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Democracy and Judicial Review: Are They Really Incompatible?

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Is judicial review incompatible with democratic government? The claim that it is has been ably defended by Jeremy Waldron, a longstanding opponent of judicial review. A recent paper, aptly titled, ‘The Core of the Case against Judicial Review’, summarises these arguments.¹ Shorn of historical digressions and contentious interpretations of American constitutional practice,² Waldron presents the democratic case against judicial review in the form of two theses.

The first, which we can call the Substantive Thesis, maintains that it is impossible to decide whether or not judiciaries are better than legislatures at protecting rights, because evidence on this matter is inconclusive. The second thesis, which we can call the Procedural Thesis, holds that legislatures are overwhelmingly superior to courts from a procedural perspective. This is because legislatures are more legitimate, egalitarian and participatory than courts, according to Waldron, and so embody crucial democratic rights and values to an extent that is impossible for the latter to imitate. Thus, Waldron maintains,

“judicial review is vulnerable to attack on two fronts. It does not, as is often claimed, provide a way for society to focus clearly on the real issues at stake when citizens disagree about rights....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”.³

¹ ‘The Core of the Case Against Judicial Review’ is published in *Yale Law Journal*, 115 No. 6, (2006), 1346. See also, J. Waldron, ‘Rights and Majorities: Rousseau Revisited’ in *Liberal Rights: Collected Papers 1981-1991*, (Cambridge University Press, 1993), ch. 16 and *Law and Disagreement*, (Oxford University Press, 1999)

² Larry D. Kramer’s *The People Themselves: Popular Constitutionalism and Judicial Review*, (Oxford University Press, 2004) provides a wonderful historical account of an American tradition of constitutionalism hostile to judicial supremacy. Mark Tushnet, *Taking the Constitution Away from the Courts*, (Princeton University Press, 1999) and ‘Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory’, *Yale Law Journal*, Vol. 89, No. 6, 1980, pp. 1037-1062 are also very much American-centred in their critical perspective on judicial review.

³ Waldron, p. 1353

Waldron's arguments find an echo in Richard Bellamy's *Political Constitutionalism*⁴ which contrasts a legal constitutionalism, based on the idea that courts should enforce a substantive set of rights, expressive of democratic equality, with a political constitutionalism informed by Philip Pettit's reinterpretation of republican political thought.⁵ For Bellamy, as for Waldron, judicial review is undemocratic on procedural grounds, because the power it gives judges to over-rule legislatures is at odds with democratic principles. As Bellamy summarises his political constitutionalism:

‘A system of “one person, one vote” provides citizens with roughly equal political resources; deciding by majority rule treats their views fairly and impartially; and party competition in elections and parliament institutionalizes a balance of power that encourages the various sides to hear and harken to each other, promoting mutual recognition through the construction of compromises. According to this political conception, the democratic process *is* the constitution. It is both constitutional, offering a due process, and constitutive, able to reform itself’.⁶

In contrast, Brettschneider and Eisgruber argue that judicial review is sometimes justified by the democratic outcomes that it secures – and, in particular, by the ability of judges to protect core democratic rights. (Brettschneider, 138).⁷ Thus, Brettschneider believes that the US Supreme Court ‘can act democratically by overriding majoritarian decision making’ (152) when ‘the core values of democracy’ are at stake; (152) and in

⁴ Richard Bellamy, *Political Constitutionalism; A Republican Defence of the Constitutionality of Democracy*, (Cambridge University Press, 2007)

⁵ The irony, which slowly emerges in the course of the argument, is that Pettit himself endorses legal constitutionalism as an expression of a republican commitment to non-domination. See pp. 163-171

⁶ Bellamy, p. 5, emphasis in the text.

⁷ Christopher L. Eisgruber, *Constitutional Self-Government* (Harvard University Press, 2001) and Corey Brettschneider, *Democratic Rights and the Substance of Self-Government*, (Princeton University Press, 2007). Their arguments are importantly different. Eisgruber is explicit that judicial review is not necessary for democratic government (76); Brettschneider says nothing on the subject, but the direction of his argument suggests a much less critical perspective on judicial review than Eisgruber. While Eisgruber is keen to provide a non-majoritarian account of democracy, within which to situate institutions like judicial review, the use of super-majorities, and independent banks and agencies, Brettschneider's ideal conception of democracy is majoritarian, though he is at pains to point out that it is not a purely procedural conception of democracy. (146)

defence of the right to participate, ‘when this right is more fundamental than the negative impact of a policy on the core values of democracy’. (154). Likewise, Eisgruber claims that ‘the institution of judicial review is a sensible way to promote non-majoritarian representative democracy; not surprisingly, it is becoming increasingly popular in democratic political systems throughout the world’. (210)

Judicial review, according to Brettschneider and Eisgruber, is not democratic simply on substantive grounds –or in terms of the democracy-promoting consequences that it is likely to secure. Rather, they argue, it matters that judiciaries be constituted so that they reflect democratic values and are likely to promote them. As Brettschneider describes it, ‘The aim of judicial review is to ensure democratic outcomes while preserving popular participation in democratic processes’, (157) and Eisgruber attaches a great deal of weight to the ‘democratic pedigree’ which ensures that judges – at least in America – are chosen by elected representatives primarily on political, rather than legal, grounds.(64-68). Their defence of judicial review is, therefore, meant to be democratic, and to distinguish arguments for judicial review from those for benevolent dictators.(Brettschneider, 158)

These are subtle, often attractive, views. But their weakness as a response to Waldron, is their claim that judges are more likely to protect fundamental rights than legislators. Brettschneider believes that judges are not well suited to implementing welfare rights, (159) and so his arguments for judicial review can be distinguished from those, such as Cecile Fabre, who believe that we must constitutionalise *all* fundamental

rights in order to protect them.⁸ Similarly, Eisgruber maintains that, ‘There is nothing wrong with the fact that unelected justices decide questions about (for example) federalism or gay rights or economic justice on the basis of controversial judgements of moral principle’. (210) Nonetheless, he claims that judges should defer to legislators on questions that require comprehensive strategic judgement, and restrict themselves to doing what they do better than legislatures – which is determining what side-constraints morality and democratic government place on the comprehensive strategic judgements of others. (ch. 6.)

