

JUDICIAL REVIEW OF LEGISLATION

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Sometimes, in order to frame an issue in legal or political philosophy, it is good to begin with some facts. Our topic is judicial review of legislation—a practice that, like many in this subject area, can be justified or disputed in the abstract or considered in light of our experience of how it actually operates. There will be plenty of abstract argument in this essay, in the second and subsequent sections. But I want to begin with our historical experience of judicial review in the history of the United States.

A Disgraceful History

Between 1880 and 1935, more than 170 statutes—state and federal—dealing with labor matters (health and safety, working hours, child labor, unionization) were struck down by American courts. The best known is *Lochner v. New York* ((1905) 198 U.S. 45), in which the United States Supreme Court held that a New York statute limiting working hours for bakers to 10 hours a day was an “unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract.” This period is often called “the *Lochner* era,” but it is important to understand how many years it lasted and how much legislation was overthrown. It was enough to demoralize two generations of labor legislators and their supporters (Forbath 1991).

In the United States, a decision of this kind by a court is a big deal. An individual or an organization aggrieved by a statute comes before a court to challenge its constitutionality. The constitutionality is almost always a matter of dispute, in part because the provisions of the U.S. Constitution are so vague. But the courts have the last word on the validity of the statute. It matters not that people have gone to the trouble to secure a majority in both houses or that they have gotten the consent of the governor of the state or, in the case of federal legislation, the consent of the president. It matters not that the legislators have formed their own judgments of the measure’s constitutionality during the several stages of its passage. A court can decline to enforce the legislation, in effect striking it from the statute book. And it can do so by a simple majority decision (five votes to four in the U.S. Supreme Court)—in contrast to the elaborate bicameral and super-majoritarian procedures required in most legislatures. When a majority of judges votes to strike down the statute, all the legislators can do is try to assemble their coalitions and majorities again to pass another bill in somewhat different terms, hoping that this time it will satisfy the scrutiny of the courts. But the courts may well strike it down

again, as it struck down statute after statute in the *Lochner* era. In some circles this is referred to as the “dialogue” theory of constitutional review (Hogg and Bushell 1997).

In other countries, the courts have somewhat weaker powers in respect of legislation. The United Kingdom operates what is sometimes called a system of “weak-form judicial review” under the Human Rights Act 1998, whereby legislation is scrutinized by judges who may issue a formal “Declaration of Incompatibility” between the statute and the provisions of the European Convention of Human Rights. But the British judiciary may not decline to apply legislation that they judge incompatible. The legislation remains on the statute book. What the Declaration does is open the possibility of fast-track amendment in Parliament; but still it is for Parliament ultimately to decide the fate of the statute (Kavanagh 2009; Tushnet 2003; Gardbaum 2001). This seems to me to be an admirable system. It combines ultimate parliamentary responsibility with a “canary in the coalmine” function for the judiciary, exercising whatever expertise they may have in matters of rights to alert the polity formally and publicly to the dangers posed by certain pieces of legislation. Experience shows that these alerts are taken seriously, but this is achieved without undermining the authority of the elected branches of government (Hiebert 2006). In this essay, however, I shall concentrate on the American example. This is because the practice of “strong-form” judicial review that we find in the United States remains normative for many constitutionalists around the world (see Barak 2006 and Dworkin 1990); the British system is sometimes disparaged as a “half-measure.” The strong form of the practice shows most clearly the advantages and the difficulties of empowering judges in this matter.

Let us return to the *Lochner* era. Why was it thought a good idea to give judges, most of whom were unelected and democratically unaccountable, the right to strike down statutes enacted by a representative legislature? One cynical answer is that those who gave the judges this right were afraid that if the common people were enfranchised they might use their legislative power to attack the system of property, wage labor and capitalist exploitation. This has been a perennial apprehension. Since the time of the ancient Romans and the land reforms of Tiberius Gracchus, it has often been thought that popular rule will endanger the property of the rich, and that therefore those who set up the framework of a new society have a responsibility to guard against this in their constitutional designs. Certainly the threat to property and the sanctity of contract was a theme at the time of the American founding (Nedelsky 1990) and the *Lochner* era may be seen as playing out this familiar anti-populist trope. Scholars associated with the Critical Studies Movement often lament the fact that today liberal defenders of judicial review seem to have forgotten all about this (Kennedy 1997). They have forgotten how brutally and for how long judicial power was used in America to defeat and demoralize working people and their political leaders. The modern defenders of judicial review tend to represent *Lochner v. New York* as nothing more than a regrettable mistake perpetrated way back in 1908 (Dworkin 1985: 58)—they seldom pay attention to the length and scope of the *Lochner* era—and they believe it should not be used to discredit the whole institution of judicial review of legislation, which they think is a necessary and valuable part of a modern constitutional democracy.

