seek to influence? There is more to this than bills passed by Congress or state legislation. The "law" that is created by this process is the result

of the power and authority of hundreds or thousands of individuals – legislators, legislators’ staff members, executive branch officials, administrative agencies, legislative and executive commissions, and so on. These actors are often as removed – or more removed – from popular control as judges, who are either the subjects of popular election themselves or are the subjects of prominent appointment by those who are. Although the diverse group of largely unknown and unelected actors in the legislative and executive branches of government described above may not enjoy the protection of lifetime tenure, their decisions may – as a practical matter – be as effectively insulated from popular scrutiny and popular control. Although we tend to associate popular control with the legislative and executive branches of government, when the actual products of these actors are considered the picture is far more complex. If we are concerned with the ability of citizens to influence the products of government, there is – in reality – little principled distinction between much of the products of the elected branches of government and the products of the courts.

This last observation identifies a difficulty that underlies Spector’s positions and the arguments of others in favor of judicial review. In order to establish a positive case for judicial review, we must establish the superiority of judicial over legislative processes and products, since judicial review assumes the invalidation of legislation by courts. Implicit in this is the idea that the processes and products of these governmental institutions are different in important ways – for instance, that decisions by courts are characterized by detached and impartial consideration of the issues, while the decisions of legislators are the expression of political forces and constituents’ wishes. To defend judicial review against the “democratic charge”, however, our task becomes the opposite. Now we must establish that both institutions, in fact, involve deliberative processes that are quite similar; that both involve a similar vision of political equality; and that both preserve – in their processes and products – the individual autonomous ideal.

The tension between these objectives is rooted, of course, in the age-old paradox that judicial review in a democratic system involves. It is difficult to maintain that representative democratic government should both be trumped and remain paramount. It is

difficult to argue that the “conduit” theory of democratic rule is bad for the preservation of moral rights, but should be extolled as preservative of the autonomy of citizens. I would argue that there is, in fact, less tension between judicial review and democracy than we usually believe; but that this is because of the failure of *both* institutions to reflect (in practice) the idealized notions that we have for them – not (as Spector argues) solely by reason of the failure of democratic institutions to realize this ideal.

### III. CONCLUSION

In summary, our assessment of judicial review as a reasonable institutional interpretation of the moral rights of individuals is mixed. The idea that constitutional rights reflect moral rights of individuals is a reasonable one. However, this does not – in itself – establish the supremacy of the judicial branch of government of government to interpret and enforce these rights, which judicial review requires. To do this, we must establish that courts are superior institutions for the performance of this function. Whether this is true will depend, most critically, upon the models of judicial and legislative lawmaking that we employ. It will also depend upon the extent to which we see human beings – whether judges or legislators – willing and able to execute the idealized roles that we specify. Just as legislators fail to exhibit detachment from cultural, political, and ideological forces, so judges do as well. One cannot reflect – for instance – upon the centuries of judicial enforcement of slavery, the subordination of women, the oppression of gay men and lesbian women, and other failures in our history without acknowledging that courts have often been as poor as legislatures in protecting moral rights.

There are, of course, prominent and welcome examples of judicial enforcement of moral rights in the face of legislative resistance and popular prejudice. Whether – in absolute terms – judicial or legislatively inspired reforms have in fact contributed more to the cause of moral rights in our history would be a highly debatable issue. However, the fact that we so readily associate this function with the courts may identify the greatest value of judicial review. Through the idea of the judicial enforcement of constitutional rights, we enshrine the idea of *individual* responsibility for decisionmaking

and *individual* cognizance of moral rights. We must be careful, however, lest our association of these obligations with courts causes us to confine them to what is (in the end) the weakest branch of government.

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