Judicial Review in an Age of Moral Pluralism. By Ronald C. Den Otter. New York: Cambridge University Press, 2009. 356p. $97.00.
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— Alon Harel, *Hebrew University Law School*

In an ambitious book, Ronald C. Den Otter develops a new justification of judicial review grounded in Rawlsian liberal theory. His enterprise uses John Rawls's liberal theory, in particular the idea of "public reason," to justify the institution of judicial review, as well as to provide guidelines for adjudicating constitutional cases. The first part of the book is devoted to explaining what public reason is, addressing objections to it, and establishing its relevance to constitutional adjudication, whereas the second part is devoted to examining American constitutional adjudication and establishing how the idea of public reason can both explain and guide judges in adjudicating constitutional cases. The book is both a work in political theory (interpreting and elaborating the idea of public reason) and a work in constitutional theory (exploring US constitutional jurisprudence). In this review, I present the main claims of Den Otter and then criticize the Rawlsian enterprise and question the use of the idea of public reason for the purposes of justifying judicial review.

The fundamental motivation underlying Den Otter's enterprise is the value pluralism that characterizes contemporary societies. Value pluralism is a challenge to the legitimacy of government when legislation conflicts with fundamental values of some of its citizens. In such cases, the state is required to justify its authority, and Rawls's political philosophy is designed to provide such a justification without resorting to the truthfulness of the values promulgated by the state.

Rawls's starting point (endorsed by Den Otter) is that the reasons underlying legislation must be publicly justified; that is, they must be ones that cannot reasonably be rejected. The ideal of public reason is grounded in neutralist, liberal, antiperfectionist ideals. There is no public justification for promoting or hindering a reasonable conception of the good simply because this conception is true or false. What is particularly pernicious is the state using its coercive power to prevent a person from doing something that he or she believes to be an essential quality of life without providing reasons that cannot be reasonably rejected.

To render the concept of public justification less abstract, Den Otter maintains that both freedom and equality are forms of public justification. This claim has important implications, as the values of freedom and equality provide a bridge between abstract political theory and concrete constitutional adjudication. Den Otter shows that even if the Supreme Court does not use the term *public justification,* many court decisions "establish the fundamental right of all people to formulate and pursue their life plans and to prevent the state from discriminating against people on the basis of certain traits. In the eyes of law, all of us are equals, and the state may not interfere with any reasonable life plan without compelling reasons for such discrimination" (p. 52).

To complete the case for judicial review, Den Otter ought to show the superiority of courts in identifying what public reason dictates. His analysis is based on the conjecture that courts are superior to legislatures in identifying which justifications are public. It is the superiority of the courts in identifying public reason that ultimately justifies judicial review (see Chap. 10).

My critical comments are twofold. First, I shall challenge the idea of public reason. The success of Den Otter's enterprise hinges on the soundness of Rawls's idea of public reason. The powerful objections to Rawls's neutralist liberalism therefore threaten to undermine Den Otter's enterprise. Second, I shall explore critically the institutional ramifications of the idea of public reason; in particular, I shall question whether the Rawlsian ideal of public reason can justify the institution of judicial review.

In a powerful short piece, Joseph Raz has challenged some of the most foundational claims of political liberalism on several grounds ("Disagreement in Politics," *American Journal of Jurisprudence* 43 [1998]: 25–52). While Den Otter devotes much of the book to articulating what public reason is, to exploring different versions of public reason, and even to examining and rebutting standard objections to public reason, he fails to mention or explore the most compelling objections raised by Raz.

One objection raised by Raz is that the claim that the state ought to be neutral to disagreements about conceptions of the good is self-defeating. When considering paradigmatic disputes characterizing contemporary societies, Rawlsians emphasize religious disagreement and disagreements about conception of the good. But of course the neutrality principle itself is contested. Should we exclude non-neutralists such as John Stuart Mill on the grounds that Mill's perfectionist ideals are unreasonable? Note that ultimately, this objection is not a purely conceptual objection. Rawlsians could of course posit that the principle of neutrality does not apply to itself. Yet, as Raz argues, this seems an ad hoc arbitrary stipulation.

