

Can Anti-Objectivists Support Judicial Review?

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... judicial activism presupposes a certain objectivity of moral principle; in particular it presupposes that citizens do have certain moral rights against the state ... Only if such moral rights exist in some sense can activism be justified as a programme based on something beyond the judge's personal preferences.¹

... the justification of judicial review is a wild and unseemly scramble for any but a moral realist.²

I. Introduction

Those theorists who have investigated the relationship between the debate among moral objectivists and anti-objectivists (henceforth, 'the meta-ethical debate'), on the one hand, and the debate about the legitimacy of judicial review, on the other hand, have generally adopted one of two positions. The first, championed by Jeremy Waldron and (at times) Ronald Dworkin,³ is that the meta-ethical debate is irrelevant to the legitimacy of judicial review (or to adjudication more generally). The second, defended by Michael Moore and (at other times) Dworkin,⁴ is that – far from being irrelevant – the outcome of the meta-ethical debate may well be determinative of the legitimacy of judicial review. On this second view, it is open to an objectivist to defend judicial review, but it is difficult – if not

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¹ R Dworkin, *Taking Rights Seriously* (1977) 138.

² M S Moore, 'Moral Reality Revisited' (1992) 90 *Michigan Law Review* 2424, 2476.

³ J Waldron, *Law and Disagreement* (1999) ch 8; R Dworkin, *Law's Empire* (1986) 80-5. Cf Dworkin, *Taking Rights Seriously*, above n 1, 138 (quoted above); R Dworkin, 'Objectivity and Truth: You'd Better Believe It' (1996) 25 *Philosophy and Public Affairs* 87.

⁴ Above n 1 and 2.

impossible – for an anti-objectivist to do so. I shall call the first view the ‘no-difference thesis’, and shall label advocates of the second view ‘radical opponents of the no-difference thesis’.

Elsewhere, I have argued against the first view.⁵ In this article, I shall argue against the second view, contending that the meta-ethical debate does not make as radical a difference to the legitimacy of judicial review as that view suggests. While they are correct to oppose the no-difference thesis, Moore and (the earlier) Dworkin exaggerate the difficulty facing an anti-objectivist who wishes to defend judicial review.

Because there are many different types of anti-objectivism, and because these variants can diverge significantly, I shall focus on only one version of anti-objectivism, which I shall call ‘perspectival relativism’. I outline the major tenets of perspectival relativism in Part II. Part III then presents two arguments in support of judicial review. In Part IV, I consider three ways in which radical opponents of the no-difference thesis might seek to show that perspectival relativists cannot rely on these arguments. I contend that none of these attempts are successful. I conclude, in Part V, by suggesting that – while perspectival relativists, like objectivists, can accept the two arguments for judicial review presented in Part III – the meta-ethical debate still has implications for the legitimacy of judicial review.

II. Perspectival relativism

I mentioned in Part I that I shall focus on only one version of anti-objectivism – namely, perspectival relativism. The price of doing so is that the most I can show is that *one* version of anti-objectivism is compatible with support for judicial review. It may be that this is true of no other form of anti-objectivism (though I hope it will be apparent that my claims about the compatibility of perspectival relativism with judicial review can be generalised to cover many – though not all – other forms of anti-objectivism). However, this price is outweighed by the fact that my discussion can be much more precise by focusing on a particular form of anti-objectivism, rather than having to generalise across all such theories. Moreover, if I can show that perspectival relativists can support judicial review without undue difficulty, this is enough to refute radical opponents of the no-difference thesis, who assert that it is difficult (if not impossible) for *any* anti-objectivist to support judicial review.⁶

Given these reasons for focusing on a single version of anti-objectivism, why have I chosen perspectival relativism? There are other

⁵ D Smith, ‘The Use of Meta-Ethics in Adjudication’ (2003) 23 *Oxford Journal of Legal Studies* 25; D Smith, ‘Ronald Dworkin and the External Sceptic’ (2006) 19 *Canadian Journal of Law and Jurisprudence* (forthcoming).

⁶ See eg Moore, ‘Moral Reality Revisited’, above n 2, 2469-80.

versions of anti-objectivism that are more popular,⁷ and that have been discussed in the context of the no-difference thesis. For example, Simon Blackburn's expressivism is relied upon by Waldron when defending the no-difference thesis.⁸ However, I am sympathetic to Dworkin's allegation that Blackburn's expressivism is self-refuting, in the sense that if true it cannot be stated.⁹ Whatever problems perspectival relativism may have, I believe that it can at least be coherently stated. Moreover, perspectival relativism is particularly well-suited for use when determining whether radical opponents of the no-difference thesis are mistaken, partly because it embraces (more openly than many versions of anti-objectivism) some of the features of anti-objectivism that radical opponents of the no-difference thesis seize upon when claiming that anti-objectivism is inconsistent with support for judicial review (see Part IV).

So what is perspectival relativism?¹⁰ Perspectival relativism is one possible version of moral relativism. While accepting that moral judgments can be true or false, it claims that whether a moral judgment is true ultimately depends on one's moral beliefs (and so moral judgments cannot be *objectively* true). Moreover, since different people have different moral beliefs, different moral judgments will be true for them. In other words, a moral judgment can be true only relative to a set of moral beliefs (which I shall label 'a moral perspective', or simply 'a perspective'), and – as different people hold different moral beliefs – they hold different perspectives.

This does not mean that whether a moral belief is true relative to one's perspective depends solely on whether one accepts that belief. Even if one does accept it, one also accepts other moral beliefs with which the first belief may conflict. In such cases, whether the first belief is true relative to one's perspective depends on whether it coheres better with the rest of one's moral beliefs than does any rival belief. The fact that it is inconsistent with

⁷ I am not aware of any philosopher who has adopted perspectival relativism, though some have come close; see, eg, M Kolbel, 'Faultless Disagreement' (2003) 104 *Proceedings of the Aristotelian Society* 53. The version of moral relativism defended by Harman in G Harman and J Thompson, *Moral Relativism and Moral Objectivity* (1996) is also similar to – though certainly not identical with – perspectival relativism.

⁸ J Waldron, 'Moral Truth and Judicial Review' (1998) 43 *American Journal of Jurisprudence* 75, 92, 96. Strictly speaking, Waldron relies only upon certain arguments offered by Blackburn. However, those arguments depend for their soundness on the feature of Blackburn's expressivism that Dworkin finds objectionable: see below.