They say that the real point of judicial review is to protect everyone—rich or poor—against the worst human-rights abuses. Defenders of the practice worry that democracy is always liable to degenerate into the tyranny of the majority, imposing on members of vulnerable minorities the worst effects of majoritarian oppression and greed. But if this is the point of judicial review, then we have to say it has by and large failed in the

United States. The worst rights abuses in the history of the country were bound up with the persistence of chattel slavery for the first 80 years of the republic's existence. But judicial authority was *never* mobilized against slavery; on the contrary, judicial review was used many times to strike down legislative efforts to mitigate its worst effects. For example, in *Prigg v. Pennsylvania* ((1842) 41 U.S. 539), the U.S. Supreme Court struck down a Pennsylvania statute that sought to protect African-Americans from slave-catchers in a free state. And in *Scott v. Sanford* ((1857) 60 U.S. 393), known popularly as "the *Dred Scott* case," the Court struck down congressional legislation (the Missouri Compromise) that prohibited slavery in the territories, and held that Congress was not competent to make a black man a citizen. Almost 30 years later, in the 1883 *Civil Rights Cases* ((1883) 109 U.S. 3), when the matter of citizenship had finally been settled by war, by executive proclamation and by constitutional amendment, the Supreme Court struck down the Civil Rights Act of 1875, which purported to guarantee access to public accommodations for everyone, regardless of race, color or previous condition of servitude, and the Court also limited the effects of the 1871 Civil Rights Act, which tried to protect African-Americans in the South from racial terror.

Those were some of the Court's sins of commission—cases where strong-form judicial review made things worse or blocked any attempt to make things better. There were also sins of omission, for example, in *Korematsu v. United States* ((1944) 323 U.S. 214) where the Court decided that citizens of Japanese ancestry were not entitled to protection from internment in concentration camps in the American interior during World War II, or *Plessy v. Ferguson* ((1896) 163 U.S. 537), where the Court upheld segregation laws. It was not until 1954, 89 years after the passage of the Fourteenth Amendment, and 163 years after the enactment of the original Bill of Rights, that the Court acted against segregation, and even then its action was hesitant, controversial and bitterly resisted. Its decision, in *Brown v. Board of Education of Topeka* ((1954) 347 U.S. 483), has been held up as an icon by defenders of judicial review ever since. Cases like *Brown*, along with the decision that secured reproductive rights for women in the U.S., *Roe v. Wade* ((1973) 410 U.S. 113), are often presented as the poster children of judicial review. They are cited because they are supposed to illustrate how valuable the institution is for us. But I have taken the liberty here of reversing the order of presentation, beginning with the darker side of the Supreme Court's decision-making to illuminate front and center what are usually hidden away in shady and embarrassed footnotes.

The cases I have mentioned are cases on which I think there is widespread agreement that the institution of judicial review has not served us well. Quite apart from the objections one might make against its nondemocratic character (objections I shall explore in the second half of this essay), these are simply bad outcomes—outcomes that would have been better if the courts' power to review legislation had been weaker or nonexistent. Defenders of the practice may say that we should blame the text of the Constitution for these outcomes, not judicial review. They say, for example, that it was the Fugitive Slave Clause of the Constitution that compelled the decision in *Prigg v. Pennsylvania* and the Contracts Clause that led to *Lochner v. New York*. But this really won't do. Without judicial review to amplify their effects and focus them onto sharp-edged political decision-making by the judiciary, such unfortunate provisions in the Constitution might have faded into desuetude, dismissed at the outset as merely admonitory (which is how many Northern legislators actually regarded the Fugitive Slave Clause) and treated as less and less relevant for the purposes of modern politics. We say that a constitution needs judicial review or it will not be enforced; but if judicial review is to be present

among us as an active enforcement mechanism we had better pray that we have the right constitutional provisions, because it is difficult if not impossible to change them once judicial authority reveals the actual impact of the clauses. Not only that but in some cases, such as the *Dred Scott* case, the Court was not simply mapping a clear piece of constitutional text onto the vexed issue of Mr. Scott's citizenship. The Court went out of its way to dredge the constitutional record for scraps of authority to justify its conclusion that blacks are "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations." With that as a precedent, we must pray not only that we have the right constitution but that our judges bring to their task the right ideology of personhood, dignity and rights.

Certainly the cases I have cited give the lie to any claim that legislators are incapable of addressing responsibly the rights that (it is said) we need courts to protect. In the first three of the race cases I mentioned—*Prigg*, *Dred Scott* and the *Civil Rights Cases* of 1883—the legislatures had done their work; it was the courts that set about undoing it. We trumpet the achievement in *Brown*, such as it was. But eventually it was Congress that enacted the Civil Rights Act of 1964 and secured whatever we have in the way of racial and sexual equality. And the same is true of all those cases in the *Lochner* era: it was legislatures that had discerned the need for certain minimal social and economic rights; it was the legislatures that worked hard to secure them; and it was legislatures that had to do that work all over again after 1935 when the judiciary finally backed down in the face of President Franklin D. Roosevelt's exasperated threat to pack the Court with justices who would not obstruct the New Deal.

