Independent courts are very central elements of the rule of law and democracy. At the same time, criticism of judicial performances may be legitimate and even justified. Courts are not elected powers. Their legitimacy stems from the fact that they are the ones who enforce the laws and protect the citizens from arbitrary power. But the function of making the laws is usually given to accountable elected legislatures. When courts appear to be imposing their own views, this may generate a weakening of their legitimacy in the eyes of those who do not share these values. The threat is especially strong in rifted democracies, where major interests and worldviews are underrepresented in the courts.

Discussion of the role of courts in Israel today demands some introductory remarks. The Supreme Court and the President of the Supreme Court enjoy great acclaim and respect within Israel and abroad, but have recently come under attack from a variety of sources. These attacks are often confused, and many of them are clearly motivated by narrow partisan interests and an inherent objection to the rule of law and judicial review. But these motives do not necessarily weaken the dangers which the attacks pose to the legitimacy of the courts in general, and the Supreme Court in particular, in Israel's public life. The fact that in some sectors extremely harsh criticism of the court is seen to be an electoral boost, testifies to the serious and dangerous nature of the threat. This situation creates a dilemma for those who want a strong and independent judiciary, believing it is essential for freedom and democracy, but who also believe that, during the last two decades, the courts have transgressed limits they should respect. The dilemma becomes especially acute when the political echo sounds out in one's criticism, and when one is part of the group that believes that the legal and the judicial systems have made some contribution to the prevalence of these hyperbolic and dangerous attacks, as I am.

The main body of criticism against the courts is a natural and inevitable reaction of those who resent judicial review and supervision. This is so since it is not in their political interest to have their actions limited. Such review often limits their political freedom, including those actions which are against public interest and human rights. Some of the criticism, however, is based on more general analyses of society and democracy which advocate limits on the power and jurisdiction of courts. In fact, some of these alleged limits are based on the notion that a broad political role for courts will generate
precisely the type of vicious attacks which are currently being heard. Others are based on complex social assumptions, both normative and empirical, which are not directly related to the welfare of the court itself.

The current atmosphere in Israel should not distract us from the fact that the debate concerning the role of courts has been a key issue in most democracies from their very inception, and has developed much since the American model of judicial review's swift and impressive gains, around the world. The history of judicial activism and its legitimacy and proper limits is one of fierce public debate. Moreover, this is not a case of "good guys versus bad guys", or progressives versus conservatives, or lawyers versus politicians, or judges versus others. n1 The problem regarding government is ongoing, and one should not let the contingencies of the day distort the nature of the problem involved. Every society [*218] should be aware of this in designing the institutions and doctrines which suit it best. The question must be discussed and understood, and cannot be decided by default or incidentally to avoid joining forces with those whose attacks threaten the legitimacy of a crucially important institution.

This is why I am grateful to the Israel Law Review for creating a forum encouraging this kind of discussion. A professional meeting of people from different countries and disciplines, with different approaches to judicial activism, is the correct framework within which these concerns should be aired. Hopefully, the fruits of these discussions may then be introduced into society, to improve the level of general debate concerning this question.

The main thesis of this paper suggests that the question of the role of courts in democracies is not one of jurisprudence or an analysis of the concepts of "democracy" and "court". It is a normative-political question, the answer to which depends on a number of assumptions, both empirical and normative. Not surprisingly, it is not a question with "one right answer", applicable to all societies at all times. Societies differ greatly in many respects and solutions should be sensitive to the unique features and circumstances of the society under review. Nonetheless, when jurisprudential analyses of the distinct functions of law and courts in society, and analyses of democracy and its commitments, are combined with an understanding of the meaning of serious rifts within given societies, they do have implications concerning the role which courts can and should have in their societies.

My point, in a nutshell, is that in rifted democracies, courts should be reluctant to determine specific arrangements and priorities, especially in areas of social controversy, where the grounds of judicial action are not clear. Such determinations should, in general, be made by the political branches and other social bodies. Furthermore, in such societies, courts should concentrate on defending individuals against the clear violation of basic rights, and the conditions necessary for effective democracy, and stay clear of reforming the political process. The courts do have an important educative function, and they should definitely not let their decisions be dictated by popular sentiments. Normative considerations should be the courts' primary motivation. However, the courts should elaborate, articulate and implement the shared commitments of the society they serve - the values reflected in the laws of the
society - as opposed to the values which judges personally or as members of distinct groups within society, uphold.

