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The Core of the Case Against Judicial Review

ABSTRACT. This Essay states the general case against judicial review of legislation clearly and in a way that is uncluttered by discussions of particular decisions or the history of its emergence in particular systems of constitutional law. The Essay criticizes judicial review on two main grounds. First, it argues that there is no reason to suppose that rights are better protected by this practice than they would be by democratic legislatures. Second, it argues that, quite apart from the outcomes it generates, judicial review is democratically illegitimate. The second argument is familiar; the first argument less so.

However, the case against judicial review is not absolute or unconditional. In this Essay, it is premised on a number of conditions, including that the society in question has good working democratic institutions and that most of its citizens take rights seriously (even if they may disagree about what rights they have). The Essay ends by considering what follows from the failure of these conditions.

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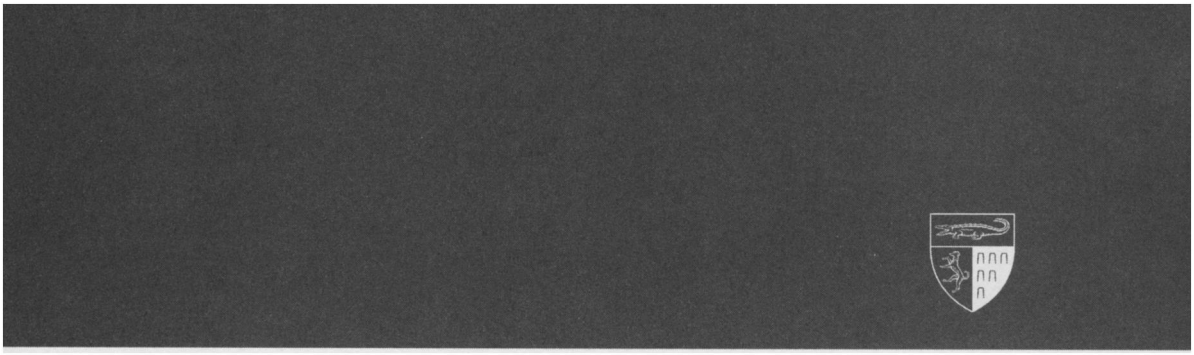

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INTRODUCTION

Should judges have the authority to strike down legislation when they are convinced that it violates individual rights? In many countries they do. The best known example is the United States. In November 2003, the Supreme Judicial Court of Massachusetts ruled that the state's marriage licensing laws violated state constitutional rights to due process and equal protection by implicitly limiting marriage to a union between a man and a woman.[1] The decision heartened many people who felt that their rights had been unrecognized and that, as gay men and women, they had been treated as second-class citizens under the existing marriage law.[2] Even if the decision is eventually overturned by an amendment to the state constitution, the plaintiffs and their supporters can feel that at least the issue of rights is now being confronted directly. A good decision and a process in which claims of rights are steadily and seriously considered[3]—for many people these are reasons for cherishing the institution of judicial review. They acknowledge that judicial review sometimes leads to bad decisions—such as the striking down of 170 labor statutes by state and federal courts in the *Lochner* era[4]—and they acknowledge that the practice suffers from some sort of democratic deficit. But, they say, these costs are often exaggerated or mischaracterized. The democratic process is hardly perfect and, in any case, the democratic objection is itself problematic when what is at stake is the tyranny of the majority. We can, they argue, put up with an occasional bad outcome as the price of a practice that has given us decisions like *Lawrence*, *Roe*, and *Brown*,[5] which upheld our society's commitment to individual rights in the face of prejudiced majorities.

That is almost the last good thing I shall say about judicial review. (I wanted to acknowledge up front the value of many of the decisions it has given us and the complexity of the procedural issues.) This Essay will argue that judicial review of legislation is inappropriate as a mode of final decisionmaking in a free and democratic society.

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1. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).
2. *See Landmark Ruling: The Victors*, BOSTON HERALD, Nov. 19, 2003, at 5.
3. This adapts a phrase of Ronald Dworkin's, from RONALD DWORKIN, A MATTER OF PRINCIPLE 9-32 (1985).
4. Lochner v. New York, 198 U.S. 45 (1905). The calculation of the overall number of cases in which state or federal statutes on labor relations and labor conditions were struck down in the period 1880-1935 is based on lists given in WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT apps. A, C, at 177-92, 199-203 (1991).
5. Lawrence v. Texas, 539 U.S. 558 (2003); Roe v. Wade, 410 U.S. 113 (1973); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

Arguments to this effect have been heard before, and often. They arise naturally in regard to a practice of this kind. In liberal political theory, legislative supremacy is often associated with popular self-government,[6] and democratic ideals are bound to stand in an uneasy relation to any practice that says elected legislatures are to operate only on the sufferance of unelected judges. Alexander Bickel summed up the issue in the well-known phrase, "the counter-majoritarian difficulty."[7] We can try to mitigate this difficulty, Bickel said, by showing that existing legislative procedures do not perfectly represent the popular or the majority will. But, he continued,

> nothing in the further complexities and perplexities of the system, which modern political science has explored with admirable and ingenious industry, and some of which it has tended to multiply with a fertility that passes the mere zeal of the discoverer—nothing in these complexities can alter the essential reality that judicial review is a deviant institution in the American democracy.[8]

In countries that do not allow legislation to be invalidated in this way, the people themselves can decide finally, by ordinary legislative procedures, whether they want to permit abortion, affirmative action, school vouchers, or gay marriage. They can decide among themselves whether to have laws punishing the public expression of racial hatred or restricting candidates' spending in elections. If they disagree about any of these matters, they can elect representatives to deliberate and settle the issue by voting in the legislature. That is what happened, for example, in Britain in the 1960s, when Parliament debated the liberalization of abortion law, the legalization of homosexual conduct among consenting adults, and the abolition of capital punishment.[9] On each issue, wide-ranging public deliberation was mirrored in serious debate in the House of Commons. The quality of those debates (and similar debates in Canada, Australia, New Zealand, and elsewhere) make nonsense of the claim that legislators are incapable of addressing such issues responsibly—just as the

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6. The locus classicus for this concept is John Locke, *The Second Treatise of Government*, *in* TWO TREATISES OF GOVERNMENT 265, 366-67 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

7. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16-17 (2d ed. 1986) ("[J]udicial review is a counter-majoritarian force in our system. . . . [W]hen the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of representatives of the actual people of the here and now. . . .").

8. *Id.* at 17-18.

9. Abortion Act, 1967, c. 87; Sexual Offences Act, 1967, c. 60; Murder (Abolition of Death Penalty) Act, 1965, c. 71.

liberal outcomes of those proceedings cast doubt on the familiar proposition that popular majorities will not uphold the rights of minorities.

By contrast, in the United States the people or their representatives in state and federal legislatures can address these questions if they like, but they have no certainty that their decisions will prevail. If someone who disagrees with the legislative resolution decides to bring the matter before a court, the view that finally prevails will be that of the judges. As Ronald Dworkin puts 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."[10]

In recent years, a number of books have appeared attacking judicial review in America.[11] For years, support for the practice has come from liberals, and opposition from conservative opponents of the rights that liberal courts have upheld. In recent years, however, we have seen the growth of liberal opposition to judicial review, as the Rehnquist Court struck down some significant achievements of liberal legislative policy.[12] But there have been spirited defenses of the practice as well.[13] The two-hundredth anniversary of *Marbury v. Madison* elicited numerous discussions of its origins and original legitimacy, and the fiftieth anniversary of *Brown v. Board of Education* provided a timely reminder of the service that the nation's courts performed in the mid-twentieth century by spearheading the attack on segregation and other racist laws.

So the battle lines are drawn, the maneuvering is familiar, and the positions on both sides are well understood. What is the point of this present

10. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 74 (1996).

11. *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

12. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (striking down part of the Violence Against Women Act); United States v. Lopez, 514 U.S. 549 (1995) (holding that Congress has no authority to legislate a prohibition on the possession of guns within a certain distance from a school); *see also* Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 IND. L.J. 47 (2003).

13. *See, e.g.*, DWORKIN, *supra* note 10; CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (2001); LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE (2004).

intervention? I have written plenty about this myself already.[14] Why another article attacking judicial review?

What I want to do is identify a core argument against judicial review that is independent of both its historical manifestations and questions about its particular effects—the decisions (good and bad) that it has yielded, the heartbreaks and affirmations it has handed down. I want to focus on aspects of the case against judicial review that stand apart from arguments about the way judges exercise their powers and the spirit (deferential or activist) in which they approach the legislation brought before them for their approval. Recent books by Mark Tushnet and Larry Kramer entangle a theoretical critique of the practice with discussions of its historical origins and their vision of what a less judicialized U.S. Constitution would involve.[15] This is not a criticism of Tushnet and Kramer. Their books are valuable in large part because of the richness and color they bring to the theoretical controversy. As Frank Michelman says in his blurb on the back cover of *The People Themselves*, Kramer's history "puts flesh on the bones of debates over judicial review and popular constitutionalism."[16] And so it does. But I want to take off some of the flesh and boil down the normative argument to its bare bones so that we can look directly at judicial review and see what it is premised on.

Charles Black once remarked that, in practice, opposition to judicial review tends to be "a sometime thing," with people supporting it for the few cases they cherish (like *Brown* or *Roe*) and opposing it only when it leads to outcomes they deplore.[17] In politics, support for judicial review is sometimes intensely embroiled in support for particular decisions. This is most notably true in the debate over abortion rights, in which there is a panic-stricken refusal among pro-choice advocates to even consider the case against judicial review for fear this will give comfort and encouragement to those who regard *Roe v. Wade* as an unwarranted intrusion on the rights of conservative legislators. I hope that setting out the core case against judicial review in

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14. *See, e.g.*, JEREMY WALDRON, LAW AND DISAGREEMENT 10-17, 211-312 (1999); Jeremy Waldron, *Deliberation, Disagreement, and Voting*, *in* DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS 210 (Harold Hongju Koh & Ronald C. Slye eds., 1999) [hereinafter Waldron, *Deliberation, Disagreement, and Voting*]; Jeremy Waldron, *Judicial Power and Popular Sovereignty*, *in* MARBURY VERSUS MADISON: DOCUMENTS AND COMMENTARY 181 (Mark A. Graber & Michael Perhac eds., 2002) [hereinafter Waldron, *Judicial Power and Popular Sovereignty*]; Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18 (1993) [hereinafter Waldron, *A Right-Based Critique*].

15. *See* KRAMER, *supra* note 11; TUSHNET, *supra* note 11.

16. Frank Michelman, *Jacket Comment* on KRAMER, *supra* note 11.

17. CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 109 (1997).

abstraction from its particular consequences can help overcome some of this panic. It may still be the case that judicial review is necessary as a protective measure against legislative pathologies relating to sex, race, or religion in particular countries. But even if that is so, it is worth figuring out whether that sort of defense goes to the heart of the matter, or whether it should be regarded instead as an exceptional reason to refrain from following the tendency of what, in most circumstances, would be a compelling normative argument against the practice.

A connected reason for boiling the flesh off the bones of the theoretical critique is that judicial review is an issue for other countries that have a different history, a different judicial culture, and different experience with legislative institutions than the United States has had. For example, when the British debate the relatively limited powers their judges have to review legislation, they are not particularly interested in what the Republicans said to the Federalists in 1805 or in the legacy of *Brown v. Board of Education*. What is needed is some general understanding, uncontaminated by the cultural, historical, and political preoccupations of each society.[18]

My own writing on this has been more abstract than most. But I have managed to discuss judicial review in a way that embroils it with other issues in jurisprudence and political philosophy.[19] I am not satisfied that I have stated in

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18. Again, this is not to dismiss the more fleshed-out accounts. The idea behind this Essay is that we take a clear view of the theoretical argument and put it alongside our richer understanding of the way the debate unfolds in, to name a few examples, Britain, the United States, Canada, and South Africa.

19. I have asked whether the very idea of individual rights commits us to judicial review in Waldron, *A Right-Based Critique*, *supra* note 14. I have considered its relation to civic republican ideas in Jeremy Waldron, *Judicial Review and Republican Government*, *in* THAT EMINENT TRIBUNAL: JUDICIAL SUPREMACY AND THE CONSTITUTION 159 (Christopher Wolfe ed., 2004), its relation to the difference between Benthamite and Rousseauian conceptions of democracy in Jeremy Waldron, *Rights and Majorities: Rousseau Revisited*, *in* NOMOS XXXII: MAJORITIES AND MINORITIES 44 (John W. Chapman & Alan Wertheimer eds., 1990) [hereinafter Waldron, *Rights and Majorities*], and its relation to Continental theories of popular sovereignty in Waldron, *Judicial Power and Popular Sovereignty*, *supra* note 14. I have considered the relation of the judicial review controversy to debates in meta-ethics about realism and the objectivity of values in Jeremy Waldron, *The Irrelevance of Moral Objectivity*, *in* NATURAL LAW THEORY 158 (Robert P. George ed., 1992) [hereinafter Waldron, *The Irrelevance of Moral Objectivity*]; and Jeremy Waldron, *Moral Truth and Judicial Review*, 43 AM. J. JURIS. 75 (1998) [hereinafter Waldron, *Moral Truth and Judicial Review*]. I have responded to various defenses of judicial review, ranging from the precommitment case, *see* Jeremy Waldron, *Precommitment and Disagreement*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 271 (Larry Alexander ed., 1998) [hereinafter Waldron, *Precommitment and Disagreement*], to the particular argument that Ronald Dworkin makes in *Freedom's Law*

a clear and uncluttered way what the basic objection is, nor do I think I have given satisfactory answers to those who have criticized the arguments I presented in *Law and Disagreement* and elsewhere.

In this Essay, I shall argue that judicial review is vulnerable to attack on two fronts. It does not, as is often claimed, provide a way for a society to focus clearly on the real issues at stake when citizens disagree about rights; on the contrary, it distracts them with side-issues about precedent, texts, and interpretation. And it is politically illegitimate, so far as democratic values are concerned: By privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights.

I will proceed as follows. In Part I, I will define the target of my argument—strong judicial review of legislation—and distinguish it from other practices that it is not my intention to attack. Part II will set out some assumptions on which my argument is predicated: My argument against judicial review is not unconditional but depends on certain institutional and political features of modern liberal democracies. Then, in Part III, I will review the general character of the argument I propose to make. That argument will attend to both outcome- and process-related reasons, and these will be discussed in Parts IV and V, respectively. In Part VI, I will expose the fallacy of the most common argument against allowing representative institutions to prevail: that such a system inevitably leads to the tyranny of the majority. Finally, in Part VII, I shall say a little bit about non-core cases—that is, cases in which there is reason to depart from the assumptions on which the core argument depends.

I. DEFINITION OF JUDICIAL REVIEW

I begin with a brief account of what I mean by judicial review. This is an Essay about judicial review of legislation, not judicial review of executive action or administrative decisionmaking.[20] The question I want to address concerns

about its ultimate compatibility with democracy, *see* Jeremy Waldron, *Judicial Review and the Conditions of Democracy*, 6 J. POL. PHIL. 335 (1998).

20. Much of what is done by the European Court of Human Rights is judicial review of executive action. Some of it is judicial review of legislative action, and some of it is actually judicial review of judicial action. See Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 WM. & MARY BILL RTS. J. 427, 458-59 (1997), for the claim that the majority of constitutional decisions by the United States Supreme Court concern challenges to the actions of low-level bureaucrats rather than of legislatures.

primary legislation enacted by the elected legislature of a polity. It might be thought that some of the same arguments apply to executive action as well: After all, the executive has some elective credentials of its own with which to oppose decisionmaking by judges. But it is almost universally accepted that the executive's elective credentials are subject to the principle of the rule of law, and, as a result, that officials may properly be required by courts to act in accordance with legal authorization.[21] The equivalent proposition for legislators has been propounded too: Judicial review is just the subjection of the legislature to the rule of law. But in the case of the legislature, it is not uncontested; indeed that is precisely the contestation we are concerned with here.

