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Promoting Rights in the Shadow of the Judiciary:

Towards a Fact-Sensitive Theory of Judicial Review

Wojciech Sadurski*

This working paper is part of a project which inquires into the rationales and motives for setting up, and favoring, strong and robust constitutional courts with the power to strike down democratically enacted legislation on the grounds of its perceived unconstitutionality. Such motives and rationales as are present in legal scholarship and in public discussions are legion, but perhaps the most frequently given, and the most influential, are those which appeal to the need to protect citizens' rights entrenched in the constitution (whether the entrenchment is explicit or only tacit is irrelevant for our purposes). It is frequently said that "our" democracy is not based on blind respect for unrestrained majority will, and individual and minority rights are the most important restraints upon the majority. The majority is capable of looking after its own interests but can we be sure that it will give sufficient protection to the minority and individual dissidents, whether the dissidence is understood in political, moral, religious or personal lifestyle terms? The majority should not be allowed to prevail always over those who disagree with its preferences and choices, and the values reflected in constitutional rights – the argument goes – reflect this "precommitment" on the outer borders of the majority's reach. As the majority cannot be trusted with observing predetermined limits upon its powers, an independent, non-majoritarian institution is needed to police, monitor and enforce those limits. The specific institutional design of such a body may vary from country to country – it may be the highest appellate ordinary court, as in the United States, or a specially designed constitutional court, as in Germany, or a quasi-court located within the legislative process *sensu largo*, as in France – but the general principle seems unimpeachable: if perfecting "liberal democracy" is our aim, then the parliament corresponds to the noun, and the judicial (or quasi-judicial) body – to the adjective in the term.

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This is a familiar argument, and the counter-argument is also familiar. Are individual rights any better protected in the United States than in the Netherlands, in Germany than in Sweden, in Canada than in Australia,[1] or in Spain than in the United Kingdom?[2] Relying on such comparisons, the counter-argument aims to show that countries without judicial review protect rights as well as, and sometimes even better than those with strongly entrenched bills of rights that allow judges to strike down unconstitutional statutes. But naturally any such comparison runs the obvious risk of drawing illegitimate conclusions from a seemingly obvious observation. The conclusions *would* be legitimate if all other things were equal, and if the only variable was the presence or absence of judicial review. However, the condition of *ceteris paribus* is never satisfied in comparisons between different countries: "everything else" is never equal, and those *other* unequal factors can significantly affect the level of rights protection. It might be said, for instance, that there are some relevant factors *other* than those related to judicial review – such as the nature of the political system, tradition, political culture, societal attitudes – in the Netherlands, Sweden, Australia or the United Kingdom that compensate for the absence of rights-based judicial review. And if they *had* robust judicial review, perhaps the protection of rights in these countries would be *even better*. Or so those who favor robust judicial review could claim.

For reasons that will become clear below, I do not propose to provide a conclusive and universally valid answer about the actual role of judicial review in the protection of individual rights. I will instead reflect upon the ways in which to provide such an answer. More specifically, I will suggest what parameters must be taken into account in order to render the argument, or the counter-argument, about the role of judicial review in protection of constitutional rights valid.

I must first announce what this paper will *not* be about. Theoretical and constitutional discussions about judicial review usually focus on the question of legitimacy: is it legitimate for non-elected judges (who are therefore not accountable through normal representative-democratic channels) to frustrate the will of the democratically accountable representatives of the people and overturn their legislative choices? If a country's constitutional text does not explicitly provide for such a judicial role – as in the United States – a court that has

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[1] While there is a robust practice of judicial review in Australia, in principle (that is, if one disregards a relatively recent and quite feeble attempt by the Australian High Court to read into the Constitution some implicit rights, and if one puts to one side a single individual right textually proclaimed in the Australian Constitution, namely freedom of religion) there is no rights-based review of legislation.

[2] Or, at least, the pre-*Human Rights Act* United Kingdom.

"usurped" such power can be (and often has been) directly confronted with its critics' concerns. If the constitution does provide for the judicial review of constitutionality – as in most European countries – the concern is addressed to the constitution's authors, who were responsible for making this institutional choice. Either way, the question is distinct from that of whether judicial review does help protect individual rights. We might consider the operation of judicial review to be illegitimate and yet rights-protective. Or, vice versa, we might consider it to be legitimate but detrimental from the point of view of rights. These are conceptually and politically distinct questions, although they can be merged in a trivial way. A trivial connection between legitimacy and rights protection would be established by saying that an illegitimate system of judicial review *necessarily* tramples upon individual rights; that is, it conflicts with our right to have coercive public decisions made only by bodies with the democratically legitimate authority to do so. But the word "necessarily" indicates that this is a trivial proposition; no meaningful conclusion about the overall quality of rights protection in a hypothetical, illegitimate system of judicial review follows from it. In this paper, I will therefore resist any temptation to merge the question of the protection of rights with the question of the legitimacy of judicial review.

1. Two Theories about Judicial Review: Ronald Dworkin and Jeremy Waldron

Various theoretical positions about the role of judicial review in the protection of individual rights range from an enthusiastically positive response to an unqualifiedly negative one. These two extreme positions can best be identified in the respective theories of Ronald Dworkin and Jeremy Waldron. These are sufficiently well known that they do not need summarizing here. Indeed, they have almost become canonical points of reference against which most of the participants in this debate define their own views.

For all the substantive differences between the two theories, one common aspect renders them less than satisfactory. Both are relatively insensitive to the facts about the protection of individual rights in existing systems of judicial review. It is not that the two writers disregard the reality of the legal systems – mainly the United States and the United Kingdom – that they use as their starting points (or as their sources of illustration). To the contrary, both scholars are deeply immersed in the life of these legal systems, and both certainly care about the substantive decisions that the relevant supreme courts and legislatures produce. However, their conclusions about the effect of a system of judicial review on the protection of individual rights *in general* are not greatly influenced by the reality of

these patterns of decisions. The strength of these two theories is therefore independent of empirical facts about the effects of judicial review.

Dworkin enthusiastically endorses the active and powerful role of the US Supreme Court and advocates the establishment of a similar system in the United Kingdom.[3] An empirical problem would thus seem to be raised by those decisions of the Court that are deplorable from the point of view of rights protection, and also by the instances where the Court was *in*active (when it could have acted) towards statutes that had an adverse effect upon individual rights. These decisions should compel an advocate of a "moral reading of the Constitution" to reassess the value of judicial review. After all, Dworkin himself stresses that the "moral reading" thesis is about what the Constitution itself *means*, and not about *whose* views about the meaning of the constitution should be binding.[4] He has been an energetic critic of many recent (and historical) Court decisions.[5] Yet it is hard not to notice that Dworkin, as a critic of this or that decision, has little in common with Dworkin *qua* a theorist of judicial review. Precisely because Dworkin's normative vision is so clearly divorced from his concern with specific effects, he can proudly – but implausibly – proclaim:

> For two centuries American judges have ruled both national and state legislation invalid because it invaded the rights of freedom of speech or religion or of the due process of law or of the equal protection of law that the United States Constitution recognizes.[6]

His normative ideal does not seem to have been affected by the fact that the Supreme Court began to take First Amendment seriously well into its second

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[3] See in particular *Taking Rights Seriously* (London: Duckworth, 1978, 2nd ed.) chapters 4 and 5; *A Matter of Principle* (Harvard University Press, 1985), chapters 1 and 2; *Law's Empire* (London: Fontana, 1986), pp. 373-79; *Freedom's Law* (Oxford University Press, 1996), pp. 1-38, 352-72.

[4] *Freedom's Law*, p.12

[5] See e.g. Dworkin's critique of *City of Richmond v. Croson*, 488 U.S. 469 (1988) (striking down an affirmative action plan) in *Freedom's Law*, p. 158; *Webster v. Missouri Reproduction Services*, 992 U.S. 490 (1989) (restrictions on the availability of abortion upheld), *id.* pp. 60-71; *Buckley v. Valeo*, 424 U.S. 1 (1976) (striking down limits on expenditure in an election campaign) in *Sovereign Virtue* (Harvard University Press, 2000), pp. 351-385; *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding a state anti-sodomy statute), *id.* pp. 454-55, *Washington v. Glucksberg*, 521 U.S. 702 (1997) and *Vacco v. Quill*, 521 U.S. 793 (1987) (upholding state statutes prohibiting doctor-assisted suicide), *id.* pp. 453-73.