Disagreement on Watershed Issues

So much by way of background. I have set all this out because I believe we should begin our evaluation of judicial review by noting that, like other political institutions, it does not have an unblemished record. Any institution of government may work for good or for ill. This is true of democracy and elective institutions—as the defenders of judicial review have always emphasized—and it is true of judicial institutions as well. Now, the record I have spoken of is uniquely American. Other practices of judicial review around the world have not done the damage that the U.S. Supreme Court did to the rights of labor, the campaign against slavery and the early stages of the enforcement of civil rights. This is partly because the American system of judicial review is much older than the equivalent institutions in Europe and elsewhere. It is partly because other constitutional systems do not empower their courts to do so much damage: I have mentioned weak-form judicial review in the United Kingdom, for example. But even those countries that have strong-form judicial review seem to have used it wisely and helpfully: this appears to be true of Germany, Canada and South Africa; for example, in the modern era, and—though it is a slightly different case—it is true by and large of the way in which the European Court of Human Rights has exercised its powers.

Nevertheless, what is emphatically true of the way in which all these institutions now exercise their powers—the U.S. Supreme Court included—is that they intervene to decide matters on which the politics in question are deeply divided. There is a range of issues that confront every modern democracy, and in every modern democracy that has judicial review they come up for decision by the courts from time to time. Besides the cases about race and social and economic rights that I mentioned already in the first part of this paper, these issues include: abortion, affirmative action, capital punishment, the

boundary between church and state, the conditions of imprisonment, the rights of criminal suspects, defamation, the treatment of detainees in the war on terrorism, the disenfranchisement of prisoners, flag burning, gay rights (including same-sex marriage), gun control, hate speech, language rights, military service, minority cultural rights, policies on obscenity and pornography, police powers to “stop and search,” privacy, the precise limits of the free exercise of religion, the regulation of speech and spending in electoral campaigns, and so on. Some of these are more important than others and systems vary in the extent to which certain of them are live issues available for judicial decision: for example, for the most part, legislative control over people’s access to firearms is not a subject for judicial review in Europe, and also some issues (like capital punishment) are settled there even though they are not settled in the United States. But with some variations, the list I have given comprises a set of what I have called elsewhere “watershed issues,” which every modern democracy has to face (Waldron 2002 and 2006).

These watershed issues define major choices that any modern society must face, choices that are reasonably well understood in each society. As things stand, the choices they pose will be settled finally by legislative decision-making in countries that have weak-form judicial review or no judicial review of legislation, and they will be settled finally by courts in countries that have strong-form judicial review. I don’t mean that, in strong-form systems, legislative settlements are never allowed to stand. The first moves on these issues are almost always made by legislators. But even when their decision-making turns out to be final, it is so only on sufferance of the courts. The courts could have struck down the statute; the statute prevails only because it was not subject to challenge before the judiciary or because, even if it was challenged, the judiciary allowed it to stand. As Ronald Dworkin (1996: 74) has put it—and he is a *defender* of judicial review—on “intractable, controversial, and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries,” the people and their representatives simply have to “accept the deliverances of a majority of the justices, whose insight into these great issues is not spectacularly special.”

The choices involved are likely to have a very significant impact on the lives of many people and on the tenor of the society as a whole. So why do some societies let their judges rather than their legislators have the final say on issues like these? Two theories suggest themselves. One is that the watershed issues define important moral as well as political choices, and moral choices are thought to be particularly appropriate for judges to make. Some view them as issues of natural law or natural rights (Moore 2001 and Fleming 2001). But not everyone is comfortable with that language and many prefer to speak, less tendentiously, about moral principles and moral rights. Whatever the detail, these watershed issues are patently issues of principle, not the issues of preference and strategy that—it is said—legislatures are set up to deal with. They engage values such as freedom, autonomy, dignity, equality and the value of human life as well as the more familiar currency of public policy—efficiency, prosperity and security. To the extent that they also involve empirical, economic and strategic issues, which many of them do, those issues are thoroughly entangled with moral conundrums as well. (Think of the debates about capital punishment: the value of life entangled with a policy debate about the best way to fight crime. Or think of affirmative action: the importance of racial and sex equality entangled with a policy debate about the best way to achieve it.) The other theory, better known (though it is not incompatible with the first), is that the choices in question are governed by the constitution of the society in question or some bill of rights that has equivalent authority, and are therefore to be determined as a matter of

law, not as a matter of legislative choice. I say the two theories are compatible. The first may explain the second: the constitution or the bill of rights may be framed specifically to cover the moral issues of principle that are likely to arise.

