THE CASE FOR MODEST CONSTITUTIONAL INSTRUMENTALISM

WHY LAW MATTERS. By Alon Harel.[1] Oxford: Oxford University Press, 2014. Pp. xii + 240. $65.00 (cloth).

Yossi Nehushtan[2]

INTRODUCTION

"This fascinating volume offers arguments that are both significant and surprising . . . a major work from a leading writer, it will force many to re-think why and how law matters" (p. viii). The editors of the Oxford Legal Philosophy book series, just quoted, got it right. Harel's book is a constitutional and philosophical treat. It is innovative and thought-provoking (much like Harel's previous work on related issues). It forces the reader to re-think major and common assumptions about the law and especially about constitutional procedures and institutions. The fact that I disagree with many of Harel's arguments—and with his main thesis—is marginal to the pleasure of reading the book and to the great challenge that it poses to those who do not share its main argument. This argument, in short, is that various legal and political institutions and procedures (constitutions and judicial review, for example) are desirable *as such*, i.e. regardless of their ability to facilitate the realization of valuable ends and of their prospects to realize such ends.

Interestingly, that was not Harel's original position, which was the exact opposite of the view presented in the book. According to Harel's original position, the desirability of constitutional directives hinges on the question of whether such directives are likely to guide the state or individual agents to act as they ought to. Accordingly, the desirability of judicial review and its optimal scope hinges exclusively on the question of

1. Phillip and Estelle Mizock Chair in Administrative and Criminal Law, The Hebrew University.

2. Senior Lecturer and Co-Director of the MA in Human Rights, Globalisation and Justice, School of Law, Keele University, U.K.

whether judicial review is conductive to reaching the right decision or acting in accordance with reason.

Had Harel chosen to write a book that established these arguments, this review would have been much shorter and less skeptical. However, Harel changed his views and now the book

> examines various legal and political institutions and procedures and argues that the desirability of these institutions and procedures is not contingent and does not hinge on the prospects that these institutions are conductive to the realization of valuable ends. Instead, various legal institutions and legal procedures that are often perceived as a contingent means to facilitate the realization of valuable ends matter *as such* (p. 2).

I will start by raising doubts as to whether Harel does make a case for anti-instrumentalism with regard to some constitutional procedures and institutions. I will then question Harel's non-instrumentalist approach with regard to constitutionalism and judicial review and will conclude with a short defense of modest constitutional instrumentalism. I will not discuss Harel's application of his general non-instrumentalist approach to the specific issues of "rights" and "privatization."

1. DOES HAREL MAKE A CASE FOR NON-INSTRUMENTALIST CONSTITUTIONALISM?

In the introduction to the book, Harel makes it clear that he does not argue that instrumental justifications necessarily fail and that he does not make a general argument against applying instrumental justifications in legal or political theory. He does argue that instrumental justifications that rest exclusively on contingencies are not free of difficulties. He also argues that with regard to the examples presented in the book, non-instrumental justifications are sound (p. 5). His more specific arguments later on imply that with regard to the examples presented in the book, non-instrumental justifications are not merely sound, but also superior.

At this point, we face a preliminary, conceptual difficulty. Throughout the book, Harel establishes his argument that constitutional institutions and procedures are important *as such* and that they have intrinsic value, in the sense that their desirability is not contingent and does not hinge on the prospects that these institutions are conductive to the realization of valuable ends. It is not always clear, however, to which of the possible

meanings of "intrinsic value" Harel refers—and whether all these meanings accurately explain what having "intrinsic value" actually means. We can find in the book at least four possible meanings of being "valuable as such" or for having "intrinsic value."

Intrinsic value type 1 can be expressed as: "X is always good regardless of the consequences." For example, "autonomous decisions are always valuable regardless of the content of such decisions." This is probably the strongest, "purest" claim for something being valuable "as such." Some may claim that this is the only possible meaning of being "valuable as such."

Intrinsic value type 2 can be expressed as: "X always brings about better consequences than the alternatives." For example, "autonomous decisions are always superior in terms of their content to non-autonomous decisions." This is a mixed argument with both instrumentalist and non-instrumentalist foundations (with the former being more dominant).

Intrinsic value type 3 could be described as: "X is always preferable, other things being equal." For example, "good decisions have added value if they are autonomous—and bad autonomous decisions have more value than bad non-autonomous decisions." This is a mild claim for something being valuable as such.

Intrinsic value type 4 is: "X is a necessary (yet not sufficient) prerequisite for doing good." For example, "being autonomous is a necessary (yet not sufficient) prerequisite for making good decisions." This argument (much like type 2) also has instrumentalist foundations as our concern here is the consequences of X (being autonomous), which is making the right decisions. In that respect, X is merely a means to an end, at least in part.

It is evident that different types of meaning of "intrinsic value" or "being valuable as such" require different justifications or supporting arguments. Also, some types require more evidence or more powerful arguments in order to be convincing with regard to a particular X. In any event, it is clear that one can argue that X is valuable "as such" in many different ways. While reading Harel's arguments for different constitutional procedures and arguments being valuable "as such," one can admire their clarity and novelty. Concerns, however, may be raised with regard to their consistency. More accurately, I suspect that throughout the

book Harel argues for different types of meaning being "valuable as such" without explicitly differentiating between these types.

For example, Harel argues that the desirability of various legal and political institutions and procedures "is not contingent and does not hinge on the prospects that these institutions are conductive to the realization of valuable ends. Instead, various legal institutions and legal procedures that are often perceived as a contingent means to facilitate the realization of valuable ends matter *as such*" (p. 2). This is clearly an "intrinsic value" argument of type 1 ("X is always good regardless of the consequences"). However, Harel also argues that the book "sides with those who believe that sometimes the justness or correctness of a decision depends on the institution making the decision and/or on the procedure by which the decision came about" (p. 2); that "legal institutions and procedures are often not mere *contingent* instruments to realize valuable ends; they are often necessary components of a just society" (p. 3); and, more specifically, that "constitutional entrenchment of rights is therefore a necessary precondition for freedom rather than merely a contingent instrument for protecting freedom" (p. 7). These are intrinsic value statements of type 4 ("X is a necessary yet not sufficient prerequisite for doing good").

Harel also suggests that "constitutions as well as judicial review are not mere instruments to guarantee good, just or coherent decisions; they are valuable for other reasons and their value does not depend only or primarily on the degree to which they contribute to the substantive merit of the resulting legislation or executive decision" (p. 133). Here Harel acknowledges that constitutions as well as judicial review are valuable also because and in so far as they guarantee good and just decisions. This is a modest argument according to which constitutions and judicial review are valuable both "as such" *and* as long as they contribute to the substantive merit of the resulting legislation or executive decision. It is quite clear that here Harel does not argue that constitutions and judicial review are always valuable regardless of the consequences (intrinsic value argument type 1) or that they are a necessary but not sufficient prerequisite for doing good (intrinsic value type 4). It is not clear, however, whether Harel argues that constitutions and judicial review will always bring about better consequences than the alternative (no constitution or judicial review), which would in fact be an intrinsic value argument of type 2; or whether he argues that constitutions and judicial review are always preferable "other things being equal"

(i.e., it is better to have them even when we get the same results without having them), which would be intrinsic value argument type 3.