[6] *Freedom's Law*, p. 352.

century of operation, and that its record in this area – as in other areas listed by Dworkin, including the equal protection sphere – has been mixed, to put it mildly.[7]

Nor does Dworkin seem disturbed by cases implicating important issues of rights in which the *legislature* was more rights-protective than the Supreme Court, such as when rights-enhancing legislative measures were invalidated by the Court, or when the legislature enhanced rights that had been affected by restrictive decisions by the Court.[8] A general theory of judicial review should be tested by the actual outcomes a review produces. The achievements during the liberal Warren and Burger eras must be compared to the losses (from a liberal perspective) produced by the Rehnquist Court, or perhaps even the Taney Court.[9] It is likely that the overall balance will be positive, but this needs to be shown. Consider the case of affirmative action. A liberal who believes (as Dworkin does)[10] in the rightness of race-conscious remedial affirmative action could be excused for thinking that this right would have been better protected if judicial review was *not* exercised by federal courts in the United States, and if recently challenged laws or policies had been allowed to continue.[11]

A *critic* of specific decisions who nevertheless *defends* the Court's strong role towards legislation therefore has reason for embarrassment. This can be avoided only by showing that there is no conflict between the criticism and the defense, which could be done in two ways. One way is to simply say that, on balance, individuals' rights are better protected under a system of judicial review because the sheer number and significance of rights-protective judicial decisions

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[7] At times he admits to a negative record but he quickly announces that the positive decisions far outweigh the negative ones, see e.g. *Law's Empire*, pp. 375-76.

[8] See Neal Devins, *Shaping Constitutional Values* (Baltimore: The Johns Hopkins University Press, 1996), pp. 16-17 and 32; Neal Devins, "The Democracy-Forcing Constitution", *Michigan Law Review* 97 (1999): 1971-93 at 1987-88; Stephen M. Griffin, *American Constitutionalism* (Princeton University Press, 1996), pp. 116-7.

[9] Roger B. Taney was the Court's Chief Justice in 1836-1854, and he authored the Court's opinion in *Dred Scott v. Sanford*, 60 U.S. (17 How.) 393 (1857). This decision affirmed the right to own a slave as a constitutional right, prohibited Congress from preventing the spread of slavery into the free states and territories, and denied Africans in America the status of citizenship.

[10] See *Taking Rights Seriously*, chap. 9; *A Matter of Principle*, chapters 14-16; *Law's Empire*, pp. 393-7; *Freedom's Law*, chap. 6; *Sovereign Virtue*, chapters 11, 12.

[11] In *Texas v. Hopwood*, 78 F.3d 932 (5th Cir. 1996) a federal court of appeals held a Texas university affirmative-action policy to be unconstitutional. The Supreme Court subsequently refused to hear the university's appeal, *Texas v. Hopwood*, 518 U.S. 1033 (1996).

greatly outweighs the number and significance of decisions that weaken legislatively conferred rights.[12] This is notoriously difficult to prove *in abstracto*, and some would simply disagree with the outcome of such an equation, at least with respect to the United States.[13] Another option is to dismiss the "wrong" decisions as aberrations, as cases of system failure that are unavoidable in any human institution. This alternative precludes the need to count and weigh a particular decision's impact on rights, but it makes Dworkin's thesis unfalsifiable and hence unverifiable. It acquires an internal self-validation quality and thus becomes immune to confrontation with the reality of the practice of judicial review in a given legal system. This is what I mean by its (relative) insensitivity to facts.

Dworkin's insensitivity to facts is all the more puzzling because he openly endorses a result-driven test for judging institutional design: "The best institutional structure is the one best calculated to produce the best answers to the essentially moral questions of what the democratic conditions actually are, and to secure stable compliance with those conditions".[14] This seems to be a sensible beginning for a fact-sensitive balancing of good and bad (that is, rights-protective and rights-limiting) decisions. But Dworkin draws a conclusion from the result-driven test that sounds like a non-sequitur. He asserts that established constitutional practice *actually reveals* that US judges have a strong authority to conduct constitutional review:

> If the most straightforward interpretation of American constitutional practice shows that our judges have final interpretive authority ... we have no reason to resist that reading and to strain for one that seems more congenial to a majoritarian philosophy.[15]

This sounds like conservatism pure and simple: the fact of a given practice validates its value and demands that it be preserved. But the question is not whether these judges *do* have the final authoritative power over constitutional meanings, but whether – in light of a result-driven test – they *should* keep exercising such a power. The fact of authority and compliance is not a substitute for a critical review of an established practice. And while the practice *is* certainly established, it is far from being uncontroversial. This is something that Dworkin

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[12] This seems to be Dworkin's view: "we would have more to regret if the Court had accepted passivism wholeheartedly: southern schools might still be segregated, for example", *Law's Empire*, p. 375.

[13] Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 1999), pp. 129-54.

[14] *Freedom's Law*, p. 34.

[15] Id., p. 35.

admits elsewhere when he refers to "the contemporary debate among American constitutional lawyers about the legitimacy of the United States Supreme Court's power to overrule the decisions of elected legislators"; it is, he says, a debate "dominated" by "unspoken assumptions" about the centrality of majority rule in a democracy.[16]

Jeremy Waldron's right-based criticism of judicially enforceable bills of rights exemplifies the opposite pole in the controversy surrounding judicial review.[17] Waldron relies upon the point that the judicial reversal of democratically adopted laws denies an important individual right, namely, a right to democratic self-determination. As he claims:

> this arrogation of judicial authority, this disabling of representative institutions ... should be frowned upon by any rights-based theory that stresses the importance of democratic participation on matters of principle by ordinary men and women.[18]

Waldron's argument is unimpeachable as far as democratic *legitimacy* is concerned: there is a chronic legitimacy deficit in any system that allows democratically unaccountable judges to displace choices made by a democratically elected legislature. Even if the system of democratic representation and accountability is defective, the defects can hardly be remedied by establishing an *even less* democratically accountable body.[19] However – as indicated earlier – the question of legitimacy is conceptually and politically distinct from the question of the effect of judicial review upon the protection of rights. And while Waldron's argument serves as a powerful objection to the legitimacy of constitutional judicial review, it is not conclusive as an argument that judicial review adversely affects the protection of constitutional rights. At best, it adds into the equation a particular type of right that seems to be infringed when judges reverse statutes; namely, the right to democratic self-government through electoral representation.

This is an important right but not the only one, and perhaps not even the most important one. So Waldron's argument is incomplete in the context of the protection of rights: the loss of self-government rights in a specific legal system might be more than compensated by the superior judicial protection of other rights

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[16] *Sovereign Virtue*, p. 189, see also *id.* p. 357.

[17] First put forward in "A Rights-Based Critique of Constitutional Rights", *Oxford Journal of Legal Studies* 13 (993): 18-51; and then developed in *Law and Disagreement* (Oxford University Press, 1999), especially chapters 10-13.

[18] "A Rights-Based Critique", p. 42.

[19] See id. at pp. 44-5; James Allan, "Bills of Rights and Judicial Power – A Liberal's Quandary", *Oxford Journal of Legal Studies* 16 (1996): 337-52, at 349-50.

that had been disregarded by the legislature.[20] Obviously such a calculus cannot be made in abstraction but only by reference to a particular legal system. Waldron's argument serves as a reminder that the judicially produced loss of self-government rights has to be included in our calculation, but it does not determine the result in the final weighing and balancing of different rights.