⁹ Dworkin, 'Objectivity and Truth', above n 3, 110-2. Dworkin describes Blackburn's expressivism as the 'Cheshire cat' of moral philosophy.

¹⁰ The following account draws heavily upon Smith, 'The Use of Meta-Ethics in Adjudication', above n 5, 28.

certain of one's moral beliefs tells against it, but is not necessarily fatal (if, for example, it coheres better with yet further moral beliefs that one considers more important than the beliefs with which it conflicts).

We therefore need to distinguish between one's belief-set (which contains all one's current moral beliefs) and one's perspective, since the fact that a moral belief is a member of one's belief-set does not necessarily mean that it is true relative to one's perspective. Rather, one's perspective represents what one's belief-set would be if all shortcomings in terms of lack of coherence (such as inconsistent pairs of beliefs) were rectified.

As there is overlap between different people's belief-sets, there is likely to be overlap between their perspectives. However, there are also divergences between different people's belief-sets, and so any overlap is likely to be limited. One could speculate that – as we eliminate inconsistencies in our moral beliefs – we will all converge on a single perspective. However, perspectival relativism is committed to rejecting that speculation, as the claim that we can all converge upon certain moral beliefs by applying principles of rationality (such as removing inconsistencies among our moral beliefs) is a paradigmatic objectivist claim.¹¹

Obviously, this account requires a lot of fleshing out. However, it should suffice for my task, which is to determine whether it is difficult (if not impossible) for perspectival relativists to support judicial review, not to determine whether perspectival relativism is correct. Judicial review cannot be legitimate relative to every possible perspective if perspectival relativism is correct, since there are possible belief-sets with which the belief that judicial review is illegitimate coheres well. However, I shall argue that it can be legitimate relative to some, even many, perspectives. In other words, perspectival relativism is not (logically, or in spirit) inconsistent with support for judicial review, though it does not demand such support.

III. Two arguments in favour of judicial review

In this Part, I present two arguments that purport to show that judicial review is not unjustifiably undemocratic.¹² These are not the only arguments one could offer in support of judicial review. However, they are sufficient to provide a basis for considering whether perspectival relativists can support judicial review. Nor are these arguments particularly novel. Instead, I draw to a large extent upon existing defences of the practice. My goal is not to offer new grounds for supporting judicial review, but rather to show that a perspectival relativist can rely upon certain existing grounds.

¹¹ Ibid 27-8.

¹² This wording is intended to leave open whether judicial review is not undemocratic at all or is undemocratic but justified. While the second argument for judicial review presented below may need to take sides on the meaning of 'democracy', the first argument need not do so.

Moreover, while I consider some objections to these two arguments, I do so only to the extent necessary to show that they are worthy of consideration. It is enough for my purposes if I can show that there are plausible, albeit contested, arguments in favour of judicial review that are available to perspectival relativists.

Before proceeding further, I should explain what I mean by 'judicial review'. Prima facie, this is simple: courts exercise the power of judicial review when they decide whether to strike down legislation as unconstitutional.¹³ However, the meta-ethical debate is most likely to affect the legitimacy of judicial review in cases where judges use moral reasoning to reach the conclusion that a particular statute is or is not unconstitutional. It is this situation on which I shall concentrate. (I shall assume that some cases of this type exist in any jurisdiction that adopts judicial review.) Not surprisingly, it is also this situation that radical opponents of the no-difference thesis have in mind when they argue that anti-objectivists are hard-pressed to support judicial review.¹⁴

A. The protection of rights

The first argument I wish to consider is that judicial review is necessary to protect people's rights.¹⁵ Legislators are (typically) dependent upon the support of a majority of the electorate to retain office, and so lack sufficient motivation not to mistreat any minority that the majority wishes to oppress. As rights exist, in part, to protect individuals and groups from oppression by the majority, their protection cannot safely be left to an institution that is dependent upon the support of that very majority. Since we cannot trust the majority (through the legislature) always to respect rights, and because rights are too important to be left subject to such a risk, judicial review is needed to ensure that rights are respected. Judges, unlike legislators, are (again, typically) not dependent on the majority's support to retain office, and so are better placed to oppose the majority when it fails to respect a minority's rights. In other words, judges are appropriate protectors of rights, not because they are wiser than legislators, but because they are not beholden to the majority and so are more capable of protecting the interests of the unpopular and unrepresented.¹⁶

¹³ It could be argued that judges also exercise the power of judicial review when they interpret legislation so that it conforms to fundamental principles of the common law. However, I shall limit my focus to the form of judicial review discussed in the text.

¹⁴ See eg Moore, 'Moral Reality Revisited', above n 2, 2469-70.

¹⁵ Except where indicated otherwise, all references to rights in this article are to moral rights.

¹⁶ J H Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (1980) 67-70.

Even if we confine our attention to cases in which the majority acts in good faith, there is still an unacceptable risk of oppression, because the majority's sincerely held beliefs about rights may be mistaken. For example, if the majority acts on a sincere belief that members of a particular group have no right to the protection of the law (eg because they are not citizens), that group is as much in need of protection as if the majority were acting in bad faith. Thus, even when the majority acts in good faith, the recognition it gives to the minority's rights may be inadequate. (The majority may also underestimate its *own* rights, but I shall not pursue this possibility here.)

This argument in favour of judicial review need not assume that members of the majority are motivated solely by their own self-interest, without any scruples regarding the treatment of the minority. The majority may generally be well-disposed to the minority, but this will not always be the case. No matter how benevolent the majority is generally, there will be occasions on which it fails to respect the minority's rights.¹⁷ Even when the majority acts correctly by its own lights, it may not in fact be acting correctly, and so may infringe the rights that the minority in fact possesses.¹⁸ It is for the protection of the minority on *these* occasions that judicial review is necessary. Nor does the fact that such occasions may be infrequent mean that judicial review is of little worth. The minority interests that are infringed on such occasions may be so vital that judicial review is very important indeed.