There are a variety of practices all over the world that could be grouped under the general heading of judicial review of legislation. They may be distinguished along several dimensions. The most important difference is between what I shall call strong judicial review and weak judicial review. My target is strong judicial review.[22]

In a system of strong judicial review, courts have the authority to decline to apply a statute in a particular case (even though the statute on its own terms plainly applies in that case) or to modify the effect of a statute to make its application conform with individual rights (in ways that the statute itself does not envisage). Moreover, courts in this system have the authority to establish as a matter of law that a given statute or legislative provision will not be applied, so that as a result of stare decisis and issue preclusion a law that they have refused to apply becomes in effect a dead letter. A form of even stronger judicial review would empower the courts to actually strike a piece of legislation out of the statute-book altogether. Some European courts have this

21. Seana Shiffrin, Richard Pildes, Frank Michelman, and others have urged me to consider how far my argument against judicial review of legislation might also extend to judicial review of executive action in the light of statutes enacted long ago or statutes whose provisions require extensive interpretation by the courts. Clearly more needs to be said about this. Pursuing the matter in this direction might be considered either a *reductio ad absurdum* of my argument or an attractive application of it.

22. The distinction between strong and weak judicial review is separate from the question of judicial supremacy. Judicial supremacy refers to a situation in which (1) the courts settle important issues for the whole political system, (2) those settlements are treated as absolutely binding on all other actors in the political system, and (3) the courts do not defer to the positions taken on these matters in other branches (not even to the extent to which they defer to their own past decisions under a limited principle of stare decisis). *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 352 & n.63 (1998); Jeremy Waldron, *Judicial Power and Popular Sovereignty*, *supra* note 14, at 191-98.

authority.[23] It appears that American courts do not,[24] but the real effect of their authority is not much short of it.[25]

In a system of weak judicial review, by contrast, courts may scrutinize legislation for its conformity to individual rights but they may not decline to apply it (or moderate its application) simply because rights would otherwise be violated.[26] Nevertheless, the scrutiny may have some effect. In the United Kingdom, the courts may review a statute with a view to issuing a "declaration of incompatibility" in the event that "the court is satisfied that the provision is incompatible with a Convention right"—i.e., with one of the rights set out in the European Convention of Human Rights as incorporated into British law through the Human Rights Act. The Act provides that such declaration "does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and . . . is not binding on the parties to the proceedings in which it is made."[27] But still it has an effect: A minister may use such a declaration as authorization to initiate a fast-track legislative procedure to remedy the incompatibility.[28] (This is a power the minister would not have but for the process of judicial review that led to the declaration in the first place.)

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23. *See* Mauro Cappelletti & John Clarke Adams, Comment, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207, 1222-23 (1966). There are further complications in regard to whether the statute declared invalid is deemed to have been invalid as of the time of its passage.

24. The matter is not clear-cut. In support of the proposition that unconstitutional statutes are not struck out of the statute book, consider *Dickerson v. United States*, 530 U.S. 428 (2000), in which the Supreme Court by a majority held that a federal statute (18 U.S.C. § 3501) purporting to make voluntary confessions admissible even when there was no *Miranda* warning was unconstitutional. The closing words of Justice Scalia's dissent in that case seem to indicate that legislation that the Supreme Court finds unconstitutional remains available for judicial reference. Justice Scalia said: "I dissent from today's decision, and, until § 3501 is repealed, will continue to apply it in all cases where there has been a sustainable finding that the defendant's confession was voluntary." *Id* at 464. A contrary impression may appear from *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004), in which the Fifth Circuit held that the Texas abortion statute at issue in *Roe v. Wade* must be deemed to have been repealed by implication. A close reading of that case, however, shows that the implicit repeal was held to have been effected by the Texas statutes regulating abortion after *Roe*, not by the decision in *Roe* itself. (I am grateful to Carol Sanger for this reference.)

25. *See* Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1339-40 (2000).

26. *See* Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001).

27. Human Rights Act, 1998, c. 42, § 4(2), (6).

28. *Id.* § 10.

A form of even weaker judicial review would give judges not even that much authority. Like their British counterparts, the New Zealand courts may not decline to apply legislation when it violates human rights (in New Zealand, the rights set out in the Bill of Rights Act of 1990[29]); but they may strain to find interpretations that avoid the violation.[30] Although courts there have indicated that they may be prepared on occasion to issue declarations of incompatibility on their own initiative, such declarations in New Zealand do not have any legal effect on the legislative process.[31]

There are some intermediate cases. In Canada, there is a provision for the review of legislation by courts, and courts there, like their U.S. counterparts, may decline to apply a national or provincial statute if it violates the provisions of the Canadian Charter of Rights and Freedoms. But Canadian legislation (provincial or national) may be couched in a form that insulates it from this scrutiny—Canadian assemblies may legislate "notwithstanding" the rights in the Charter.[32] In practice, however, the notwithstanding clause is rarely invoked.[33] Thus, in what follows I shall count the Canadian arrangement as a

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29. New Zealand Bill of Rights Act 1990, 1990 S.N.Z. No. 109, § 4 ("No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), . . . [h]old any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or . . . [d]ecline to apply any provision of the enactment—by reason only that the provision is inconsistent with any provision of this Bill of Rights.").

30. *Id.* § 6 ("Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.").

31. *See* Moonen v. Film & Literature Bd. of Review, [2000] 2 N.Z.L.R. 9, 22-3 (C.A.).

32. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 33(1)-(2) (U.K.). The full text of the provision reads:

> (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
>
> (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

33. When it has been invoked, it has mostly been in the context of Québécois politics. *See* Tsvi Kahana, *The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter*, 44 J. INST. PUB. ADMIN. CAN. 255 (2001).

form of strong judicial review, with its vulnerability to my argument affected only slightly by the formal availability of the override.[34]

A second distinction among types of judicial review pays attention to the place of individual rights in the constitutional system of a society. In the United States, statutes are scrutinized for their conformity to individual rights as set out in the Constitution. Rights-oriented judicial review is part and parcel of general constitutional review, and the courts strike down statutes for violations of individual rights in exactly the spirit in which they strike down statutes for violations of federalism or separation of powers principles.[35] This gives American defenses of judicial review a peculiar cast. Though philosophical defenses of the practice are often couched in terms of the

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34. Jeffrey Goldsworthy has suggested that the "notwithstanding" provision provides a sufficient answer to those of us who worry, on democratic grounds, about the practice of strong judicial review. Jeffrey Goldsworthy, *Judicial Review, Legislative Override, and Democracy*, 38 WAKE FOREST L. REV. 451, 454-59 (2003). It matters not, he says, that the provision is rarely used.

> [S]urely that is the electorate's democratic prerogative, which Waldron would be bound to respect. It would not be open to him to object that an ingenuous electorate is likely to be deceived by the specious objectivity of constitutionalised rights, or dazzled by the mystique of the judiciary—by a naive faith in judges' expert legal skills, superior wisdom, and impartiality. That objection would reflect precisely the same lack of faith in the electorate's capacity for enlightened self-government that motivates proponents of constitutionally entrenched rights.

Id. at 456-57. I believe that the real problem is that section 33 requires the legislature to misrepresent its position on rights. To legislate notwithstanding the Charter is a way of saying that you do not think Charter rights have the importance that the Charter says they have. But the characteristic stand-off between courts and legislatures does not involve one group of people (judges) who think Charter rights are important and another group of people (legislators) who do not. What it usually involves is groups of people (legislative majorities and minorities, and judicial majorities and minorities) all of whom think Charter rights are important, though they disagree about how the relevant rights are to be understood. Goldsworthy acknowledges this:

> When the judiciary . . . is expected to disagree with the legislature as to the "true" meaning and effect of Charter provisions, the legislature cannot ensure that its view will prevail without appearing to override the Charter itself. And that is vulnerable to the politically lethal objection that the legislature is openly and self-confessedly subverting constitutional rights.

Id. at 467. However, maybe there is no form of words that can avoid this difficulty. As a matter of practical politics, the legislature is always somewhat at the mercy of the courts' public declarations about the meaning of the society's Bill or Charter of Rights. I am grateful to John Morley for this point.

35. The most famous judicial defense of judicial review, *Marbury v. Madison*, had nothing to do with individual rights. It was about Congress's power to appoint and remove justices of the peace.

judiciary's particular adeptness at dealing with propositions about rights, in reality that argument is subordinate to a defense of the structural role the courts must play in upholding the rules of the Constitution. Sometimes these two defenses are consistent; other times, they come apart. For example, textualism may seem appropriate for structural issues, but it can easily be made to seem an inappropriate basis for thinking about rights, even when the rights are embodied in an authoritative text.[36] In other countries, judicial review takes place with regard to a bill of rights that is not specifically designated as part of the (structural) constitution. Weak judicial review in the United Kingdom on the basis of the Human Rights Act is of this kind. Because most cases of strong judicial review are associated with constitutional review, I shall focus on these cases. But it is important to remember both that an approach oriented to structural constraints might not be particularly appropriate as a basis for thinking about rights, and the additional point that many of the challenges to rights-oriented judicial review can be posed to other forms of constitutional review as well. In recent years, for example, the Supreme Court of the United States has struck down a number of statutes because they conflict with the Supreme Court's vision of federalism.[37] Now, everyone concedes that the country is governed on a quite different basis so far as the relation between state and central government is concerned than it was at the end of the eighteenth century, when most of the constitutional text was ratified, or in the middle of the nineteenth century, when the text on federal structure was last modified to any substantial extent. But opinions differ as to what the new basis of state/federal relations should be. The text of the Constitution does not settle that matter. So it is settled instead by voting among Justices – some voting for one conception of federalism (which they then read into the Constitution), the others for another, and whichever side has the most votes on the Court prevails. It is not clear that this is an appropriate basis for the settlement of structural terms of association among a free and democratic people.[38]

A third distinction is between a posteriori review of the American kind, which takes place in the context of particular legal proceedings, sometimes long

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36. *See* DWORKIN, *supra* note 3, at 11-18; ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 156-57 (rev. 2d ed. 2005).

37. *See, e.g.*, *supra* note 12.

38. The need for judicial review for patrolling structural limits on the allocation of authority between state and federal legislatures is often cited (opportunistically) by defenders of rights-based limitations on legislatures. People say, "Legislatures are subject to judicial review anyway, for federalism reasons. So why not exploit that practice to develop rights-based judicial review as well?" My analysis of the desirability of rights-based judicial review will be pertinent to this sort of hybrid or opportunistic argument.

after a statute has been enacted, and ex ante review of legislation by a constitutional court specifically set up to conduct an abstract assessment of a bill in the final stages of its enactment.[39] There are questions about how to understand ex ante review. Something that amounts in effect to a final stage in a multicameral legislative process, with the court operating like a traditional senate, is not really judicial review (though the case against empowering an unelected body in this way may be similar).[40] I shall not say much more about this. For some defenses of judicial review, the a posteriori character of its exercise—its rootedness in particular cases[41]—is important, and I shall concentrate on that.

A fourth distinction is connected with the third. Judicial review can be carried out by ordinary courts (as in the Massachusetts case we began with) or it can be carried out by a specialized constitutional court. This may be relevant to an argument I will make later: The ability of judges in the regular hierarchy of courts to reason about rights is exaggerated when so much of the ordinary discipline of judging distracts their attention from direct consideration of moral arguments. Perhaps a specialist constitutional court can do better, though experience suggests that it too may become preoccupied with the development of its own doctrines and precedents in a way that imposes a distorting filter on the rights-based reasoning it considers.

II. FOUR ASSUMPTIONS

To focus my argument, and to distinguish the core case in which the objection to judicial review is at its clearest from non-core cases in which judicial review might be deemed appropriate as an anomalous provision to deal with special pathologies, I shall set out some assumptions.[42]

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39. Some systems of the first kind make provision for ex ante advisory opinions in limited circumstances. For example, in Massachusetts, "[e]ach branch of the legislature, as well as the governor or the council, shall have authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions." MASS. CONST. pt. II, ch. III, art. II (amended 1964). This procedure was used in the months following the *Goodridge* decision, discussed at the beginning of this Essay. In *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004), the Supreme Judicial Court of Massachusetts held that a legislative provision for civil unions for same-sex couples that also prohibited discrimination against civilly joined spouses would not be sufficient to avoid the constitutional objection to the ban on same-sex marriages noted in *Goodridge*.

40. *See* Jeremy Waldron, *Eisgruber's House of Lords*, 37 U.S.F. L. REV. 89 (2002).

41. *See infra* Section IV.A.

42. These assumptions are adapted from those set out in Jeremy Waldron, *Some Models of Dialogue Between Judges and Legislators*, 23 SUP. CT. L. REV. 2d 7, 9-21 (2004).

Certain of these assumptions may strike some readers as question-begging, but I am not trying any sort of subterfuge here. The reasons for beginning with these assumptions will be evident as we go along, and the possibility of non-core cases, understood as cases in which one or more of these assumptions does not hold, is freely acknowledged and will be considered in Part VII. In effect, my contention will be that the argument against judicial review is conditional; if any of the conditions fail, the argument may not hold.[43] Let me add that part of what I want to combat in this Essay is a certain sort of bottom-line mentality toward the issue of judicial review.[44] I fully expect that some readers will comb quickly through my assumptions to find some that do not apply, say, to American or British society as they understand it, leading them to ignore the core argument altogether. What matters to them is that judicial review be defended and challenges to it seen off; they don't particularly care how. That is an unfortunate approach. It is better to try and understand the basis of the core objection, and to see whether it is valid on its own terms, before proceeding to examine cases in which, for some reason, its application may be problematic.

Let me lay out in summary the four assumptions I shall make. We are to imagine a society with (1) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage; (2) a set of judicial institutions, again in reasonably good order, set up on a nonrepresentative basis to hear individual lawsuits, settle disputes, and uphold the rule of law; (3) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and (4) persisting, substantial, and good faith disagreement about rights (i.e., about what the commitment to rights actually amounts to and what its implications are) among the members of the society who are committed to the idea of rights.

I shall argue that, relative to these assumptions, the society in question ought to settle the disagreements about rights that its members have using its legislative institutions. If these assumptions hold, the case for consigning such disagreements to judicial tribunals for final settlement is weak and unconvincing, and there is no need for decisions about rights made by legislatures to be second-guessed by courts. And I shall argue that allowing decisions by courts to override legislative decisions on these matters fails to satisfy important criteria of political legitimacy. Let me first elaborate the four assumptions.

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43. *See infra* text accompanying note 136.

44. For a general critique of the "bottom-line" mentality in political philosophy, see Jeremy Waldron, *What Plato Would Allow*, *in* NOMOS XXXVII: THEORY AND PRACTICE 138 (Ian Shapiro & Judith Wagner DeCew eds., 1995).

A. Democratic Institutions

I assume that the society we are considering is a democratic society and that, like most in the modern Western world, it has struggled through various forms of monarchy, tyranny, dictatorship, or colonial domination to a situation in which its laws are made and its public policies are set by the people and their representatives working through elective institutions. This society has a broadly democratic political system with universal adult suffrage, and it has a representative legislature, to which elections are held on a fair and regular basis.[45] I assume that this legislature is a large deliberative body, accustomed to dealing with difficult issues, including important issues of justice and social policy. The legislators deliberate and vote on public issues, and the procedures for lawmaking are elaborate and responsible,[46] and incorporate various safeguards, such as bicameralism,[47] robust committee scrutiny, and multiple levels of consideration, debate, and voting. I assume that these processes connect both formally (through public hearings and consultation procedures) and informally with wider debates in the society. Members of the legislature think of themselves as representatives, in a variety of ways, sometimes making the interests and opinions of their constituents key to their participation, sometimes thinking more in terms of virtual representation of interests and opinions throughout the society as a whole. I assume too that there are political parties, and that legislators' party affiliations are key to their taking a view that ranges more broadly than the interests and opinions of their immediate constituents.