Furthermore, it is not necessarily true that the right to democratic self-determination must be defeated by establishing a system of robust judicial review. Such an effect is only inevitable if it is, *by definition*, understood to occur whenever the legislative majority's view is not final. This is what Waldron seems to have in mind when he says that "if the process is non-democratic, it *inherently and necessarily* does an injustice, in its operation, to the participatory aspirations of the ordinary citizens ... whether it comes up with the correct result or not".[21] But then the connection between judicial review and a violation of the right to democratic self-determination is merely trivial. And yet, it is always open to us to question the operation of the system of representation in a given country. It is possible to show that the preferences of the majority undergo such radical distortions in the political process that a right to be accurately represented by one's parliamentarians is not actually respected in a given society. This might be due to particularities of the electoral system, the influence of wealth on the process of representation, a biased media, self-interest and myopia of the representatives, and a great number of other political and social factors. In such a society, judicial review *might* offer individuals a better way of producing results that correspond to the majority's actual preferences in the legal system. And if *that* is what the requirement of democratic self-determination is fundamentally about, under some factual circumstances it may better served by judicial review than by the electorally accountable institution. Suppose the great majority of people favors strict gun control, or wishes to allow doctor-assisted suicide under some conditions, but that the elected politicians systematically oppose these legal

[20] See Griffin, op. cit., p.123: "Deciding to place the protection of basic rights in the hands of the judiciary is also a decision to remove such issues from the agenda of the elected branches. This restricts the basic right of citizens to participate in important political decisions respecting the content of such rights. While this consideration is by no means decisive, it provides a salutary reminder that the decision to adopt judicial review involves restricting some basic rights in order to promote others. This immediately raises the question of whether the rights to be promoted are of greater importance than the political rights that are restricted".

[21] "A Rights-Based Critique", p. 50, emphasis added.

measures due to pressure from powerful (though minority) interest groups.[22] Recourse to a non-democratic institution – such as a court empowered to verify the constitutionality of laws – might help to overcome the blocked political process. It might help to produce an outcome that, in these respects, better represents majority preferences than the legislative process does. If a particular authority is anointed with democratic validity only by virtue of its electoral pedigree, such an outcome might be thought to lack legitimacy. But it nonetheless passes the test of democratic self-determination.

It will no doubt be noted that this last suggestion resembles a celebrated theory by John Hart Ely who attempted to support the power of judicial review by appealing to the integrity of the democratic process. His claim is that the Court's power to overturn legislative decisions can only be justified when it helps to remedy the malfunctions of democracy, such as defects in the functioning of communication channels or systemic disregard for the interests of under-represented minorities.[23] Although this paper is not the right place to review Ely's theory and consider the claims by his critics (including Jeremy Waldron himself),[24] I will make a brief comment.

As a general theory of judicial review, Ely's thesis strikes me as erroneous. The basic problem concerns the existence of reasonable disagreement about the devices and processes of democracy. The question about why an unrepresentative body should have the last word in the debate about the best procedural devices for democracy merely *replicates* a dilemma – which Ely recognizes as fatal to many theories of judicial review – about an unrepresentative body having the last word on the substance of laws. Further, the values of process are often indistinguishable from the values of substance.[25] For example, freedom of speech is a procedural device that is necessary for the effective functioning of a democracy, but it is also a substantive interest of individuals that is protected by the constitution. So when, for example, the legislature compels broadcasting stations to respect Christian

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[22] See Neil K. Komesar, *Imperfect Alternatives* (The University of Chicago Press, 1994), pp. 56, 79-81; Bruce A. Ackerman, "Beyond *Carolene Products*", *Harvard Law Review* 98 (1985): 713-46, at pp. 718-19.

[23] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Harvard University Press, 1980).

[24] *Law and Disagreement* at 295-96.

[25] See Laurence Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories", *Yale Law Journal* 89 (1980) 1063-1080.

values,[26] is it imposing constraints upon the channels of political communication or, rather, upon individuals' rights to publicly express themselves as they wish? A natural answer would be "both", but the process-oriented theory of judicial review would have us disregard the latter effect and focus on the former. The problem with the former interpretation is that virtually any speech might be seen to be directly or indirectly related to the political mechanisms of democracy.[27] If this is so, the process-based argument collapses into a substance-based argument, and one is indistinguishable from the other.

However, Ely's theory may be instructive for our purposes in that it points to the fact that there can be democratically endorsed distortions of the representation process (even if not everyone does agrees that they really are distortions). The existence of disagreement might be fatal to the problem of legitimacy (why should a court have the final word when the two institutions disagree about the proper devices of political representation?), but not to the problem of rights-protection. From the perspective of someone concerned with how to design institutions to protect individual rights, there is nothing irrational about using a court to remedy legislatively endorsed distortions of the right to self-determination.

Returning to Waldron: his argument certainly runs deeper than judicial review. Indeed, he criticizes the very idea of a constitutional bill of rights. But at that level his critique simply reproduces the fact-insensitivity of his critique of judicial review. According to Waldron, demands for the constitutional entrenchment of a particular right reflect a particular combination of self-assurance (a conviction that the right is fundamental) and mistrust. The latter is

> implicit in [the proponent's] view that any alternative conception that might be concocted by elected legislators ... is so likely to be wrong-headed or ill-motivated that *his own* formulation is to be elevated immediately beyond the reach of ordinary legislative revision.[28]

Waldron finds this mistrust incompatible with crediting all citizens with autonomy and responsibility. But, of course, whether any proponent of a specific institutional arrangement *has* reason to mistrust the legislators is contingent upon whether that person believes that the legislators are so "wrong-headed or ill-motivated" when they draft laws that they detract from, rather than contribute to, the citizens' ability to exercise autonomy and responsibility. It is one thing to

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[26] See, e.g., Articles 18.2 and 21.2.6 of the Broadcast Law in Poland of December 29, 1992, upheld as constitutional by the Constitutional Tribunal on June 7, 1994.

[27] See Wojciech Sadurski, *Freedom of Speech and Its Limits* (Kluwer: Dordrecht 1999) 20-31.

[28] *Law and Disagreement*, p. 222.

mistrust one's fellow citizens; it is another to mistrust one's elected legislators.[29] Whether the latter sort of mistrust is symptomatic of the former is entirely context-dependent. It is not a matter of principle.

2. The Fact-Sensitivity of a Theory of Judicial Review

Suppose you have a relatively clear view about how constitutional rights should operate in your country in specific circumstances. In other words, you have a view about how to translate broad constitutional pronouncements of rights – equality before the law, human dignity, freedom of speech, freedom of association, and so on – into specific outcomes of which you approve. (I will henceforth refer to these "translations" as "rights articulations"; that is, specifications of the preferred method of application of a general constitutional right to a concrete issue). What is important is that you approve of these articulations *qua* constitutional rights and not as free-floating values; in other words, you believe that constitutional rights will be imperfectly implemented if the political system translates the broad constitutional pronouncements in a different manner to that which you believe is the correct articulation of a broad constitutional value. Suppose the Constitution declares a right to freedom of speech but does not make it clear whether defamatory statements about public officials are or are not constitutionally protected, and you believe the proper articulation of that constitutional right demands that such statements should be constitutionally protected (within specified limits). Or, suppose the Constitution provides for a right to equal treatment but does not make it clear whether preferences in favor of a traditionally disadvantaged group count as violation of that right or not, and you believe that they should not. In both these cases, it is important that you do not merely think that the preferred outcome (non-prosecution of speech that is defamatory of politicians; protection of affirmative action) is politically or morally right, but that you think it is the correct articulation of these constitutional rights in the specific fact-situations. In other words, you genuinely hold these outcomes to be a correct interpretation of your Constitution's rights, rather than simply your ideological preferences.

Your support for any particular constitutional right – and through an accumulation of the support for various particular rights, your support for a whole set of rights – is colored by your view about the correct articulation of those rights. You have no reason to value a particular right unless it is (or you believe that it plausibly can be) articulated in a way of which you approve. This articulation

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[29] See also Cécile Fabre, "The Dignity of Rights", *Oxford Journal of Legal Studies* 20 (2000): 271-282 at pp. 275-6.

confers value upon the right. For instance, there is no sense in valuing "freedom of speech" unless it can be articulated in a valuable way. If you believe that it is important to protect individuals who criticize officials, and that for this reason those individuals must enjoy a degree of immunity against defamation suits pressed by politicians, then you would only value a "right to freedom of speech" if it is (or can be) articulated in a way that entails such an immunity. Of course, every abstract "right" does many different things, and even if the right to freedom of speech in your country is not, and cannot realistically be, articulated in your preferred way with respect to the defamation of officials, it can do many other useful things. For example, it might protect private speech or protect journalists against having to reveal their sources. But these *other* things are also positive by virtue of a valuable articulation. Unless some such articulation can be made, you would have no reason to value a right to freedom of speech in your Constitution. Constitutional rights are precious only by virtue of substantively valuable articulations.