But neither explanation is satisfactory or complete as it stands. We can accept that the issues define moral questions as well as strategic ones, questions of principle—like the meaning of human dignity and the relation between freedom and equality—as well as calculations of policy and strategy. But it is wrong to suggest either that legislatures are inept at dealing with moral choices or that courts are invariably reliable when moral issues are at stake. In systems of weak-form judicial review or no judicial review at all, legislatures deal well and straightforwardly with moral issues: the record of legislative reforms on capital punishment, abortion and the decriminalization of homosexuality in countries like the United Kingdom and New Zealand in the 1960s and '70s attests to that. And the American history we explored in the first section of this chapter shows that courts are by no means trustworthy on matters of morality such as the wrongness of slavery or the need to protect the rights of workers. What we reviewed in that section was legislatures making moral moves on moral grounds and having to back down in the face of hardheaded obstruction by the courts.

We have to say at least this: the choices at issue, moral or nonmoral, are all highly controversial. There is an immense amount of disagreement about them; there was disagreement in nineteenth- and twentieth-century America about the issues we set out in the first section and there is ferocious disagreement about all of these watershed issues I have mentioned in this section. This is moral disagreement—not just disagreement between one set of people taking a moral stance and another set of people taking their stand on some other nonmoral ground like economic efficiency. Though it is hard for partisans on each side to see this, both sides on every one of these issues holds to a strong and well-thought-through moral position. They disagree about what values are important, what their priorities are, what trade-offs to allow and how to weigh and balance competing moral considerations; and they disagree about how to map the values onto the complex tangles of fact and speculation in each of the issues in question. These disagreements are not surprising, nor is there any reason to blame them exclusively on ignorance, bias, superstition or self-interest. As John Rawls (1993) argued in relation to debates about comprehensive values, disagreement is best explained by “the burdens of judgment”—the difficulty of the subject matter, together with the different perspectives and experiences people inevitably bring to the debates.

Elsewhere I have made the case that these disagreements are just colloquial versions of the disagreements one finds among philosophers (Waldron 1993). We philosophers argue about rights, principles and ultimate values in our hallways, seminars and published symposia. And ordinary people argue about them in roughly similar terms at home, at church, on the streets and in their political activity. We find these disagreements throughout society in every institution and at every level of political decision-making. Voters disagree about them. The legislators they elect disagree about them. And it is no surprise to find disagreement about them on the judiciary too, since the judges are drawn (albeit not on a representative basis) from the society that is wracked with these disputes. Like citizens and legislators (though using cruder procedures) the judges too have to vote and decide by majority rule when they are figuring out which legislative decisions really respect the rights that people have.

Nor are the disagreements likely to disappear. Academic disagreements about rights show no sign of diminishing or being put to rest by philosophers' expertise, and the same

is true of the public and political disagreements. Of course, each philosopher may think that he has the right answer, and he will insist (quite rightly) that his academic opponent's denial of this doesn't make him wrong. But his opponent across the hall will take exactly the same stance. And so will the citizens, legislators and judges in society. Few of them are moral skeptics—they think there is a truth of the matter and some of them think they have got it. The trouble is they are not all on the same side. For even if there is an objective moral truth, it does not disclose itself to us on Earth in ways that belie our disagreements. As I have argued elsewhere, moral objectivity is not the issue (Waldron 1992 and 1998a). On some issues on which we disagree, we have the good fortune not to need a common answer: we don't have to agree about the Holy Trinity or the causes of the First World War. But the watershed issues I have mentioned are not like that. They are issues of public policy on which some position has to be taken in the name of us all, and on which few of us are indifferent about which position we want our name associated with. The question we have to ask, then, in evaluating the practice of judicial review of legislation, is not whether there are right answers, but what is the best or—if this is different—the fairest way to make a decision in the name of the whole society?

Besides the moral character of these disagreements, the other characteristic that is cited in favor of their being decided by courts is their legal character. Legislative decisions will become law but, in ordinary cases, the decisions are not governed by law prior to or at the time of enactment. But—it is said—this is not true of our watershed cases. Those are not issues on which the legislature is supposed to have a free hand. The choices the legislature faces are governed by the provisions of the constitution or bill of rights that a given society has already committed itself to.

We have to be careful with this argument. As I have noted several times, some societies have bills of rights but do not empower judges to make final decisions about the issues they define. A case can perhaps be made that the Rule of Law requires that the legislature must regard itself as bound by the norms of the constitution. But whether this "being bound" requires enforcement by a court is open to question. On the one hand, there is the position of the American Supreme Court since *Marbury v. Madison* ((1803) 5 U.S. 137), that a court has no choice but to refuse to enforce a statute once the court has determined that the statute is at odds with the Constitution that defines the legislature's authority. But a bill of rights need not be part of the Constitution: societies face a choice as to whether to entrench their rights commitments into a constitutional document that would leave courts no option but to strike down legislation that was incompatible with it—some do it and some don't—and the considerations canvassed in this essay are relevant to that choice. In recent years, a number of American jurists have started to talk about constitutional populism (Kramer 2005; Tushnet 2000; Parker 1998), emphasizing that legislators and popular majorities are capable of making constitutional judgments too and that the framers of the U.S. Constitution did not envisage such judgments as the exclusive province of the judiciary. A system of constitutional law is not necessarily a system of judicial supremacy.