This assumes that there are certain interests – those that provide a foundation for rights – that are too important to be left up for grabs in the ordinary political process. While I lack space to consider fully how this claim might be defended, I suggest some reasons for accepting it with regard to certain rights in Section B. For now, it is sufficient to note that this assumption enables us to distinguish between cases where a minority legitimately loses out in the ordinary political process (namely, where its rights are not breached) and cases where it is treated illegitimately and so should be protected by the courts (namely, where its rights *are* breached).¹⁹ In other words, there are certain interests that are so important that – where the legislature fails to respect them – the courts must do so. However, provided those interests *are* respected, the courts must let all other political issues be decided according to majoritarian principles.²⁰

¹⁷ As most opponents of judicial review concede: eg Waldron, *Law and Disagreement*, above n 3, 258.

¹⁸ Anticipating slightly, this statement can be given a perspectival relativist reading – the majority acts correctly relative to its own perspective, but incorrectly relative to the perspective being used to assess its actions.

¹⁹ Cf Choper, above n 16, 76.

²⁰ This point is confined to the present context. I am not suggesting that, when *not* exercising the power of judicial review, judges should defer to the majority unless someone's rights are at stake.

B. Policing democracy

A second argument in favour of judicial review is that it provides an important safeguard for democracy. To understand this argument, it helps to consider an argument offered by Waldron *against* judicial review. He claims that legislative decision-making respects individuals in a way that judicial decision-making does not.²¹ Having political decisions made by the people's elected representatives gives weight to each person's views (since each person has a vote when electing those representatives), and ensures that the weight given to each person's view is equal (since each person has an *equal* vote). Waldron concludes that this 'pure majoritarianism' '... attempts to give each individual's view the greatest weight possible in this process compatible with an equal weight for the views of each of the others.'²² It therefore respects people in a way that adjudication does not.

Underlying Waldron's argument is the view that people have the right to participate in all aspects of their community's governance, based on the values of autonomy and responsibility.²³ However, the right to participate in a majoritarian decision-making process is not particularly meaningful if the *opportunity* to participate is lacking. Moreover, the opportunity to participate is best protected by recognising further rights.²⁴ For example, the right to free (political) speech is necessary to protect people's ability to acquire the information they need to participate meaningfully in the political process. Similarly, the right of assembly is needed to protect people's ability to organise into viable political units. Where a majority seeks to infringe these rights, there is a conflict between the right of participation on which majoritarianism is based and the importance of these further rights for ensuring that participation is meaningful. In such cases, judicial review may be necessary to uphold these further rights.²⁵ Where the majority would undermine these rights, the damage done by taking this matter away from the majority may be less than the damage done by letting the majority have its way.²⁶ Democracy can survive having an occasional decision taken away from the electorate and made by the judiciary; it cannot survive widespread breaches of the rights to

²¹ Waldron, *Law and Disagreement*, above n 3, 108-9.

²² *Ibid* 114 (footnote omitted).

²³ *Ibid* 213.

²⁴ Choper, above n 16, 4; R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996) 363.

²⁵ Dworkin, *Freedom's Law*, above n 24, 363; S Freeman, 'Constitutional Democracy and the Legitimacy of Judicial Review' (1990) 9 *Law and Philosophy* 327, 355.

²⁶ This assumes that the court is more likely than the majority to decide the matter correctly. Both of the arguments for judicial review in this Part depend on this assumption, but testing the correctness of that assumption would take us too far from the main goal of this article.

free speech or assembly. Such breaches undermine the democratic credentials of *all* political decisions.

Of course, even if the protection of certain rights is a prerequisite of meaningful participation in the political process, so is actual involvement in that process. Judicial review breaches this latter requirement – rights must be respected, not because the electorate has so decided, but because judges require it. Therefore, there is something lost, from a democratic point of view, when an unelected and unaccountable court makes a binding decision about what democracy requires.²⁷ Even if the *content* of that decision advances democratic values (because the right it upholds is indeed a prerequisite of meaningful political participation), the *process* of judicial review is still undemocratic because the court is not elected by, and accountable to, the electorate.²⁸ This leads opponents of judicial review such as Waldron to accept that majoritarianism has merit only under certain conditions (such as free speech and freedom of association), but to argue that the majority should be left to determine the exact nature and scope of those conditions.²⁹

However, while judicial review interferes with the majority's right of participation to some extent, it leaves much scope for the exercise of that right (in cases not involving other rights), and (if courts decide cases correctly) respects the majority's other rights. If, on the other hand, the majority is left free to oppress the minority, it can deny the minority's most basic rights, and hence its ability to participate meaningfully in the political process. Thus, even if it reduces the majority's opportunity to participate to some extent, judicial review can be vital to protecting minorities from a far more serious reduction in their ability to participate.

This argument does, however, justify a more limited form of judicial review than the argument in Section A. On the present view, courts are permitted only to uphold that subset of one's rights that is necessary to render one's right of participation meaningful. This involves recognising that decisions reached via a majoritarian process may infringe important rights that are *not* preconditions of that process.³⁰ Such rights fall outside the proper scope of judicial review because they are not essential components of democracy:

Once the rights and other interests necessary to the democratic process have been effectively secured, then the more the [courts] extend their authority to

²⁷ Waldron, *Law and Disagreement*, above n 3, 293.

²⁸ Choper, above n 16, 9-10.

²⁹ Waldron, *Law and Disagreement*, above n 3, 283.

³⁰ R A Dahl, *Democracy and Its Critics* (1989) 176. He gives the example of the right to a fair trial.

substantive questions, the more they reduce the scope of the democratic process.³¹

Limited in this way, judicial review promotes participation overall, by ensuring that the opportunity to participate in the political process is not unduly restricted, whilst respecting the outcome of people's participation in all other cases.³²

IV. Perspectival relativism and judicial review

In the previous Part, I presented two arguments commonly invoked to support judicial review. The purpose of this article is not to determine whether those arguments are correct, but rather to examine whether perspectival relativists can accept them. In this Part, I consider three attempts to show that – while objectivists can rely on these arguments – perspectival relativists cannot. In Section A, I consider a general argument to the effect that judicial review is defensible only if objectivism is correct. In Section B, I respond to the claim that anti-objectivists cannot defend judicial review as a way of protecting rights. Finally, Section C considers the claim that a perspectival relativist must oppose judicial review because she is committed to treating her moral beliefs as true only for those people whose perspectives overlap with hers regarding the belief in question.