Provided you care strongly about constitutional rights, your view about whether an institutional system that is designed to enforce the Constitution promotes or hinders these preferred articulations – *on balance and in the long run* – will obviously affect your evaluation of the institutional system. (But, of course, the same institutional system does many other things besides protecting individual rights, such as providing for the smooth and efficient operation of a governmental system by allocating powers among different branches and institutions. Your overall evaluation must take into account these other functions of the system. But as this stretches beyond the focus of this working paper, we will proceed as if you would only be concerned with rights when evaluating your country's institutional system). *On balance and in the long run*: they are important provisos. "On balance", because to make this assessment you will have to compare the net result of the existing institutional system with the expected net results of alternative institutional systems. To simplify: if you live in a constitutional system with a robust system of judicial review (a system in which the judicial institution may displace legislative articulations of rights), you need to compare the net outcomes of your system with a scenario in which everything else is equal except for the unconditional supremacy of the parliament. "In the long run" is a difficult proviso because its very nature is unclear. It is obvious that you must take a dynamic and historical approach, rather than a snapshot of one particular moment in time that might be an aberration or exception. However, an unduly long time-frame distorts the picture because people harmed by today's legal system cannot be consoled by the promise that the system will produce more good than harm "in the long run".

At this point, the most obvious objection is that this whole approach to assessing an institutional system of constitutional enforcement is unhelpful because people radically differ in their preferred interpretations of the same constitutional pronouncements. For instance, they do not merely differ as to whether affirmative action is a good or bad policy, but also as to whether it is permitted or prohibited by their Constitution's right to equal treatment. This disagreement is replicated with regard to most, if not all, constitutional rights. Some people will certainly reject some constitutional rights altogether (for example, a religious fundamentalist will probably reject the very idea of a right to the free exercise of religion). But what is more typical, and more relevant to our discussion here, is that they will genuinely accept a given right (such as freedom of speech) as a good thing to have, but will equally genuinely disagree about its proper articulation with respect to specific cases (such as defamatory political speech).

We must not allow disagreement to halt discussion at this stage. Our assessment of how a system of judicial review affects the protection of constitutional rights cannot be considered separately from our assessment about how the specific judicial review systems promote the values that we consider the best constitutional interpretations of broad pronouncements of rights. For example, suppose you genuinely believe that the best interpretation of a right to equality requires the practice of affirmative action in certain circumstances, and you think that a constitutional right to equality is beneficial partly because it will facilitate the practice of affirmative action (by lowering the costs for legislators and policy-makers of establishing such practices). You would thus consider an institutional system that appeals to a constitutional right to equal treatment in order to *frustrate* efforts to establish affirmative action, to be a sub-optimal method of protecting constitutional rights. You would prefer to opt for a different institutional system if it is likely to give effect to your preferred interpretation of a constitutional right to equality. Your assessment of the value of institutions cannot be fully divorced from your assessment of the value of the outcomes they produce. The fact that people will disagree about outcomes means that they will consequently disagree about the value of the institutions that produce those results. This disagreement is a second-order consideration that must be factored into the institutional design. But, in order to have somewhere to start, you must first conduct your own assessment of the institutions as a function of your assessment of the outcomes they produce; you must do this according to your own standards concerning the best articulation of broad constitutional rights.

3. 'Matrix" of Rights-Enhancing Judicial Review

How can you go about deciding whether the gains of judicial review exceed the losses from a rights-protection perspective? The "score card" of a constitutional court would arguably take the form of Table I. It would not simply call for a comparison between the number and significance of "correct" decisions (invalidations that are conducive to the implementation of a constitutional value that we endorse: Box 1) and "incorrect" ones (invalidations that are detrimental to an implementation of a constitutional value that we endorse: Box 2). The calculus would have to be subtler and more complex. "Incorrect" decisions (Box 3) would have to include the invalidations that are not conducive to a value that we share, *as well as* decisions that uphold a provision when the Court *should* (from the point of view of a constitutional value which we share) and *could* (from the point of view of the legal resources available to it) have invalidated it.

Table I: The calculus of gains and losses resulting from constitutional court decisions:

	Rights-enhancing decisions ("gains")	***Rights-weakening decisions ("losses")***
Invalidations	(Box 1) Invalidations of "wrong" statutes	(Box 2) Invalidations of "right" statutes
Upholding	~~(Box 4) Upholding of "right" statutes~~	(Box 3) Upholding of "wrong" statutes

The second category might initially seem to be an inappropriate factor to place on the negative side of the score card. After all, one might claim that it does not detract from a country's system of rights protection if a decision erroneously upholds a rights-problematic statute, because the legislature would have enacted the provision anyway if there had been no constitutional court to prevent it from doing so. But this is not so. The existence of a constitutional court somewhat relaxes the responsibility – a special duty of care – of the political branches to avoid creating legislation that might infringe constitutional rights. The very fact that a court can review the statute might encourage the other branches to be more cavalier with law-making; if bad laws are likely to be struck down anyway, the stakes are not as high. Legislators might try to test a particular provision while knowing that judicial scrutiny is likely, and they might not have risked this in the absence of such scrutiny. Legislating in the shadow of constitutional review affects the motivations and the risk calculus of legislators. The erroneous endorsement of

a rights-implicating provision is therefore a negative – rather than a neutral – factor in the calculus of costs and benefits of constitutional review. This is an important argument developed by Mark Tushnet in his recent book.[30]

If a system of supremacy of legislation is the baseline of comparison, "wrongfully" upheld statutes indicate a loss of rights protection. However, no parallel "gain" occurs as a result of a "right" upholding of the "right" statutes: in comparison with a no-judicial-review system, nothing is gained if the court considers a challenge to a statute and upholds it. That is why there is no symmetry between Boxes 3 and 4, and Box 4 is empty.

Note that Boxes (3) and (4) of Table I deal with *specific* decisions by courts in the process of conducting judicial review; that is, decisions in which the courts decide to uphold the validity of specific statutes. This is the argument that, compared with a no-judicial-review situation, a loss occurs when a court decides to uphold a wrong statute; compared with a finality of legislation regime, no special gain is achieved when a court upholds a "right" statute. But this argument is tentative. Perhaps by upholding a "right" statute (Box 4), the court makes it more difficult to launch a legislative initiative to amend the statute in a negative (from our point if view) way. For example, a Court partly "entrenches" a liberal abortion law that it upholds, and thus makes it more difficult to render the law less liberal in the future. Such an effect should be placed on the positive side of the score card, so Box 4 is in fact not empty. A similar effect occurs in Box 3: when a rights-positive cause loses in the constitutional court, the rights-detrimental law acquires additional support and it becomes more difficult to annul it in future. As Tushnet suggests, "the rejected claims of rights simply drop out of political consideration instead of becoming ordinary political claims like any other".[31] This is a loss from the point of view of rights protection.

But it is not enough if we confine ourselves to a definite set of judicial-review decisions in the calculation of gains and losses from the point of view of one's preferred interpretation of rights. Judicial review can affect the implementation of rights, not merely through the impact of actual decisions (that is, when specific cases have already reached the court), but also by its very existence (regardless of whether a challenge to a rights-implicating statute has been actually launched). The fact of judicial review *just being there* – "judicial

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[30] Tushnet, *Taking the Constitution Away from the Courts,* op. cit., pp. 57-70.