Then there is the fact of disagreement, as stubborn in the constitutional realm as it is in the moral realm. People disagree about the bearing of these constitutional and bill of rights positions on the watershed issues. In the United States, for example, on each of the issues I have mentioned, it is indisputable both (1) that the provisions of the Bill of Rights have a bearing on how the issue is to be resolved and (2) that the provisions of the Bill of Rights do not themselves determine a resolution of the issue that is beyond reasonable dispute (Waldron 2006). The rights provisions are almost always vague and abstract in their formulations; their abstraction means that people who disagree about

concrete moral issues can commit themselves to the formulations nonetheless: both opponents and defenders of capital punishment can agree not to allow punishments that are cruel and unusual; both opponents and defenders of affirmative action can agree not to deny anyone the equal protection of the laws, and so on. Disagreement does not prevent the enactment of a bill of rights. But the disagreements on the watershed issues remain unresolved, leaving us in a situation in which—when a question about a piece of legislation arises—it is beyond dispute that a bill of rights provision bears on the matter. But what its bearing is and whether it prohibits (or should limit the application of) the legislative provision that is called into question remains a matter of dispute among reasonable people.

The abstraction of our rights provisions is not an aberration. As Ronald Dworkin (1996) has argued, it is not inappropriate to phrase rights guarantees in general terms, because we cannot foresee the exact form in which issues will arise. If our constitutional provisions were more specific, we might have to admit that they have no application to new and unforeseen cases or that their application depends on analogy, which would be equally controversial. Also our rights provisions are sometimes not just generalizations but *moral* generalizations, using predicates like “cruel” or “reasonable” because any more empirical predicate would sell short the principles we are trying to represent (Dworkin 1996). There is a school of jurisprudential thought that maintains that this sort of indeterminacy arises only around the margins of natural language predicates: we agree, for example, on central cases of cruelty but we do not agree on cases in that concept’s “penumbra” (Hart 1994). But this model is mistaken. Disagreements are often on central cases—one way of putting this is that the concept is “essentially,” not just peripherally, contested (Gallie 1955–1956 and Dworkin 1977)—and these disagreements seem to flourish without throwing the conceptual debate into unproductive confusion. The general point here is that both parties to the dispute can reasonably claim that they take the underlying constitutional provision seriously. And as we have seen, to the extent that the constitutional provision embodies a moral principle, they can reasonably claim to be taking that seriously as well.

This is not to deny that arguments can be made that seem conclusive—at least to those who make them—as to the bearing of the rights provisions on the watershed issue in question. If judicial review is set up in the society, then lawyers will argue about these issues using both the text and the gravitational force (Dworkin 1977) of the text of the bill of rights. Each side to each of the disagreements will claim that its position can be read into the bland commitments of the bill of rights if only those texts are read generously or narrowly enough. And as a matter of political strategy, neither will be prepared to acknowledge what I am assuming right now will be obvious: that the bland rhetoric of the bill of rights simply finesses the real and reasonable disagreements that are inevitable among people who take rights seriously for long enough to see such a bill of rights enacted.

None of this shows conclusively that decision-making by courts is inappropriate. Courts often have to make decisions on which the law is deeply contestable. But it helps undermine some of the sillier arguments that are put forward in favor of judicial review.

One such argument is that the constitutional or rights provisions represent *precommitments* by the society and that the courts, when they decide them, are simply enforcing something to which the society has already committed itself (Freeman 1990). The idea is that, like Ulysses choosing to be bound to the masts so that he can hear but not respond to the Sirens, so a polity may bind itself with a constitutional commitment so that it may hear but not respond to the siren call of rights violations. But the model of

precommitment simply doesn't work in the context of the extent of disagreement we are talking about (Elster 2000). Though the society may have been wholehearted in its embrace of the original commitment to some provision about rights, it is utterly divided about whether a present piece of legislation represents the danger that the rights provision was supposed to guard against (Waldron 1998b and 1999). If someone insists nevertheless that society has committed itself to a particular view about the right in question and that the judges, by voting among themselves, are able somehow to ascertain that precommitment or even construct it on society's behalf (Waluchow 2005), then it is not clear why the precommitment should hold given that an alternative understanding of the right is in play. The Ulysses model works only when the precommitment guards against various aberrations of choice, not when it prevents changes of mind in relation to genuine disagreement as to what a reasonable outcome would be (Schelling 1984, ch. 4).