Another concern regarding Harel's commitment to non-instrumentalism arises from the following. Harel departs from those who argue that first we need to identify the "right" or correct decision—and then to identify the institution or procedure that is most likely to get it right. Instead, Harel argues that "sometimes the justness or correctness of a decision depends on the institution making the decision and/or on the procedure by which the decision came about" (p. 2). He also argues that "there is a close (or strong) affinity between legal and political institutions and procedures on the one hand and the desirable goals or values, such that the latter can, even in principle, be realised only by establishing the former" (p. 5). This is, again, an argument of intrinsic value type 4 (X is a necessary yet not sufficient prerequisite for doing good). As such it has strong instrumentalist foundations. Harel argues that sometimes (only?) certain institutions or procedures are likely to get certain decisions right and therefore these institutions are the ones that should make these decisions. In other words, even according to Harel, legal institutions and legal procedures are not in fact valuable as such. They are only valuable because with regard to certain decisions they are likely (or more likely?) to get it right. If Harel thinks that certain institutions and procedures will always get it right or if he thinks that it is inevitable that they would get it right—we are getting slightly closer to a stronger, yet not pure, "valuable as such" argument. If Harel thinks that certain institutions and procedures are preferable and valuable as such—regardless of their being able to get it right or of their being a necessary condition for getting it right—then we would have a truly pure and powerful non-instrumentalist argument. But if certain institutions and procedures are formed in order to increase the likelihood that they would get it right—or are formed as a necessary but not sufficient condition for getting it right—then these institutions and procedures are not valuable as such. They are only valuable if they are being used as instruments for getting it right.

Up to now I have raised a few concerns about the true nature of Harel's general non-instrumentalist approach (within the context of constitutional theory). I will now move to discuss in more detail Harel's critique of constitutional instrumentalism within the context of constitutionalism and judicial review.

2. WHY CONSTITUTIONS MATTER

A. CONSTITUTIONAL ENTRENCHMENT OF RIGHTS—AND THE DUTY TO PROTECT RIGHTS

The title of part III of Harel's book is "Why Constitutions Matter: The Case for Robust Constitutionalism." Here Harel makes a few bold and fascinating arguments. His main argument is that "the constitutional entrenchment of pre-existing moral or political rights is valuable, independently of whether such an entrenchment is conductive to the protection of these rights" (p. 7), and that

> the value of binding constitutionalism is grounded not in its likely contingent effect or consequences, e.g., better protection of rights; but rather in the fact that constitutional entrenchment of rights constitutes public recognition that the protection of rights is the state's *duty* rather than a mere discretionary gesture on its part (pp. 7, 134).

To clarify this point Harel adds that "in the absence of binding constitutional directives, a state which protects a right can be analogized to a debtor who gives what he owes to his lender but insists that his act is a charitable donation rather than a repayment of a debt" (pp. 7, 172-173).

Harel suggests a rigid dichotomy: rights are protected either by duty-based decisions or by discretionary decisions (pp. 133, 150). Moreover, Harel differentiates between moral or political duties on the one hand and constitutional duties on the other. Duty-based decisions, according to Harel, result from (and perhaps only from) entrenching rights in a constitution. Harel writes that "in the absence of constitutional entrenchment, conformity of the legislature with its moral/political duties is not sufficient as it does not represent sufficient recognition or acknowledgement of the state's duties. The effective protection of the duties in such a case can naturally be attributed to the legislature's judgments or inclinations and not necessarily to its duties" (p. 172).

I suspect that Harel is a bit too quick in suggesting the dichotomy between protecting rights by duty-based decisions (which must be based on constitutionally entrenched rights) and protecting rights by discretionary decisions. He also accords too much weight to the distinction between moral or political duties and constitutional duties (by arguing that only the latter represent sufficient recognition or acknowledgement of the state's duties).

Lastly, a third type of duties—legal duties—which are not constitutional duties in the sense that they are not entrenched in a constitution, is ignored to some extent.

What are the implications of differentiating between moral duties, legal duties and constitutional duties, and how does this differentiation relate to the distinction between duty-based decisions and discretionary decisions? Constitutional entrenchment of rights always creates a legal duty (but not necessarily moral duty) to protect these rights. Yet, the absence of constitutional entrenchment of rights does not rule out the state's acknowledgment of a moral and/or legal duty to protect these rights. The state—through its agents—has to protect rights as long as the state's laws compel its agents to do so. The state will protect rights if the state acknowledges a moral duty to do so. The moral duty to protect rights is independent of such rights incorporated into any legal norm, be that an ordinary statute or a constitution. Moreover, moral duties, when they are publicly acknowledged and deeply rooted in the society's traditions, conventions, customs and practices, does represent sufficient recognition or acknowledgement of the state's duties. The effective protection of the duties in such a case cannot be attributed to the legislature's mere judgments or inclinations, but rather to its publicly and politically binding moral duties. Thus, acts of grace or charity are not the only alternatives to constitutional entrenchment of rights, and constitutional entrenchment of rights is not the only source of duty for protecting such rights (both objectively—and from the point of view of the state itself).

Harel may argue that the state (or the legislature) acknowledges its duty to protect rights only when these rights are constitutionally entrenched, i.e., only when these rights are incorporated into an entrenched constitution rather than included in an "ordinary" statute—or that the sense of duty is stronger in the former. Neither argument is convincing. It is true that the legislature can easily change its ordinary statutes whereas an entrenched constitution is harder to amend. But the state's organs are legally subject to the state's ordinary statutes and constitution alike—until they are changed. The fact that changing the constitution is more difficult than changing ordinary statutes is of little importance here.