None of this is meant to be controversial; it picks out the way in which democratic legislatures usually operate. In general, I am assuming that the democratic institutions are in reasonably good order. They may not be perfect and there are probably ongoing debates as to how they might be improved. I assume these debates are informed by a culture of democracy, valuing responsible deliberation and political equality. The second of these values—

45. Thus, the application of my argument to nondemocratic societies, or societies whose institutions differ radically from these forms, is not a subject discussed in this Essay.

46. *See* Jeremy Waldron, *Legislating with Integrity*, 72 FORDHAM L. REV. 373 (2003).

47. The assumption of bicameralism might seem problematic. There are in the world a number of well-functioning unicameral legislatures, most notably in the Scandinavian countries: Denmark, Norway, and Sweden. But unicameral arrangements can easily exacerbate other legislative pathologies. For an argument that this has happened in New Zealand to an extent that may take that country outside the benefit of the argument developed in this Essay, see Jeremy Waldron, *Compared to What?—Judicial Activism and the New Zealand Parliament*, 2005 N.Z. L.J. 441.

political equality—is worth particular emphasis. I assume that the institutions, procedures, and practices of legislation are kept under constant review from this perspective, so that if there are perceived inequities of representation that derogate seriously from the ideal of political equality, it is understood among all the members of the society that this is an appropriate criticism to make and that, if need be, the legislature and the electoral system should be changed to remedy it. And I assume that the legislature is capable of organizing such change, either on its own initiative or by referendum.[48]

I belabor these points about a democratic culture and electoral and legislative institutions in reasonably good working order because they will be key to the argument that follows. The initial structure of the argument will be to ask the following question: Once we have posited this first assumption, what reason can there be for wanting to set up a nonelective process to review and sometimes override the work that the legislature has done? On the other hand, I do not want to beg any questions with this initial assumption. I shall balance it immediately with the assumption that the society we are postulating also has courts in good working order—this will be the second assumption—doing reasonably well what courts are good at doing. The society we are contemplating has what it takes to have a system of judicial review, if judicial review can be shown to be appropriate.

One note of caution: When I say that the institutions are in good working order, I am not assuming that the legislation that the reasonably democratic legislature enacts is by and large good or just, so far as its content is concerned. I assume some of the legislation is just and some of it unjust (people will disagree about which is which), and that this is true both of the measures that might conceivably be subject to judicial review and of the measures that nobody is proposing to subject to judicial review. All that I have said about the legislative and electoral arrangements being in good working order goes to process values rather than outcome values. In Part V, however, I shall say more about the sort of reasoning that we would expect to see in such a process.

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48. It is sometimes said that elective institutions are incapable of reforming themselves because legislators have an entrenched interest in the status quo. This may be true of some of the pathological electoral and legislative arrangements in the United States. (But the issues for which this is most true in the United States are those on which the courts have scarcely dared to intervene—consider the disgraceful condition of American redistricting arrangements, for example.) It is patently false elsewhere. In New Zealand, for example, in 1993 the legislature enacted statutes changing the system of parliamentary representation from a first-past-the-post system to a system of proportional representation, in a way that unsettled existing patterns of incumbency. *See* Electoral Act 1993, 1993 S.N.Z. No. 87; Electoral Referendum Act 1993, 1993 S.N.Z. No. 86.

B. Judicial Institutions

I assume that the society we are considering has courts—that is, a well-established and politically independent judiciary, again in reasonably good working order, set up to hear lawsuits, settle disputes, and uphold the rule of law. I assume that these institutions are already authorized to engage in judicial review of executive actions, testing it against statutory and constitutional law.

I assume that, unlike the institutions referred to in the previous Section, the courts are mostly not elective or representative institutions. By this I mean not only that judicial office is not (for the most part) an elective office, but also that the judiciary is not permeated with an ethos of elections, representation, and electoral accountability in the way that the legislature is. Many defenders of judicial review regard this as a huge advantage, because it means courts can deliberate on issues of principle undistracted by popular pressures and invulnerable to public anger. Sometimes, however, when it is thought necessary to rebut the democratic case against judicial review, defenders of the practice will point proudly to states where judges are elected. This happens in some states in the United States. But even where judges are elected, the business of the courts is not normally conducted, as the business of the legislature is, in accordance with an ethos of representation and electoral accountability.

I am going to assume that, in the society we are considering, courts are capable of performing the functions that would be assigned to them under a practice of judicial review. They could review legislation; the question is whether they should, and if so, whether their determinations should be final and binding on the representative branches of government. I assume, though, that if they are assigned this function, they will perform it as courts characteristically perform their functions. There is an immense law review literature on the specific character of the judicial process and of the tasks for which courts do and do not seem institutionally competent.[49] I do not want to delve deeply into that here. As I indicated above, I will assume that we are dealing with courts that (1) do not act on their own motion or by abstract reference, but rather respond to particular claims brought by particular litigants; (2) deal with issues in the context of binary, adversarial presentation; and (3) refer to and elaborate their own past decisions on matters that seem relevant to the case at hand. I further assume a familiar hierarchy of courts,

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49. *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 640-47 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

with provisions for appeal, and with larger multimember bodies (perhaps five or nine judges) addressing cases at the highest level of appeal, with lower courts being required largely to follow the lead of higher courts in the disposition of the matters that come before them.

In some societies, judges are specially and separately trained; in other societies, they are chosen from the ranks of eminent lawyers and jurists. In either case, I assume that they have high status in the political system and a position that insulates them from specific political pressures. In other regards, I assume they are typical of the high-status and well-educated members of their society. This is important for two reasons. First, because the society prides itself on being largely democratic, I shall assume that the judges share some of that pride and so are likely to be self-conscious about the legitimacy of their own activity if they engage in judicial review of legislation. This may affect how they exercise such authority.[50] Second, although judges are likely to be at least as committed to rights as anyone else in the society, I assume that like other members of the society, judges disagree with one another about the meaning and implications of individual and minority rights. That is, I assume they are subject to my fourth assumption about rights-disagreement, and that this too affects how they exercise powers of judicial review (if they have such powers). Specifically, just like legislators, modes of decisionmaking have to be developed for multi-judge tribunals whose members disagree about rights. The decision-procedure most often used is simple majority voting. In Part V, I will address the question of whether this is an appropriate procedure for judges to use.

C. A Commitment to Rights

I assume that there is a strong commitment on the part of most members of the society we are contemplating to the idea of individual and minority rights. Although they believe in the pursuit of the general good under some broad utilitarian conception, and although they believe in majority rule as a rough general principle for politics, they accept that individuals have certain interests and are entitled to certain liberties that should not be denied simply because it would be more convenient for most people to deny them. They believe that minorities are entitled to a degree of support, recognition, and insulation that is not necessarily guaranteed by their numbers or by their political weight.

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50. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980) (discussing the Supreme Court's legitimacy in this context); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864-69 (1992) (same).

The details of the prevalent theory of rights need not detain us here. I assume that this society-wide commitment to rights involves an awareness of the worldwide consensus on human rights and of the history of thinking about rights.[51] I assume that this commitment is a living consensus, developing and evolving as defenders of rights talk to one another about what rights they have and what those rights imply. I assume that the commitment to rights is not just lip service and that the members of the society take rights seriously: They care about them, they keep their own and others' views on rights under constant consideration and lively debate, and they are alert to issues of rights in regard to all the social decisions that are canvassed or discussed in their midst.

No doubt there are skeptics about rights in every society, but I assume that this position is an outlier. Some reject rights as they reject all political morality; others reject rights because they hold utilitarian, socialist, or other doctrines that repudiate them for (what purport to be) good reasons of political morality—e.g., rights are too individualistic or their trumping force undermines the rational pursuit of efficiency or whatever. But I assume that general respect for individual and minority rights is a serious part of a broad consensus in the society, part of the most prevalent body of political opinion, and certainly part of the official ideology.

To make this third assumption more concrete, we may assume also that the society cherishes rights to an extent that has led to the adoption of an official written bill or declaration of rights of the familiar kind. I shall refer to this throughout as the "Bill of Rights" of the society concerned. This is supposed to correspond to, for example, the rights provisions of the U.S. Constitution and its amendments, the Canadian Charter of Rights and Freedoms, the European Convention on Human Rights (as incorporated, say, into British law in the Human Rights Act), or the New Zealand Bill of Rights Act. Those familiar with the last of these examples will recognize that I am making no assumption that the Bill of Rights is entrenched or part of a written constitution. I want to leave that open. All I assume at this stage is that a Bill of Rights has been enacted to embody the society's commitment to rights. Thus, it may have been enacted sometime in the past on the society's own initiative, or it may be the product of imitation, or it may be a fulfillment of the country's external obligations under human rights law.

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51. This is so even if this awareness does not involve much more than a vague understanding that human rights conventions have become ascendant in the world since 1945, and that their history reaches back to the sort of conceptions of natural right alluded to in documents such as the 1776 Declaration of Independence and the 1789 French Declaration of the Rights of Man and the Citizen.

Readers may be puzzled by these assumptions. On the one hand, I appear to be arguing against interest, stacking the deck in favor of judicial review by assuming a Bill of Rights. On the other hand, it may seem that something sneaky is in the offing. Readers may be aware that I have argued in the past that judicial review should not be understood as a confrontation between defenders of rights and opponents of rights but as a confrontation between one view of rights and another view of rights.[52] What I want to emphasize in response to both these observations is that there is a distinction both at the cultural and at the institutional level between a commitment to rights (even a written commitment to rights) and any particular institutional form (e.g., judicial review of legislation) that such a commitment may take. I am tired of hearing opponents of judicial review denigrated as being rights-skeptics. The best response is to erect the case against judicial review on the ground of a strong and pervasive commitment to rights.

This third assumption defines as non-core cases societies in which the commitment to rights is tenuous and fragile. It may seem strange or unfair to proceed in this way, for defenders of judicial review do sometimes argue that we need the practice to help shore up our commitment to rights, to teach participants in a new democracy to value rights, or to give guarantees to minorities that might not be forthcoming in a pure majority-rules system. Such arguments are interesting, but they do not go to the heart of the case that is made for judicial review in countries like the United States, Britain, or Canada. In those countries, we are told that judicial review is an appropriate way of institutionalizing or administering a society's existing commitment to rights. These formulations should be taken at face value, and that is what I am doing with my third assumption.[53]

D. Disagreement About Rights

My final and crucial assumption is that the consensus about rights is not exempt from the incidence of general disagreement about all major political issues, which we find in modern liberal societies. So I assume that there is

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52. *See* Waldron, *A Right-Based Critique*, *supra* note 14, at 28-31, 34-36.

53. My approach here is similar to that of John Rawls. I am using this device of the core case to define something like a well-ordered society with a publicly accepted theory of justice. *See, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM 35-36 (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]. Rawls seems to assume that judicial review of legislation is appropriate for even a well-ordered society. *Id.* at 165-66, 233-40; *see also* JOHN RAWLS, A THEORY OF JUSTICE 195-99, 228-31 (1971) [hereinafter RAWLS, A THEORY OF JUSTICE]. One of my aims is to show that he is wrong about that.

substantial dissensus as to what rights there are and what they amount to. Some of these disagreements are apparent at a philosophical level (e.g., whether socioeconomic rights should be included in the Bill of Rights), some become apparent when we try to relate abstract principles of right to particular legislative proposals (e.g., whether the free exercise of religion demands exemptions from otherwise generally applicable laws), and some become apparent only in the context of hard individual cases (e.g., how much tolerance for dissident speech there should be in a time of national emergency).

I assume that the rights-disagreements are mostly not issues of interpretation in a narrow legalistic sense. They may present themselves in the first instance as issues of interpretation, but they raise questions of considerable practical moment for the political community. Elsewhere I have referred to these as "watershed" issues of rights.[54] They are major issues of political philosophy with significant ramifications for the lives of many people. Moreover, I assume that they are not idiosyncratic to the society in which they arise. They define major choices that any modern society must face, choices that are reasonably well understood in the context of existing moral and political debates, choices that are focal points of moral and political disagreement in many societies. Examples spring quickly to mind: abortion, affirmative action, the legitimacy of government redistribution or interference in the marketplace, the rights of criminal suspects, the precise meaning of religious toleration, minority cultural rights, the regulation of speech and spending in electoral campaigns, and so on.

As these examples suggest, disagreements about rights are often about central applications, not just marginal applications. Because I am already assuming a general commitment to rights, it is tempting to infer that that general commitment covers the core of each right and that the right only becomes controversial at the outer reaches of its application. That is a mistake. A commitment to rights can be wholehearted and sincere even while watershed cases remain controversial. For example, two people who disagree about whether restrictions on racist hate speech are acceptable may both accept that the right to free speech is key to thinking through the issue and they may both accept also that the case they disagree about is a central rather than marginal issue relative to that right. What this shows, perhaps, is that they have different conceptions of the right,[55] but that is no reason to doubt the sincerity of their adherence to it.

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54. *See* Waldron, *Judicial Power and Popular Sovereignty*, *supra* note 14, at 198.

55. For a discussion of the distinction between the concept of a right and various conceptions of it, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 134-36 (1977).

Generally speaking, the fact that people disagree about rights does not mean that there must be one party to the disagreement who does not take rights seriously. No doubt some positions are held and defended disingenuously or ignorantly by scoundrels (who care nothing for rights) or moral illiterates (who misunderstand their force and importance). But I assume that in most cases disagreement is pursued reasonably and in good faith. The issues involved are serious issues on which it is not reasonable to expect that there would be consensus. In other words, I assume something like John Rawls's "burdens of judgment," but applied (where Rawls hesitated to apply the doctrine) to issues of the right as well as issues of the good.[56] It is not reasonable to expect that people's views on complex and fraught issues of rights will always converge to consensus. And as Rawls emphasizes, "It is unrealistic . . . to suppose that all our differences [on these matters] are rooted solely in ignorance and perversity, or else in the rivalries for power, status, or economic gain."[57]

The assumption of disagreement has nothing to do with moral relativism. One can recognize the existence of disagreement on matters of rights and justice—one can even acknowledge that such disagreements are, for practical political purposes, irresolvable—without staking the meta-ethical claim that there is no fact of the matter about the issue that the participants are disputing. The recognition of disagreement is perfectly compatible with there being a truth of the matter about rights and the principles of constitutionalism—assuming that our condition is not one in which the truth of the matter discloses itself in ways that are not reasonably deniable.[58]

If there is a Bill of Rights, I assume that it bears on, but does not resolve, the issues at stake in the disagreements. I mentioned some examples a few paragraphs back. In the United States, it is indisputable both that the provisions of the Bill of Rights have a bearing on how each of these issues is to be resolved and that the provisions of the Bill of Rights do not themselves determine a resolution of the issue in a way that is beyond reasonable dispute. Thus, I assume that the extent of these disagreements belies our ingenuity at devising abstract formulations. Disagreement does not prevent the enactment

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56. *See* RAWLS, POLITICAL LIBERALISM, *supra* note 53, at 54-58 (discussing "the burdens of judgment"). Rawls argues that "many of our most important judgments are made under conditions where it is not to be expected that conscientious persons with full powers of reason, even after free discussion, will arrive at the same conclusion." *Id.* at 58. For an argument applying this to the right as well as the good, see WALDRON, *supra* note 14, at 149-63.