Outcomes and Methodologies

None of this talk about disagreement makes the underlying issues go away. Society does need to take a stand on each of these watershed issues. Is abortion to be treated as homicide or is it to be left to the choice of women and their doctors? Is affirmative action to be permitted as a strategy for equality or is it to be forbidden as itself a form of invidious discrimination? Is capital punishment to be made available as a punishment for particularly heinous offenses or is it to be taken out of our penal repertoire? Choices on these matters cannot indefinitely be postponed. So I return now to the question I posed a little while ago. These matters could be settled by legislatures—by elected representatives of the people deciding through complicated majoritarian and super-majoritarian processes—or they could be taken ultimately by unelected judges deciding by simple majority voting in a supreme court whether to approve or disapprove of the legislative decision. Both institutional practices are fallible, as we saw in the first section of this chapter. But which is the better or—if this is different—which is the fairer way to decide?

Some philosophers maintain that the only proper basis for answering this question looks to the likelihood that one or the other procedure will come up with the right answer. According to Raz, “[a] natural way to proceed is to assume that the enforcement of fundamental rights should be entrusted to whichever political decision-procedure is, in the circumstances of the time and place, most likely to enforce them well, with the fewest adverse side effects” (1998: 45).

That sounds reasonable. After all, everyone agrees that the stakes in these decisions are high: they are issues of right and justice and we want to get the correct outcomes in as many of these cases as possible. On the other hand, there are also reasons that bear on our question that are not purely outcome related. Consider for example, the principle of self-determination: we believe, for any given society, that the watershed issues I have identified should be settled by decision procedures *within* that society rather than imposed on it by diktat from outside (e.g., by a neighboring government or a former colonial power). I don't mean that societies have nothing to learn from one another, but what they do learn is fed back into their own autonomous political processes (Waldron 2011). Of course, strong-form judicial review and democratic legislative decision-making both satisfy this requirement. But there may be other similar reasons of a non-outcome-related kind that distinguish between the two decision procedures. We should not neglect these issues of process and fairness just because of the importance of getting to the right outcome.

The contrast between outcome-related and process-related considerations is a complicated one. Since we disagree about what counts as the right outcomes, we are hardly likely to agree as a society on a decision procedure based directly on outcome-related considerations. If you think the pro-life alternative is the right outcome on abortion you may favor legislative decision-making in the United States, whereas your pro-choice opponents—equally convinced of their view about outcomes—may favor judicial review. True, there are some outcomes on which we all now agree, such as the wrongness of slavery. But as we have seen, that outcome-related consideration does not settle anything in favor of judicial authority.

If we are going to settle this in an outcome-related way, we will have to adopt a less direct approach, focusing on aspects of procedure that seem to us more likely to lead to good outcomes even when we disagree about what those outcomes are. As Aileen Kavanagh puts it:

[W]e do not need a precise account of what rights we have and how they should be interpreted in order to make some instrumentalist [i.e., outcome-related] claims. Many instrumentalist arguments are . . . based on general institutional considerations about the way in which legislatures make decisions in comparison to judges, the factors which influence their decision and the ways in which individuals can bring their claims in either forum.

(2003: 466)

Unfortunately, reasons of this kind also seem to point in both directions: we quickly encounter antinomy upon antinomy. On the one hand, many say that it counts in favor of judicial decision-making that judges are insulated from the interests and emotions of popular majorities. Undistracted by majority interests, they are better able to form an impartial view of the matter. On the other hand, if the question is about the moral attention due to the interests of vulnerable people, we may affirmatively value the fact that legislatures enable decisions to be made by representatives of the persons whose lives will be affected by the legislation in question, particularly in circumstances where those people do not have any other sort of social, economic or political power. As Raz puts it, “[s]ometimes one may be unable to appreciate the plight of classes of people unless one belongs to the same class oneself, and therefore rather than entrusting the decision to those not affected by it, it should be given to those who are so affected” (1998: 46). This seems to have been true of the issues that faced America during the *Lochner* era: the legislative decisions were sensitive to the interests of working people, whereas the judges, being selected by nonrepresentative means from among the higher ranks of the wealthy professional classes, were less able to apprehend what could be said in favor of legislation of this kind.

It is also sometimes said that the duty of judges to cite reasons for their decisions counts in favor of judicial review. Legislators may be politically more accountable, but they are not accountable in this particular way, which seems to go to the heart of responsible and reasoned decision-making. Courts give reasons for their decisions, we are told, and this is a guarantee that they are taking seriously the moral considerations that are at stake, whereas legislatures often do not. In fact, this is a false contrast. Legislators give reasons for their votes just as judges do. The reasons are given in what we call debate and they are published in *Hansard* or the *Congressional Record*. The difference is that lawyers are trained to close study of the reasons that judges give; they are not trained to close study of legislative reasoning (though they will occasionally ransack it for interpretive purposes).