[*219] In the first section I propose that conceptual and jurisprudential analyses alone cannot dictate answers to these questions. This part is of special importance in view of the fact that some supporters of both judicial activism and judicial self-restraint base their conclusions on such arguments. The fact that supporters of polar positions both rely on conceptual arguments should raise doubts about their validity. I could have rested my case against them by simply pointing out this fact. My main reason for tackling them is that they may have pernicious effects. They may suggest that people who disagree with one position are not only wrong (which they of course may well be) but that they are also people who do not understand the nature of democracy or of law, or - worse still - people who oppose the ideals of democracy and the rule of law. We should not allow the debate to be presented in this way.

In the second section, the implications of jurisprudential analyses of courts and law and their possible and desirable social roles will be examined. In the third section, I deal with the implications of a commitment to democracy. The fourth section examines the implications of dealing with rifted and heterogeneous societies to the role of courts in those societies.

My conclusions in the final section bring together the findings of the foregoing discussion. n2

Even if we accept, as I believe we must, that the question of the role of the courts is primarily a normative—political question, we must appreciate the fact that it includes many different levels of discussion. The first and most obvious one is what I will call the merits approach. According to this approach, courts should be allowed or encouraged to act whenever their results, in terms of public interest, are likely to be better than those reached by other political and social processes. On this level, we compare decisions made by courts with decisions on the same questions made by other political and social agents. The second level is that of relative institutional competence: Courts are a part of government in the broad sense, but have a unique role within it. The uniqueness of courts is reflected, among other things, in the way they are appointed and in the different grounds they may use for justifying their decisions. They are given different responsibilities, and their accountability takes a different form. Institutional considerations may sometimes pull in a different direction to the merits approach. n3

Others add yet another level, that of an analysis of the society which the law and the state seek to serve. On this level, the main question is not one of institutional design and relative advantage within state organs, but rather that of the relationships between state and society, and the identification of the right way of dealing with social processes. This level stresses the need to understand what makes individuals and societies act, what makes them unite into a single society, and what is needed in order to govern societies in ways which will be both effective, enduring and just. Answers to these questions


may indicate limits to the role of law in general, and courts in particular, in dealing with certain social issues.

Clearly, all these approaches involve combinations of empirical and evaluative assumptions. However, it must be stressed that while arguments belonging to the three levels may be interconnected, the kinds of questions which they stress and identify may be very different.

My analysis is based on the belief that all three levels of discussion should be integrated when we consider the role of courts in society, and that focusing on any one aspect alone is likely to be misleading. Not surprisingly, it is my belief that such an integration of levels and approaches lends deeper and more enduring support to the endorsement of a more restrained role for courts in society, especially in rifted democracies.

Most of the points made here are not new. They have been made before in all societies and systems, often even by judges. However, in many countries today, this position has been criticized heavily, by judges, academics and politicians, on all three levels mentioned above. I do not expect that the debate can or should be decided by a "knockout". Ultimately, I think that one's stand on these questions is more a question of temperament and inclination than a matter of either truth [*221] or a commitment to any set of values. n4 Furthermore, I do not think that the matter can be resolved in any society once and for all. Relations between courts and other branches of government are dynamic, and rightly so. I hope that my presentation can make a contribution towards the clarification of the questions relevant to forming a responsible attitude.

I. The Insufficiency of Conceptual Analysis

One must understand that the question of the proper role of courts in society is not one of conceptual analysis or jurisprudence. Answers do not follow from the nature of courts or adjudication, or from the nature of democracy, separation of powers or the rule of law. It is important to stress this because the literature contains arguments which appear to suggest that such concepts either require or prohibit "activist" judicial review. In this section I will show that neither is true.