Before proceeding, I should clarify what it means to say that perspectival relativists can support judicial review. At a minimum, it is to assert that perspectival relativism is logically consistent with support for judicial review. However, radical opponents of the no-difference thesis do not necessarily claim that anti-objectivism and judicial review are logically inconsistent. Often, they make a more modest claim – that it is *difficult* for an anti-objectivist to defend judicial review,³³ or that any attempt by an anti-objectivist to defend judicial review will be 'a wild and unseemly scramble'.³⁴ While vague, these formulations suggest that – even if it is logically possible for anti-objectivists to support judicial review – their meta-ethical position provides them with strong reasons not to do so.³⁵

³¹ Ibid 191.

³² J H Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) 77. In considering whether perspectival relativists can accept this argument, it is perhaps noteworthy that Ely is an anti-objectivist: 54.

³³ H M Hurd, 'Relativistic Jurisprudence: Skepticism Founded on Confusion' (1988) 61 *Southern California Law Review* 1417, 1459 (discussing jurisprudence in general, not just judicial review).

³⁴ Moore, 'Moral Reality Revisited', above n 2, 2476.

³⁵ Those reasons must be strong or else they could easily be defeated, allowing anti-objectivists to support judicial review without undue difficulty. However, those reasons need not be undefeated, since radical opponents of the no-difference thesis need claim only that anti-objectivists cannot support judicial review *without great difficulty*.

Whether this is so is a matter of degree and judgment. There cannot be any bright-line test for determining whether a reason is strong enough to warrant the conclusion that perspectival relativists cannot support judicial review. Instead, we must consider the reasons that radical opponents of the no-difference thesis claim to exist, and decide whether they show that support for judicial review is not a viable option for perspectival relativists.

A. A preference for aggregating preferences

Dworkin has suggested that one possible ground for opposing 'judicial activism' is that it presupposes that moral principles can be objective, since it assumes that citizens have rights against the state that judges should enforce.³⁶ Perhaps something similar could be said about judicial review. Certainly, both of the arguments in Part III assume that citizens have rights that judges should enforce. However, Dworkin offers no argument to support the claim that only objectivism leaves room for the notion of rights, and I shall postpone an examination of this claim until the next Section. For now, it is enough to note that there can at least be *right answers* to moral questions if perspectival relativism is correct. Perspectival relativism allows that moral statements can be true or false, denying only that they can be *objectively* true or false.³⁷ Thus, the fact that the arguments for judicial review in Part III presuppose that there are correct answers to moral questions (that judges should uphold) does not mean that they presuppose the truth of moral objectivism.

There is more to Dworkin's argument, however. While there can be right answers to moral questions if perspectival relativism is correct, those answers are right only relative to a perspective. Moreover, an answer is right relative to one's perspective if it coheres (better than any rival answer) with one's moral beliefs. Thus, if perspectival relativism is correct, moral truth depends ultimately on one's moral beliefs, and so judicial review designed to uphold moral truths ultimately upholds nothing more than someone's – most likely the judge's – moral beliefs or preferences. Yet, Dworkin argues, if judges' claims about moral truth are ultimately merely an expression of their preferences, then courts usurp the role of the legislature when exercising the power of judicial review. It should be for the legislature to decide whose preferences shall prevail, rather than the

³⁶ Text for above n 1. He later abandoned this argument: Dworkin, *Law's Empire*, above n 3, 372-3. However, similar arguments continue to be advanced by other people: see below n 38 and text for n 45.

³⁷ I have argued elsewhere that perspectival relativism need not collapse into moral nihilism (that is, the view that no moral statement can be true, or in any other way preferable to another moral statement): D Smith, *Making a Difference: The Use of Meta-ethics in Adjudication* (DPhil Oxford University 2005) 111-6.

preferences of a small number of judges prevailing over the preferences of a majority of the electorate.³⁸

However, even if our claims about moral truth are ultimately 'mere' expressions of our preferences, this argument underestimates the significance of those preferences. Our preference that (say) the right to free speech be upheld may be sufficiently important to us that we would want the courts to overrule a legislature that thwarted that preference, even if this means that our preference prevails in the face of majority disapproval.³⁹ This may lead us to support judicial review on the basis that it is more likely to result in that preference being upheld.

More importantly, Dworkin's argument fails on its own terms. Let us assume that he is right in claiming that, if objectivism is false, one should not insist on having one's moral beliefs upheld in the political forum. If so, one should not insist on upholding the (moral) belief that the legislature is the appropriate body to resolve moral disputes. This belief, too, is a 'mere preference' according to our current assumptions, since its truth ultimately depends on one's other moral beliefs. If we are not entitled to uphold our moral preferences if perspectival relativism is correct, then we cannot uphold our preference for majoritarianism, and so we have no basis for arguing that – when preferences conflict – the majority's should prevail.⁴⁰ Conversely, if we *are* entitled to uphold that preference, then we are also entitled to uphold our other preferences, including our belief that there are rights the majority must respect even if it does not want to.

However, is there not a world of difference between saying that judicial review is justified because judges are more likely to uphold objective moral truths and saying that it is justified because judges are more likely to arrive at decisions that are correct relative to a particular perspective? Certainly, there is a marked difference for anyone who does not share the perspective being upheld. The fact that judges are more likely to arrive at decisions that are correct relative to X's perspective may carry little (if any) weight if one does not share X's perspective. However, if perspectival relativism is correct, one must decide whether to support

³⁸ Dworkin, *Taking Rights Seriously*, above n 1, 140. Dworkin rejects the premise that moral truth is relative. Robert Bork, on the other hand, accepts that moral beliefs are (in some sense) expressions of preference, and concludes from this that the majority's preferences should prevail: R H Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 *Indiana Law Journal* 1, 9-10.

³⁹ That preference might remain important to us even if we came to accept perspectival relativism: see Waldron, 'Moral Truth and Judicial Review', above n 8, 95-6 regarding the importance and durability of the emotions underlying our moral judgements.