Perhaps this argument is not really about the presence or absence of reason giving, but rather about its quality. In my view, however, the reasons that courts tend to give when they are exercising powers of judicial review of legislation are seldom the reasons that would be canvassed in a full deliberative discussion, and the process of searching for, citing, assessing and comparing the weight of such reasons is quite different for courts than for an ideal political deliberator. If one examines an American judicial opinion, one will find plenty of discussion of interpretive theories, as the judges struggle to find a way to map very general eighteenth-century prose onto a quite specific twenty-first-century problem. And one will find plenty of reference to and discussion of earlier cases, in which the judges try to present a plausible analogy between what they are doing in the instant case with what other judges, exercising similar powers have done in the past. All this is no doubt of great juridical interest, but it does not necessarily capture the important moral reasons that are at stake. Indeed, often in American judicial opinions, interpretive and precedential issues crowd out any discussion of the substantive merits of the case.

In the Supreme Court's 50-page opinion on abortion in *Roe v. Wade* ((1973) 410 U.S. 113), for example, there are no more than a couple of paragraphs dealing with the moral importance of reproductive rights in relation to privacy, and the few paragraphs addressed to the other moral issue at stake—the rights status of the fetus—are mostly taken up with showing the diversity of opinions on the issue. The outcome of the case may be appealing to pro-choice advocates, but from a moral point of view the “reasoning” is threadbare. In contrast, it is striking how rich the reasoning tends to be in legislative debates on such issues in countries without judicial review. I recently read through the House of Commons debates on the Medical Termination of Pregnancy Bill from 1966, a bill proposing to liberalize abortion law in Britain (see Waldron 2006: 1384–85). The second debate on that bill is as fine an example of a political institution grappling with moral reasons as you could hope to find. It is a sustained debate—about 100 pages in *Hansard*—and it involved pro-life Labour people and pro-choice Labour people, pro-life Conservatives and pro-choice Conservatives, talking through and focusing on all of the questions that need to be addressed when abortion is being debated. They debated the questions passionately, but also thoroughly and honorably, with attention to the rights, principles and pragmatic issues on both sides. It was a debate that in the end the supporters of the bill won; the pro-choice faction prevailed. American judicial reasoning on the issue was mostly concerned with interpretation, doctrine and history. But in the British legislature, responsible lawmakers were able to focus steadfastly on the issue of abortion itself and what it entailed—on the ethical status of the fetus; on the predicament of pregnant women and the importance of their choices, their freedom and their privacy; on the moral conflicts and difficulties that all this involves; and on the pragmatic issues about the role that law should play in regard to private moral questions. Those are the issues that surely need to be debated when society is deciding about abortion rights, and those are the issues that are given most time in the legislative debates and least time in the judicial deliberations.

Maybe these instances are aberrations; in other cases, the roles may be reversed. But it is pretty clear that indirect, outcome-related reasons of this kind do not establish a decisive advantage in favor of strong-form judicial review.

Objections Based on Political Equality

What then of procedural reasons that are not outcome related? The most important of such reasons have to do with democracy—the array of institutional practices that seek to

establish control by the people, i.e., by all the individuals in society over the fundamental conditions of their association, on roughly equal terms. For a political philosopher, it is one of the many delights of the debate about judicial review that it takes us back to the first principles of democratic theory. Philosophers who support judicial review sometimes write as though this idea of democracy were a complete innovation (Alexander 2007): who is supposed to be enfranchised, they ask, and on what issues, and how are agendas to be set and questions posed? They write as though the very idea of democratic decision-making on important matters of principle were preposterous—a reflection, perhaps, of the ancient grudge that philosophy has had against democracy since the time of Socrates. On the other hand, some of the recent books on democratic theory that bear on this issue happen to be among the best yet written on the justification (and the limits) of democratic decision-making (e.g., Christiano 1996 and 2008; Estlund 2008).

There is no space here to rehearse a general theory of democracy. But I do want to emphasize one thing. In the argument about judicial review, the democratic argument does not suppose that there is some entity called “the people” whose decisions are entitled to prevail, or some group called “the majority” which is entitled to rule. We can eschew all such reifications. There are just individual persons, millions of them, with views and interests of their own, who live their lives together in a community, and individually and occasionally in factions and parties want their views to have influence in the corridors of power. They accept that in the circumstances of disagreement that we have outlined, no individual can be guaranteed that his or her view will prevail. An individual may often have to submit to decisions on the watershed issues we have been discussing which he or she thinks are wrong or unjust or misconceive the rights that people have. This is so under a system of judicial rule and it is also true under a system of democratic decision-making. The difference is that in a system of strong-form judicial review, those who make the final decisions act as though the views they happen to hold—which of course they think are right—are entitled to a great deal more respect than the views that I happen to hold or any one of my millions of fellow citizens happen to hold. In other words, the issue comes down to fairness and the principle of political equality.