Harel does agree that there are moral rights, human rights or natural rights which are independent of judgments or preferences of the legislature or "the people." These rights, Harel argues,

should be constitutionally entrenched because they create "public recognition that the protection of rights is the state's *duty* rather than a mere discretionary gesture on its part" (p. 7). Here we could ask why this sense of duty is valuable as such—and whether it is valuable at all. Harel explicitly argues that the value in constitutional entrenchment of rights does not result from its being the best way to properly protect rights. Rather, it results from the recognition of the duty it imposes on the state to protect rights. In order to eliminate the "actual protection of rights" factor let us assume (as Harel also does) two states that equally protect human rights. State A protects human rights reluctantly and grudgingly—and only because its agents acknowledge that they are under a legal-constitutional duty to protect rights. The state's agents protect rights only or mostly because they fear that if they do not their decisions will be overturned by courts exercising judicial review or be condemned by others, either other states' agents or the public. State B protects human rights even though these rights are not constitutionally entrenched. It does so because it acknowledges its moral duty to protect rights. Is state A more virtuous than state B? Is there inherent value in acting in a certain way only because one is under a legal duty to do so? From the point of view of rights-holders, would they prefer their rights to be protected by state agents who only protect rights because they are under a legal-constitutional duty to do so, or would they prefer their rights to be protected by state agents who protect rights because they acknowledge that they are under a moral duty to do so? (Here, again, we have to assume that both states protect rights to the same extent).

When a person's rights are protected only because others are under a legal duty to do so, that person is being tolerated rather than respected as an equal or as a rights-holder. When there are compelling moral reasons to acknowledge a person's moral right, protecting that right merely because the law compels one to do so may even insult the right-holder, making him feel tolerated rather than truly respected or accepted. A person is truly respected and accepted as an equal and as a rights-holder when his rights are respected, regardless of a legal duty to do so.

It can be argued, of course, that we should not trust state agents to properly protect rights in the absence of a legal-constitutional duty to do so—and that legal duties complement moral duties to protect rights and hence are necessary for a better protection of rights. This may be true but this is not what Harel is arguing. Harel argues that the value of binding constitutionalism

is grounded not in its likely contingent effect or consequences, such as a better protection of rights. Rather, it is grounded in the fact that constitutional entrenchment of rights constitutes public recognition that the protection of rights is the state's *duty* rather than a mere discretionary gesture on its part. My response thus far was that (a) protection of rights can be the state's legal and moral duty in the absence of "binding constitutionalism," or, in other words, protecting rights by exercising discretion is not the only alternative to binding constitutionalism; and (b) there is no inherent value in protecting rights merely out of a legal-constitutional duty.

B. CONSTITUTIONAL ENTRENCHMENT OF RIGHTS—AND BEING AT THE MERCY OF THE RULER

Harel insists that a state in which the legislature protects rights because it is bound by constitutional duties is superior to a state in which the legislature protects rights to the same extent but in the absence of such duties. This is so, Harel argues, because in the latter case individuals live at the mercy of the legislature—i.e., their rights depend on the legislature's inclination (p. 148). Here Harel does not explicitly argue that living at the mercy of the legislature may result in uncertainty, a less stable protection of rights or a lesser protection of rights—as this will be an instrumentalist argument of the kind that Harel rejects. But he does write that the entrenchment of constitutional duties is essential to the protection of freedom. Citizens are freer in a society in which such rights are recognized as duties rather than resulting from the mere judgments or inclinations of legislatures. This is because in such a society citizens do not live at the mercy of their legislature and are not subject to its judgments or preferences (p. 149). Harel adds that citizens in a state in which rights are not constitutionally entrenched are subject "to the risk of a potential shift in the legislature's judgments or inclinations" (p. 151), and that they are subject to the arbitrary sway and potentially capricious will of the legislature.

If the importance and value of the entrenchment of constitutional rights do not only lie in its being a form of "symbolic" public recognition that the protection of rights is the state's duty (and that may be a non-instrumentalist argument)—but also on its being a means to an end (making the citizens freer and enhancing certainty and stability in terms of the extent to which rights are protected), then Harel is actually suggesting a very convincing yet instrumentalist argument for

constitutionalism. Harel answers this difficulty by endorsing a "republican understanding of freedom," according to which to be free does not only mean not being coerced, but also not living "at the mercy of the potential violator's inclinations" (p. 171). Moreover, he argues that "even if the citizens' rights are not better (or at least are equally) protected by constitutionally entrenching moral or political norms, citizens are freer under such a scheme as they are not subject to the judgments or inclinations of the legislature" (p. 172). This is a more subtle argument but is still not completely non-instrumentalist. Firstly, not being at the mercy of a potential violator's inclination and not being subject to the judgments or inclinations of the legislature is only valuable when the legislature or the executive are likely to violate rights. Put differently, not being at the mercy of the ruler is not valuable "as such" but as a means to an end—as a means to secure a proper protection of rights from unexpected, arbitrary or unjust violation. It is a defense mechanism against making things worse and it is only valuable when it actually prevents things from getting worse or is likely to do so. Therefore, Harel may be right by arguing that even if the citizens' rights are not better (or at least are equally) protected by constitutionally entrenching moral or political norms, entrenching rights is preferable. This is an "all other things being equal" argument (intrinsic value type 3), and, as such, it is convincing. But it would be odd to argue, in a purely non-instrumentalist way, that entrenching rights is always preferable (as it makes citizens freer)—even if it results in a lesser protection of rights or cannot prevent lesser protection of rights in a certain state at a certain time.

Secondly, and as I noted earlier, the state's organs are legally subject to the state's ordinary statutes and constitution alike—until either of the latter is changed. Constitutions, much like ordinary statutes, can be changed—and are changed. In that respect, citizens are still at the mercy of those who are authorized to change the constitution and are subject to their judgments and inclinations. Harel stresses that freedom, properly understood, is in fact "non-domination" (p. 174), and that "domination is understood in terms of the potential for arbitrary interference" (p. 174). As constitutions, much like ordinary laws, can be changed on an arbitrary basis and can be interpreted arbitrarily, citizens are still at the mercy of the ruler. Some constitutions are indeed harder to change than "ordinary" statutes, but this is a matter of degree, not of principle. It seems that throughout his discussion Harel assumes that a constitution is an "external"

constraint, as if a third party creates it and constrains the state or the legislature by it, whereas the constitution can be created and often is amended, by the same "rulers" who are both subject to it and compel it on "the people." Thus, constitutionalism in and of itself does not make the citizens free or freer in terms of being free from domination. A constitution merely constrains some state agents in a certain way until other state agents (or sometimes the same agents) decide to amend it at their will.

C. CONSTITUTIONAL ENTRENCHMENT OF RIGHTS AS A NECESSARY PRECONDITION FOR FREEDOM

As noted above, Harel argues that constitutional entrenchment of rights is a necessary precondition for freedom rather than a mere contingent instrument for protecting freedom (pp. 7, 150). Two further comments can be made here.

Firstly, we should note that this is a slightly different argument than the previous one, described above. According to Harel's previous argument, constitutional entrenchment of rights is valuable regardless of its consequences, i.e., regardless of the likelihood that it will better protect rights. According to the current argument, constitutional entrenchment of rights is valuable because it is a necessary precondition for freedom, i.e., because of its desired (potential) consequences. This brings us back to the distinction between intrinsic value type 1 (X is always good regardless of the consequences) and type 4 (X is a necessary yet not sufficient prerequisite for doing good).