1. Democracy, Separation of Powers, Rule of Law and Judicial Activism

The mere fact that some democracies exist without activist judicial review, and without any systematic judicial review of legislation (for example, England, Holland and Israel n4a) suggests that there is nothing in the idea of
democracy itself which requires such review. The fact that most modern democracies have constitutions, bills of rights and judicial review, and that in many of them, supreme courts have periods of activism which are tolerated, and even welcomed, by some commentators, suggests that there is nothing in the concept of democracy to prevent such phenomena.

Even if political realities had not provided us with such examples, an analysis of the concepts themselves could have shown that democracy neither requires nor prohibits activist judicial review as a matter of conceptual necessity. I emphasize this point since the literature contains many arguments in which such a conclusion is based on no more than an assertion of conceptual necessity.

The more frequent conceptual move is that democracy prohibits such activist review because it offends the principle of separation of powers, and because it may let the non-elected and unaccountable courts defeat the policies and normative decisions of the accountable "political" branches. This is of special importance in the criticism of primary legislation, and the argument has been dubbed "the counter-majoritarian difficulty". First, it may be said that the power of courts to review decisions of the other branches is itself based on a deeper preference of the majority, reflected in a constitution, or in a deeper level of social values, which the courts enforce upon the political branches.

Second, and complementing the first argument, is the notion that even in a democracy, not all decisions should be made by accountable branches. In some contexts, we prefer more insulated, professional and principled mechanisms of decision-making. Courts are just such mechanism, and reviewing the decisions of other bodies may well be just their unique function in some contexts. In particular, courts may be the mechanisms to defend democracy itself against the tendency of government to perpetuate its own power.

Third, it has been argued, quite convincingly, that it is not always the case that the political branches represent the majority, and that the court is not accountable. Governments and even legislatures are known to use their power to promote partisan or narrow self-interests. Courts, in the long run, have not maintained positions counter to the convictions of pervasive majorities in the community. Thus, even if we accept the controversial definition of democracy as consisting only of a formal set of rules-of-the-game, it is far from clear that this notion of democracy, or even the notion of majority rule, requires the absence of substantive judicial review. I presented above an outline of some of the explanations why, according to this line of reasoning, judicial review is not denied by the mere acceptance of democracy.

Similarly, judicial review is not required by democracy, not even by a democracy which is richer than simple "rules of the game" notions, one which includes commitments to some basic rights and values. We may well choose to have a system in which the constraints on the activities of the
political branches are all public and political, in various configurations. n10 In
fact, in some societies such constraints may yield protection to human rights
and basic values that are just as strong as those provided by systems with
elaborate constitutions and bills of rights.

Others have argued that a distinction should be drawn here between the
review of administrative actions, which is accepted in most systems as
required by a commitment to the ideal of the rule of law, and the review of
legislative actions, whose legitimacy is more questionable, since the
challenged act in such cases is itself a law. Either way, it should be clear that
this is an argument about the desirable scope of judicial review, not an
argument that a democracy cannot function without it. Clearly, the larger the
part of majority rule and the rules of the game in one's conception of
democracy, the larger the apparent inconsistency between it and judicial
review, especially of legislation which enjoys broad support among voters.

It is important to note that the rhetoric here may be confusing: while some
use a notion of democracy that identifies law with norms enacted by
legislatures, others use democracy to mean the combination of a general rule
of law thus conceived, but subject to a set of deeper values. Clearly, the latter
will seek some institutional way of defending these values against the
legislature, and will see this protection as mandated by democracy itself.
However, this position may lead to both pro-court [*224] and anti-court
positions - both in the name of democracy - depending on the source of the
values and organs seen most fit to defend them. n11 n11a

Some claim that judicial review is required by democracy because
democracy requires, in turn, a separation of powers which can only be
effectively maintained by the courts. Today, however, most concede that a
strong version of separation of powers is both impossible and undesirable:
most basic organs or powers necessarily perform functions that "belong" to
the other powers: legislatures perform executive and semi-judicial functions,
executives legislate and adjudicate, and judges decide cases, legislate and
perform various executive functions. Hence, what needs to be enforced is not
total separation, but a system of checks and balances. These checks and
balances, in turn, are not all legal, and not exclusively 'policed' by the courts.
Moreover, the extent of discretion and autonomy given to courts, or taken by
the other powers, depends on many factors other than judicial interpretation,
and this judicial interpretation itself is not totally determined by either the law
or by the desires and values of the judges themselves. n12