57. RAWLS, POLITICAL LIBERALISM, *supra* note 53, at 58.

58. *See* Waldron, *The Irrelevance of Moral Objectivity*, *supra* note 19, at 182.

of a Bill of Rights.[59] But the disagreements remain unresolved, leaving us in a situation in which—when an issue about a possible rights-violation 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.[60]

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 Bill of Rights on the 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 of the text of the Bill of Rights. In fact, lawyers will have a field day. 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. Neither will be prepared to acknowledge publicly that which I am assuming now will be obvious: that the bland rhetoric of the Bill of Rights was designed simply to finesse the real and reasonable disagreements that are inevitable among people who take rights seriously for long enough to see such a Bill enacted. Instead of encouraging us to confront these disagreements directly, judicial review is likely to lead to their being framed as questions of interpretation of those bland formulations. Whether that is a desirable context in which to deliberate about the moral issues that they pose is one of the things we shall consider in Part V.

III. THE FORM OF THE ARGUMENT

So these are our assumptions. What do we do with the situation they define? The members of the community are committed to rights, but they disagree about rights. Most issues of rights are in need of settlement. We need settlement not so much to dispose of the issue—nothing can do that[61]—but to provide a basis for common action when action is necessary. Now, there are all

59. *See* Thomas Christiano, *Waldron on Law and Disagreement*, 19 LAW & PHIL. 513, 537 (2000).

60. Once again, I am not saying that the provisions in the Bill of Rights cover the central cases, with disagreement confined to the margins of their application. The provisions are usually vague and abstract, leaving open the possibility that even when there are uncontroversial cases, people still might be using the same abstract formula to cover different substantive approaches to the right—and we should still say that they both take the right seriously.

61. *Cf.* JON STEWART ET AL., AMERICA (THE BOOK): A CITIZEN'S GUIDE TO DEMOCRACY INACTION 90 (2004) (discussing *Roe v. Wade* and noting that "[t]he Court rules that the right to privacy protects a woman's decision to have an abortion and the fetus is not a person with constitutional rights, thus ending all debate on this once-controversial issue").

sorts of issues on which we do not need society-wide settlement—transubstantiation, the meaning of *Hamlet*, the value of a purely contemplative life—and that is fortunate, because there is little prospect of agreement in these areas. Unfortunately, on issues of rights, for which we do need settlement, there is little prospect of agreement either. The need for settlement does not make the fact of disagreement evaporate; rather, it means that a common basis for action has to be forged in the heat of our disagreements.

In the real world, the need for settlement confronts us in the legislative arena. We legislate in certain areas, and the legislation we enact raises issues of rights. Those issues may not be facially prominent in the legislation. The legislation may be on marriage formalities, minimum working hours, campaign finance reform, or the historic preservation of city centers, but what happens is that somebody notices that its application happens to raise an issue of rights and it is in connection with that issue—is the legislation to be applied according to its terms or not?—that the need for settlement arises.

An argument, which I respect, for some sort of power of judicial review goes as follows: It may not always be easy for legislators to see what issues of rights are embedded in a legislative proposal brought before them; it may not always be easy for them to envisage what issues of rights might arise from its subsequent application. So it is useful to have a mechanism that allows citizens to bring these issues to everyone's attention as they arise. But this is an argument for weak judicial review only, not for a strong form of the practice in which the abstract question of right that has been identified is settled in the way that a court deems appropriate. It is an argument for something like the system in the United Kingdom, in which a court may issue a declaration that there is an important question of rights at stake.[62] Alternatively, it is an argument for the arrangement we find in systems of even weaker review, whereby the attorney general has the nonpartisan duty to scrutinize legislative proposals and publicly identify any issues of rights that they raise.[63] Such an arrangement is a kind of institutionalization of the alertness to issues of rights that was embodied in assumption three above.

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62. *See supra* text accompanying notes 26-28.

63. *Cf.* New Zealand Bill of Rights Act 1990, 1990 S.N.Z. No. 109, § 7 ("Where any Bill is introduced into the House of Representatives, the Attorney-General shall . . . as soon as practicable after the introduction of the Bill,—bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights."). For a controversial example of the exercise of this power, see Grant Huscroft, *Is the Defeat of Health Warnings a Victory for Human Rights? The Attorney-General and Pre-Legislative Scrutiny for Consistency with the New Zealand Bill of Rights*, 14 PUB. L. REV. 109 (2003).

Let us assume, for now, that the legislature is broadly aware of the issues of rights that a given bill gives rise to and that, having deliberated on the matter, it resolves—through debate and voting—to settle those issues in a particular way. The legislature takes sides on one or more of the disagreements we imagined in assumption four. The question we face is whether that resolution of the legislature should be dispositive or whether there is reason to have it second-guessed and perhaps overruled by the judiciary.

How should we answer this question? I have heard people say that the decision-rule should be this: The legislature's decision stands, except when it violates rights. But clearly this will not do. We are assuming that the members of the society disagree about whether a given legislative proposal violates rights. We need a way of resolving that disagreement. The point is as old as Hobbes: We must set up a decision-procedure whose operation will settle, not reignite, the controversies whose existence called for a decision-procedure in the first place.[64] This means that even though the members of the society we are imagining disagree about rights, they need to share a theory of legitimacy for the decision-procedure that is to settle their disagreements. So, in thinking about the reasons for setting up such a procedure, we should think about reasons that can be subscribed to by people on both sides of any one of these disagreements.[65]

I am presenting the need for legitimate decision-procedures as a response to the problem of moral disagreement. But I have heard philosophers say that because disagreement is pervasive in politics, we should not let it throw us off our stride. Because we disagree as much about legitimate decision-procedures as we do about the justification of outcomes, and because (on my own account) it is plain that we have to take a stand on *something*—namely, decision-procedures—despite such disagreement, why can't we just take a stand on the issue of substance and be done with it?[66] The response to this is that we must go to the issue of legitimacy whether we are likely to find disagreement there or

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64. *Cf.* THOMAS HOBBES, LEVIATHAN 123 (Richard Tuck ed., 1996) (1651).

65. Another way of saying this is that a normative political theory needs to include more than just a basis for justifying certain decisions on their merits. It needs to be more than, say, a theory of justice or a theory of the general good. It also has to address the normative issue of the legitimacy of the decision-procedures that are used to make political decisions in the face of disagreement. A normative political theory that does not do that is seriously incomplete.

66. Christiano phrases the point in terms of a regress of procedures: "We can expect disagreement at every stage, if Waldron is right; so if we must have recourse to a higher order procedure to resolve each dispute as it arises, then we will be unable to stop the regress of procedures." Christiano, *supra* note 59, at 521. But Christiano makes no attempt to show that this is a vicious regress. For discussion of the regress, see WALDRON, *supra* note 14, at 298-301.

not. For one thing, we do need to design a decision-procedure and we need to consider reasons relevant to that design. For another thing, there are important reasons relating to legitimacy—e.g., fairness, voice, participation—that arise because of disagreement and do not arise apart from our addressing the question of decision-procedures. Even if we disagree about these too, we have no choice but to consider them. The fact that we will disagree about them is not a proper ground for pushing them to one side and simply taking a stand on one side or the other in the prior (or substantive) disagreement.

No decision-procedure will be perfect. Whether it is a process of unreviewable legislation or whether it is a process of judicial review, it will sometimes come to the wrong decision, betraying rights rather than upholding them.[67] This is a fact of life in politics. Everyone must concede that there will sometimes be a dissonance between what they take to be the right choice and what they take to be the choice yielded by the decision-procedure they regard as legitimate. Richard Wollheim called this "a paradox in the theory of democracy,"[68] because it allows one and the same citizen to assert that *A* ought not to be enacted, where *A* is the policy he voted against, and *A* ought to be enacted, because *A* is the policy chosen by the majority. But Wollheim was wrong to ascribe this paradox to democracy. It is a general paradox in the theory of politics affecting any political theory that complements its account of what ought to be done with an account of how decisions ought to be made when there is disagreement about what ought to be done.

With that caution in mind, what are the reasons that need to be taken into account in designing or evaluating a decision-procedure for settling disagreements about rights? Two sorts of reasons may be considered. I shall call them "outcome-related" and "process-related" reasons, though they are both relevant to the issue of decision-procedure.

Process-related reasons are reasons for insisting that some person make, or participate in making, a given decision that stand independently of considerations about the appropriate outcome. In personal life, we sometimes say that a parent has the right to make the decision as to whether her child should be disciplined for a given infraction: It is not for a passer-by on the street or another passenger on the bus to make that decision. We may say that

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67. I have heard people say that the errors are always likely to be worse on the legislative side: The legislature may actually violate rights, whereas the worst that the courts can do is fail to interfere to protect them. This is a mistake. Courts exercising the power of judicial review may sometimes violate rights by striking down a statute that aims to protect them. I will discuss this further at the end of Part IV.

68. Richard Wollheim, *A Paradox in the Theory of Democracy*, *in* PHILOSOPHY, POLITICS AND SOCIETY 71 (Peter Laslett & W.G. Runciman eds., 2d ser. 1969).

while reserving judgment on whether the child should be disciplined. Indeed, we may say that even though we think the passer-by is likely to make a better decision on this than the parent. In politics, the most familiar process-related reasons are those based on political equality and the democratic right to vote, the right to have one's voice counted even when others disagree with what one says.

Outcome-related reasons, by contrast, are reasons for designing the decision-procedure in a way that will ensure the appropriate outcome (i.e., a good, just, or right decision). Our subject matter is disagreements about rights. Because rights are important, it is likewise important that we get them right and so we must take outcome-related reasons very seriously indeed. Wrong answers may be tolerable in matters of policy; but on matters of principle, if the wrong answer is given, then rights will be violated. The members of the society we are imagining understand how important it is to avoid such outcomes or minimize them to the extent they can.

Of course, it may not be easy to identify outcome-related reasons that people on opposing sides of rights-disagreements can agree upon. As I said earlier,[69] the design of a decision-procedure must be independent of the particular disagreement it is supposed to settle; it is no good if it simply reignites it. So we must avoid outcome-related reasons that aim specifically at particular controversial outcomes—e.g., favoring a decision-procedure because it is more likely to generate a pro-choice than a pro-life outcome. A decision-procedure chosen on this basis will hardly command the allegiance of the pro-life advocates. Given the disagreement, the whole point here is to set up a procedure for generating settlements in a way that can be recognized as legitimate on both sides.

It is possible, however, to garner outcome-related reasons on a more modest basis. Instead of saying (in a question-begging way) that we should choose those political procedures that are most likely to yield a particular controversial set of rights, we might say instead that we should choose political procedures that are most likely to get at the truth about rights, whatever that truth turns out to be. 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 not based on knowledge of the content of any particular rights. Rather, they are based on general institutional considerations about the way in

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69. *See supra* text accompanying note 64.

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.[70]

Reasons of this kind deserve to be taken seriously. Joseph Raz has gone further and suggested that these kinds of outcome-related reasons are the only reasons worth considering.[71] This dogmatism is based, presumably, on the importance of the issues at stake. The outcomes of decisions about rights are important. But there are also all sorts of important reasons that are not outcome-related that we should not hesitate to apply to the choices we make about the design of procedures for the resolution of disagreements about rights. I have given a few examples already, but here is another one: the principle of self-determination. There is a reason for having these disagreements be settled for each society within its own political system, rather than by diktat from outside (e.g., by a neighboring government or a former colonial power). Some think this is not a conclusive reason. They say that national self-determination and sovereignty should sometimes give way to international authority on questions of human rights.[72] But few deny that it has some importance. Raz has paid insufficient attention to the point that although outcome-related reasons are very important in this area of decisionmaking about rights, reasons of other kinds may be important too.

Once we see that there are reasons of all sorts in play, we have to consider their normative character because this will affect how they relate to one another. The term "outcome-related" sounds consequentialist. But because the consequences we are trying to avoid are rights-violations, their avoidance has some of the deontological urgency associated with rights. They may not be quite as compelling as the principle that prohibits direct violations: The designers of a decision-procedure are indirectly, not directly responsible for the violations that might be involved in an exercise of that procedure. But their responsibility is still a rights-based responsibility—there is a duty to take care in this regard.[73]

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70. Aileen Kavanagh, *Participation and Judicial Review: A Reply to Jeremy Waldron*, 22 L. & PHIL. 451, 466 (2003).

71. J. Raz, *Disagreement in Politics*, 43 AM. J. JURIS. 25, 45-46 (1998); *see also* RAWLS, A THEORY OF JUSTICE, *supra* note 53, at 230 ("The fundamental criterion for judging any procedure is the justice of its likely results.").

72. *See, e.g.*, Louis Henkin, That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera, Address at Fordham University School of Law, Robert R. Levine Distinguished Lecture Series (Feb. 23, 1999), *in* 68 FORDHAM L. REV. 1 (1999).

73. For the idea of various waves of duty being generated by a particular right, see Jeremy Waldron, *Rights in Conflict*, 99 ETHICS 503, 509-12 (1989).

What about the normative character of the process-related reasons? Process-related reasons are often matters of deontological urgency also. Ronald Dworkin, I think, misstates the character of participatory reasons when he refers to them as "[t]he participatory consequences of a political process."[74] He suggests that allowing individual citizens the opportunity to play a part in the community's political decisionmaking has a consequence—a good consequence—which is that it confirms their equal membership or standing in the community. It reassures them that they are regarded by others as persons whose opinions and choices have value. Allowing people to participate also has the good consequence of helping citizens to identify with the results of political decisions and to view those decisions as in some sense theirs, with good knock-on effects for legitimacy (in the sociologist's sense of that word).[75] All this is no doubt important. But it has the flavor of a headmaster noting the advantages that may accrue from giving his pupils a say in educational affairs through a school council. Dworkin's account radically underestimates the notion of a *right* to participate, the imperative that one be treated as an equal so far as a society's decisionmaking is concerned, the sense of principle that is at stake when someone asks indignantly, "How dare they exclude *my* say—disenfranchise *me*—from this decision, which affects me and to which I am subject?"

So, how do we weigh these process-related and outcome-related considerations? We face the familiar problem of trying to maximize the value of two variables, like asking someone to buy the fastest car at the lowest price. There are various ways we can set up the question. We could ask: "What method is most likely to get at the truth about rights, while at the same time adequately respecting the equal claim to be heard of the voices of those affected?"[76] Or we could ask: "What method best respects the equal claim to be heard of the voices of those affected, while at the same time being reasonably likely to get at the truth about rights?" I think I can cut through this Gordian knot. What I will argue, in Part IV, is that the outcome-related reasons are at best inconclusive. They are important, but they do not (as is commonly thought) establish anything like a clear case for judicial review. The process-related reasons, however, are quite one-sided. They operate mainly to discredit judicial review while leaving legislative decisionmaking unscathed. Thus, it

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74. RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 187 (2000).

75. These summary formulations of Dworkin's view are adapted from Kavanagh, *supra* note 70, at 458-59.

76. This is how the question is stated in FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY 59-60 (1999).

seems to me the legislative side wins on either formulation of the question. And that will be the core of the case against judicial review.

IV. OUTCOME-RELATED REASONS

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."[77] I guess the discussion at this point ought to be continuous with the broader debate about the institutional competence of courts, initiated by the legal process school.[78] Courts are good at deciding some issues and not others. Technically, we use the term "rights" to denote the issues that courts characteristically decide, because a plaintiff has to state a claim of right to be heard in a court at all. But as Lon Fuller observed, it does not follow that courts are therefore the appropriate forum for dealing with claims of right in the less technical sense under consideration here.[79] Some claims of right have the character of the sort of binary issue that courts might be competent to address; others have a multifaceted character that has usually been regarded as inappropriate for decision in a judicial structure. This matter bears further consideration. I will not say much more about it now, but will turn instead to the more specific claims that are made about the competence of courts and legislatures on the important moral issues that are the subject of this Essay.