Secondly, it is important to note that Harel's argument (that the constitutional entrenchment of rights is a necessary precondition for freedom) can only be true if we understand the term "freedom" in its "republican," non-intuitive meaning, i.e., "freedom" not as not being coerced to do X or prevented from doing Y, but rather freedom as not living "at the mercy of the ruler." However, most people presumably do not perceive the term "freedom" that way, and that alone undermines Harel's argument, as Harel aims to accurately describe genuine sentiments that "the people" have for their constitution. If we perceive freedom as most people (and constitutions) normally do, i.e., as not being coerced to do X or prevented from doing Y, then the argument that constitutional entrenchment of rights is a necessary precondition for freedom can be easily disputed. There are examples of democratic states protecting their citizens' rights in a satisfactory way without constitutionally entrenched rights (e.g., the U.K., Australia and New Zealand—and I am aware of

the significant constitutional differences between these three states). Having a (proper) Bill of Rights may increase the likelihood of protecting freedom more effectively. Having a Bill of Rights is not, however, a "necessary precondition for freedom," as freedom can be effectively and sufficiently protected by good-hearted legislatures and administrators and by political conventions in the absence of a constitution.

D. THE TRUE PASSION FOR CONSTITUTIONALISM

Harel's argument against constitutional instrumentalism is that it distorts what is really valuable about constitutionalism, namely, the sense that "constitutions are a necessary (rather than contingent) feature of a just or legitimate society" (p. 139). Harel argues that the instrumental value of the constitution, even if it could be established, fails to be attentive to the real reasons underlying the passion for constitutionalism. It may be the case that instrumentalist arguments for constitutionalism fail to be attentive to the reasons underlying the passion of non-instrumentalists for constitutionalism. It does not have to be the case that instrumentalist arguments fail to reflect the "real" reasons for constitutionalism, i.e., reasons that are sincerely held by scholars, politicians and "the people." One interesting example that is painfully familiar to Harel and myself may help in clarifying this claim.

The example is taken from Israel's unique constitutional history. Israel does not have a unified and codified constitution. Until 1992, it had nine "Basic Laws," most of which dealt with "constitutional subjects," none of which had normative superiority over "regular laws." The struggle in Israel to enact a constitution has always been identified with liberal politicians and academics. The struggle led to the enactment of two new Basic Laws in 1992, and to a few subsequent Supreme Court decisions that stated that all "Basic Laws" are in fact constitutional legal norms which are normatively superior to "regular laws." So, at present, Israel does have a set of Basic Laws that, when put together, are a "partial constitution." Israel still does not have a complete and unified constitution—and especially not a complete and unified Bill of Rights. Since the early 1990s, there has been an ongoing academic, political and public struggle for ending this constitutional anomaly and for enacting a "proper" comprehensive and unified constitution. This struggle, which was led by liberals and human rights advocates, has slowly faded after the campaigners realized that the Israeli Parliament (which has

the authority to enact a constitution) as well as the Israeli Government are heavily dominated—and will probably be dominated for the next few decades—by right-wing nationalist parties. In the Israeli parliamentary system, both "regular laws" and constitutional legal norms are enacted by Parliament and through the ordinary legislative procedure. For the campaigners, this means that should a new and comprehensive constitution be enacted in Israel, it will probably be a horrendous one. It will constitutionally entrench nationalistic, religious, "non-democratic," and possibly also racist norms. Many of the liberals who fought for a "constitution for Israel" now think it is better for Israel's fragile democracy not to have a constitution than to have an intolerable one that will be interpreted and enforced by the new generation of Supreme Court judges, some of whom are too fearful of the new generation of anti-democratic politicians or are sympathetic to their views. This is constitutional instrumentalism at its best. It reflects a genuine approach according to which a constitution is only or mostly valuable if it enhances the proper protection given to democracy and human rights. It demonstrates that the real reasons underlying the passion for constitutionalism is protecting human rights and democratic principles and that constitutions are not necessarily perceived as "valuable as such." If there are good reasons to assume that under certain circumstances constitutionalism will fail to protect human rights and democratic principles—or might put them in greater danger—the passion for constitutionalism is significantly or completely diminished—and rightly so.

3. IS THERE A NON-INSTRUMENTALIST ARGUMENT FOR JUDICIAL REVIEW—AND DO WE NEED ONE?

I will discuss Harel's arguments concerning judicial review in the following order: I will first discuss the relation between judicial review and the right to a hearing, and will refute the argument that the right to a hearing provides non-instrumentalist justification for judicial review. I will then discuss Harel's implied suggestion for "judicial review without courts." This will be followed by criticizing common views (and Harel's novel view) on the implications of the (alleged?) contrast between judicial review and democratic legitimacy. It should be noted that Harel limits the discussion to "constitutional" judicial review (i.e., review of legislation) and does not aim to apply his arguments to "administrative" judicial review (review of decisions of the executive). This is important as even if Harel succeeds in making

his case for a non-instrumentalist justification for judicial review, the argument is only applied to the relatively exceptional cases when the court invalidates legislation rather than to the far more common cases in which administrative decisions are invalidated.

A. JUDICIAL REVIEW—AND THE RIGHT TO A HEARING

According to Harel, judicial review is desirable because it protects the right to a hearing. More specifically, he argues that "the justification for judicial review is grounded not in the superior quality of the decisions resulting from judicial review but in the willingness to hear individual grievances, consider their soundness, address these grievances in good faith, and act in accordance with the outcomes of the deliberation" (p. 2), namely, "to reconsider decisions on the basis of the deliberation" (pp. 8, 134). For Harel "judicial review is (nothing but) a hearing to which individuals have a right" (pp. 8, 133, 134). Thus, judicial review is not valuable because of the superior quality of decisions rendered by judges, the superior ability or willingness of judges to protect rights, the special deliberative powers of judges or the greater stability and coherence of judicial decision (p. 192). It is only or mainly valuable as an application of the right to a hearing.