[*225] It is true that if the limits of the powers of the legislature and the
executive are not effectively monitored and reviewed, the effectiveness of
legal constraints on their powers is reduced. However, it does not follow that
the necessary political solution to this dilemma is to empower courts to pass
judgment on the actions of the other branches. Since there is no legal
recourse against the Supreme Court itself, it might be more symmetrical if the
top echelons of the other powers were restricted by unenforceable
conventions and ethos alone. The absence of judicial review in some areas
(for example, that of the regulation of the political process itself) may be the
result of one of the conceptions of the rule of law, rather than a proof that the ideal does not obtain. n13

In other words, we should not let ourselves be misled into thinking that the answers to the question of the proper role of courts in democracies are necessarily derived from our commitment to either democracy or the rule of law or the separation of powers. The arguments supporting or rejecting such activist judicial review need to be practical, and they will depend on values and on empirical statements, on basic perceptions of the needs of society and its basic structure, and what is required for its general well-being. The need to make these arguments cannot be avoided by the appearance of a conceptual knock-out. More importantly, we should not allow the impression that those in favour, or against judicial review or an activist court are, because of that, anti-democratic or opposed to the rule of law. n14

[∗226] 2. The Limited Relevance of a Constitution

Another semi-conceptual move that is often made in this context is the claim that even if democracy alone does not require judicial review, the existence of a constitution does. It should come as no great surprise that I do not think that the existence of a constitution makes that much of a difference to these questions. Of course, the content of the constitution will put some constraints on the kinds of answers acceptable within the society it governs. A written, entrenched constitution, which explicitly defines itself as the supreme law of the land, and specifies power of judicial review, provides a more secure basis for such review than more ambiguous arrangements. For any specific exercise of judicial review, the more extensive the social support for the judicial decision the judiciary enjoys at the time of adjudication, the stronger the claim that invoking the constitution to invalidate actions of the political branches is in fact an exercise in democracy rather than an action contrary to it. However, this merely comes from the fact that much depends on the contingent content and circumstances of particular systems and constitutions. Nothing substantial concerning these questions follows from the mere fact that a system may be described as one of a constitutional democracy.

The mere existence of a constitution does not decide the scope of judicial review even in countries like the United States, Germany or Canada. They all have a written constitution, ratified with an explicit design to grant them superiority, coupled with the need to have an authoritative mechanism to deal with issues of federalism. n15 Constitutional [*227] rhetoric cannot do the trick on its own. This is doubly true for a country like Israel, where the existence of an entrenched, supreme constitution is itself controversial. n16 Be this as it may, the argument about the desirable role of courts in democracy persists even in countries where the power to review primary legislation is conceded by all. Clearly, then, its basis is not that of the nature (or even the desirability) of the constitutional mandate in itself.
In any event, the debate about judicial activism should not focus on the power to invalidate primary legislation, or on supreme courts or constitutional courts. While these are naturally very important, and their decisions enjoy a high profile, the real question is the way in which the power of judicial review is in fact exercised by all of the courts, and it covers judicial activism vis-à-vis actions by the executive branch as well. Some of the power of judicial review of executive action does follow from the ideal of the rule of law and the need to have an effective way to make sure that the executive does not transgress the powers allocated to it by the legislature and other norms of the system. However, the exact contours of such review - the issue at hand - do not.

In short, having a constitution, in itself, does not change the fact that the question of the desirable role of courts in society belongs to the realm of normative political theory. The answers cannot be derived logically from the mere existence of a constitution any more than they can derive from the notions of democracy, separation of powers or the rule of law.

[*228] 3. The Nature of Courts

There are those who seek to derive an argument against judicial review (and against all judicial creativity and rule-making) from the representation of courts as "appliers" rather than "makers" of law. Like the strategy discussed above, the argument here is allegedly based on the nature of courts, and as such is a matter of conceptual necessity rather than of normative desirability. Less commonly, the special nature of courts is used as an argument to support an extensive role for courts in elaborating the norms of their societies.