It is tempting to associate outcome-related reasons with the case for judicial review (and process-related reasons with the case against it). This is a mistake. It is true that many of the more important process-related reasons are participatory and therefore favor elective or representative institutions. But it does not follow that all or most outcome-related reasons argue the other way. Outcome-related reasons, as we shall see, cut in both directions. There are things about legislatures that sometimes make them vulnerable to the sorts of pressures that rights are supposed to guard against; but there are also things about courts that make it difficult for them to grapple directly with the moral issues that rights-disagreements present.

Raz acknowledges that outcome-related reasons may weigh on both sides. He argues in familiar fashion that

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77. Raz, *supra* note 71, at 45.

78. *See* HART & SACKS, *supra* note 49, at 640-47.

79. Fuller, *supra* note 49, at 368-70.

> [i]n many countries there are ample reasons to suspect that members of the legislature are moved by sectarian interests to such a degree that they are not likely even to attempt to establish what rights (some) people have. . . . We may know that certain factors are likely to cloud people's judgments. They may be, for example, liable to be biased in their own interest. We may therefore prefer a procedure in which those charged with a decision are not affected, or not directly affected, by their own decision. There are other factors known to bias judgment, and their nature and presence can be established even without knowledge of the content of the rights concerned.[80]

Now, in considering a charge like this, we have to ask about its compatibility with our third assumption: Is this sort of sectarian prejudice typical of legislatures in all societies? Or should we associate it with the non-core case of a society whose members are largely indifferent to rights? I shall say more about this in Part VII.[81] But even taken at face value, Raz's argument is not univocal in its tendency. The same sectarian pressures often explain judicial neglect of rights as well. We have seen this in the United States in cases as diverse as *Korematsu*, *Schenck*, *Dred Scott*, and *Prigg*.[82] More recently, Laurence Tribe (usually a stalwart defender of judicial review) observed that in the panic that afflicted America after 9/11, "it would be a terrible mistake for those who worry about civil rights and liberties to pin too much hope on the judiciary in times of crisis."[83]

In any case, Raz acknowledges that outcome-related reasons also argue in the opposite direction:

> Sometimes . . . there are reasons for thinking that those whose interests are not going to be affected by a decision are unlikely to try honestly to

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80. Raz, *supra* note 71, at 46.

81. *See infra* text accompanying notes 137-141. This is where I will deal with the claim (for non-core cases) that judges who sympathize with minority rights are in a better position to resist popular prejudice than are legislators who sympathize with minority rights.

82. Korematsu v. United States, 323 U.S. 214 (1944) (refusing to protect citizens of Japanese descent from internment during the Second World War); Schenck v. United States, 249 U.S. 47 (1919) (holding that criticizing conscription during the First World War was like shouting fire in a crowded theater); Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 425-27 (1857); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 612 (1842) (striking down state legislation that sought to protect African-Americans from slave-catchers).

83. Laurence Tribe, *Trial by Fury: Why Congress Must Curb Bush's Military Courts*, NEW REPUBLIC, Dec. 10, 2001, at 18, 19; *see also* Ronald Dworkin, *The Threat to Patriotism*, N.Y. REV. BOOKS, Feb. 28, 2002, at 44, 46-47 (noting courts' past tolerance of rights-violations in times of crisis).

> find out what is just in the circumstances. Sometimes 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.[84]

Legislatures are set up with structures of representation precisely in order to foster this sense of appreciation.

It is sometimes suggested that structures of democratic participation take no cognizance at all of the independent importance of securing appropriate outcomes—they just blindly empower the majority. This is nonsense. All democracies limit the franchise in various ways in order to secure a modicum of mature judgment at the polls. They exclude children from voting, for example, even though children are affected by the decisions under consideration. Moreover, legislatures are constituted in a way that ensures that information about the tolerability of various options to different sections of the society is fed into the decision-process. And decisions are usually made in the context of bicameral institutions, so that each legislative proposal has to secure majority support in each of two houses on slightly different elective schedules.[85] Furthermore, systems with weak judicial review or no judicial review sometimes make specific provision in the legislative process for issues of rights to be highlighted.[86] Specific provision is made in most democracies for carefully orchestrated debate around election time, as well as a whole array of connections between formal debate in the legislature and informal debate and accumulation of information outside the legislature. All these are outcome-related adjustments to democratic procedures. What we see, on the participatory side, is not what Rawls called a claim of pure procedural justice, but something like imperfect procedural justice.[87]

In general, what I notice when I read outcome-related arguments in favor of judicial review is that people assume that an outcome-related case must be

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84. Raz, *supra* note 71, at 46.

85. Some bicameral systems, like the United Kingdom, have an unelected upper house and provisions (in the Parliament Acts and in some of the conventions of the British Constitution) that allow the lower house to prevail (eventually) in the event of conflict.

86. *See supra* note 63 and accompanying text.

87. *See* RAWLS, A THEORY OF JUSTICE, *supra* note 53, at 84-85. We speak of pure procedural justice when we want to indicate that there is nothing more to the justice of the outcome than the fact that it was arrived at by scrupulously following a just procedure. We speak of imperfect procedural justice when we want to convey the point that a given outcome must be judged on its merits as well as on the basis of the procedure that yielded it.

able to be made in favor of courts, if only because the most familiar arguments against judicial review are non-outcome-related. People strain to associate outcome-related reasons with the judiciary, and in so doing they often peddle a quite unrealistic picture of what judicial decisionmaking is like.[88] Opponents of judicial review are often accused of adopting a naively optimistic view of legislatures. But sometimes we do this deliberately, matching one optimistic picture with another in the face of the refusal of the defenders of courts to give a realistic account of what happens there.[89]

In the remainder of this Part, I want to consider in more detail three outcome-related advantages that are sometimes claimed for courts (a) that issues of rights are presented to courts in the context of specific cases; (b) that courts' approach to issues of rights is oriented to the text of a Bill of Rights; and (c) that reasoning and reason-giving play a prominent role in judicial deliberation. These are said to weigh in favor of judicial review. On all three counts, however, I shall argue that there are important outcome-related defects in the way courts approach rights and important outcome-related advantages on the side of legislatures.

A. Orientation to Particular Cases

People sometimes argue that the wonderful thing about judicial reasoning on rights (as opposed to legislative reasoning on rights) is that issues of rights present themselves to judges in the form of flesh-and-blood individual situations. Rights, after all, are individual rights, and it helps focus the mind to see how an individual is affected by a piece of legislation. As Michael Moore puts the point, "judges are better positioned for . . . moral insight than are legislatures because judges have moral thought experiments presented to them everyday [sic] with the kind of detail and concrete personal involvement needed for moral insight."[90]

But this is mostly a myth. By the time cases reach the high appellate levels we are mostly talking about in our disputes about judicial review, almost all trace of the original flesh-and-blood right-holders has vanished, and argument

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88. For a general critique of arguments that associate judicial review with careful moral deliberation among, for example, Justices on the U.S. Supreme Court, see KRAMER, *supra* note 11, at 240. Kramer gives a fine description of the way in which Justices' political agendas, and the phalanxes of ideologically motivated clerks in the various chambers, interfere with anything that could be recognized as meaningful collegial deliberation.

89. *See* JEREMY WALDRON, THE DIGNITY OF LEGISLATION 2 (1999).

90. Michael S. Moore, *Law as a Functional Kind*, *in* NATURAL LAW THEORY, *supra* note 19, at 188, 230. For a response, see Waldron, *Moral Truth and Judicial Review*, *supra* note 19, at 83-88.

such as it is revolves around the abstract issue of the right in dispute. Plaintiffs or petitioners are selected by advocacy groups precisely in order to embody the abstract characteristics that the groups want to emphasize as part of a general public policy argument. The particular idiosyncrasies of the individual litigants have usually dropped out of sight by the time the U.S. Supreme Court addresses the issue, and the Court almost always addresses the issue in general terms.[91]

The process of legislation is open to consideration of individual cases, through lobbying, in hearings, and in debate. Indeed, there is a tendency these days to initiate legislation on the basis of notorious individual cases—Megan's Law, for example.[92] Hard cases make bad law, it is sometimes said. To the extent that this is true, it seems to me that legislatures are much better positioned to mount an assessment of the significance of an individual case in relation to a general issue of rights that affects millions and affects them in many different ways.[93]

B. Orientation to the Text of a Bill of Rights

We are imagining a society with a Bill of Rights, and if there is to be judicial review of legislation, it will presumably center on the Bill of Rights. The Bill of Rights, we have assumed, has been adopted in the society pursuant to members' shared commitment to the idea of individual and minority rights notwithstanding the fact that they disagree about what these rights are and what they entail. Now, when rights-disagreements erupt in regard to

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91. *See* Sarah Weddington, *Roe v. Wade*: Past and Future, Address at Suffolk University Law School, The Donahue Lecture Series (Dec. 7, 1989), *in* 24 SUFFOLK U. L. REV. 601, 602-03 (1990).

92. Megan's Law, which created a register of sex offenders, was enacted in New Jersey in 1994, 1994 N.J. Laws 1152 (codified at N.J. STAT. ANN. §§ 2C:7-1 to 7-11 (2005)), after Megan Nicole Kanka was raped and murdered by a convicted sex offender. There is also now a Federal Megan's Law. 42 U.S.C. § 14071 (2000). For a description of the enactment of this legislation, see Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315 (2001).

93. *See* EISGRUBER, *supra* note 13, at 173 ("Judges take up constitutional issues in the course of deciding controversies between particular parties. As a result, those issues come to them in a way that is incomplete . . . . Not all interested persons will have standing to appear before the court. Judges receive evidence and hear arguments from only a limited number of parties. . . . As a result, judges may not have the information necessary to gain a comprehensive perspective on the fairness of an entire social, political, or economic system."). Eisgruber concludes from this that it is probably unwise for judges to attempt to address issues that turn on what he calls "comprehensive" moral principles. *Id.* at 165, 171, 173.

legislation, there is a question about the role that the established Bill of Rights should play in the decision-process in which the issue is posed. From an outcome-related point of view, is it a good idea or a bad idea that rights-disagreements be fought out in relation to the terms of a Bill of Rights?

One reason for thinking it is a good idea is that the written formulations of the Bill of Rights can help disputants focus on the abstract rights-issues at stake. But there are powerful reasons on the other side. The forms of words used in the Bill of Rights will not have been chosen with rights-disagreements in mind. Or, if they were, they will have been chosen in order to finesse the disagreements about rights that existed at the time the Bill of Rights was set up. Their platitudes may be exactly the wrong formulations to focus clear-headed, responsible, and good faith explorations of rights-disagreements.

The written formulations of a Bill of Rights also tend to encourage a certain rigid textual formalism.[94] A legal right that finds protection in a Bill of Rights finds it under the auspices of some canonical form of words in which the provisions of the Bill are enunciated. One lesson of American constitutional experience is that the words of each provision tend to take on a life of their own, becoming the obsessive catchphrase for expressing everything one might want to say about the right in question. This may be less of a danger in a system of legislative supremacy, because legislators can pose the issue for themselves if they like without reference to the Bill of Rights' formulations. But it is part of the modus operandi of courts to seek textual havens for their reasoning, and they will certainly tend to orient themselves to the text of the Bill of Rights in a rather obsessive way.

At the very least, courts will tend to be distracted in their arguments about rights by side arguments about how a text like the Bill of Rights is best approached by judges. American experience bears this out: The proportion of argument about theories of interpretation to direct argument about the moral issues is skewed in most judicial opinions in a way that no one who thinks the issues themselves are important can possibly regard as satisfactory. This is partly because the legitimacy of judicial review is itself so problematic. Because judges (like the rest of us) are concerned about the legitimacy of a process that permits them to decide these issues, they cling to their authorizing texts and debate their interpretation rather than venturing out to discuss moral reasons directly.[95]

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94. This is an argument I developed in Waldron, *A Right-Based Critique*, *supra* note 14.

95. *See* TUSHNET, *supra* note 11, at 60 ("Courts may design some doctrines to reflect their sense of their own limited abilities, not to reflect directly substantive constitutional values.").

One final point. The text of a Bill of Rights may distort judicial reasoning not only by what it includes but also by what it omits. Suppose the members of a given society disagree about whether the Bill of Rights should have included positive (socioeconomic) as well as negative (liberty) rights.[96] Those who think positive rights should have been included may think the present Bill of Rights distorts moral reasoning by excluding them. A response may be that, at worst, this omission just leads to a possible failure to review legislation in cases in which review would be appropriate, but it is not an argument against judicial review as such. But that's too simple. A failure to include positive rights may alter (or distort) judges' understanding of the rights that *are* included. Judges may give more weight to property rights or to freedom of contract, say, than they would if property and freedom of contract were posited alongside explicit welfare rights. And giving them greater weight may lead judges to strike down statutes that ought not to be struck down—statutes that are trying to make up the deficiency and implement by legislation those rights that failed to register in the formulations of the Bill of Rights.

C. Stating Reasons

It is often thought that the great advantage of judicial decisionmaking on issues of individual rights is the explicit reasoning and reason-giving associated with it. Courts give reasons for their decisions, we are told, and this is a token of taking seriously what is at stake, whereas legislatures 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

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96. *See* Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.) (observing that the American constitutional scheme "is a charter of negative rather than positive liberties"); *cf.* Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1393-94 (1984) ("We could of course have a different Constitution. . . . One can argue that the party of humanity ought to struggle to reformulate the rhetoric of rights so that Judge Posner's description would no longer seem natural and perhaps would even seem strained.").

the weight of such reasons is quite different for courts than for an ideal political deliberator. Partly this is the point mentioned earlier—that the reasons will be oriented toward the terminology of the Bill of Rights. If one is lucky enough to have a fine and up-to-date Bill of Rights, then there may be some congruence between judicial reason-giving and the reason-giving we would look for in fully rational, moral, or political deliberation. But if one has an antiquated constitution, two or three hundred years old, then the alleged reason-giving is likely to be artificial and distorted. In the United States, what is called "reason-giving" is usually an attempt to connect the decision the court is facing with some antique piece of ill-thought-through eighteenth- or nineteenth-century prose. (For example, is an argument about whether "substantive due process" is an oxymoron the best framework for thinking about labor law or, for that matter, abortion rights?)

Courts' reason-giving also involves attempts to construct desperate analogies or disanalogies between the present decision they face and other decisions that happen to have come before them (and in which they were engaged in similar contortions). There is laborious discussion of precedent, even though it is acknowledged at the highest levels of adjudication that precedent does not settle the matter.[97] (So there is also laborious discussion of the circumstances in which precedent should or shouldn't be overridden.[98]) And all the time, the real issues at stake in the good faith disagreement about rights get pushed to the margins. They usually take up only a paragraph or two of the twenty pages or more devoted to an opinion, and even then the issues are seldom addressed directly. In the Supreme Court's fifty-page opinion in *Roe v. Wade*, for example, there are but 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.[99] Read those paragraphs: The result may be appealing, but the "reasoning" is thread-bare.

I actually think there is a good reason for this. Courts are concerned about the legitimacy of their decisionmaking and so they focus their "reason-giving"

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97. *See, e.g.*, Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988).

98. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854-69 (1992) (discussing the circumstances in which constitutional precedents may be overturned).