[31] *Id.*, p. 137.

overhang", as Tushnet calls it – can have rights-positive or rights-negative consequences.[32]

On the positive side, the existence of judicial review influences the motivations and incentives of legislators when it makes them more cautious of rights than they might have been in its absence, and they end up adopting statutes that more closely accord with our understanding of rights. Further, the existence of judicial review – and publicly available information about the case law of the court(s) exercising judicial review – can have an educational effect and promote the "right" understanding of constitutional rights among the legislators and the general public. However, this does presuppose a degree of awareness about judicial decision making that is often not reflected in the general public or legislators.[33]

On the negative side, one has to consider cases in which legislative irresponsibility is generated by judicial review; that is, when the awareness of possible review makes legislators less attentive to constitutional rights, with the possible result that a sub-optimal law will never be invalidated. Another negative consequence could be legislative apathy in the implementation of constitutional rights (along the lines: "if something is wrong, the court will remind us of it").[34] The very existence of judicial review can also have a negative educational effect; it might help to generate the perception that rights discourse is an obscure activity reserved for lawyers, and that deliberation about the political values that give rise to specific articulations of rights is something over which neither the population nor its elected representatives have any control. As Ronald Dworkin puts it, "[t]here is little chance of a useful national debate over constitutional principle when constitutional decisions are considered technical exercises in an arcane and conceptual craft".[35] However, while this last effect is regrettable from the viewpoint of a participatory conception of democracy, it is not necessarily detrimental to any specific articulation of preferred rights. It might be a neutral matter from an individual's perspective about which rights should be articulated. And it will only register on the "losses" side if one has reason to believe that public

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[32] "Legislators may define their jobs as excluding considerations of the Constitution precisely because the courts are there. The judicial overhang might make the Constitution outside the courts worse than it might be", *id.* p. 58.

[33] For the United States, see Devins, "The Democracy Forcing Constitution", p. 1985.

[34] This basically applies only to those few cases of constitutional courts which can act on their own initiative, and which have the power of identifying unconstitutional legislative omissions (such as the Hungarian Constitutional Court).

[35] *Freedom's Law*, p. 31.

apathy about rights in general will detrimentally affect her own set of preferred articulations of rights. This may or may not be the case.

Table II: The calculus of gains and losses resulting from the very existence of the system of judicial review:

	Rights-enhancing effects ("gains")	***Rights-weakening effects ("losses")***
Affecting legislative incentives and behavior	(1) Promoting consideration of rights in legislation	(2) Promoting legislative negligence towards rights
Affecting society at large (educational role)	(3) Promoting pro-rights attitudes	(4) Promoting apathy vis-à-vis rights

It must again be emphasized that the effects in Boxes (1) and (3) count as "gains" only if the very existence of judicial review promotes an articulation of "rights" that accords with our preferred articulation of particular "rights". In this sense, the calculation in Table II is just as substance-dependent as that in Table I. For example, suppose someone believes that, properly understood, the right to equality mandates affirmative action in some circumstances, but the court in her country consistently passes decisions that invalidate affirmative action under the constitutional right to equality (and thus count as losses under Table I, Box 2). The fact that this attitude of the court affects a "consideration of rights" by the legislature – in the sense that it discourages parliament from even trying to establish affirmative action by statutes – cannot count as (1) in Table II; it must be (2). It would not make any *moral* sense to say: "I believe in the rightness of affirmative action, but I still believe that it is better to have legislators consider rights when deciding about affirmative action, even if a result of this consideration – operating as it does in the shadow of judicial review – is that politicians will refrain from enacting affirmative action programs". If the acceptance of affirmative action is a correct interpretation of the right to equality, then "judicial overhang" (which, by virtue of its existence, paralyses legislators from instituting affirmative action because they know that it is likely to be invalidated) cannot count as a gain from the point of view of rights protection.

4. Rights Protection and Disagreement about Rights

Tables I and II illustrate the consequentialist calculations that can be conducted by someone who has a preferred articulation of rights and who uses it as

a yardstick for assessing the net benefit of a system of judicial review. But this is not the end of the story. We have thus far been disregarding the consequences of significant disagreements about the preferred articulation of constitutional rights. Suppose I have a set of preferred interpretations of constitutional rights – a checklist – that consists of the following articulations of three important rights:

(a) a constitutional principle of equal protection allows (and sometimes mandates) affirmative action;

(b) a constitutional prohibition of cruel and unusual punishment proscribes the death penalty;

(c) a right to freedom of speech renders it impossible (or excessively difficult) for public figures to recover for damages resulting from defamation, unless they can prove actual malice on the part of the defamer.

Let us call this set of preferred articulations of rights *S-1*. Imagine that the constitutional court of my country consistently gives effect to articulations that contradict these three preferred articulations; we can call the Court's actual set of authoritative rights articulations *S-2*. Would I still have any good moral and political reason to support judicial review in my country?

The answer is, "it depends". I must assess the chances of having my preferred interpretations enforced by the legislature. If they are higher than the chances of convincing the court to adopt my preferred articulations, then I acquire a good *prima facie* reason against supporting the system of judicial review. But it is only a *prima facie* reason. It can be defeated by an appeal to any of three arguments that might compel me to support judicial review even if the court is likely to deliver "wrong" interpretations of specific rights that matter to me. These are: an overlap argument, an argument regarding the deliberative institutional properties of judicial review, and a prudential argument. I will now turn to these three arguments[36] and, as we will see, conclude that each has rather limited power.

a. Overlap

In real-life situations there is likely to be a degree of overlap between *my* preferred interpretation of the rights (*S-1*) and that of the Court (*S-2*). After all, if the Court gives effect to *S-2*, there must be a constituency that espouses *S-2* and expects the Court to enforce it. It is hard to imagine that there is no overlap in the articulations of rights offered by different constituencies in one society: such a radical division would be a sign of a very fundamental breakdown in social

[36] I have benefited from discussions with Robert Post in thinking about these arguments.

cohesion, and it seems unlikely that any system of judicial review could operate in a context of such fundamental dissensus. In reality, there must be a degree of overlap between different constituencies. For example, *S-1* and *S-2* might differ on (a) affirmative action and (b) the death penalty, but converge on (c) freedom of political speech. And as soon as we extend the set of constitutional rights beyond the three examples given above, we are likely to find more aspects of overlap (and, of course, more aspects of incongruence). For the sake of argument, let us confine the set of relevant issues to these three matters only. Notwithstanding the incongruity of our articulations on (a) and (b), the fact that the Court articulates (c) the same way as I do gives me at least one good reason to support judicial review. If I have some reason to believe that the Court is more likely than the legislature to enforce my articulation of (c) – which is actually a realistic expectation in our example because it is plausible to believe that legislators will be more nervous about defamatory political speech than the judges are – then this will weigh heavily on my decision in favor of judicial review. This rationale can still be overridden by my dissatisfaction with the Court's articulation of (a) and (b), but the picture is no longer uniformly negative towards judicial review. I will now need to consider how important (a) and (b) are to me in comparison with (c); perhaps I care much more about affirmative action than about freedom of political speech. I will also need to consider how likely it is that the legislative interpretation of (a) and (b) would be closer to *S-1* (mine) than to *S-2* (that of the Court).

Note that although it identifies an area of *consensus*, the *overlap* recognized in the preceding paragraph has nothing to do with Rawlsian "overlapping consensus";[37] as a mater of fact, it is just the opposite. Overlapping consensus occurs as a result of the congruence of *conclusions* reached by different people on different *grounds*. Rawls postulates that we should ignore the dissensus about the justifications in favor of the consensus regarding the conclusions. That type of agreement has little relevance to a rights advocate who reflects upon whether she should support a system of judicial review. Her problem is not that people have different *reasons* for supporting the same conclusions, but rather that other people have reached different *conclusions* about the correct articulation of constitutional rights, and that the Court has chosen to give effect to those people's articulations rather than to her own. In other words, the Rawlsian "overlapping consensus" is part of the *political* theory and, as such, is addressed to the authoritative bodies in the society (such as the courts). In contrast, this paper is about which institutional

[37] See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 144-68.

system a citizen concerned with rights should support when faced with an institutional conclusion that differs from her own interpretation.