It is worth dwelling on the basis of the affront to political equality that judicial review involves (Waldron 1993). People fought long and hard for the vote and for democratic representation. They wanted the right to govern themselves, not just on mundane issues of policy, but also on the high matters of principle that are represented in the watershed issues I have been discussing. They rejected the Platonic view that ordinary people are incapable of thinking through issues of justice. Consider the struggles there have been, in Britain, Europe and America—first, for the abolition of property qualifications; second, for the extension of the franchise to women; and third, for bringing the legacy of civil rights denials to an end in the context of American racism. In all those struggles, people have paid tribute to the democratic aspiration to self-governance, without any sense at all that it should confine itself to the interstitial quibbles of policy that remain to be settled after some lawyerly elite have decided the main issues of principle.

The relevant disparity of power is between citizens and judges. In most polities, judges are not elected to their office and they are not accountable publicly for their decisions. Citizens do not have the opportunity to choose or review their judges in a process that treats them (the citizens) as equals. In most countries judges who exercise powers of judicial review are appointed by elected politicians and in some countries confirmed by elective assemblies. But they operate at one or two removes from direct popular accountability. I say “in most countries.” In a few American states, though not at the federal

level, high judicial office *is* elective. But this tends to raise more problems than it solves (Nagel 1973). Defenders of judicial review sometimes ask me if I would lessen my opposition to the practice if all judges were elected. The question is usually disingenuous; those who ask it have no intention of pressing for such a change. And quite rightly: in the states where they exist, elective judicial arrangements are marred by the absence of any respectable theory about the appropriate relation between election and accountability on the one hand and the proper basis of judicial decision-making on the other, which could possibly guide the way in which judges campaign and respond to popular influence.

Legislators, by contrast, are elected, and electoral systems are designed to ensure that the system of elections gives something approximating an equal say to each enfranchised citizen in the choice of those who will exercise legislative power. What is more, in the case of legislators we do have a well-worked-out theory of representation—which we do not have for elective judges—relating the conditions of campaigning, election and subsequent electoral accountability to the character of the deliberation and decision-making in which representatives participate. The theory is not perfect—we oscillate in an attempt to find a balance between Burkean representation, constituency representation, party representation and the representation of interests (Pitkin 1972)—but it is immeasurably better thought through than the equivalent theorizing about the way in which elected judges ought to behave. The practice is not perfect either. Controversies about electoral systems continue and improvements are slow in coming. We have not yet succeeded in presenting the political equality of all citizens as a sure function of the equality of legislators voting in their chambers together with the equality of electors voting in their constituencies (Buchanan and Tullock 1967, ch. 15).

But we are certainly far enough advanced both in theory and practice to be able to say this: judicial review is a massive violation of the principle of political equality, which is fundamental to democracy. In matters of which the people of a society disagree in good faith, matters important to their lives and to their life together, strong-form judicial review gives immeasurably greater weight to the views of appointed judges than it gives to ordinary citizens. Defenders of the practice, sensitive to this charge, will respond that legislative decision-making also gives immeasurably greater weight to the views of legislators than to the views of ordinary citizens. But the difference is that, in the case of legislators, there is an electoral system that enables the system of representation to act as an approximation to the principle of political equality—a shabby approximation sometimes, as I have acknowledged, but an immeasurably closer approximation in the case of legislators than in the case of judges. Legislators are accountable to ordinary people; legislative representation is designed in part to allow the channeling of opinion from ordinary people to their lawmakers in roughly equal terms; and the legislative system is designed so that no substantial interest in the community will be neglected, even when they are interests of the (otherwise) powerless and vulnerable. All these factors mean that there is a substantially greater amount of political fairness in the way decisions are made in a system of legislative supremacy than there is in a system of strong-form judicial review.

I do not deny that there is a modicum of democratic legitimacy in the way judges are appointed and confirmed (more so in some countries than in others), nor that judges may find it difficult in the long term to run in the face of popular opinion (Friedman 2009), nor that judicial review offers a kind of access for citizens to the sinews of power. But our question is a comparative one: which mode of decision-making is fairer? Which mode of decision-making defines a *more* equal process? It seems to me that when the question is focused in that way, the advantage of legislative supremacy is undeniable.

Of course the fact that legislative decision-making is fairer is not conclusive. Some may give greater weight to the outcome-related dimension and they may have a more sanguine view about the prospects for good judicial decision-making than I have. Charles Beitz (1989) has argued that the principle of political equality requires us to take substantive as well as procedural factors into account. And Ronald Dworkin (1996) has argued that the principle of political equality gets no purchase unless we are sure that people are already being respected in their fundamental rights. We should not underestimate the willingness or ability of the defenders of judicial review to add epicycle after epicycle to the debate. Nor should we doubt the ability of its opponents to make their case at any level of complexity chosen by the defenders of this practice.

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