Furthermore, the primary motivation for Rawlsian political liberalism rests on the view that neutrality is essential to the legitimacy of governments. The justification underlying the Rawlsian enterprise is that the state does not respect people when it forces them to act against their reasonable beliefs. Thus, Rawls posits symmetry between those who hold reasonable true beliefs and those who hold reasonable false beliefs. But, as Raz notes, no such symmetry exists. Admittedly, both those who hold reasonable false beliefs and those who hold reasonable true beliefs are symmetrical in that both have reasonable beliefs. But they are not symmetrical in that the former hold false beliefs

while the latter hold true beliefs. Is it necessarily more respectful to give no weight to the truthfulness or falsity of one's beliefs? In some ways, it could be regarded as even less respectful, as the person himself cares not about the fact that he or she holds certain convictions but about the question whether these convictions are true or not. If the person's beliefs are (unbeknown to him or her) false, he or she would (under certain circumstances) want to be forced not to act on the basis of these beliefs. While Den Otter is fully aware of the opposition to the idea of public reason, and while he addresses that opposition in Chapter 7, he fails to examine some of the most compelling objections to it. If these objections are not addressed, they undermine his enterprise as it hinges on the success of the Rawlsian framework.

Rawls's political theory is highly influential. It is legitimate for a Rawlsian liberal theorist to examine its implications to constitutional theory without defending the Rawlsian framework. Let me challenge the claim that Rawls's political theory can be used to defend judicial review.

In a previous paper, I identified the deficiencies of what I labeled "instrumentalist" theories of the US Constitution (see Alon Harel and Tsvi Kahana, "The Easy Core Case for Judicial Review," *Journal of Legal Analysis* 2 [Spring 2010]: 227–56). Let me define what I mean by instrumentalist theories, establish that Den Otter's justification for judicial review is indeed an instrumentalist one, and then specify the difficulties of instrumentalist approaches to the Constitution.

The instrumentalist views of judicial review differentiate sharply between two stages of analysis. At the first stage, the theorist addresses the question of what the point of the Constitution is, and consequently how it should be interpreted. The point of the Constitution could be defending rights, democracy, stability, and coherence or even defending the will of the people against the will of governments and politicians. Once the "point" of the Constitution is settled, the theorist turns to identify the institutions best capable of realizing that point. Instrumentalist theories of judicial review perceive this second step as subservient to the findings in the first stage.

It is evident that Den Otter's theory is an instrumentalist theory of judicial review. It identifies the "point" of the Constitution as implementing the idea of public reason. Chapter 10 of the book is devoted to establishing that courts are indeed instrumental in implementing public reason. Yet the claim that the Court is likely to implement the idea of public reason (or more likely to do so than the legislature) is a contingent claim; it ultimately depends on the dispositions of judges and those of the legislatures. There is nothing in the concept of adjudication that guarantees the superiority of judges in fulfilling this task.

In the past, I criticized the instrumentalist approach on several grounds. I argued that the question whether courts or legislatures are better or worse in achieving any particular goal hinges on particular contingencies that change in different places and times. The ambition of constitutional theorists (including Den Otter) to design foundational institutional mechanisms independently of these contingencies is therefore misguided. Den Otter argues, for instance, that courts are more likely to be exemplars of public reason. Yet it is difficult to see why this would be the case. Courts clearly have advantages over legislatures, as it is part of the judicial ethos that courts should provide reasons and those reasons are subject to scrutiny. Yet courts are often also more elitist than legislatures and are often detached from the values of large social and religious groups. Can anybody establish convincingly that the first consideration is indeed so much more important than the second?

Furthermore, even if Den Otter establishes that courts are indeed better than legislatures in implementing the idea of public reason, it is unclear that they are better than any other possible institutional alternative. There is nothing in courts or in the adjudicative process that makes courts better than philosophers, for instance, in identifying the reasons that are public. If we find that philosophers are better than judges, should we appoint them to review legislation? I think many would resist this proposal for principled reasons. It follows, therefore, that instrumental considerations are not sufficient to justify judicial review. Establishing the justifiability of judicial review requires abandonment of instrumental justifications and substitution with justifications that establish not merely that courts are contingently better than legislatures but that there are certain intrinsic features in the adjudicative process that are prerequisites for the legitimacy of the state.

I share Den Otter's view that judicial review is an essential component of a liberal polity and (like him) I resist the recent call for a weakening of the powers of the courts. Yet ultimately I believe that despite its sophistication and erudition, Den Otter's book fails to establish the case for judicial review. It must be found elsewhere.

Montesquieu and the Logic of Liberty: War, Religion, Commerce, Climate, Terrain, Technology, Uneasiness of Mind, the Spirit of Political Vigilance, and the Foundations of the Modern Republic. By Paul A. Rahe. New Haven: Yale University Press, 2009. 400p. $30.00.

Soft Despotism, Democracy's Drift: Montesquieu, Rosseau, Tocqueville, and the Modern Prospect. By Paul A. Rahe. New Haven: Yale University Press, 2009. 400p. $38.00 cloth, $25.00 paper.
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In these two volumes, Paul A. Rahe sets out to understand how and why modern democracies have veered from their fundamental roots by drawing on the work of