What might cause me to consider supporting judicial review even though it has been producing *S-2* rather than *S-1* is precisely the *opposite* of Rawls' overlapping consensus: while I see incongruity between the Court's conclusion about (a) and (b) and my own, the very fact that the Court (typically) has to reveal its *reasons* for its decision might indicate converging reasons despite the divergent results. I return to the point about the deliberative nature of judicial institutions below, but at this stage one should note the following possibility: the Court's argument might contain traces of an evolution towards my position on rights. These signals – in the dissenting opinions, in obiter dicta, and so on - might be more comforting than those emanating from the legislature (bearing in mind that we rarely receive hints from legislatures about how they are likely to change their positions concerning constitutional rights). Suppose you strongly support the right to life of all fetuses and you believe that your country's constitutional rights demand that abortion should be outlawed. Even though current United States law would not vindicate your articulation of this right, you could be reasonably optimistic about the way in which the Court is moving towards adopting a more rigorous anti-abortion stance. So while the Court's current abortion doctrine should count against your embrace of judicial review if you follow the consequential type of analysis outlined earlier, it would not be an unqualified reason to favor legislative supremacy. You might reasonably anticipate that the Court will finally overrule its pro-choice precedents in the next few years, and that it will entrench an anti-abortion position even more firmly than the legislature could do through a statutory act. This is because, under a system of robust judicial review, it is much harder for the legislature to override the Court's interpretation of a constitutional right (in principle, this would require a constitutional amendment) than it is to override an earlier statutory provision (a routine process of legal change). You might therefore have a good reason to support judicial review in preference to legislative supremacy, even if the court does not currently espouse your preferred articulation of rights and the legislature does.

b. Deliberative institutions

Suppose I have identified a degree of overlap between *S-1* and *S-2*, and I know that a sizeable social constituency supports *S-2*. I believe that members of this group are mistaken and that constitutional rights are suffering due to their error. Neither of these facts – the overlap or the existence of a constituency favoring *S-2* – are conclusive factors in my support for judicial review. It would be

perfectly rational for me to demand that the *S-2* constituency acts through democratic political mechanisms only, and that it attempts to win the support of a legislative majority for the *S-2* conception of (a) and (b). At this point, much depends on my theory of rights. Suppose I believe that the standard of justification required to support rights-implicating action is different to that required for many other types of action (including "good policy", as most rights theorists believe), and that rights-implicating actions require the giving of more careful reasons than do other authoritative decisions. I might thus have reason to believe that the judicial decision-making process is more likely to consider rights than is the political process. This is a familiar type of argument: courts are said to be more immune from political pressures, less subject to short-term political incentives, more at home with reasoned deliberation, more transparent in their giving of reasons, and so on.

I do not want to labor these well-known arguments.[38] Instead, I would like to emphasize their contingent nature: they are context-dependent and hinge upon the institutional design of a specific court vis-à-vis the legislature in the same country. The giving of reasons is almost non-existent in some judicial review systems (consider, for example, the brief, terse, purely legalistic grounds for decisions given by the French *Conseil constitutionnel*; it has no place for dissenting opinions, or discussions of the issues, and the French voter can surely learn more about the motives of his or her elected legislators than those of the *Conseil constitutionnel* judges). But even that paragon of deliberation and public reason-giving, the US Supreme Court, has led Ronald Dworkin to admit to the "tentative" nature of the suggestion that "judicial review *may* provide a superior kind of republican deliberation".[39] However, the contingency of the argument does not indicate that it is weak. It only means that it will apply to some countries and not to others. We began this paper by postulating that any theory of judicial review must be fact sensitive: the facts about the comparative institutional properties of courts and of

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[38] For a *locus classicus* of this position, see Dworkin, *Taking Rights Seriously* ("A judge who is insulated from the demands of the political majority whose interests the right would trump is ... in a better position to evaluate the argument [of principle]", *id.* at 85). See also Dworkin, *A Matter of Principle*, pp. 24 and 70; *Sovereign Virtue*, p. 208; Owen Fiss, "The Forms of Justice", *Harvard Law Review* 93 (1979): 1-58 at 10 (legislatures "are not ideologically committed or institutionally suited to search for the meaning of constitutional values, but instead see their primary function in terms of registering the actual ccurrent preferences of the people. . . .").

[39] *Freedom's Law*, p. 31, emphasis added. For a powerful critique, see Waldron, *Law and Disagreement*, pp. 289-91; see also Cass R. Sunstein, *The Partial Constitution* (Harvard University Press, 1993), pp. 145-46.

legislatures are among the most important ones that need to be considered. From the point of view of protecting constitutional rights, it is crucial to establish a link between the protection of rights and the institutional differences of courts and legislatures. Unless this link is established, the institutional specifics of courts are irrelevant for our purposes.

Before I discuss the significance of such a link, one particular proposition needs to be mentioned about the institutionally privileged position of courts with respect to rights protection (as compared to the position of legislatures). It is significant because it is very popular and often used by theorists of judicial review, and it is the argument that it is inappropriate to entrust the task of protecting minority rights to legislatures that are likely to be particularly insensitive to the interests and preferences of minorities:

> Legislators who have been elected, and must be reelected, by a political majority are more likely to take that majority's side in any serious argument about the rights of a minority against it... For that reason legislators seem less likely to reach sound decisions about minority rights than officials who are less vulnerable in that way.[40]

There are three problems with this argument.

First, its implications are dependent upon a comparison of whether those *other* "officials" are indeed "less vulnerable" to majority pressures. Perhaps the difference is only one of degree and the degree might not be all that great in a specific context. Many political scientists studying the US Supreme Court have argued that – as a "national policymaker" – it has never drifted too far from the prevailing opinions in the community.[41] Much depends upon the system of appointment and tenure within constitutional courts: when judges have limited tenure (as in the European constitutional courts), they will understandably be alert to their post-Court professional or political career, and this may affect their eagerness to be acceptable to the political majority.[42] In contrast, life tenure might make judges "more inclined to take a long-term view" as they are "free to imagine themselves writing principally for an audience concerned with the long-term

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[40] Dworkin, *Law's Empire*, p. 375.

[41] For a classical statement, see Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker", *Journal of Public Law* 6 (1957): 279-95.

[42] This is the point that repeatedly has been made to me by constitutional judges and experts in Central Europe where the "Continental" European model of judicial review was adopted, with centralized and abstract review exercised by judges appointed to limited, non-renewable tenure, e.g. interview with Professor Neno Nenovsky, former Justice of the Constitutional Court of Bulgaria (in 1991-94), Sofia, 10 May 2001; interview with Professor Todor Todorov, Justice of the Constitutional Court of Bulgaria, Sofia, 11 May 2001.

import of a dispute".[43] While this does not ensure the privileged place of rights in such a "long-term view", it at least decreases the likelihood that short-term interests and immediate policy considerations will have an impact on the decision. Whether judges are sensitive to majority opinions is dependent upon a great number of factors, and the analysis needs to be more context-dependent than suggested by Dworkin in the piece quoted at the end of the previous paragraph.

Second, the fact that a particular preference or ideal is espoused by the majority (social or legislative) does not necessarily mean that it is antithetical to minority interests. When people – in their capacity as citizens-voters, or legislators – pronounce opinions about the legal rights of minorities, they incorporate their views about justice (as well as their self-interest and bias) into their decision in proportions that are not necessarily different from those of the judges. It would be a travesty of a realistic account of a formation of social opinions to imagine that majority views are always governed by self-interest rather than by a genuine belief in the justice of a proposed arrangement.[44] Consider affirmative action schemes that give preferences to people from minority races: such a scheme might have just as many proponents (proportional to their numbers in society) among the majority as among the targeted minority. The espoused views will not necessarily express self-interest or bias, but might be about conflicting principles of justice. In many countries – including the US – various anti-discrimination measures (which are needed more by the minority) have been enacted through a majoritarian political process.[45] Hence, there is no obvious basis for a claim that any disagreement

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[43] Christopher L. Eisgruber, "Is the Supreme Court an Educative Institution?", *NYU Law Review* 67 (1992): 961-1032 at 1006.

[44] See Jeremy Waldron, *Liberal Rights* (Cambridge University Press, 1993), chap. 16.

[45] An American legal scholar observed, for example, that in the United States "[r]emedies for gender discrimination have come as often from the political process as from the judiciary. . . . Similarly, both after the Civil War and during the past two decades, Congress intervened to curtail discrimination against blacks that affected state political processes," Neil K. Komesar, "Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis", *University of Chicago Law Review* 51 (1984): 366-446, p. 404, footnotes omitted. See also Devins, *Shaping Constitutional Values*, p. 32 (examples of congressional measures concerning gender-based discrimination and religious discrimination, being more rights-enhancing than the relevant decisions of the Supreme Court); Griffin, *op. cit.*, p. 117 (a list of significant civil rights and liberties laws enacted by the US Congress between 1982 and 1994). England is another example of a country where various anti-discrimination laws result from legislative rather than judicial activism, see e.g. Race Relations Act 1965, amended in 1968 and 1976; Equal Pay Act 1970; Sex Discrimination Act 1975.

between the majoritarian and non-majoritarian institution on such measures is grounded in anti-minority animus.