Even if we subscribe to the view that judicial review is only valuable as an application of the right to a hearing, it does not follow that we are in fact making a non-instrumentalist argument for judicial review. Hearing individual grievances in good faith is not valuable as such. It is merely or mostly a means to an end, and the end is making the right decision. Within the context of judicial review, hearing grievances is almost pointless if it does not improve the quality of the decisions resulting from the review process. If hearing grievances is all that matters and if it is valuable as such, individuals could present their grievances to any public officer even if he or she does not have the authority to amend or abolish the statute (or administrative decision) that violated a person's rights. Instead of having courts which have the authority to review, amend and abolish statutes (or administrative decisions), we could have a governmental "department of grievances" which merely hears grievances from individuals and conveys them to other governmental departments or the legislature for future reference and general interest. But even Harel agrees that the hearing process requires the state agent to act in accordance with the outcomes of the deliberation, i.e., "to reconsider decisions on the basis of the deliberation" (pp. 8, 134). Also, reading Harel's discussion of the right to a hearing within

the context of judicial review leads to a conclusion that Harel implicitly admits that a hearing itself is a means to an end. What would be the point of the hearing process and the right to a hearing if it did not allow (and in fact require) the state agents to reconsider their decisions in order to make better ones or right ones? Being so, the right to a hearing cannot be "valuable as such" and cannot form a non-instrumentalist argument for judicial review. Harel insists that "judicial review is not a means for protecting the right to a hearing; it is, in reality, its institutional embodiment" (p. 202). This is slightly confusing, as Harel immediately adds that "judicial review is designed to facilitate the voicing of grievances by protecting the right to a hearing" (p. 202). So perhaps judicial review is a means for protecting the right to a hearing after all. Moreover, even if we agree that judicial review is not a means for protecting the right to a hearing, but rather its institutional embodiment, we cannot escape the conclusion that this institutional embodiment is a means to an end after all—a mechanism for improving decisionmaking.

Moreover, if a hearing is all that matters, there is little point in allowing standing to those who were already heard before the legislature made its decision. If an individual—perhaps also through his representatives—has already been heard before the decision was made, and if the hearing is all that matters, what would be the point of hearing him again after the decision has been made? The point of hearing him again is to allow one institution (court of law) to apply legal procedure (judicial review) in order to amend or abolish a wrong decision that was made by another institution and to get it right.

The right to hearing is a procedural right. Procedural rights may have various rationales. They may secure fairness and transparency; they may enable participation in the decisionmaking process; they allow the decisionmakers to be provided with all the relevant information—and the list goes on. But eventually it comes down to enabling the legislature, the administrative authority or the courts to make the right decisions. These "right" decisions can be right from various perspectives. They may promote efficacy, reflect the legislature's intent, promote the common good, ensure appropriate protection of rights and interests, and so on. Regardless of how we decide what a right decision is or may be, procedural rights have little value unless they enable decisionmakers to make the right decision. I do not deny that the right to a hearing (much like other procedural rights) does have some independent value regardless

of the merit of the decision likely to result at the end of the process. But this independent value is very limited and secondary to the main purpose of procedural rights, which is enhancing the probability that the resulting decision will be right, reasonable, or at least better.

B. JUDICIAL REVIEW WITHOUT COURTS?

Harel argues that "judicial review is not a practice which must be conducted by courts of judges" and that "it is the process of adjudication that renders the practice valuable; rather than the fact that it is conducted by courts or judges" (pp. 8, 213).

Harel is probably too hasty here. First, and this is the point made above, the process of adjudication, which, as Harel argues, is equated with a process of hearing, is not valuable as such. It is valuable mainly as a means to an end. The end is making the right decision. The means is a process of hearing/adjudication. Secondly, and more importantly, Harel is too quick to dismiss the necessity of courts and judges. For a process of adjudication or hearing to be conducted appropriately and in good faith—and as a process of "review"—an independent third party is required. This third party (the adjudicator or arbitrator) has to be personally and institutionally independent of both the state's organs (especially those who made the original decision) and the litigant-individual. For the adjudication process and its results to be fair, consistent and equal they have to rely on the adjudicator's best and honest understanding of the law rather than on his personal perception of justice. In other words, the adjudication process has to be conducted by a court of law—or by any other institution that goes by whatever name that will be institutionally identical to what we know as "courts of law." Independent, bias-free and law-obeying institutions, which also have the authority to overrule decisions of the state's organs, are a necessary precondition for a proper process of hearing to take place. Harel therefore is probably wrong to argue that "it is the process of adjudication that renders the practice valuable; rather than the fact that it is conducted by courts or judges" (p. 8), as the latter is a necessary precondition of the former. Harel later admits that "to the extent that other institutions can conduct a hearing, it is only because they operate in a judicial manner and thereby functionally become courts" (pp. 212, 214). It is not clear, however, why Harel thinks that "in principle, the right to a hearing can be protected by any institution, including perhaps the legislature" (p. 214). Adjudication, "constitutional" hearing,

judges and courts (properly understood) are intertwined as one assumes the existence of the others. This means that judicial review is a practice that must be conducted by courts and judges after all.

C. JUDICIAL REVIEW AND DEMOCRATIC LEGITIMACY

Harel accurately presents the current state of affairs in the common political and constitutional theory discourse (p. 135): advocates of constitutionalism and rights-based judicial review rely only on instrumentalist arguments according to which constitutionalism and judicial review are justified because (or as long as) they bring about better protection of human rights. A similar instrumentalist argument would be that constitutionalism and especially judicial review are justified because they are likely to bring about better protection of human rights. Critics of constitutionalism and rights-based judicial review use both instrumentalist arguments (by stressing the superior quality of legislative decisions) and non-instrumentalist arguments (by describing constitutionalism and judicial review as "anti-democratic" and thus illegitimate). Harel concludes that by ignoring non-instrumentalist arguments for constitutionalism and judicial review, their advocates "fight with one hand tied behind their back" (p. 135). Harel's mission is therefore to add non-instrumentalist arguments to the arsenal of arguments favoring constitutionalism and by that to "level the field in constitutional theory" (p. 135).

The non-instrumentalist, legitimacy-based argument against constitutionalism and judicial review could have been troubling for advocates of constitutionalism (who do not use non-instrumentalist arguments) if it were a convincing or even a valid one. The non-instrumentalist, legitimacy-based argument against constitutionalism is, however, an extremely weak, unconvincing argument. As will be explained shortly, it relies on myths and imaginary facts. Thus there is no unlevelled field in constitutional theory that needs to be levelled. The need to add non-instrumentalist arguments to the arsenal of arguments favoring constitutionalism would have been an urgent and essential need only if advocates of constitutionalism in fact thought that there are powerful non-instrumentalist, legitimacy-based arguments against constitutionalism, arguments that cannot be refuted easily. This is, however, not the case. As this is a book review rather than a book, I am not able to establish this argument in full.

I will therefore limit the following discussion to a list of pressure points.

The core of the non-instrumentalist, legitimacy-based argument against constitutionalism and judicial review is that they are "anti-democratic." This argument focuses on the counter-majoritarian difficulty, which is one of the most common problems in constitutional theory. According to the counter-majoritarian argument, there is a problem with the legitimacy of the institution of judicial review and with constitutional entrenchment of rights. It is "anti-democratic" when unelected judges use the power of judicial review to nullify the actions of elected legislators, while interpreting a constitution that can hardly be amended. The court, so it is argued, acts contrary to the majority will as expressed by representative institutions. There are numerous ways to answer this counter-majoritarian argument. I will present, very briefly, only some of them, and will conclude by suggesting my own response.