The relationships between law, adjudication, theories of law and theories of adjudication, be they descriptive (what in fact do judges do?) or normative (what should judges do?) have been a subject of serious debate in contemporary legal philosophy for some decades now. The most influential legal scholar to argue that judges do not have discretion and therefore do not (and should not) "make" law, is Ronald Dworkin. Nevertheless, Dworkin has been known to justify and advocate feats of judicial activism. This illustrates that the jurisprudential debate, whatever its merits may be, will not decide the issues with which we are concerned here. What Dworkin describes as creative Herculean ways of discovering law as integrity would be labelled judicial activism or law-making by many. Dworkin may be correct that the justices in Roe v. Wade were simply seeking to reveal the meaning of the arrangements in fact adopted by American law, but the legitimacy of their doing just that, against the background of the way important groups felt about abortion, was precisely the question to be decided. The jurisprudential debate should not lead to a presentation of the issue as a matter of the right theory about the nature of adjudication. n18

[*229] It should be added that today, a legal scholar who argues that judges should never make law is a straw person. Most legal scholars find
themselves in no-man's land - between those that claim that judges never apply the law, because laws cannot bind due to logical or political reasons, and those who claim that in most cases judges can and do apply the law, but in some cases (the "hard cases") they must make law. They all concede, at the very least, that courts must make law some of the time. Against this background, an argument opposing judicial law-making, based on the nature of judging, seems misguided. n19

II. Law and the Courts

While the nature of courts cannot determine the question of judicial activism, it does have important implications for the limits of law and courts in society. I will begin with what I hope is a non-controversial description of law, courts and their functions, and from that, deduce certain implications regarding the proper role of courts in society.

The unique role of courts in democracies (and in other types of political systems) is affected by the fact that they have two closely related distinguishing features. The first is that they are institutions connected with the application of the law, and the second is that they are institutions with a distinct nature and structure. While the two features are related, they are not identical, and both are important to the role of courts. Institutions other than courts are involved with the application and enforcement of laws in society (notably the police and all individuals and institutions acting under the shadow of the law). Furthermore, courts do have functions that are not exhausted by the application of laws (such as law-making, n20 or the resolution of disputes in ways that do not involve the application of pre-existing laws). n21

In making these statements I presuppose a picture of the law as a normative system containing standards of behaviour which are applied to a given society, through an institutional structure which claims a monopoly of force in that society, and is a supreme authority. Courts are a part of that institutional structure. In the types of systems we are familiar with, courts have a degree of independence (which varies considerably between systems) from the political branches. This independence is considered crucial to the ideal that in the settling of individual disputes, especially those with which the authorities themselves are concerned, the judge will be able to exercise his judgment so that the result of the case is not dictated by the powers-that-be. This independence may lead the judge to reject the factual picture suggested by the state, or to refuse to accept the state's interpretation of the requirements of the law. In other words, judicial independence is crucial even when judges are only applying the law. In such cases, a guarantee is required that they will indeed apply the law, rather than submit to what the authorities want. Independence is needed especially where the judicial decision goes beyond pre-existing law: in such cases, the mere invocation of the judge's obligation to obey the law does not suffice. He must provide reasons for
making a normative judgment that is at odds with the official determinations presented by the representatives of the political branches litigating the case.

Courts then perform both the primary and secondary functions of law, direct and indirect: law is designed to guide conduct by general norms, to resolve regulated disputes (that is, to resolve disputes governed by pre-existing legal norms), to distribute goods, and to resolve unregulated disputes. In addition, it regulates its own creation and change, and has symbolic and expressive functions. n22 The superiority of law and its monopoly over the justified use of force in society are features essential for it to be able to perform its functions. Yet it should be clear that the law cannot perform its functions unless additional requirements, both procedural and substantive, are met. For instance, the effective enforcement of the law, essential for its ability to protect law and order and the basic rights to life and freedom, requires a level of acceptance by the population at large and by the enforcing agencies. While the law may well use sanctions against offenders in order to enforce desirable conduct, it cannot rely exclusively on the fear of sanctions as a deterrent. This suggests that the content of legal norms must coincide with the moral norms accepted by the community. Legal norms must include "the minimal content of natural law". n23 Furthermore, there may be a presumption in favour of prohibiting what is seen [*232] as deeply immoral by most members in the society. In addition, the cost of enforcing the laws must not be prohibitive in respect of resources or potential intrusion. These general considerations affect the limits of legal regulation in any given society.