Third, even if we put the former two points to one side, the argument is of limited application because only some rights can plausibly be characterized as "minority rights". It is infrequent that the class of beneficiaries of a given right can be precisely identified as a specific social group: who are the beneficiaries of the right to abortion, the right to free political speech, or the right not to suffer the death penalty? The line between the advocates and opponents of any such concretely articulated right does not neatly divide those who stand to benefit from that right from those who are against it by virtue of their membership of a "majority" that cannot be trusted to protect the interests of the minority. Take prohibition of the death penalty as an articulation of the right to life: both the proponents of the prohibition and its opponents target the entire society as beneficiary of their preferred articulation of the right. The proponents of each view simply disagree about how society is best served. They hence disagree about a conception of justice, not about how to protect a minority.

So much for the minority-based argument about the privileged position of courts vis-à-vis rights protection. But there may be other institutional particularities of courts that might make them more sensitive than other political institutions to considerations of rights. As mentioned earlier, these other particularities – such as better insulation from political pressures, a requirement and capacity to give reasons, and so on – might indeed put courts in a better position to reason in terms of rights. Rights, the argument goes, are based on sound moral grounds rather that on mere expressions of preferences that might be purely interest-based. The institutional position of courts that have to support their decisions with reasons and are thus subject to public scrutiny might indicate the privileged position of courts when it comes to reasoning in terms of rights. As one American constitutionalist stated, "the duty to write opinions gives judges an incentive to examine the reasons for their decisions, since they know they will have to justify the result in a document subject to public criticism".[46] One *could* therefore conclude that there is a link between a particular institutional feature of courts – a duty to justify their decisions in a publicly transparent fashion – and the tendency to consider a given matter from the angle of the implicated rights.

The giving of reasons is just one among a number of institutional circumstances which may affect the comparative incentives and capacities of courts (vis-à-vis the legislature) to reason in terms of rights. The circumstances of

[46] Eisgruber, op. cit., at 1003, footnote omitted. Note that this observation by Eisgruber is *not* made in the context of a discussion on rights-reasoning by courts.

selection and tenure of judges (alluded to earlier) is another. The established structure of argument and deliberation might be yet another: even if judges have an *incentive* to reason in terms of rights, they might lack the *capacity* to do so if proceedings are structured in a way that limits their ability to engage in a serious consideration of all the aspects that might influence the articulation of rights. In a highly adversarial model of appellate judicial proceedings – such as in the United States – those same factors that are often cited as improving the impartiality of a trial can simultaneously handicap judicial inquiries into a wide range of moral issues that might be relevant to the rights in question. Deliberation can actually be impoverished rather than improved if judges, in contrast to the legislature, "get their information solely from the briefs and records prepared for the case sub judice", "are prohibited from seeking outside advice (except by way of amici curiae briefs)" and "[o]nly the parties to the case may be heard in each matter, and public participation in the process, whether by letter-writing or by demonstration, is very much discouraged".[47] Surely the link between the institutional features and a tendency to consider rights must be contingent upon the degree to which the judiciary suffers such limitations on the sources of its information and the inspirations for its arguments.

Suppose, *arguendo*, that we have successfully established a link between the institutional design of the court and the tendency to take rights seriously. All this tells us is that, in a system with judicial review, our political system is more likely to give effect to *some* considerations of rights than it would in the absence of judicial review. But returning to the hypothesis with which we began, if the rights articulation of our particular court is more likely to be *S-2* than *S-1*, do we have a reason to support such a system? In other words, is it better for us to have *S-2* than weak (or non-existent) protection of rights across the board?

In order to answer this question we need to pose a fundamental question: what good is produced by protecting rights *in abstracto* that is distinct from the good produced by protecting specific articulations of rights? The most usual answer is: the very idea of rights presupposes limits upon the exercise of political power, and so protecting rights – *any* rights – limits political power, regardless of whether we agree on the specific limits of those rights. But is this answer compelling? Consider Waldron's response to this point, given in the context of his criticism of the contention that we need counter-majoritarian measures to give effect to the idea of rights:

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[47] Abner J. Mikva, "Why Judges Should Not Be Advicegivers: A Response to Professor Neal Katyal", *Stanford Law Review* 50 (1998): 1825-32 at 1829.

> [W]e should not underestimate the extent to which the idea of rights may pervade legislative or electoral politics. The idea of rights is the idea that there are limits on what we may do to each other, or demand from each other, for the sake of the common good. A political culture in which citizens and legislators share this idea but disagree about what the limits are is quite different from a political culture uncontaminated by the idea of limits, and I think we sell ourselves terribly short in our constitutional thinking if we say that the fact of disagreement means we might as well not have the idea of rights or limits at all.[48]

To translate Waldron's point into the language of the question I have just formulated: it is better to have a political system in which rights matter – are taken seriously and are protected, regardless of whether we agree with the dominant articulation of those rights – than to have a system "uncontaminated" by rights. Rights express an idea of the "limits" upon the sacrifices we might impose and demand in the name of the common good, and this idea is valuable *per se*. However, I am not sure whether this idea of "rights as limits" gives us as much mileage in supporting the very idea of rights as Waldron seems to suggest. Our disagreement about the proper articulation of rights is not merely disagreement about the *proper* limits of rights; rather, we disagree about whether a particular articulation *is* a limit in the first place.

Take, for example, a disagreement about the constitutional status of abortion as a consequence of specific articulations of two intersecting rights: the right to life and the right to privacy. A "pro-choice" advocate will believe that the proper articulation of these two rights will result in the constitutional protection of women's reproductive decisions: imposing a duty on women to give birth against their wishes would transgress the state's limits on what we may do to each other. A "pro-life" advocate will claim that to tolerate abortion is to impose an intolerable penalty on the fetus, and would violate the limits on what the government may permit one person to do to another. Proponents of both views can argue about the limits on the sacrifices that can be extracted for the purpose of the common good, and each might consider that the opposing position violates these limits. The pro-choice person's "limit" is a restraint on *governmental* action, and the pro-life person's "limit" is a restraint on *individual* action, but this is not relevant to the very idea of rights as "the limits on what we may do to each other". It would be relevant if we believed that the only intelligible rights are those that give us claims against official action, but this would be an extravagantly restrictive conception of rights.

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[48] *Law and Disagreement*, p. 307.

Here is another example. Suppose we disagree about whether the right to free speech should protect me if I defame politicians (unless a politician can prove actual malice on my part). Suppose I believe this articulation gives effect to a limit on what the government can do to me; namely, I cannot be required to pay damages to the politician I have defamed, even if such damages could be seen as contributing to the common good. But someone who disagrees with this articulation of rights– a defamed politician, for instance – might say that his preferred articulation of the right to free speech is that I should pay damages. His preferred articulation gives effect to the idea of rights as limits – it limits what I can say about him, even if my comments could contribute to the common good – and consequently limits the state's authority to support the defamer's position. According to the politician, my impunity will reflect a system "uncontaminated by the idea of limits". So the disagreement is not just about where the proper limits lie, but also about what properly constitutes a limit. This would mean that, in abstraction from what articulations of rights we actually hold to be valuable, an appeal to rights as limits cannot provide a reason for preferring a regime of rights over a regime of no-rights.

c. Prudence

Consider a familiar pattern of reasoning. We all want our respective rights articulations to be enforced in our society. But we cannot all have this because we disagree among ourselves, and *S-1* and *S-2* have areas of incompatibility. The second-best solution would be to have *some* articulations of rights enforced (even though they will not all be *my* articulations) on the basis of an expectation of reciprocity, rather than having rights counting only weakly in authoritative decisions. This is a characteristically prudent argument. I submit to your articulation regarding affirmative action and the death penalty because, if I don't, I might lose my freedom of speech without receiving any compensatory gain in the areas of the other two rights.