Firstly, one can hold the "discrete and insular minorities" doctrine, according to which there are groups that are excluded from the give-and-take of democratic politics. These groups are almost always the losers in the democratic process and should be protected from certain decisions of the majority. Therefore, judicial review is legitimate only when it serves to protect the rights of "discrete and insular minorities" against oppressive actions by democratic majorities. John Hart Ely's "procedural rights theory" falls neatly within this instrumentalist argument for judicial review.[3] This approach, however, offers too narrow a protection of human rights. For that reason (and for other reasons that will not be elaborated here), it does not provide a satisfactory reply to the anti-majoritarian argument.

Secondly, one can argue, much like Bruce Ackerman, that judicial review is actually a democratic institution that checks the anti-democratic actions of elected officials.[4] Ackerman distinguishes between "ordinary politics" and "constitutional politics." He then adds that for various reasons, "the people" do not really get involved in ordinary politics. Therefore, ordinary politics are not really very democratic. Things are quite different regarding "constitutional politics." Here, "the people" normally become more engaged in the relevant issues and by expressing its

3. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 157 (1980).

4. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 9–13 (1991).

wishes through the constitutional level, the majority commands its representatives to act in accordance with its clear wishes. The courts are merely enforcing the majority will by subordinating "ordinary politics" to "constitutional politics." The part of Ackerman's theory that stresses the difficulty with "ordinary politics" has its appeal. I suspect that Ackerman's "constitutional moments" answer does not solve the counter-majoritarian difficulty in a satisfactory way, yet I will not discuss this point here.

Thirdly, one can admit that judicial review is anti-democratic but add that there are some values (liberty, equality, some moral imperatives and the like) that trump democratic legitimacy. Therefore, judicial review is indeed anti-democratic but at the same time justified when it protects these values (p. 141). This approach, which has a certain appeal, is explicitly refuted by Harel.

Fourthly, and this is the argument suggested by Harel, it can be argued that some decisions about human rights are not the type of decisions that should be made by the public or by the majority (through its representatives) to begin with. Thus, there is no "democratic loss" that needs to be justified, as some decisions about human rights are by their nature beyond the jurisdiction of "the people". This is a very interesting argument that may offer a sound response to the anti-majoritarian argument. I am afraid, however, that Harel does not fully explain and does not set clear criteria as to why exactly some decisions are beyond the jurisdiction of the democratic legislature—or indeed "the people."

Harel gives the example of his owing $100 to John. Harel argues that should he refuse to pay his debt, the dispute should not be decided by democratic deliberation. Moreover, Harel argues that in this case we should not strike a balance between John's right to the money (or his claim that such a right exists) and the procedural rights of citizens to political participation—as in this case there is no right to political participation to begin with (at least not on fairness or neutrality grounds). This is so because John's claim, Harel argues, "hinges only on the substantive merit of his claim" (p. 142) rather than on a vote or a referendum or any other procedure. In other words, John's right to the $100 "is not conditional on anybody's good will or preference or judgment" (p. 142). But what makes the courts—or perhaps other institutions that do not reflect the majority will—better at adjudicating such a dispute? Harel's answer is that considerations of neutrality and fairness are irrelevant here (or merely insufficient). All that

matters is that the institution that adjudicates such cases will be an embodiment of reason—and that the dispute will be decided by using reason (p. 143). This innovative approach gives rise to a few troubling questions. First, it is not quite clear what Harel means by "reason"—what would be the alternatives for acting upon reason (within the political-legal context)? Secondly, it is not clear whether there is a difference between acting upon reason and applying the law. Put differently, it is not clear whether decisions about rights should be made in accordance with "reason" or in accordance with the law. Thirdly, Harel does not explicitly say which institution is more likely to act upon reason—and how are we to ensure that it would do so. Fourthly, and despite the third point above, it is implied that disputes about rights should be decided by courts and not by democratic deliberation. If this is so, Harel is in fact making what appears to be an instrumentalist argument, which goes as follows: the only way to make the right decision in cases involving disputes about rights is to use "reason"; courts are more likely to use reason when deciding such cases; therefore, courts are more likely to get it right when disputes about rights are decided; thus, courts should adjudicate such cases. This is in fact an instrumentalist argument for rights-based judicial review. Moreover, if courts are the appropriate forum for deciding disputes about rights because they are superior in their deliberative powers (as they are more qualified and more likely to act upon reason), it may raise dignity-based concerns as this approach is based on a distrust of people's normative judgments. Harel himself refers to these concerns as a drawback of instrumentalist arguments for judicial review. He argues that these concerns result only from instrumentalist arguments for judicial review (or constitutionalism). My worry is that these concerns result from Harel's approach as well, probably because it is an instrumentalist approach after all.[5]

Thus far I have discussed three common replies to the "counter-majoritarian" argument against constitutionalism and judicial review—and a fourth and innovative one which was suggested by Harel. In the following I wish to offer a fifth reply which is absent from the current political and constitutional theory discourse and was not mentioned in Harel's book either.

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5. I suspect that the concerns about distrusting people's normative judgments should be ignored, as most people are ignorant and lack sufficient knowledge and ability to make proper normative judgments, but since Harel takes these concerns seriously I am assuming, for the sake of argument, that he is right in doing so.

My proposed response to the counter-majoritarian difficulty is that it should be admitted that judicial review is, by and large, anti-democratic, in the sense that judges do not necessarily act according to the majority will. However, and for numerous reasons, we should also admit that the legislature and "democratic deliberation" also do not and often cannot reflect the majority will, either accurately, remotely or at all. The counter-majoritarian argument applies both to the judiciary and to the legislature—and to a similar extent. Therefore, various instrumentalist arguments can be brought against judicial review and in favor of legislative supremacy. The counter-majoritarian argument, however, as a legitimacy-based argument (which may be a non-instrumentalist argument) cannot really be an argument against judicial review and for legislative supremacy, since this is an argument against both judicial review and legislative supremacy (or legitimacy).

Jeremy Waldron, a prominent champion of anti-constitutionalism and anti-judicial review, asserts that opting for judicial review results in a loss for democracy.[6] It would seem that the idea at the basis of this claim is that being unable to participate in a decision about rights undermines the political equality that is fundamental to democracy. Thus, the choice, as Waldron presents it, is between letting the elected representatives of the people who occupy the legislature make the final decisions on rights and letting the unelected "judicial aristocracy" make the ultimate decisions. We are encouraged to regard the choice in favor of the legislature as resulting in no loss of government by the people, and the choice in favor of judicial review as occasioning a significant loss.