⁴⁰ In his later writings, Dworkin seems to acknowledge this fact: Dworkin, *Law's Empire*, above n 3, 373. However, this is not true of other advocates of this argument: text for below n 45.

judicial review from within some perspective or other. There is no ‘neutral’ vantage point from which to reach this decision. (One might seek to reach that decision based on non-moral considerations, but the claim that this is an appropriate way of resolving the issue is itself partly a moral claim.) Moreover, if the judge’s decision is correct relative to one’s perspective, then she decided in the morally right way. Her decision cannot be objectively correct, but it can be morally right (relative to one’s perspective). Furthermore, the fact that our moral beliefs are not *objectively* correct does not mean that we should cease to attach importance to them. Whether we should do so is itself a moral question, and perspectival relativism cannot entail an answer to that question, since any true answer must be either objectively true (and hence inconsistent with perspectival relativism) or only relatively true (and hence not a *necessary* consequence of perspectival relativism). Therefore, whether perspectival relativism or objectivism is correct, judicial review may be justified on the basis that judges are more likely to protect people’s rights than the legislature, and that this is a valuable outcome.

One might respond that – while we *could* continue to value our moral beliefs if perspectival relativism were correct, and so support judicial review to the extent that it does a better job of upholding those beliefs – few people would find this position attractive. If objectivism is correct, we can view judicial review as upholding objective moral principles that should operate as constraints upon the legislature in its task of balancing people’s preferences. If perspectival relativism is correct, on the other hand, the moral principles upheld by judicial review simply reflect further preferences, and so it is unclear why they should act as constraints upon the majoritarian process.⁴¹

This response assumes that whether objectivism is true determines whether judges can uphold objective moral principles, but does not affect the legislature’s task of balancing preferences. However, if objectivism is correct, it is likely that legislators need to consider objective moral principles if they are adequately to address many of the issues that come before them. Therefore, an objectivist who wishes to defend judicial review must explain why judges’ views about objective moral principles should operate as constraints upon legislators’ views about such principles. This appears to be just as challenging a task as the perspectival relativist’s job of explaining why the ‘mere preferences’ upheld by judges should operate as constraints upon the ‘mere preferences’ upheld by legislators.⁴²

I am not claiming that objectivists cannot meet this challenge. For example, an objectivist who wishes to defend judicial review could argue

⁴¹ This argument was suggested by John Tasioulas.

⁴² Waldron, *Law and Disagreement*, above n 3, 184. This is the grain of truth in the no-difference thesis. However, it does not preclude there being ways in which the meta-ethical debate does affect the legitimacy of judicial review: see Part V.

that judges are more likely than legislators to identify objectively true moral principles. However, this challenge can also be met by a perspectival relativist, who could argue that judges are more likely than legislators to uphold those moral beliefs that are true relative to her perspective.

Is the objectivist's response to this challenge more appealing than the perspectival relativist's? This depends on whether there is a morally important difference between viewing the moral beliefs upheld by judges as objective and viewing them as 'mere' preferences. If perspectival relativism is correct, there will be some perspectives according to which these two ways of viewing moral beliefs are importantly different. These will be perspectives that attach great moral significance to whether our moral beliefs are objectively valid. However, there will be other perspectives according to which what is important is whether those moral beliefs are correct, not whether they are *objectively* correct. There is no obvious pressure on the perspectival relativist to adopt the first type of perspective. Even if we view our moral beliefs as simply reflecting our preferences, we may regard those preferences as sufficiently important that we would want to act on (some of) them even if this meant overriding the majority's preferences. The recognition that our moral beliefs are not *objectively* correct need not – indeed, is unlikely to – lead us to cease attaching importance to those beliefs.⁴³ Which beliefs we should attach importance to (eg the preference for majoritarianism or the preference that certain rights be upheld whether the majority wishes this or not) depends on which cohere best with the rest of our belief-set.

There might have been some merit to Dworkin's argument if perspectival relativism were committed to treating everyone's preferences as equally good. Such a commitment might indicate that we should defer to the majority – if everyone's preferences are equally good, it makes sense to let the weight of numbers determine political outcomes. (Though this suggestion would itself be only equally good as rival views, such as support for judicial review.) However, care must be taken when considering whether perspectival relativism is committed to treating everyone's preferences as equally good. There is a sense in which everyone's preferences are equally good, since none are objectively correct (or incorrect). However, morally speaking, whether everyone's preferences are equally good must be assessed relative to a moral perspective, and few perspectives will treat everyone's preferences as equally good. Most

⁴³ If Waldron is correct about the importance and durability of the emotions underlying our moral judgements (above n 39), we are likely to continue to regard our moral beliefs as important. Moreover, consider how difficult it would be to cease attaching importance to one's moral beliefs. How would one's interactions with other people be governed? How could one make claims on other people? One might seek to make purely self-interested claims on others, but it would be hard to avoid *moral* outrage if (certain of) those claims were rejected.

perspectives will contain a preference as to whether (say) capital punishment is permissible, and will treat that preference as better than any alternative. Thus, relative to most perspectives, it is mistaken to claim that everyone's preferences are equally good. Relative to those perspectives, the argument sketched at the start of this paragraph (which depends upon everyone's preferences being *morally* equal) cannot get off the ground.

B. Relative rights

I have argued that the fact that (if perspectival relativism is correct) right answers to moral questions exist only relative to a perspective does not mean that judicial review cannot be justified. However, Moore claims that – even if there can be moral truths if anti-objectivism is correct – there cannot be moral rights. Since both of the arguments for judicial review in Part III assert that it is needed to protect rights, I must consider whether Moore is correct in claiming that anti-objectivism leaves no room for rights.

Moore argues that someone who accepts his version of objectivism is better placed to defend judicial review than anti-objectivists. For Moore's objectivist, there is always a right answer to the question 'what rights do people have?', opening up the possibility that judges are better able to identify that answer than legislators. For the anti-objectivist, on the other hand, people do not have any rights at all, and so judicial review cannot be justified on the basis that judges are better able to identify people's rights.⁴⁴

Moore concedes that anti-objectivists can *talk* about rights. However, he argues that, for anti-objectivists, talk about rights (like any other moral assertion) is merely an expression of one's feelings. Thus, anti-objectivists cannot justify judicial review on the basis that judges are better at identifying rights, since this would be to claim that judicial review is justified because judges are better at identifying a particular person's *feelings*. Any such claim would undervalue democracy, by expressing a willingness to have a particular individual's feelings prevail even when she is in the minority. Moore asks: '... since [our views about rights] are only feelings, why should we have our way if a majority of our fellow citizens have different feelings?'⁴⁵

However, this is simply a variation on the argument considered in Section A (namely, that judicial review is unjustifiably undemocratic unless objectivism is correct). It fails for the same reasons. In particular, if anti-objectivism is correct, to argue that judicial review is unjustifiably undemocratic is itself to express one's feelings. At this point, a supporter of judicial review could ask why our feeling that we should defer to the majority should trump our other feelings. There cannot be any *a priori*

⁴⁴ Moore, 'Moral Reality Revisited', above n 2, 2477-8.