Among the functions of law, the ones which are the distinctive role of courts are those related to the resolution of disputes, both regulated and unregulated. Incidental to this function, they may participate in the making and articulation of norms, and in strengthening the expressive functions of the law. When the disputes resolved are not regulated, the function of the courts goes beyond the law even if they do not make laws - in those cases courts are given the power to decide the issue itself, not merely the power to apply a legal arrangement that had been established before the judicial decision.

While courts can, in principle, do things that are not related to the actual decision of specific disputes (e.g., the referral function, or advisory opinions), this is perceived as a function parasitic to their primary function of dispute resolution. n24 Consequently, the primacy of dispute resolution indicates limits on the courts' competence to perform decision-making in other contexts. A good representation of these implications is Fuller's "Forms and Limits of Adjudication". n25 Another unique problem of adjudication is that, unlike law-making, the case may exert pressures of resolution that offend the desirable general rule - hence the maxim "hard cases make bad law". Moreover, non-incidental judicial legislation may make the often necessary "acoustic separation" very difficult. n26

An imminent and general issue arising from this account is that of the relationships between rules and discretion in both adjudication and [*233] in the activity of all individuals and authorities. It seems that today most proponents concede that "ruleness" is important, and is a central element of the prevention of arbitrariness and of the promotion of equality before the law,
but that full "ruleness" is both impossible and undesirable. n27 This is true for both courts and other authorities, so that when courts review the actions of other authorities, they should allow for discretion that stops short of arbitrariness and the blatant abuse of power.

It is also important to remember that courts do have features that affect their effectiveness as decision-makers. On the one hand, courts have neither purses nor swords. In other words, they cannot enforce their own decisions, nor can they budget the mechanisms needed to implement them. While courts may effectively invalidate laws or decisions, they must rely on the cooperation and the good will of the other powers to positively implement their decisions. When such cooperation is not forthcoming, the court's decision remains ineffective. n28 As already noted, lack of effectiveness is not necessarily a conclusive reason against action. The court is judged by its pronouncements, not only by what it can implement. But the courts should be aware of their limits, and not act in ways which "waste" their institutional capital.

The independence of courts from direct political power creates additional responsibility: while courts cannot, independently, implement policies not shared by social and political forces, they can, by their decisions, legitimate (or refuse to legitimate) trends or actions by these forces. Since courts, especially supreme courts, have a high moral profile, they should be extremely careful not to legitimate anything which is blatantly immoral or unacceptable. A range of escape routes is available to courts who wish to avoid such dangers. The best way is when the courts can decide so that both the bottom line as well as the reasoning support the rule of law as well as justice. When this is impossible, or [*234] perceived to be impossible by the court, it should use its ingenuity to refrain from legitimating, on the merits, something which is unacceptable. Here the court may well use what Bickel called "the passive virtues" - abstention from deciding the issue on the merits by invoking doctrines such as "political question" or "mootness"; formal "separation of powers" grounds that leave the moral question undecided. Nonintervention in such cases may be so problematic that the bottom line will be held against the court in any event. But in terms of the role of the courts in society, close attention to such issues is of crucial importance. n29

The above is true of the legal system in all societies. In democracies, as we shall see below, the distinction between application and law-making may gain additional importance because of specific justifications applicable to democracies. We shall also see how basic disagreements in societies affect the role of courts. But the kinds of considerations mentioned here do stem from the most basic analysis of law and courts.