However, there is a significant loss for self-government in the choice of a representative democracy itself. Martin Loughlin rightly writes that a representative democracy

> establishes a form of government far removed from the notion of democracy as collective self-government . . . . Governments of a modern representative democratic character do not in any strict sense express the popular will. Although they elect representatives, the people do not govern, even in the indirect sense of choosing individuals who will assemble to put their will into action. Rather, it would be more accurate to say that the

6. *See* JEREMY WALDRON, LAW AND DISAGREEMENT 10–17, 211–312 (1999). *See generally* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006); Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18 (1993).

> people merely select from amongst the competitors those who will take the political decisions.[7]

When reading Waldron's work in this area, one is left with the sense that whenever disagreements about rights arise we are choosing between a system where a particular citizen goes out and casts a vote in favor of or against a particular conclusion and a system in which a group of judges makes the decision for him. What Loughlin's point makes us realize it that even when the legislature is deciding, someone else is deciding for that particular citizen. The notion that democracy is in fact a myth is not new. It was Jean-Jacques Rousseau who said that "If we take the term in the strict sense, there never has been a real democracy, and there never will be."[8] He also added that "The people of England regards itself as free; but it is grossly mistaken; it is free only during the election of members of parliament. As soon as they are elected, slavery overtakes it, and it is nothing."[9] Even though Rousseau wrote this at a certain time in a certain place, the core of his arguments (which will not be elaborated here) is universally valid.

Thus, to present the argument as though judicial review is the only choice that results in a loss of self-government is incorrect. This point needs further elaboration, yet I will not try to explain in full why democracy does not exist and cannot exist. In the following I will describe in a nutshell three well-known reasons (out of 15 I have identified to date—and my research is not over yet) why modern representative democracy results in a loss of democracy, in the sense that it fails, at times significantly, to reflect the idea of collective self-government. The reasons are first, a lack of real choice; second, the need to form a political coalition; and third, the complete distortion of the majority will caused by non-proportional voting systems.

As to a lack of real choice: all too often citizens do not have a real choice when they elect their representatives. This is the case when the voter can only choose between a few political parties or candidates. This is the case, for example, in the U.S.A. (where normally only two political parties are represented in the federal

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7. Martin Loughlin, *Rights, Democracy, and Law*, *in* SCEPTICAL ESSAYS ON HUMAN RIGHTS 41, 51 (Tom Campbell, K.D. Ewing & Adam Tomkins eds., 2001).

8. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT, OR PRINCIPLES OF POLITICAL RIGHT III, at ch.4 (1762), *available at* https://ebooks.adelaide.edu.au/r/rousseau/jean_jacques/r864s/book3.html#section27.

9. *Id.* at ch.15.

legislature), the U.K. (normally three to five parties) and Canada (normally four parties).

Generally speaking, we have a real choice which enables us to express and realize our preferences when we have an adequate number of valuable options. When we only have a handful of parties or candidates to choose from, and especially when some or most of them are not perceived by us as "valuable options," we normally do not have a real choice, and therefore are not able to express our true will by choosing one of them. In the U.S.A., to take one clear example, there are normally only two political parties and two candidates for President. In this case, when a voter's views do not match in a satisfactory way the political agenda of either of these parties, this voter has little or almost no real political choice. How should a voter vote when he supports compulsory health insurance but opposes same-sex marriage? How should a voter vote when she supports hard-core capitalism and the idea of small government but also supports abortion on demand?

This lack of choice makes it harder to argue that the elected body represents in any meaningful way the majority will. The problem, however, is that having a great number of political parties does not necessarily increase self-government and accordingly does not decrease the democratic loss. This leads us to the second reason for why democracy cannot exist.

As to proportional voting systems and the necessity to form a political coalition: in political systems where parliament consists of a large number of political parties, a coalition of a few parties may be required in order to form a stable government. This is the case, for example, in France, Italy, and especially in Israel, where we can find around 10 political parties represented in parliament and 4–6 political parties forming a coalition government. Alas, those who vote for a certain political party cannot always predict who its associates in a future coalition would be, and consequently cannot always predict which political principles will guide this coalition. Such a political system can offer more choice at the time of the election. But once the election is over and decisions are made concerning the compromises that should be made in order to form a coalition of political parties, the will of the majority is set aside, at least to a certain extent.

Moreover, in a political regime of a coalition of parties, a counter-majoritarian problem within the legislature is almost inevitable. This is so because in a system of political coalition,

small political parties that are part of the leading coalition of parties enjoy great political influence, which is highly disproportionate to the number of votes they received. In these cases, the majority will (if there is any) is not just being ignored, at least in part, but is being replaced by the will of several minorities, which, at times, runs against the clear interests of the majority itself.

As to non-proportional voting systems and the complete distortion of the majority will: non-proportional voting systems, such as majoritarian voting systems, winner-takes-all voting systems (in cases when there are several constituencies) and mixed voting systems normally completely fail to reflect the majority will.

In the U.K., for example, in almost all cases in the twentieth century in which one political party won more than 50% of seats in parliament, this party did not receive more than 50% of the people's votes. In other words, a single political party normally gains almost ultimate control on the executive and legislative branches, while being opposed by the majority of voters. In Italy, after the 2008 election, Berlusconi's coalition won 47% of the people's votes but 54% of seats in the legislature. In France, after the 2007 election, Nicolas Sarkozy's party won 39% of the people's votes but 54% of seats in parliament. In Canada, in the 2011 election, the conservative party won 40% of the people's votes but 54% of seats in Parliament. In the U.S.A., in the 2000 elections, Al Gore won more than 51 million votes but lost the presidency to George Bush who won less than 50.5 million votes (with Ralph Nader winning almost 3 million votes—most of which would have been given to Gore had Nader not run for the presidency). These are not rare examples but representative ones.

More generally, in non-proportional voting systems, there is normally no correlation between the percentage of votes a political party gets and the number of seats in parliament to which the same party is entitled—and smaller parties are systematically adversely affected. In the U.K., to take only one illustrative example, the Liberal Democrat party has been consistently under-represented in Parliament in a way that completely diminishes the "democratic" nature of the election. In 1974 and in 1992, for example, the Liberal Democrat party won 18% of the votes but less than 2% of seats in Parliament. In 2010 they won 23% of the votes but less than 9% of seats in Parliament.

In the 2015 election, the gap between U.K.'s self-perception as a democracy and the facts was truly astonishing. To take a few examples: the Labour Party increased its share of the votes by 1.5% but lost 26 seats in Parliament; the SNP got 4.7% of votes and 56 seats. The Liberal-Democrats got 7.9% of votes but only 8 seats; and UKIP got 12.6% of the votes but only 1 seat. It is quite obvious that in majoritarian, anti-democratic voting systems, gaining popular support is one thing and gaining seats in the legislature is another thing. More generally, it is not clear how political systems that employ a non-proportional voting system can seriously discuss the majority will as a justification for rejecting constitutionalism or judicial review on both legislative and administrative decisions.