⁴⁵ *Ibid* 2479.

reason why the preference for majoritarianism should always prevail. Instead, for the perspectival relativist, whenever this preference conflicts with a desire to uphold a different preference in the face of majority disapproval, we must ask which of these two preferences coheres best with the rest of our belief-set. For many people, the latter preference will prevail in some cases, for the reasons given in Part III.

In an earlier article, Moore offered a further argument to support his claim that anti-objectivists cannot defend judicial review on the basis that it protects people's rights. He argued that moral rights cannot exist unless objectivism is correct, because anti-objectivism leaves no room for rights that '... are natural and independent of convention.'⁴⁶ What is it for a right to be 'natural and independent of convention'? Moore offers some guidance when he asserts that, to an anti-objectivist, '... it is unintelligible to speak of a right ... that is dependent neither upon the subjective expectations of its holder nor upon the conventions, or "shared expectations", of society.'⁴⁷ Thus, his view seems to be that a right is the kind of thing that is independent of social conventions and 'the subjective expectations of its holder', and that anti-objectivism leaves no room for such a thing.

There is some basis for looking at rights in this way. Arguably, part of their purpose is to provide individuals or minorities with some protection from the majority. If so, the content of a right must not be determined solely by reference to social conventions (since these are presumably responsive to the majority and so would preclude rights from providing protection *from* the majority, except in cases where the majority acts contrary to its own conventions). Yet nor do we think that a right has whatever content its holder expects it to have, and so the content of a right cannot be determined solely by reference to its holder's subjective expectations, either.

However, even if we assume that these are appropriate constraints upon the content of a right, they can be satisfied by perspectival relativism. Perspectival relativism allows for the content of a right to be independent of the expectations of its holder. Relative to my perspective, someone can have a right whose content is completely independent of her expectations (since its content is determined by reference to *my* perspective). Even relative to the holder's perspective, the right may have a different content from what she believes it to have, since she may be mistaken relative to her own perspective (for example, if she holds inconsistent beliefs about the right). Moreover, if perspectival relativism is correct, the content of a right can also be independent of social conventions. Relative to one's perspective, those conventions may be mistaken. Obviously, there will be many perspectives according to which those conventions are correct, but (assuming a moderate amount of moral disagreement within a society) there

⁴⁶ M S Moore, 'Moral Reality' [1982] *Wisconsin Law Review* 1061, 1069.

⁴⁷ *Ibid* 1070.

are likely to be a significant number of perspectives according to which they are incorrect.

Admittedly, the content a right has relative to my perspective cannot be completely independent of *all* expectations, since it depends on the beliefs or expectations I would hold if I rendered my belief-set fully coherent. However, there is no reason why rights should be required to meet such a stringent test. They can provide protection from the majority without having to meet that test, and our intuition that rights do not simply have whatever content their holder expects them to have can also be upheld without requiring them to meet that test. Moreover, an *objectivist* may also have reason to reject that test, since she might well wish to allow that the content of some rights depends partly on certain expectations.

Thus, Moore fails to show that perspectival relativism does not leave room for the existence of rights. However, it might be thought that there is a connection between an anti-objectivist position like perspectival relativism and a sceptical account of rights (according to which rights either do not exist or should be accorded little weight in our moral reasoning).⁴⁸ In other words, viewing our moral beliefs as lacking objectivity (as perspectival relativists do) might be thought to create pressure to adopt a sceptical account of rights. As the arguments in favour of judicial review outlined in Part III rely on a non-sceptical account of rights, this suggests that it may be difficult for perspectival relativists to support judicial review after all.

The suggestion being made here is not that perspectival relativists are logically committed to a sceptical account of rights. Perspectival relativism cannot logically entail a particular account of rights, for the same reason that it cannot entail an answer to the question of whether we should attach importance to our moral beliefs (see Section A). Rather, the suggestion is that a sceptical account of rights should prove particularly attractive to adherents of perspectival relativism, since both views share a similar attitude toward moral reasoning. Perspectival relativism tells us that a correct assessment of what rights we have is based on (a fully coherent version of) someone's moral beliefs. Similarly, the sort of sceptical approach to rights of relevance to the present suggestion treats claims about moral rights as reflecting 'mere beliefs'.⁴⁹

⁴⁸ See, eg, R Geuss, *History and Illusion in Politics* (2001) 143-5, who argues that there are no moral (cf legal) rights, and who seems to base this sceptical account of rights on a form of anti-objectivism. This is not to claim that anti-objectivism provides the only possible motivation for adopting a sceptical account of rights; see, eg, M V Tushnet, *Taking the Constitution Away from the Courts* (1999) 139-40, whose scepticism about rights is not obviously connected to any meta-ethical view.

⁴⁹ See, eg, Geuss, above n 48, 144-5, who claims that to call something a moral right is simply to suggest that it would be a morally good idea if it

Nevertheless, there is reason to doubt whether this suggestion is correct. I argued in Section A that a perspectival relativist is unlikely to regard her moral beliefs as *mere* preferences; rather, she is likely to continue to attach importance to her moral beliefs. Among the moral beliefs that she is likely to continue to value are her beliefs about (at least some) rights. Because (some) rights protect interests that many people regard as among the most important (such as the interest in physical integrity or free speech), many people are likely to continue to value rights even if they reject objectivism. Even if they think that the falsity of objectivism gives them some reason to refrain from imposing their moral beliefs on other people, they may well conclude that this reason is outweighed when it comes to the sorts of rights that judicial review would be most concerned to protect (such as rights to life or free speech). Therefore, while recognising that the truth about moral rights ultimately depends on her moral beliefs, the perspectival relativist is likely to regard those beliefs as highly important, and so is likely to oppose any attempt to dismiss them as *mere* beliefs.⁵⁰

It is therefore unlikely that many perspectival relativists will be attracted to a sceptical account of rights.⁵¹ This is not to say that a perspectival relativist cannot adopt such an account. Upon discovering that there are no objectively true moral beliefs (including beliefs about rights), she *could* conclude that purported moral rights reflect *mere* beliefs and so adopt a sceptical approach towards rights. However, we have seen that this is not the only approach open to her. Indeed, she is unlikely consistently to adopt the dismissive attitude towards her moral beliefs that this sort of sceptical account of rights recommends. Even if they accept that there are no objectively true moral beliefs, most perspectival relativists are likely to continue to attach importance to moral issues and to their beliefs about those issues.