How strong is this argument in the overall configuration of my reasons in favor and against judicial review? Not very, I would suggest. It assumes a lot that is uncertain: that the legislatures will ignore rights considerations (unlike the courts) and, more importantly, that what I lose by conceding victory to the "wrong" expressions of rights in (a) and (b) is less valuable to me than my probable loss regarding (c) if judicial review disappears altogether. These assumptions are contingent on the specific context in which I make my assessment, but they are not implausible. Consider the analogy from a standard form of prudential reasoning: I concede a certain value *V-1* to another person (*X*) in the

hope that when another value is at stake in the future (*V-2*), *X* will return the favor by conceding *V-2* to my preferred *V-1*. The assumptions rendering this reasoning attractive are: my relatively high level of risk-aversion and also the dominance of *V-2* (discounted by the probability that the question of *V-2* will occur) over *V-1* in my hierarchy of values. For example, I allow my neighbor a right of way across my property in the hope that when I need to go across her property, she will let me in as well.

However, some characteristics of the rights reasoning render the analogy with standard prudential reasoning less than adequate. Standard prudential reasoning derives much of its attractiveness from an appeal to simple utility maximization: it makes good sense for me, as a utility maximizer, to concede *V-1* today in order to gain *V-2* tomorrow if *V-2* is more important to me than *V-1*. But rights reasoning does not benefit from such an appeal because, in contrast to utility-maximization, it is not solely agent-oriented. Under the standard prudential argument there is an identity of the subject and the beneficiary of the prudential reasoning. There is not necessary any such identity in discussions about rights because we often demand rights that benefit others. If I support affirmative action it is not necessarily (and perhaps not typically) because I am a likely beneficiary of the preferences granted by such a policy. Rather, I support it as a proper articulation of the right to equal treatment because I believe that it is consistent with my understanding of the correct meaning of equality rights, and because I believe that it is just to treat *others* in this way.

This "other-regardedness" of rights reasoning indicates the limits of the prudential argument when applied to judicial review of constitutional rights. Prudential reasoning involves a sacrifice of *V-1* today in the expectation of securing *V-2* tomorrow. But the prudential sacrifice would have a different form with respect to rights: it would be necessary to sacrifice some rights *for some people* in order to gain some other rights, possibly *for other people*, in the future. Consider our standard example again. I endorse *S-1* but the Court currently supports *S-2*; there is a discrepancy between our notions of the correct interpretation of (a) and (b), affirmative action and the death penalty, but we overlap on (c), strong protection of the freedom to defame public officials. Suppose I decide to support the current judicial articulation of (a) and (b) in the hope that the judges will support my view of (c) when it becomes an issue in the future. This leads to the conclusion that I am prepared to suffer no-affirmative action and the existence of the death penalty in the hope that I will not endanger strong protection of free speech if and when it becomes an issue in my country. The prudential nature of such a reasoning is all but illusory because there is no

necessary convergence in the identity of the main beneficiaries of rights (a), (b) and (c). So, if I decide to "sacrifice" (a) and (b) now in order to protect (c) in the future, I am in fact choosing the winners and the losers of a particular system of institutional design.[49]

However, this last conclusion might be tainted by the specific selection of rights (as in my example). As noted earlier, it is often impossible to precisely identify the likely beneficiaries of a specific, authoritative articulation of rights. The rights to free speech, freedom of religion, freedom from unjustified seizure, and the whole set of rights implicated in the judicial process, cannot be characterized, *ex ante*, as benefiting one class of citizens more than others. In this sense, these rights are different from the right to affirmative action. I might have a stake in fighting for the strong protection of criminal defenders, even if it is rather unlikely that I will ever be in their position. Still, the possibility of becoming a criminal defender one day cannot be excluded, and I wish to insure myself against weak protection in that case. To the extent that such a motivation for arguing in favor of a particular rights articulation is plausible, the analogy with the standard prudential argument holds. To the extent that it is not plausible (that is, where the disparate impact of the different rights I am advocating is reasonably identifiable with respect to specific classes of people), my support for judicial review must rely on non-prudential arguments.

The latter case is based on a selection of some values to the detriment of others. If I choose to support judicial review when I endorse *S-1* but the court endorses *S-2*, the only rational explanation for my behavior is that I consider the area of overlap – the value (c), in our example – to have more long-term importance than the costs of (a) and (b) being given a contrary articulation by the Court. The "sacrifice", in such a case, is people as well as values. I sacrifice an important "good" for people who would benefit from affirmative action or from prohibition of the death penalty, in order to advance some other interest (freedom of speech) that might be of greater importance to some other people. This sacrifice is an important moral and political cost of supporting judicial review. And even if I conclude that it is a price worth paying, it is a price nonetheless.

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[49] Of course, this is subject to the hypothesis that it would be possible to reverse the law on (a) and (b) through the legislative procedure. If the hypothesis is implausible, then it does not make any difference – from the point of view of rights protection – which institutional system we choose: robust judicial review or the supremacy of the legislature.

5. Conclusions

This working paper opened with the question: Are legal systems with judicial review more protective of constitutional rights than those without? My answer can be summarized as, "it depends". This sounds like a singularly unilluminating response. Nevertheless, it might be helpful in resisting arguments that seek to establish or refute the connection between judicial review and rights-protection as "a matter of principle". The popularity of the former strategy – that is, of showing that judicial review is a necessary element of a system that meaningfully protects human rights – has been particularly visible in discussions about the most recent wave of constitutionalism, namely post-authoritarian constitutions drafted after the fall of communism in Central and Eastern Europe. It has been accepted virtually without critical scrutiny that constitutional courts must have strong powers to monitor the constitutionality of legislation if constitutional rights are to be meaningful. The burden of the present paper has been that such a conclusion is much more contingent on a number of context-sensitive circumstances than has usually been accepted in public and theoretical discourse about constitutional rights.

I have also been arguing that the opposite principled position – that of finding that rights are necessarily damaged by robust judicial review – is unfounded. The starting point for an assessment of the role of judicial review must be a careful calculus of gains and losses resulting from a system of judicial review in a given country. Gains and losses resulting from a set of specific decisions, and also gains and losses resulting from the very existence of judicial review in that country, must be assessed. (The latter includes the ways in which judicial review affects legislative behavior – positively or negatively – and the educational role it has in improving rights-consciousness within the community at large.) This complex calculation clearly depends upon our preferred articulations of abstract rights, and people who disagree with our articulations will also disagree about the final verdict concerning the role of judicial review in rights protection. This fact of disagreement must also be taken into account in the reckoning. While we might doubt the general net benefit of judicial review, we might have some prudential reasons to support it. That is, it might be rational to support judicial review if the institutional particularities of judicial institutions, compared with those of the political branches, render courts more sensitive to rights considerations in general. But this judgment will be contingent on specific institutional comparisons and cannot be made in abstraction from the particular circumstances in a particular country.

This assumption, adopted in this paper for argumentative reasons – that the protection of constitutional rights is the *only* purpose of judicial review – is evidently unrealistic: constitutional courts are not only in the business of monitoring legislation for its compliance with constitutional rights. They perform a number of other tasks, and how a court performs these tasks will obviously have a bearing on our assessment of its institutional design. Further, courts' success (or otherwise) in, for example, policing the constitutional allocation of powers to different institutions, or in policing the allocation of powers between the central government and smaller governmental units, will affect how we feel about their standing to monitor the enforcement of the constitution as a whole, including its charter of rights. Indeed, as an historical thesis, it might be the case that courts are most successful in gaining social support for rights-based judicial review if they precede it with a successful adjudication of conflicts arising out of horizontal and vertical allocations of powers.[50] The political capital that is gained in their performance of the latter task may then be used by them in opposing the legislative articulation of constitutional rights. However, this is an empirical and historical, rather than normative, proposition.

[50] Martin Shapiro, "The Success of Judicial Review", in Sally J. Kenney, William M. Reisinger & John C. Reitz (eds), *Constitutional Dialogues In Comparative Perspective* (London: Macmillan 1999), pp. 193-219; Martin Shapiro, Some Conditions for the Success of Constitutional Courts: Lessons from the U.S. Experience (unpublished manuscript 2000, on file with the author).

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