[*235] Clearly, in different societies there may be different conditions, which may well affect the role of courts. Thus, in some societies there is a large and developed body of legal norms, covering most situations that come into the courts, and a developed sensitivity among law-making authorities to the changing conditions and needs. In such societies, most disputes will be regulated, the resolutions will not be out-dated or inadequate, and most adjudication will consist of the application to actual disputes of pre-existing law. Where any of these conditions are not met, the role of the court may well
be expanded. Clearly, the role of the court will be wider in those societies where courts determine cases between individuals and the authorities in addition to disputes between individuals. Similarly, the role of the court will be wider where the texts which the courts use to justify their decisions are more abstract and vague. n29a

Nevertheless, in all societies, and all kinds of regimes, the special legitimacy of courts rests on their competence as organs whose main and primary function is the resolution of disputes, against the general background of a system of government in which primary responsibility for making the rules and for implementing them lies elsewhere. The wider a court strays from this primary function, the more vulnerable the court becomes to attacks against its legitimacy.

I believe what follows from this description is that courts should participate in the effort to strengthen their legitimacy as the authoritative arbiters of disputes in society. To do that, they should try to act in ways that encourage the public in thinking that they either "do justice" in the cases that come before them in a neutral way, or that they are truly and sincerely playing a secondary role - that of the application and enforcement of arrangements made elsewhere, coupled with creative interpretation only where necessary. Such creativity is indeed legitimate, even required, where the creativity reflects popular feelings, or where the courts are seen to have the power and responsibility to adapt laws to the public's changing needs. What may undermine this legitimacy is when judges are seen to be partisan.

The courts should also be careful to adapt their procedures to their "real" task. If the court is determining a general question of value, the court should hear arguments about this question. If the court makes [*236] presuppositions about social reality and the consequences of its decisions, the process should be one that enables the court to reach these decisions on an intelligent basis. n30 If such processes are impossible, or deemed undesirable, the court should seek to base its decision on the kinds of grounds and arguments which could be, and were, effectively argued before it.

III. Implications of Democracy

As stated above, democracy neither prohibits nor requires judicial review. Nonetheless, the commitment to democracy does have important implications for the general scope of judicial review and activism. First, democracy (and separation of powers) implies some deference to the actions of the political branches; secondly, it means that judicial law-making is of suspected legitimacy, especially when it goes against the known preferences of a majority of the people.

This general statement is true for all the existing versions of democracy and their justifications. It is important to see, however, that there are different levels of implications that can be drawn from a commitment to democracy.
They stem in part from the fact that the term "democracy" is very vague, and can have different meanings in various contexts.

It is commonly accepted that democracy is the type of regime in which the use of power is legitimated by basing it on the consent of the governed. From the very earliest theories of democracy, deep controversies [*237] concerning the significance of this consent and the arrangements which it requires, have emerged. On the one hand, these controversies are related to the choice between individualistic and organic conceptions of society. On the other hand, they are related to the tension between the two conceptions of liberty explicated by Berlin - the negative liberty of individuals to do what they want as long as they do not harm others, and the positive liberty of self-government, of participating in the structuring of one's own life. As Berlin reminded us, ideals of positive liberty have been invoked to enhance individual liberty, but they have also been powerful vehicles of oppressive collective ideals. The rhetoric of positive liberty only added insult to injury: people were oppressed by those who claimed that they were promoting liberty.

It should therefore be clear that we need to say more about democracy and the conditions necessary for its culmination, flourishing and stability in order to guarantee an institutional framework within which it can function.

Historically, democratization meant giving more people more control over their lives. Thus, popular legislatures were seen as an advancement following periods of absolute rule. But, as J.S. Mill powerfully stated, popular legislatures, especially when it becomes harder to exclude whole groups from the vote, create new dangers. Protection from the tyranny of the majority becomes necessary. However, the remedy cannot be another tyranny, namely, that of a minority, enlightened or progressive as it may be. Balancing between the wish to give the people real power over their lives, and the need to prevent major abuses of these powers is the most persistent challenge of all democracies.