C. A question of scope

There is a further reason why someone might claim that perspectival relativists, in particular, cannot support judicial review. If perspectival relativism is correct, moral beliefs can be true or false only relative to a

were enforced, and who proceeds to describe moral beliefs as 'variable' and as a shedding only a 'flickering light'.

⁵⁰ For example, a perspectival relativist may well regard Geuss' account of rights as inappropriate, since its attempt to downplay the importance of our moral convictions (by describing them as 'variable' and as shedding only a 'flickering light') is inconsistent with the importance those convictions have relative to her perspective.

⁵¹ At least, not for the reason suggested by the objection presently under consideration. As mentioned above, there is more than one possible motivation for adopting a sceptical account of rights.

perspective. Does this not mean that, while we can continue to hold moral beliefs, we must regard them as applying only to ourselves, rather than being universal in scope? In other words, are perspectival relativists committed to the view that one's moral beliefs are true for only those people (if any) who share one's perspective (or, at most, those people whose perspective overlaps with one's own regarding the belief in question)?

If so, judicial review is unlikely to be justified if perspectival relativism is correct. When a judge engages in moral reasoning to decide whether to strike down legislation as unconstitutional, she uses certain moral beliefs to determine how the parties to the case (and anyone else affected by the decision) will be treated. However, if perspectival relativism entails the view outlined in the previous paragraph, the moral beliefs she uses apply only to the judge herself (and perhaps also to anyone whose perspective overlaps with hers at the relevant point). Those beliefs are unlikely to apply to everyone affected by her decision, since it is likely (given that this issue is the subject of a constitutional challenge) that some of the people affected by her decision will hold perspectives that diverge from hers on the issue in question. Yet how can it be legitimate to treat those people in accordance with moral beliefs that do not apply to them?

However, this line of thought is based on a confusion. There is a sense in which, if perspectival relativism is correct, we must regard our moral beliefs as applying only to ourselves, and a sense in which we need not do so. Our moral beliefs apply only to ourselves in the sense that (assuming we are not mistaken relative to our own perspective) they are true relative to a perspective that we hold, but other people do not. Relative to other perspectives, our moral beliefs may be false. However, there is a further question we could ask. Granting that our moral beliefs are correct only relative to our own perspective (and any other perspective that overlaps with ours on the relevant issue), *within our perspective* do those beliefs apply to everyone or only to us? For example, if (relative to my perspective) murder is immoral, can it be true that *no one* should commit murder or is it true only that *no one who holds my perspective*⁵² should commit murder? Let us call this 'the question of scope'.

It is hard to see how perspectival relativists could be committed to the second answer to the question of scope. When I consider whether it is permissible for people to commit murder, I am concerned with what people are permitted to do relative to my perspective, not theirs. It may be that, relative to their perspective, murder is permissible, but what implications this has relative to my perspective depends on the moral assessment I make of this fact (provided that assessment coheres with the rest of my belief-set). Furthermore, the moral assessment I will make is obvious – the fact that murder is permissible relative to X's perspective does not mean that,

⁵² Or, possibly, *no one whose perspective overlaps with mine on this issue*.

relative to my perspective, it is permissible for X to commit murder. There may be reasons why, relative to my perspective, I should be reluctant to require people to act contrary to the requirements of their own perspective. However, any such reasons are outweighed in this case by the importance, relative to my perspective, of ensuring that people do not commit murder.

Let me put the point another way. Imagine that someone claims that one may do whatever one is permitted to do relative to one's own perspective. Being moral in nature, this claim must itself be made relative to a perspective. Whether it is true relative to that perspective depends on whether it coheres, better than any alternative, with the belief-set of the person who holds that perspective. Now let us focus the discussion further by considering my belief-set. My belief-set includes the belief that no one is permitted to commit murder, and it attaches a very high degree of importance to this belief. Yet the claim that one may do whatever one is permitted to do relative to one's own perspective may conflict with this belief, since there may be some perspectives that permit murder. Given the importance I attach to my belief that no one should be permitted to commit murder, that belief is likely to cohere better with the rest of my belief-set than the belief that one may do whatever one is permitted to do relative to one's own perspective. In other words, it is highly likely that (to the extent that these two beliefs conflict) the latter is false relative to my perspective.

Therefore, a perspectival relativist is not committed to the second answer to the question of scope. She can hold that, relative to her perspective, there are moral norms that apply to everyone. This leaves open the possibility that, when engaging in judicial review, judges are justified in imposing moral norms upon the people affected by their decisions, because – relative to the perspective being used to assess whether their decisions are justified – those norms apply to everyone. (Obviously, this represents a necessary, not sufficient, condition for judicial decisions to be justified, but it *is* sufficient to refute the objection currently under consideration.)

Of course, if perspectival relativism is correct, judicial review will not be legitimate relative to *every* perspective. For example, it may be that, relative to some perspectives, one should not impose one's moral beliefs on people who are rational in rejecting those beliefs. Combining this moral principle with perspectival relativism *does* suggest that we should not impose our moral beliefs on (all) other people, since there are likely to be some people who are rational in rejecting those beliefs (because their perspective does not overlap with ours at the relevant points). Relative to such a perspective, judicial review may well be illegitimate (as may most, if not all, other forms of political decision-making).

However, the same is not true of all perspectives. Some, probably many, perspectives reject the view that one should never impose one's moral beliefs on people who are rational in rejecting those beliefs. For example, many people would consider themselves justified in requiring X not to commit murder, even if murder is permissible relative to X's

perspective. Relative to *these* perspectives, judicial review may well be justified, and this is enough to show that perspectival relativists can (though they need not) support judicial review on the grounds suggested in Part III.

I have argued that perspectival relativists need not accept the second answer to the question of scope. However, it could be objected that the same pressures that push someone towards accepting perspectival relativism also push her towards accepting that answer. For example, perspectival relativism might be thought to derive much of its motivation from a 'spirit of tolerance', according to which we should respect other people's differing moral beliefs. One way of giving substance to this spirit of tolerance might be to regard one's moral beliefs as applying only to oneself, rather than as constituting claims about how other people should behave.