99. There is a tremendous amount of legal and social history in the opinion, but only a few pages address the actual moral issues at stake. Roe v. Wade, 410 U.S. 113, 153-55 (1973) (discussing privacy and the importance of reproductive rights); *id.* at 159-62 (discussing the alleged rights or personality of the fetus).

on facts that tend to show that they are legally authorized—by constitution, statute, or precedent—to make the decision they are proposing to make. This is an understandable thing to do. But it counts heavily against the courts in the outcome-related argument about the preferability of judicial review over legislation.[100] Distracted by these issues of legitimacy, courts focus on what other courts have done, or what the language of the Bill of Rights is, whereas legislators—for all their vices—tend at least to go directly to the heart of the matter.[101]

In this regard, it is striking how rich the reasoning is in legislative debates on important issues of rights in countries without judicial review.[102] I recently read through the House of Commons debates on the Medical Termination of Pregnancy Bill from 1966.[103] This was a bill proposing to liberalize abortion law. The second reading debate on that bill is as fine an example of a political institution grappling with moral issues as you could hope to find. It is a sustained debate—about one hundred pages in *Hansard*[104]—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.[105] One remarkable thing was that everyone who participated in the debate, even the pro-life MPs (when they saw which way the vote was going to go), paid tribute to the respectfulness with which their positions had been

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100. Eisgruber seems to concede this, acknowledging that "[t]oo often judges attempt to justify controversial rulings by citing ambiguous precedents, and . . . veil their true reasons behind unilluminating formulae and quotations borrowed from previous cases." EISGRUBER, *supra* note 13, at 70; *see also id.* at 135 ("[J]udges . . . often . . . pretend that they are not making political judgments themselves, and that their decisions were forced upon them by textual details or historical facts.").

101. There is an important point here that Mark Tushnet has emphasized: We should not be criticizing legislators for failing to reason as judges do, for that may not be a smart way to address the issues at stake. TUSHNET, *supra* note 11, at 63-65.

102. This is adapted from Waldron, *supra* note 46.

103. In the British legislature, the second reading debate is when deliberation takes place on the main principles of the bill.

104. 732 PARL. DEB., H.C. (5th ser.) (1966) 1067, 1067-1166.

105. The second reading debate was not the end, of course. There was a long committee stage and then a third reading debate, and then similar debates in the House of Lords. But eventually the liberalizing legislation was enacted.

listened to and heard in that discussion.[106] Think about that: How many times have we ever heard anybody on the pro-life side pay tribute to the attention and respectfulness with which her position was discussed, say, by the Supreme Court in *Roe v. Wade*?[107]

In the United States, we congratulate ourselves on consigning issues of individual rights such as abortion rights to the courts for constitutional adjudication on the ground that courts may be regarded as forums of principle, to use Ronald Dworkin's famous phrase.[108] Indeed we sometimes say the British are backward for not doing things that way.[109] But the key difference between the British legislative debate and the American judicial reasoning is that the latter is mostly concerned with interpretation and doctrine, while in the former decisionmakers are able to focus steadfastly on the issue of abortion itself and what it entails—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.[110]

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106. *See, e.g.*, 732 PARL. DEB., H.C. (5th ser.) (1966) 1152. Norman St. John-Stevas, a Catholic MP who voted against the bill, nevertheless began his argument by noting, "[w]e all agree that this has been a vitally important debate, conducted on a level which is worthy of the highest traditions of the House." *Id.* He then moved on to congratulate the bill's sponsor "on the manner in which he introduced the Bill, which he did with extraordinary moderation and skill." *Id.*

107. When I mention this example, my American friends tell me that the British legislature is organized to make forms of debate possible that are not possible in the United States. Well, leaving aside the question of whether the United States should be regarded as a pathological case, this is simply false. The debate I have just referred to worked because the House of Commons suspended one of its distinguishing features—strong party discipline—for the purpose of this issue of rights. MPs actually debated the matter much more in the style of their American counterparts, not necessarily toeing a party line but stating their own opinions clearly and forcefully.

108. DWORKIN, *supra* note 3, at 33, 69-71.

109. *See* Editorial, *Half-Measures on British Freedoms*, N.Y. TIMES, Nov. 17, 1997, at A22 (criticizing the Human Rights Act for not moving the United Kingdom wholeheartedly to a system of strong judicial review).

110. Elena Kagan and others have suggested to me that this critique of the way courts discuss rights is predicated on an assumption that what we are aiming to protect are moral rights. If, on the other hand, what we value is the protection of our legal constitutional rights, then this mode of discussion is not as inappropriate as my critique suggests. I am not convinced. What we aim to protect is rights, and the question is what mechanisms available in the

I am sure there is more to be said on the outcome-related question. It is certainly the case that just as courts address questions of rights in ways that distort what is really at stake, so too can legislative reasoning be a disgrace, as legislative majorities act out of panic, recklessly, or simply parrot popular or sectarian slogans in their pseudo-debates. The question is this: Which defects in deliberation should be regarded as normal and which as aberrations in the way that the respective institutions—courts and legislatures—are supposed to behave? Despite Dworkin's rhetoric about "forums of principle," I think courts are expected to behave in the ways that I have criticized, focusing on precedent, text, doctrine, and other legalisms. Our assumption about courts—assumption two—is about institutions that behave in that way, indeed behave well by those (legalistic) standards. In the case of legislatures, however, hasty or sectarian legislating is not part of the normal theory of what legislatures are set up to do. It is not what we should assume for the core case of legislative decisionmaking in a society most of whose members respect rights. There may be some countries—perhaps the United States—in which peculiar legislative pathologies have developed. If that is so, then Americans should confine their non-core argument for judicial review to their own exceptional circumstances.

V. PROCESS-RELATED REASONS

Among the reasons we have for setting up decision-procedures one way or another, some may have little to do with outcomes, either particular outcomes or outcomes in general. They are concerned instead with voice or fairness or other aspects of the process itself. As I said earlier, it is often assumed that process-related arguments weigh unequivocally against judicial review. This is not quite true. Some feeble process-related arguments have been concocted by defenders of the practice, and I shall review those at the end of this Part. But it is mostly true: The preponderance of the process-related reasons weigh in favor of legislatures.

The question of the political legitimacy of decision-procedures in the face of disagreement about outcomes may be posed as follows. (I am afraid this is going to be quite abstract.)

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modern state are best at protecting them and facilitating intelligent discussion about them. I do not assume that the mode of discourse in a moral philosophy seminar is the appropriate one. What I am suggesting here is that it is important, one way or another, to get at the real issues of human interests and human liberties that are at stake in our disagreements. A legalistic way of proceeding may or may not be the best way of doing that, but it would be quite wrong to say that we ought to value the legalism as an end in itself.

We imagine a decision being made by a certain process and we imagine a citizen C_n—who is to be bound or burdened by the decision—disagreeing with the decision and asking why she should accept, comply, or put up with it. Some of those who support the decision may try to persuade C_n that it is right in its substance. But they may fail, not because of any obtuseness on her part, but simply because C_n continues (not unreasonably) to hold a different view on this vexed and serious matter. What then is to be said to C_n? A plausible answer may be offered to her concerning the process by which the decision was reached. Even though she disagrees with the outcome, she may be able to accept that it was arrived at fairly. The theory of such a process-based response is the theory of political legitimacy.

Political decision-procedures usually take the following form. Because there is disagreement about a given decision, the decision is to be made by a designated set of individuals $\{C_1, C_2, \ldots C_m\}$ using some designated decision-procedure. The burden of legitimacy-theory is to explain why it is appropriate for these individuals, and not some others, to be privileged to participate in the decisionmaking. As C_n might put it, "Why them? Why not me?" The theory of legitimacy will have to provide the basis of an answer to that question. Because the problem is general—it is not just a matter of C_n's idiosyncratic perversity—it will have to give a similar answer to similar questions from C_o and C_p and all the other C's not included in the set of privileged decisionmakers. But even if this answer is accepted, the struggle is not over. The theory of legitimacy also has to provide an answer to an additional question that C_n may pose: "In the decision-procedure that was used, why wasn't greater weight given to the views of those decisionmakers who felt as I do about the matter?" There must be a defense of the decision-procedure used by $\{C_1, C_2, \ldots C_m\}$, not just a defense of its membership.

Let us now make this abstract algebra more concrete. Suppose a citizen who disagrees with a legislative decision about rights poses the two questions I have envisaged. She asks: (1) why should this bunch of roughly five hundred men and women (the members of the legislature) be privileged to decide a question of rights affecting me and a quarter billion others?; and (2) even if I accept the privileging of this five hundred, why wasn't greater weight given to the views of those legislators who agreed with me?

In democracies, legislatures are set up in ways that provide reasonably convincing answers to these two questions. The answer to the first question is provided by the theory of fair elections to the legislature, elections in which people like C_n were treated equally along with all their fellow citizens in determining who should be privileged to be among the small number participating in decisions of this kind. The answer to the second question is given by the well-known fairness arguments underlying the principle of

majority decision (MD). It is not my task to defend this here; the fairness/equality defense of the majority-decision rule is well known.[111] Better than any other rule, MD is neutral as between the contested outcomes, treats participants equally, and gives each expressed opinion the greatest weight possible compatible with giving equal weight to all opinions. When we disagree about the desired outcome, when we do not want to bias the matter up-front one way or another, and when each of the relevant participants has a moral claim to be treated as an equal in the process, then MD—or something like it—is the principle to use.[112]

But what if someone responds as follows: I can see why individual citizens like C_n have a right to be treated as equals in a decisionmaking process on a matter that affects them all. But why do the five hundred representatives in the legislature have a right to be treated as equals in this process? What justifies their use of MD?

The answer refers to the continuity as between the answers to the first and second questions in the case of legislatures. For legislatures, we use a version of MD to choose representatives and we use a version of MD for decisionmaking among representatives. The theory is that together these provide a reasonable approximation of the use of MD as a decision-procedure among the citizenry as a whole (and so a reasonable approximation of the application of the values underlying MD to the citizenry as a whole).

In general, then, what we are saying to C_n is roughly as follows: You are not the only one who makes this challenge to the decision-procedures we use. As a matter of fact, millions of individuals do. And we respond to each of them by conceding her point and giving her a say in the decision. In fact, we try to give her as much of a say as we can, though of course it is limited by the fact that we are trying to respond fairly to the case that can be made along the same lines to take into account the voice of each individual citizen. We give each

111. For the theorem (in social choice theory) that MD alone satisfies elementary conditions of fairness, equality, and rationality, see AMARTYA K. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 71-74 (1970); and Kenneth O. May, *A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision*, 20 ECONOMETRICA 680 (1952). There are also useful discussions in CHARLES R. BEITZ, POLITICAL EQUALITY 58-67 (1989); and ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 139-41 (1989).

112. Ronald Dworkin has convinced me, in conversation, that MD is not an appropriate principle to use in regard to first-order issues of justice. If we were in an overcrowded life-boat and somebody had to go overboard, it would not be appropriate to use MD to decide who that should be. MD *is* an appropriate principle, however, for choosing among general rules. If someone in the life-boat proposes that we should draw straws and someone else suggests that the oldest person should be required to leave the life-boat, then MD seems a fair basis for choosing among these rules.

person the greatest say possible compatible with an equal say for each of the others. That is our principle. And we believe that our complicated electoral and representative arrangements roughly satisfy that demand for political equality—that is, equal voice and equal decisional authority.

Of course, in the real world, the realization of political equality through elections, representation, and legislative process is imperfect. Electoral systems are often flawed (e.g., by unsatisfactory arrangements for drawing district boundaries or a lack of proportionality between districts) and so are legislative procedures (e.g., by a system of seniority that compromises fairness in the legislature). All this can be acknowledged. But remember our first assumption: a set of legislative institutions—including a system of elections to the legislature and a system of decisionmaking within it—that are in reasonably good shape so far as these democratic values of equality and fairness are concerned. We are assuming also that the legislators and their constituents keep this system under review for its conformity to these principles. For example, in many democracies there are debates about rival systems of proportional representation, districting, and legislative procedure. C_n may complain that these systems are not perfect and that they have not been reformed to the extent that they ought to have been. But a good theory of legitimacy (for real-world polities) will have a certain looseness to accommodate inevitable defects. It will talk about reasonable fairness, not perfect fairness. No doubt some electoral and legislative systems fail even these generous criteria. But our core case is not supposed to address situations in which the legislative and electoral systems are pathologically or incorrigibly dysfunctional.

Let's return to our core case and to the confrontation we are imagining with our recalcitrant citizen C_n. That something along the lines described above can be said in response to C_n's complaint about the decision of a reasonably well-organized legislature is important for legitimacy, but it is not conclusive. For C_n may envisage a different procedure that is even more legitimate than the legislative procedure is. Legitimacy is partly comparative.[113] Because different institutions and processes might yield different results, defending the legitimacy of a given institution or process involves showing that it was or would be fairer than some other institution or process that was available and might have reached the contrary decision.[114]

So now we imagine—or, in a system like the United States, we observe—decisions being made not by a legislature but by a court (let's make it the U.S.

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113. *See* Waldron, *supra* note 47.

114. *See* MICHELMAN, *supra* note 76, at 57-59.

Supreme Court) on a vexed issue of rights on which the citizens disagree. And a citizen—again we'll call her C_n—who disagrees with the substance of one of the court's decisions complains about it. She asks: (1) why should these nine men and women determine the matter?; and (2) even if they do, why should they make their decision using the procedure that they use rather than a procedure that gives more weight to Justices with a view that C_n favors?

These are much tougher questions for the Court to answer than they were for legislators to answer. We have it on good authority that challenges like these are often voiced noisily outside the Court and that the Justices are sometimes distressed by them. Some of them, however, reflect on that distress. (It is time to roll your eyes now and pay no attention for a few minutes, because I am going to quote Justice Antonin Scalia and quote him at length.)

> In truth, I am as distressed as the Court is . . . about the "political pressure" directed to the Court: the marches, the mail, the protests aimed at inducing us to change our opinions. How upsetting it is, that so many of our citizens (good people, not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus. The Court would profit, I think, from giving less attention to the *fact* of this distressing phenomenon, and more attention to the *cause* of it. That cause permeates today's opinion: a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls "reasoned judgment," which turns out to be nothing but philosophical predilection and moral intuition.[115]

Justice Scalia continued:

> What makes all this relevant to the bothersome application of "political pressure" against the Court are the twin facts that the American people love democracy and the American people are not fools. As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making *value judgments* . . . then a

115. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 999-1000 (1992) (Scalia, J., dissenting) (citation omitted).

> free and intelligent people's attitude towards us can be expected to be (*ought* to be) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better. If, indeed, the "liberties" protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours*.[116]

So, as Scalia says, the legitimacy questions are front-and-center, and the defenders of judicial review have to figure out a response.

First, why should these Justices and these Justices alone decide the matter? One answer might be that the Justices have been appointed and approved by decisionmakers and decisionmaking bodies (the President and the Senate) who have certain elective credentials. The President is elected and people often know what sort of persons he is likely to appoint to the Supreme Court, and the U.S. Senators who have to approve the appointments are elected also, and their views on this sort of thing may be known as well. True, the Justices are not regularly held accountable in the way legislators are, but, as we have already remarked, we are not looking for perfection.

So, the defender of judicial review is not altogether tongue-tied in response to our citizen's challenge; there is something to say. Nevertheless, if legitimacy is a comparative matter, then it is a staggeringly inadequate response. The system of legislative elections is not perfect either, but it is evidently superior as a matter of democracy and democratic values to the indirect and limited basis of democratic legitimacy for the judiciary. Legislators are regularly accountable to their constituents and they behave as though their electoral credentials were important in relation to the overall ethos of their participation in political decisionmaking. None of this is true of Justices.

Second, even if we concede that vexed issues of rights should be decided by these nine men and women, why should they be decided by simple majority voting among the Justices? Here, the situation gets worse for defenders of judicial review. I have always been intrigued by the fact that courts make their decisions by voting, applying the MD principle to their meager numbers. I know they produce reasons and everything we discussed above. But in the end it comes down to head-counting: five votes defeat four in the U.S. Supreme Court, irrespective of the arguments that the Justices have concocted. If MD is challenged in this context, can we respond to it in roughly the same way that we imagined a response on behalf of legislatures? Actually, no, we cannot. MD

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116. *Id.* at 1000-01.

is appropriate for persons who have a moral claim to insist on being regarded as equals in some decision-process. But I cannot see any moral basis for this claim in the case of Supreme Court Justices. They do not represent anybody. Their claim to participate is functional, not a matter of entitlement.