Due to this complexity, most theories of democracy create a presumption in favour of decisions made by the majority, but they do not necessarily give up all invocations of the public interest, or disguise the fact that at times, even frequently, popular will and the public interest (not to mention the rights of chronic minorities) may move in opposing directions. Democracies need to design their institutions in such a way that will reflect both the presumption in favour of majority rule, and the mechanisms designed to protect against the majority's abuse of power (or the power of its elected representatives). n31

[*238] Furthermore, a democratic government should do more than just protect against the violation of rights and the abuse of power. It should also deal with the resolution of social problems. In order to be effective, all modern democracies are representative rather than direct. But even such representation may not be enough to ensure effective government. The need to be re-elected in relatively short, regular intervals, which is essential for the reality of consent, may well mean that there will be a tendency against undertaking long-term processes which involve short-range burdens. And if
the political system does not generate a government that is relatively stable and can govern without devoting all of its energies to mere survival - it may well be that democratic governments will not be able to perform even the most basic functions of the state. It is well-known that the implications to institutional designs are far from easy, and involve internal tensions and ambiguities. It follows that the role of the courts is just one among many important questions of institutional design that need to be answered.

Basically, the role of the court should reflect the fact that we need to maintain a good balance between effectiveness and accountability of democratic government. Courts are there to strengthen accountability, but their functioning should not undermine the effectiveness of government. Furthermore, political, non-judicial forces should have a large role in strengthening the "accountability" side of government and legislatures.

Our interest in democracy is not exhausted by our concern with effective institutional design. Most of us see democracy not merely as the political regime we happen to live under, but as an ideal or - at the very least - as the least dangerous mode of political regime. Our interest in its promotion is one of our strongest commitments. For both moral and prudential reasons, we wish to strengthen democracy and guarantee the conditions required for its survival. We thus need to look beyond the literature on institutional design into the broader social science literature about the conditions of democracy. We will find that these social perspectives on democracy, too, have implications to the role of law and courts in society.

[*239] While there is some controversy among scholars, it seems that stable democracies depend on a number of factors, among which a high level of education and economic growth, and the support of most political, economic and cultural powers must be counted. n31a Another requirement of a stable democracy is a good balance between the legitimacy of pursuing the particular interests of individuals and groups on the one hand, and the feeling of citizenship, a commitment to promoting the "public good" and the active participation in its articulation, transcending self-interest, on the other. n32 The structure of government and the relationships between branches of government should contribute to the creation of that balance. Self-interest is helped by the legitimacy of parties and factions, and the willingness to acknowledge that society is not only about the harmony of interests, but also about the authoritative resolution of conceded conflicts of interest. A democracy thus needs to enhance the legitimacy of decisions made by government which benefit some more than others. In part, this legitimacy is attained by the process which allows people with different visions of what is "good" to hold, maintain and promote such opinions, seek to persuade others of their cause, and seek to influence the political decision-makers to promote their interests. These elements are among the most basic ingredients of a democracy. The commitment to public good is strengthened by shared values, often reflected in constitutions and a bill of rights, and by the participation of individuals and groups in processes designed to reach agreement on valuable national goals. n33
Societies may differ greatly in their internal cohesiveness (and whether relations between individuals and groups are harmonious or conflictual). The same societies may develop different attitudes to these questions over time. This point will be dealt with in the next section. But even in the most cohesive society, some conflicts are inevitable. Theories of democracy take different attitudes to such conflicts. Most such theories accept the existence of conflicts, and design procedures of decision-making that will serve the necessary functions of coordination and resolution. These procedures invoke a coupling between the regulated struggle about adopted solutions, and a mechanism that will authoritatively decide, while creating at least a temporary reason for obedience.

While most theories concede existing conflicts, they may have a different attitude about the long-term situation to which one aspires. Some theories value pluralism and difference, or at least believe that conflicts of interests are persistent and enduring. They consequently stress those features of government that respond to the reality of differences and struggles, mediating between them by these accepted procedures. Other theories may attempt to reduce the real or perceived conflicts, seeking to reach a harmony of interests and an agreement on substantive goals. Theories of democracy which belong to the second group are reluctant to recognise the existence of conflict and its depth. Rather, they use a variety of means to create a feeling that the society governed by law shares enough basic values and visions of the good to create a more organic union. In such theories, conceptions of the "public good" and "public interest" are seen as self-evident and non-controversial, and may, in turn, form the basis for specific decisions and arrangements.

The differences between these attitudes may be a matter of actual social reality. Usually, however, these attitudes are complex constructions, with a self-fulfilling and self-serving potential, whether conscious or sub-conscious. The status of women is an example. For many gener