It is not clear why perspectival relativists should be attracted to this line of thought. We have seen that, even if one accepts perspectival relativism, one may continue to attach importance to one's moral beliefs, and this may well prompt one to demand that those beliefs prevail over conflicting beliefs held by other people. Admittedly, there are reasons why a perspectival relativist might be reluctant to impose her moral views on other people (depending, for example, on her beliefs about the nature and value of autonomy). However, those beliefs are true relative to only some perspectives, rather than representing core commitments of perspectival relativism. Moreover, even people who share this reluctance may conclude that it needs to be weighed against other considerations (such as the importance of prohibiting *everyone* from committing murder or genocide). If so, they may not be precluded from supporting judicial review as a way of upholding those considerations that outweigh this reluctance.

Bernard Williams has suggested that anti-objectivists may be more willing to tolerate opposing points of view than some objectivists, because some forms of objectivism supply motives for bigotry (or at least for dogmatism). For example, a form of objectivism that holds out the promise of divine rewards for true believers might encourage a lack of tolerance towards opposing moral viewpoints.⁵³ However, anti-objectivism could also supply motives for dogmatism and intolerance. For example, an anti-objectivist might believe that – since there is nothing objective she could be mistaken about – she should continue to adhere to her current beliefs, no matter what anyone else might say or do. She might even believe that, since she cannot be objectively mistaken, she should feel no restraints in imposing her moral beliefs on other people.

This suggests that neither objectivists nor anti-objectivists have a monopoly (or even a better claim) on either dogmatism or toleration. An objectivist could be dogmatic because she believes she is objectively right, but an anti-objectivist could be dogmatic because he thinks that his moral

⁵³ B Williams, 'Subjectivism and Toleration', in A P Griffiths (ed), *A J Ayer: Memorial Essays* (1991) 197, 202.

beliefs determine what is right for him. Conversely, an anti-objectivist might be tolerant because she recognises that there are no objective grounds for requiring people to conform to her moral beliefs, but an objectivist might be tolerant because he believes that toleration is objectively required.

Perhaps perspectival relativism more overtly reminds us that other people have views different from our own, since it posits the existence of an indefinite number of moral perspectives. However, what we make of this fact depends on our moral assessment of it,⁵⁴ and nothing about perspectival relativism determines (or, by itself, influences) that assessment.

Williams suggests two further reasons why anti-objectivism might be linked to a spirit of tolerance, of which I shall consider one.⁵⁵ Imagine that Anna is an objectivist who disagrees with Brian about a particular moral issue. Reflecting on their disagreement, Anna might conclude that – if Brian were to agree with her – not only would there be less conflict between them, but Brian’s views would be closer to the truth. This might provide Anna with a motive to try to change Brian’s mind, rather than tolerating his different moral viewpoint. In particular, she might be motivated by paternalistic considerations to help Brian realise the truth.⁵⁶

Williams asserts that these paternalistic considerations could not exist if objectivism were false. However, if perspectival relativism is correct, Anna can still believe that Brian’s views diverge from the truth (relative to her perspective). Moreover, she might attach importance to believing what is true relative to her perspective, and so might think that it is in Brian’s interests for him to believe whatever is true relative to her perspective. On this view, Brian will be better off (relative to Anna’s perspective) if he comes to realise the truth about (say) the wrongness of genocide, rather than continuing to hold his current, mistaken belief. Of course, he may not be better off relative to his own perspective, but – in deciding whether Brian should be encouraged to change his mind – Anna will assess matters relative to her perspective, not his. Thus, the same paternalistic considerations might apply even if perspectival relativism is correct.

Admittedly, this is not the only line of reasoning open to Anna. She might believe that it is less important that Brian believe what is true relative to her perspective (if perspectival relativism is correct) than that he believe what is objectively true (if objectivism is correct). Nevertheless,

⁵⁴ As Williams acknowledges: *ibid* 203.

⁵⁵ His other argument (that anti-objectivism is more likely to lead to toleration of people who are remote in time from oneself: *ibid* 203-5) is not particularly relevant to judicial review, which is generally concerned with the treatment of people in relatively close temporal proximity to the decision-maker. Moreover, Williams is somewhat ambivalent about the success of this argument.

⁵⁶ *Ibid* 205.

Anna need not adopt this line of reasoning, as opposed to the one sketched in the previous paragraph. If she came to believe that objectivism is false, Anna *might* cease to believe that Brian is better off if he realises that genocide is wrong. However, it does not seem far-fetched to speculate that other people in her position would continue to regard it as desirable (not just for his potential victims, but for Brian himself) that he comes to believe that genocide is unacceptable.⁵⁷

V. Conclusion

I have sought to show that there are two arguments in favour of judicial review that could be accepted by perspectival relativists, not just by objectivists. If so, Moore and (the earlier) Dworkin are wrong when they suggest that, while objectivists can support judicial review, it is difficult (if not impossible) for anti-objectivists to do so. The difference that the meta-ethical debate makes to the legitimacy of judicial review is not as great as they claim.

This is not to say that the meta-ethical debate makes *no* difference to the legitimacy of judicial review. I have argued elsewhere that there are other ways in which that debate *does* affect the legitimacy of judicial review.⁵⁸ For example, some objectivists are committed to an epistemological theory that is not available to anti-objectivists, and that may produce distinctive assessments of judges' ability to identify the morally correct answer to the cases before them. However, it is not the case that anyone who does not accept that epistemological theory will find it difficult, if not impossible, to support judicial review.⁵⁹ This means that *both* of the views sketched in Part I are mistaken. Instead, the truth lies somewhere between them – it is not the case that the outcome of the meta-ethical debate makes no difference to the legitimacy of judicial review, but nor is it the case that it is difficult (if not impossible) for any anti-objectivist to support judicial review.

⁵⁷ Some people might not attach importance to Brian's beliefs, as opposed to his actions. However, Williams' argument proceeds on the basis that people may be better off holding correct moral beliefs, and I have granted him this premise in assessing his argument.

⁵⁸ Smith, 'The Use of Meta-Ethics in Adjudication', above n 5, 44-47.

⁵⁹ *Ibid* 45.