I am handicapped here by the more or less complete lack of theoretical attention to the use of MD in courts.[117] Scholars have written some about our empirical experience of voting and voting strategy on courts, and some have suggested novel ways of combining judges' votes on the particular issues involved in each case, rather than on the overall outcome.[118] But I am not aware of any elementary defense of judicial majoritarianism.[119] The usual fairness-and-equality defense is unavailable. I suspect that if the use of MD by courts were to be defended, it would be defended either as a simple technical device of decision with no further theoretical ramifications,[120] or on the basis of Condorcet's jury theorem (majority voting by a group of adjudicators arithmetically enhances the competence of the group beyond the average competence of its members).[121] If it is the latter, then the defense of MD is part of the outcome-related case for judicial competence, which means that it will have to compete with a similar case that can be made for the much larger voting bodies in legislatures.[122] However this argument would play out, my

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117. I try to say a little about it in Waldron, *Deliberation, Disagreement, and Voting*, *supra* note 14, at 215-24.

118. *See, e.g.*, Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1 (1993); Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986); David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743 (1992).

119. One reason for this is that defenders of judicial review prefer not to talk about the use of simple majority voting among the Justices on issues of rights. They want to be able to condemn majority voting on rights as a characteristic of legislatures. If pressed, they will acknowledge that, of course, judges decide issues by, say, 5-4 or 6-3 majorities on the Supreme Court. But I have never, ever heard a defender of judicial review introduce this into discussion himself or herself, let alone undertake to explain why it is a good idea.

120. *See* HANNAH ARENDT, ON REVOLUTION 163 (photo. reprint 1982) (1963) (stating that "the principle of majority is inherent in the very process of decision-making" and is "likely to be adopted almost automatically in all types of deliberative councils and assemblies").

121. MARQUIS DE CONDORCET, *Essay on the Application of Mathematics to the Theory of Decision-Making* (1785), *reprinted in* CONDORCET: SELECTED WRITINGS 33 (Keith Michael Baker ed. & trans., 1976).

122. The Condorcet theorem holds that the larger the voting group, the greater the enhancement of group competence above average individual voter competence by majority voting. Of course, the result presupposes that average individual competence is higher than fifty percent. For a discussion of Condorcet's doubts about the application of this last condition, see Jeremy Waldron, *Democratic Theory and the Public Interest: Condorcet and Rousseau Revisited*, 83 AM. POL. SCI. REV. 1317, 1322 (1989).

point is this: There is no additional fairness argument for the use of MD by courts, as there is for its use by legislatures.

These last points should remind us that the responses we have been imagining to C_n's challenge to legislative and judicial procedures do not stand alone. We may also make an outcome-related case to respond to her challenge. But I think I have been able to show in this Part, and the previous Part, that the outcome-related case is inconclusive (or it argues in favor of legislatures) while the process-related case is almost wholly on the legislative side. Remember too what we said at the end of Part III. The reasons on both sides have to do with rights. If one institution or the other was clearly superior at determining what rights people really have, then that would weigh very heavily indeed in favor of that institution. But that is not the case. On the process side, institutions giving final authority on these matters to judges fail to offer any sort of adequate response to the fairness-complaint of the ordinary citizen based on the principle—not just the value—of political equality. That failure might be tolerable if there were a convincing outcome-based case for judicial decisionmaking. Defenders of judicial review pretend that there is. But as we saw above, it is just unsupported assertion.

Perhaps aware of all this, defenders of judicial review have tried a number of last-ditch attempts to reconcile their favored institution to democratic values. I will consider these briefly, because there is not much to them.

First, defenders of judicial review claim that judges do not make their own decisions about rights; they simply enforce decisions of the people that are embodied in a Bill of Rights, which itself has democratic credentials, either as legislation or as part of a constitution. This claim does not undermine the core case against judicial review. We are assuming that the Bill of Rights does not settle the disagreements that exist in the society about individual and minority rights. It bears on them but it does not settle them. At most, the abstract terms of the Bill of Rights are popularly selected sites for disputes about these issues. The question we have been considering is who is to settle the issues that are fought out on those sites.

Second, and in much the same spirit, defenders of judicial review claim that judges are simply enforcing the society's own precommitment to rights. The society has bound itself to the mast on certain principles of right, and, like Ulysses' shipmates, the judges are just making sure the ropes remain tied. This common analogy has been thoroughly discredited in the literature.[123] Briefly,

123. *See* JON ELSTER, ULYSSES UNBOUND 88-96 (2000) (casting doubt on some arguments made in JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 93 (1984)); *see also* WALDRON, *supra* note 14, at 255-81.

the response is that the society has not committed itself to any particular view of what a given right entails, so when citizens disagree about this, it is not clear why giving judges the power to decide should be understood as upholding a precommitment. If someone insists nevertheless that society has committed itself to a particular view about the right in question (and the judges, by voting among themselves, somehow ascertain that precommitment), once an alternative understanding of the right is in play, it is not clear why the existing precommitment should hold. The Ulysses model works only when the precommitment guards against various aberrations, not when it guards against changes of mind in relation to genuine disagreement as to what a reasonable outcome would be.[124]

Third, defenders of judicial review claim that if legislators disagree with a judicial decision about rights, they can campaign to amend the Bill of Rights to explicitly override it. Their failure to do this amounts to a tacit democratic endorsement. This argument is flawed because it does not defend the baseline that judicial decisionmaking establishes. Amending a Bill of Rights characteristically involves a supermajority; or if it is a British- or New Zealand-style statute, it will have credentials in the political culture that raise the stakes and increase the burden associated with the amendment effort. If our disgruntled citizen C_n asks why the deck should be stacked in this way, the only answer we can give her refers back to judicial decision. And that has already been found wanting.

Fourth, defenders of judicial review insist that judges do have democratic credentials: They are nominated and confirmed by elected officials, and the kind of judicial nominations that a candidate for political office is likely to make nowadays plays an important role in the candidate's electoral campaign.[125] This is true; but (as I have already remarked) the issue is comparative, and these credentials are not remotely competitive with the democratic credentials of elected legislators. Moreover, to the extent that we accept judges because of their democratic credentials, we undermine the affirmative case that is made in favor of judicial review as a distinctively valuable form of political decisionmaking.

Fifth and finally, defenders of judicial review claim that the practice may be justified as an additional mode of access for citizen input into the political

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124. *See* WALDRON, *supra* note 14, at 266-70.

125. EISGRUBER, *supra* note 13, at 4 ("Though the justices are not chosen by direct election, they are nevertheless selected through a process that is both political and democratic. . . . [T]hey are chosen by elected officials: they are nominated by the president and confirmed by the Senate. . . . The justices have . . . a democratic pedigree: they owe their appointments to their political views and their political connections as much as . . . to their legal skills.").

system. Sometimes citizens access the system as voters, sometimes as lobbyists, sometimes as litigants. They say we should evaluate the legitimacy of the whole package of various modes of citizen access, not just the democratic credentials of this particular component. The point is a fair one, as far as it goes. But embedding judicial review in a wider array of modes of citizen participation does not alter the fact that this is a mode of citizen involvement that is undisciplined by the principles of political equality usually thought crucial to democracy. People tend to look to judicial review when they want greater weight for their opinions than electoral politics would give them. Maybe this mode of access can be made to seem respectable when other channels of political change are blocked.[126] We will discuss this in Part VII. But the attitudes toward one's fellow citizens that judicial review conveys are not respectable in the core case we are considering, in which the legislature and the elective arrangements are in reasonably good shape so far as democratic values are concerned.

VI. THE TYRANNY OF THE MAJORITY

I want to give defenders of judicial review—for the core case—one last bite at the apple. The concern most commonly expressed about the work of a democratic legislature is that, because they are organized on a majoritarian basis, legislative procedures may give expression to the "tyranny of the majority." So widespread is this fear, so familiar an element is it in our political culture, so easily does the phrase "tyranny of the majority" roll off our tongues,[127] that the need for judicially patrolled constraints on legislative decisions has become more or less axiomatic. What other security do minorities have against the tyranny of the majority?

I believe that this common argument is seriously confused. Let us grant, for now, that tyranny is what happens to someone when their rights are denied. The first thing to acknowledge is that, according to this definition, tyranny is almost always going to be at stake in any disagreement about rights. In any disagreement about rights, the side in favor of the more expansive understanding of a given right (or the side that claims to recognize a right that

126. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

127. Mill's one criticism of Tocqueville's *Democracy in America* was that the likely political effect of his popularizing the phrase, "the tyranny of the majority," would be to give conservative forces additional rhetoric with which to oppose progressive legislation. *See* JOHN STUART MILL, *M. de Tocqueville on Democracy in America*, EDINBURGH REV., Oct. 1840, *reprinted in* 2 DISSERTATIONS AND DISCUSSIONS: POLITICAL, PHILOSOPHICAL, AND HISTORICAL 1, 79-81 (photo. reprint 1973) (1859).

the other denies) will think that the opposite side's position is potentially tyrannical. For example, the peyote smokers will think the subjection of their sacraments to generally applicable narcotics laws is tyrannical. Opponents of campaign finance laws will think those laws are tyrannical. But it is an open question whether they are right. Some of these claims about tyranny are no doubt correct. But they do not become correct simply because they are asserted. Indeed, in some cases, there will be allegations of tyranny on both sides of a rights issue. Defenders of abortion rights think the pro-life position would be tyrannical to women; but the pro-life people think the pro-choice position is tyrannical to another class of persons (fetuses are persons, on their account). Some think that affirmative action is tyrannical; others think the failure to implement affirmative action programs is tyrannical. And so on.

Let us grant what we acknowledged in Part III, in our discussion of Wollheim's paradox. Democratic institutions will sometimes reach and enforce incorrect decisions about rights. This means they will sometimes act tyrannically. But the same is true of any decision process. Courts will sometimes act tyrannically as well.[128] Tyranny, on the definition we are using, is more or less inevitable. It is just a matter of how much tyranny there is likely to be, which was the subject of our discussion in Part IV.

Is the tyranny of a political decision aggravated by the fact that it is imposed by a majority? I leave aside the pedantic point that a court may also reach its decision by majority voting. Is tyranny by a popular majority (e.g., a majority of elected representatives, each supported by a majority of his constituents) a particularly egregious form of tyranny? I do not see how it could be. Either we say that tyranny is tyranny irrespective of how (and among whom) the tyrannical decision is made, or we say—and this is my view—that the majoritarian aspect actually mitigates the tyranny, because it indicates that there was at least one non-tyrannical thing about the decision: It was not made in a way that tyrannically excluded certain people from participation as equals.

That may seem a little flip, so let me address the question less provocatively. The most commonly expressed misgiving about unrestrained legislative authority is that minorities or individuals may suffer oppression in relation to the majority. They may be oppressed, or discriminated against, or their rights denied and violated compared to those of the majority, or their interests unduly subordinated to those of members of the majority (for

128. I am not referring to their sins of omission (failing to protect us against certain legislative rights abuses). For examples of these, see *supra* note 82. Here, I am referring to their sins of commission: Sometimes the power of judicial review will be exercised tyrannically to prevent legislatures from according people (what are in fact) their rights. For reference to some examples, see *supra* note 4 and accompanying text.

example, harmed or neglected in a way that justice condemns). In describing these forms of tyranny, oppression, or injustice, we use the terms "majority" and "minority." But in this particular context they are not necessarily terms related to political decision-processes. Let me explain.

Injustice is what happens when the rights or interests of the minority are wrongly subordinated to those of the majority. Now, we have conceded that this may happen as a result of majoritarian political decisionmaking. When it does, however, we need to distinguish at least in the first instance between the "decisional" majority and minority and what I shall call the "topical" majority and minority[129]—i.e., the majority and minority groups whose rights are at stake in the decision. In some cases the membership of the decisional majority may be the same as the membership of the topical majority and the membership of the decisional minority—those who voted against the injustice—may be the same as the membership of the topical minority. This is often true in the case of racial injustice for example: White legislators (decisional majority) vote for white privilege (topical majority); black legislators lose out in the struggle for equal rights for blacks. These are the cases, I submit, that we should be particularly concerned about under the heading of "the tyranny of the majority."

With this distinction in mind, let us return to cases of rights-disagreement. Suppose that there is disagreement in a society about what the rights of a topical minority are. Assuming this disagreement has to be settled, the society will have to deliberate about it and apply its decision-procedures to the issue. Suppose the society uses MD to settle this matter, I take part in this decisionmaking, using my vote, and the side that I vote for loses. I am therefore a member of the decisional minority on this issue. But so far it has not been shown that anything tyrannical has happened to me. To show that we would have to show two additional things: (1) that the decision really was wrong and tyrannical in its implications for the rights of those affected; and (2) that I was a member of the topical minority whose rights were adversely affected by this wrong decision.

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129. I use "topical" because their rights and interests are the topic of the decision. The term "topical minority" is a loose one, and there is always likely to be dispute about whom it comprises (and the same is true of "topical majority"). But the looseness is not a problem. Even loosely defined, the distinction between topical and decisional minorities enables us to see that not everyone who votes for the losing side in an issue about rights should be regarded as a member of the group whose rights have been adversely affected by the decision. *See* WALDRON, *supra* note 14, at 13-14; Waldron, *Precommitment and Disagreement*, *supra* note 19; Waldron, *Rights and Majorities*, *supra* note 19, at 64-66.

The point to remember here is that nothing tyrannical happens to me merely by virtue of the fact that my opinion is not acted upon by a community of which I am a member. Provided that the opinion that is acted upon takes my interests properly into account along with everyone else's, the fact that my opinion did not prevail is not itself a threat to my rights, or to my freedom, or to my well-being. None of this changes necessarily if I am also a member of the topical minority whose rights are at issue. People—including members of topical minorities—do not necessarily have the rights they think they have. They may be wrong about the rights they have; the majority may be right. Responsible talk about "tyranny of the majority" will keep these analytic points in mind.

To sum up, tyranny of the majority is possible. But the term should not be used simply to mark the speaker's disagreement with the outcome of a majority decision. The most fruitful way of characterizing tyranny of the majority is to say that it happens when topical minorities are aligned with decisional minorities. In Part VII, I shall consider the application of this to what are called "discrete and insular minorities."[130] For now, though, we may note that this sort of alignment is exactly what we should not expect under the core assumptions we are considering. Assumption three was that most people, and therefore most members of any given decisional majority, care about rights just as much as the members of a given decisional minority. And our fourth assumption about disagreement was that disagreement is not usually driven by selfish interests. Disagreement is sufficiently explained by the complexity and difficulty of the issues themselves. What Rawls called "the burdens of judgment"[131] argue precisely against the sort of alignment between opinion and interests that, we have just seen, responsible talk of the tyranny of the majority ought to presuppose.

The conclusion is not, however, that tyranny of the majority is something we need not worry about. Rather, the conclusion is that tyranny of the majority—if that term is being used responsibly—is a characteristic of non-core cases, in which people care little for minority or individual rights other than their own. I do not want to deny that this happens. But I think it is important to emphasize its incompatibility with my third assumption and not to try to talk *simultaneously* about a society committed to rights in which tyranny of the majority is nevertheless an endemic possibility.

The distinctions made in this Part can help us deal with two other arguments about judicial review. First, Ronald Dworkin argues in *Freedom's*

130. *See infra* text accompanying notes 137-141.