These are just a few reasons—and there are many more—why democracy does not exist and cannot exist. In light of the above incomplete, simplistic, yet clear evidence of how the majority will is being significantly and institutionally distorted in all "democracies," the academic discourse about "democratic legitimacy," the majority will, and the democratic supremacy of Parliament is completely meaningless, as it is based on myths and fabricated assumptions.

One quick warning is required here: we should be careful not to equate free elections and public legitimacy (which may result from ignorance or brainwashing) with democracy. "The people" may be happy with rolling a dice or flipping a coin as a voting or decisionmaking system. These systems may enjoy public legitimacy—but they will not be democratic in any meaningful sense—in the same way that one's autonomous decision to completely waive one's autonomy and to unquestionably obey an authority does not mean that that person is now autonomous. For a voting system to be democratic, it is not sufficient that it enjoys public legitimacy. For a voting system to be democratic, its results should reflect as accurately as possible the genuine preferences of voters.

Since no representative democracy—or any other type of democracy—can truly or even remotely reflect the majority will, the counter-majoritarian argument or the argument about "democratic deliberation" cannot be used against constitutionalism and judicial review. And since non-instrumentalist arguments for constitutionalism and judicial review have very limited power, then in the battlefield of arguments for and against constitutionalism and judicial review it is instrumentalist arguments who decide who wins. Harel is right

to argue that instrumentalist arguments for constitutionalism and judicial review have their flaws, but it does not follow that there are better, non-instrumentalist arguments that can overcome these flaws. It is possible that, for better or for worse, instrumentalist arguments are all we have for (and against) judicial review.

CONCLUSION: THE CASE FOR MODEST CONSTITUTIONAL INSTRUMENTALISM

Harel's purpose in his book is not to replace all instrumentalist arguments for constitutionalism and judicial review with non-instrumentalist arguments. Harel does suggest, however, that some instrumentalist arguments for constitutionalism and judicial review are not as strong as they appear to be, and that sometimes non-instrumentalist arguments complement instrumentalist ones, are superior to them, or even are the only ones that can truly explain the nature and importance of constitutionalism and judicial review. The argument that constitutionalism and judicial review are not merely means for protecting rights and promoting justice but are also valuable as such—can be quite powerful. However, in some parts of the book it seems that Harel's dismissal of instrumentalist arguments is too quick and too broad, and, accordingly, the weight that he accords to non-instrumentalist arguments is probably too excessive, as they are not always free of difficulties.

To take one example, in his attack on constitutional instrumentalism Harel argues that it rests on factual speculations that cannot be substantiated and that it suffers from inauthenticity or insincerity (pp. 4, 135). The argument about constitutional instrumentalism resting on factual speculations can be answered in the following way. It can be argued that constitutional instrumentalism does not necessarily mean that, for example, constitutionalism and judicial review are desirable because they *always* bring about good or better results in terms of protecting rights and public goods. Constitutional instrumentalism may mean that constitutionalism and judicial review are desirable as long as they bring about better results and to the extent that they do that. This way we avoid factual speculations. We also avoid the difficulty of making broad generalizations while ignoring social, political and legal circumstances that are time- and place-sensitive. Presumably we can be a bit bolder, and argue that constitutionalism and judicial review are desirable because they increase the likelihood that human rights and public goods will be

better protected, simply because they put limits on the power of the executive and the legislature, and because usually power corrupts and absolute power corrupts absolutely. Thus the (intrinsic?) value of constitutionalism and judicial review lies within the good old doctrine of the separation of powers in its modern form of "checks and balances." Constitutions and judicial review put limits on the power of the legislature and the executive. In some cases these limits may prevent the legislature and the executive from doing the right thing, but in the long run and on the whole it is better for citizens to live in a state in which the most dangerous branches (the legislature and the executive) are being restrained by constitutionalism and judicial review. This is so because usually power corrupts and absolute power corrupts absolutely, and because constitutionalism and rights-based judicial review do not accord absolute power to the courts, whereas the lack of a binding constitution and judicial review results in nearly absolute legislative and executive power. We do not really need social science research to successfully substantiate this statement. Common sense as well as recent and not-so-recent history will do.

As to the problem of inauthenticity or insincerity, I am afraid that Harel's non-instrumentalist arguments are also not free from this difficulty. Harel's argument that constitutions and judicial review are valuable as such, relies in part on factual speculations. Harel argues that his purpose is to "identify justifications which meet the test of sincerity, namely that address the genuine sentiments underlying the popular support of political institutions and procedures, rather than to rationalize these institutions and procedures in terms that are alien to those who establish the institutions and sustain them" (pp. 4-5). Harel then assumes that the value of constitutions as the public acknowledgment of the duty to protect rights and the value of judicial review as the institutional embodiment of the right to a hearing accurately capture popular sensibilities.

There are some huge factual assumptions here that call into question the authenticity of Harel's approach. Harel assumes that both current popular support of political institutions and procedures—and the state of mind of those who established and sustain these institutions and procedures—rely, in whole or in part, on non-instrumentalist arguments. There is no evidence to support these assumptions. These assumptions may or may not be reasonable, but they are assumptions and speculations nevertheless. Harel may offer a compelling way to understand the

true nature or rationale of some political institutions and procedures, regardless of whether this way is shared by others. But as compelling as this way may be, it does not follow that it is shared by the public or by state officials.

In conclusion, the importance of Harel's book is twofold. First, it offers important, exciting, and innovative non-instrumentalist arguments for constitutionalism and judicial review, and it does so in a clear, engaging and captivating way. Second, while I have doubts as to whether Harel's non-instrumentalist arguments outweigh some relevant instrumentalist arguments, they do give rise to doubts with regard to the soundness of some common relevant instrumentalist arguments. These doubts call for modesty, coherence, and sincerity when instrumentalist approaches are applied to support constitutional procedures and institutions. Too many instrumentalist arguments in the common discourse about constitutionalism and judicial review attempt to establish that constitutions and judicial review always result in better protection of rights, public goods or democratic principles, and that is what makes them valuable. A more modest and defensible line of argument would be that constitutionalism and judicial review are valuable because they are likely to better protect rights, public goods or democratic principles, and to an extent they actually do so. Much like the law, the rule of law, autonomy, and life itself, constitutions and judicial review are means to an end (doing good or promoting justice), and are only or mainly valuable to the extent that they achieve that end. Their success depends on changeable circumstances and is time- and place-sensitive. This modest instrumentalism is perhaps not very exciting, but is probably the best way to understand the value of constitutionalism—and its limits.