131. RAWLS, POLITICAL LIBERALISM, *supra* note 53, at 54-58.

Law that democratic decisionmaking is inherently tyrannical if people's rights are not respected. This is not just because it may generate tyrannical outcomes, he argues, but because respect for rights is a background condition for the legitimacy of any system of political decisionmaking. Dworkin is not just making the familiar point that democracy depends (constitutively) on certain rights, like the right to vote or, indirectly, the right to free speech or freedom of association. His point is more sophisticated than that. He maintains that processes like MD have no legitimacy at all in a democratic context (or any other context) unless each voter is assured that the others already regard him with equal concern and respect. A bunch of terrorists deciding my fate by majority decision (even an MD process in which I am given a vote) has no legitimacy at all, because this background condition is not met. In general, Dworkin argues, a person can hardly be expected to accept majority decisions as legitimate if she knows that other members of the community do not take her interests seriously or if the established institutions of the community evince contempt or indifference toward her or her kind.[132]

Dworkin thinks this refutes the democratic objection to judicial review.[133] Suppose a piece of legislation is enacted by an elected assembly and then challenged by a citizen on the ground that it undermines right *R*, a right that is a condition of democratic legitimacy. We imagine that others will disagree, some because they think *R* is not a condition of democracy, others because they understand *R* in a quite different way. And suppose the issue is assigned to a court for final decision, and the court strikes down the statute, accepting the citizen's challenge. Is there a loss to democracy? The answer, Dworkin says, depends entirely on whether the court makes the right decision. If it does—that is, if the statute really was incompatible with the rights required as conditions for legitimate application of MD—then democracy is surely improved by what the court has done, because the community is now more democratically legitimate than it would have been if the statute had been allowed to stand.[134]

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132. DWORKIN, *supra* note 10, at 25.

133. Dworkin is careful to say that it is not an argument for judicial review. *Id.* at 7 ("Democracy does not insist on judges having the last word, but it does not insist that they must not have it.").

134. *Id.* at 32-33 ("[I]f we assume that the court's decision was wrong, then none of this is true. Certainly it impairs democracy when an authoritative court makes the wrong decision about what the democratic conditions require—but no more than it does when a majoritarian legislature makes a wrong constitutional decision that is allowed to stand. The possibility of error is symmetrical.").

There are many things wrong with this argument, some of which I have pointed out elsewhere.[135] For one thing, Dworkin seems to be suggesting that if a political decision is *about* democracy, then there is no interesting question to be raised about the institutional process by which the decision is made. This seems wrong to me. If a decision about the majoritarian process (or about the conditions of its legitimacy) were made using some procedure that, for example, precluded the participation of women, equality-based objections to that procedure would not be disqualified simply because the legitimacy of the majoritarian process was actually the matter at issue. We care about process-values even when process is what is at stake in our disagreements.

But the most telling objection is this. Let us grant Dworkin's premise—that democratic procedures are legitimate only among people who respect one another's rights. That may be read in two ways: (1) democratic procedures are legitimate only among people who hold and act upon the correct view of one another's rights; or (2) democratic procedures are legitimate only among people who take one another's rights seriously and who in good faith try as hard as they can to figure what these rights are. The first reading is far too strong; no imaginable political system satisfies it. And I cannot see any objection to the second reading of Dworkin's premise. But if we read it this way, then Dworkin's premise is satisfied for the sort of society we are considering in this Essay. Even if people disagree about rights, they may take one another's rights seriously. Decisional majorities may prevail. Sometimes they will be right about rights and sometimes they will be wrong. But that is something they have in common with all systems of decisionmaking and that alone cannot undermine their legitimacy, so long as topical minorities have an assurance that most of their fellow citizens take the issue of their rights seriously.

Second, we can also use the distinctions developed in this Part to help deal with the allegation that unreviewable legislative decisionmaking about rights involves the majority being the judge in its own case. Those who invoke the maxim *nemo iudex in sua causa* in this context say that it requires that a final decision about rights should not be left in the hands of the people. Rather, it should be passed on to an independent and impartial institution such as a court.

It is hard to see the force of this argument. Almost any conceivable decision-rule will eventually involve someone deciding in his own case. Unless we envisage a literally endless chain of appeals, there will always be some person or institution whose decision is final. And of that person or institution,

135. For a full response, see WALDRON, *supra* note 14, at 282-312.

we can always say that because it has the last word, its members are ipso facto ruling on the acceptability of their own view. Facile invocations of *nemo iudex in sua causa* are no excuse for forgetting the elementary logic of legitimacy: People disagree, and there is need for a final decision and a final decision-procedure.

What this second argument for the necessity of judicial review might mean is that the members of the topical majority—i.e., the majority whose rights and interests is at stake—should not be the ones whose votes are decisive in determining whether those rights and interests are to remain ascendant. And there are legitimate grounds for concern when topical majorities align with decisional majorities. (If this alignment is endemic, then I think we are dealing with a non-core case, for reasons I will explain in Part VII.) But it is striking how rarely this happens, including how rarely it happens in the kinds of cases that are normally dealt with by judicial review in the United States. Think of the two examples I mentioned earlier: abortion and affirmative action. In neither case is there the sort of alignment that might be worrying. Many women support abortion rights, but so do many men; and many women oppose them. Many African-Americans support affirmative action, but so do many members of the white majority; and many African-Americans oppose affirmative action. This is what we should expect in a society in which our third and fourth assumptions, set out in Part II, are satisfied. People who take rights seriously must be expected to disagree about them; but it is a sign of their taking rights seriously that these disagreements will be relatively independent of the personal stakes that individuals have in the matter.

VII. NON-CORE CASES

The arguments I have made so far are based on four quite demanding assumptions. What becomes of these arguments when the assumptions fail, or for societies in which the assumptions do not hold? I have in mind particularly my first assumption that a society has democratic and legislative institutions in good shape so far as political equality is concerned, and my third assumption that the members of the society we are considering are by and large committed to the idea of individual and minority rights. For many people, I think the case for judicial review rests on the refusal to accept these assumptions. Judicial review is in part a response to perceived failures of democratic institutions, or it is in part a response to the fact that many people do not take rights sufficiently seriously (so they need a court to do it for them). In sum, supporters of the practice will say we need judicial review of legislation in the real world, not the ideal world defined by my assumptions.

A number of things need to be said in response to this, before turning to a couple of specific issues about non-core cases. First, the assumptions on which I have been proceeding are not unrealistic. Assumption three, for example—a general commitment to rights in the society—is fairly easily satisfied, given that the case for judicial review almost always assumes that somehow the society for which judicial review is envisaged has a Bill of Rights that stands in some real relation to the views of citizens. The first assumption was about electoral and legislative arrangements being in reasonably good shape, bearing in mind that even in the name of political equality we are not entitled to demand perfection. Also, in Part V, when I talked about the legitimacy of legislatures and courts, I again stressed that my argument did not turn on there being a perfect response to individual citizens' demand for voice and participation. The case for the legitimacy of legislative decisionmaking does not depend on any assumption of the utopian perfection of legislative institutions, nor on their perfectly embodying the principle of political equality in their elective and procedural aspects. It turns on these institutions being explicitly oriented to this principle, organized in a way that is designed to satisfy the principle, and making a reasonable effort to do so. Finally, I took care to cite the actual deliberations of an actual legislature—the House of Commons on the Medical Termination of Pregnancy Bill 1966—as an example of how legislatures might work, not some concoction of the philosophical a priori.

Having said all that, we still must ask: What happens to the argument against judicial review if the assumptions fail?

In cases in which the assumptions fail, the argument against judicial review presented in this Essay does not go through. As I emphasized in Part II, my argument is a conditional one.[136] However, it does not follow that judicial review of legislation is defensible whenever the assumptions fail. There may be other good arguments against judicial review that are not conditioned on assumptions like mine. Or it may be the case that judicial review offers no hope of ameliorating a particular situation. It may not be appropriate to set up judicial review of legislation if judicial decisionmaking in a society is no less corrupt or no less prejudiced than its legislative decisionmaking. The arguments we entertained for the core case were in large part comparative, and this logic applies to non-core cases as well.

Suppose we are dealing with a case that is non-core by virtue of the failure of my first assumption: In this case, legislatures are inadequately representative or deliberative, the system of elections is compromised, and the procedures

136. *See supra* text accompanying note 43. For an example of the failure of the argument, see Waldron, *supra* note 47.

used in the legislature no longer bear any credible relation to political legitimacy. Two questions then arise: (1) Is it possible to improve the situation, so far as the legislature is concerned? (2) Should a final power of decision for important issues of rights be vested in the courts, assuming that the courts would handle those issues better? The questions are independent, for we may reasonably think that some issues of rights are too urgent to await the emergence of a more responsible and representative legislature. But they are not utterly independent. Vesting the final power of decision in courts may well make it more difficult to reform the legislature or more difficult to develop the legislative ethos that the first assumption, and perhaps also the third assumption, presuppose. I have heard speculation to this effect about the United States: The idea is that U.S. legislatures, particularly state legislatures, operate irresponsibly and in a way that fails to take rights seriously because the knowledge that the courts are there as backup makes it harder to develop a responsible culture among legislators. How far this is true, I don't know. It is certainly worth considering.

I want to end by discussing one well-known way in which my first assumption might be thought to fail. I have in mind Justice Stone's suggestion in the famous *Carolene Products* footnote four: "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . ."[137] This it seems to me is an excellent way of characterizing the sort of non-core case in which the argument for judicial review of legislative decisions has some plausibility. Minorities in this situation may need special care that only non-elective institutions can provide—special care to protect their rights and special care (as John Hart Ely points out) to repair the political system and facilitate their representation.[138]

We have to be cautious about this argument, however. It follows from what I said in Part VI that not every minority deserves this special treatment: certainly not every decisional minority, and not even every topical minority.[139] There is no reason to suppose even that every chronic minority deserves this

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137. United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938); *see also* Keith E. Whittington, *An "Indispensable Feature"? Constitutionalism and Judicial Review*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 21, 31 (2002) (stating that my neglect of this idea in *Law and Disagreement* is "striking from the perspective of American constitutional theory").

138. ELY, *supra* note 126, at 135-79.

139. TUSHNET, *supra* note 11, at 159 ("Every law overrides the views of the minority that loses. . . . We have to distinguish between *mere* losers and minorities that lose because they cannot protect themselves in politics.").

special treatment, certainly not chronic decisional minorities—Bolsheviks in the United States, for example.

Too often the phrase "discrete and insular" is used thoughtlessly. Not every distinct and identifiable minority is discrete and insular. There is nothing magical about Justice Stone's language. But if taken seriously, "discrete" and "insular" are useful adjectives, for they convey not just the idea of a minority that exists apart from political decisionmaking—in other words a topical minority—but also a minority whose members are isolated from the rest of the community in the sense that they do not share many interests with non-members that would enable them to build a series of coalitions to promote their interests. The alignment of decisional and topical minorities that we warned against in Part VI is a good example of "insularity" in this sense. And it is a cause for concern.

What about the other criterion that Justice Stone mentioned—that the minority is the victim of prejudice? Pervasive prejudice is certainly incompatible with my third and fourth assumptions; it connotes indifference or hostility to the rights of the group's members, and it may lead members of the majority to differ unreasonably from the minority members' estimation of their own rights. But the term "prejudice" may be too narrow and its connotations may fail to capture the depth of entrenched and unconscious antipathy between one group and another.[140] The point is not to insist on any particular mode of antipathy, but to distinguish between its various modes and the phenomenon of reasonable disagreement about rights.[141]

In such cases, the core argument against judicial review that I have outlined cannot be sustained. But, again, this is not the same as saying that a case has been made in favor of judicial review. Everything depends on whether judicial majorities are infected with the same prejudice as legislative majorities. If they are, then the case may be not only non-core but hopeless. A practice of judicial review cannot do anything for the rights of the minority if there is no support at all in the society for minority rights. The affirmative case that is often made for judicial review in these circumstances assumes that there is some respect for the relevant minority's rights outside the minority's own membership, but that

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140. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). I am grateful to Ian Haney-Lopez for emphasizing this point.

141. It is important also to distinguish between prejudices and views held strongly on religious or ethical grounds. We should not regard the views of pro-life advocates as prejudices simply because we do not share the religious convictions that support them. Almost all views about rights—including pro-choice views—are deeply felt and rest in the final analysis on firm and deep-seated convictions of value.

it is largely confined to political elites. The idea is that most ordinary members of the majority do not share this sympathy. Now the elite members who do share it—I shall call them elite sympathizers—may be in the legislature or they may be in the judiciary. The argument for giving final authority to judges is that elite sympathizers in the judiciary are better able than elite sympathizers in an elected legislature to protect themselves when they accord rights to the members of an unpopular minority. They are less vulnerable to public anger and they need not worry about retaliation. They are therefore more likely to protect the minority.

Notice how this argument for judicial review depends on a particular assumption about the distribution of support for the minority's rights. The sympathy is assumed to be strongest among political elites. If that is false—if the sympathy is stronger among ordinary people—then there is no reason to accept the argument of the previous paragraph. On the contrary, elective institutions may be better at protecting minority rights because electoral arrangements will provide a way of channeling popular support for minority rights into the legislature, whereas there are no such channels into the judiciary. No doubt, the distribution of support for minority rights varies from case to case. But I find it interesting that most defenders of judicial review, when they assume that there will be some support for minority rights in a society, are convinced that in all cases it will be found among elites if it is found anywhere. They will defend this as an empirical claim, but I must say it is entirely consonant with ancient prejudices about democratic decisionmaking.

One other factor to take into account is whether an established practice of judicial review will make it easier or harder in the long-term to remedy the elective and legislative dysfunctions we are imagining here. In certain circumstances, discrete and insular minorities may benefit from judicial intervention to protect their rights. But institutionally, judicial solicitude may make things worse, or at least fail to make them much better. As the United States found in the 1950s and 1960s, for all the excitement of judicial attacks on segregation in *Brown* and other cases, what was needed in the end was strong legislative intervention (in the form of the Civil Rights Act), and it turned out that the main difference was not courts versus legislatures per se, but federal institutions versus state institutions, with the federal legislature finally playing the decisive role.

Overall, we should not read the *Carolene Products* footnote or any similar doctrine as a way of "leveraging" a more general practice of judicial review into

existence.[142] The problem of discrete and insular minorities is not to be seen as a sort of Trojan Horse for judicial review or as a basis for embarrassing the arguments against it. The aim of considering such cases is not to defend judicial review; rather it is to do whatever best secures the rights of the minorities affected. We should aim directly at that, conscious of the fact that there is no convincing general argument for judicial review of which this could be treated as a sort of ideological vanguard.

CONCLUSION

I have not sought to show that the practice of judicial review of legislation is inappropriate in all circumstances. Instead I have tried to show why rights-based judicial review is inappropriate for reasonably democratic societies whose main problem is not that their legislative institutions are dysfunctional but that their members disagree about rights.

Disagreement about rights is not unreasonable, and people can disagree about rights while still taking rights seriously. In these circumstances, they need to adopt procedures for resolving their disagreements that respect the voices and opinions of the persons—in their millions—whose rights are at stake in these disagreements and treat them as equals in the process. At the same time, they must ensure that these procedures address, in a responsible and deliberative fashion, the tough and complex issues that rights-disagreements raise. Ordinary legislative procedures can do this, I have argued, and an additional layer of final review by courts adds little to the process except a rather insulting form of disenfranchisement and a legalistic obfuscation of the moral issues at stake in our disagreements about rights.

Maybe there are circumstances—peculiar pathologies, dysfunctional legislative institutions, corrupt political cultures, legacies of racism and other forms of endemic prejudice—in which these costs of obfuscation and disenfranchisement are worth bearing for the time being. But defenders of judicial review ought to start making their claims for the practice frankly on that basis—and make it with a degree of humility and shame in regard to the circumstances that elicit it—rather than preaching it abroad as the epitome of respect for rights and as a normal and normatively desirable element of modern constitutional democracy.

142. See TUSHNET, *supra* note 11, at 158-63, for a good general discussion of the limits on the usefulness of this line of argument for supporting judicial review.