However, I share Waldron’s skepticism that judges are evidently better than legislatures at protecting rights. The substantive thesis strikes me as correct, because the relative merits of judicial, as compared to legislative, protections for rights inevitably turn on complex counterfactual judgements and interpretations of events, ideas and arguments. Eisgruber may be right that ‘few observers’ of the American Supreme Court ‘look at the Court’s track record and claim, with the benefit of hindsight, that the United States would have been better off during the last fifty years without judicial review’. (73) But I imagine that many of these would *also* refuse – as would I – to claim that it was better off *with* it, because the evidence is too confused and contradictory to admit of confidence one way or the other.

The empirical, conceptual and interpretive demands necessary to support substantive, or consequentialist, arguments for judicial review are especially high in the

⁸ Cecile Fabre, ‘A Philosophical Argument for a Bill of Rights’, *British Journal of Political Science* 30 (2000), 77-98. and ‘The Dignity of Rights’, *Oxford Journal of Legal Studies*, Vol. 20, No. 2. (2000) pp. 271-282. see especially section 4

case of Eisgruber and Brettschneider, who require us to distinguish the relative competences of judges and legislatures across seemingly similar legal cases. For example, Eisgruber, like Brettschneider, wants to celebrate the ability of American courts to protect voting rights, although claiming that judges are not well-placed to make decisions about what supports, rather than undermines, democratic political institutions. (169 and 180 for a fascinating discussion of apportionment cases). Brettschneider thinks *Lochner v. New York* an instance of illegitimate judicial review, because it implicated welfare rights, and these require judgements too complicated for courts to make.⁹ Eisgruber agrees that *Lochner* was a bad decision, but his argument implies that this is the sort of question, concerning deontological constraints on legislation, which courts ought to be able to make and should be expected to get right.

Even advocates of judicial review, in other words, disagree about the best way to think about judicial competence, and to classify judicial decisions. Paradoxically, therefore, the difficulties of assessing the rights-protecting record of judicial review are multiplied, not alleviated, by more nuanced claims about the special competence of judges. These require us to substantiate the superiority of judges to legislators in certain types of cases, despite their inferiority in others, rather than trying to average the pros and cons of judicial decisions across all cases, taken as a whole. They thus multiply the conceptual and interpretive difficulties in assessing the quality of legal decisions, even before we start to ask how our positive and negative judgements should be aggregated across cases, and how counterfactual possibilities are to be assessed.

⁹ *Lochner v. New York*, 198 U.S., 45, (1905)

It is is unwise and undesirable, therefore, to rest the case for judicial review on substantive judgements about the relative rights-protecting virtues and vices of judges and legislators, even in part. Nor is it necessary to do so. Instead, I will argue, judicial review can be justified on democratic grounds, although some forms of judicial review are undemocratic, and it is doubtful that judicial review is necessary for democratic government. I will show that judicial review can be justified because judges, as well as legislators, can embody and foster democratic forms of representation, accountability and participation. There is, therefore, nothing distinctively democratic in favouring the latter over the former when the two conflict. I will therefore take issue with Waldron's procedural thesis, and with the picture of democratic government on which it rests.

My arguments for judicial review are meant to be democratic and procedural. By contrast with Eisgruber and Brettschneider, I will show that judicial review can be justified on democratic grounds even though judges may not be better than legislators at protecting rights. It is an important feature of democratic justifications of rights that special competence is not necessary for legitimate power and authority. Universal suffrage exemplifies this, as do the claims of individuals to marry, and to have and raise children. For good and ill, democratic government does not demand special wisdom, virtue, competence or efficiency. This applies to judges and legislators, as well as to voters, no matter the particular balance of power amongst them.¹⁰

¹⁰ Eisgruber's book is interesting here. On the one hand he denies 'that the Supreme Court's power of judicial review depends upon the Court's legal expertise' (p.3), on the other he wants to argue that judges are likely to make better decisions about rights than legislators in key cases. The seeming contradiction is resolved by noting that this relative superiority is meant to arise because these are matters where judges can be expected 'to resolve issues of principle on the basis of moral reasons that have popular appeal' more successfully than legislators. (57). And it is the institutional features of courts, not the personal qualities of judges, that makes this possible; 'By guaranteeing judges prestige, a good salary and life tenure, Americans

A. Some Clarifications and Assumptions

The Procedural Thesis and Democratic Procedure

In order to avoid confusion, and to focus evaluations of the procedural thesis, it will help to start with some clarifications and points of terminology. The procedural thesis which Waldron defends, and which I propose to challenge, in no way implies the ability to describe democratic government in terms of its procedures alone.

Contemporary debates in political science and democratic theory about the relative merits of procedural and substantive views of democracy are not at issue here.¹¹ Those debates concern the ways in which we decide whether or not a procedure is democratic, and under what circumstances, if any, we can describe people, relationships, manners, policies and values as democratic or undemocratic.

Some people have thought that we could and should use the predicate ‘democratic’ only where we are describing an open, competitive political system, based on universal suffrage and majority rule, the policies that are the outcome of such a system, and the rights that are necessary to create such a system.¹² This view has been

insulate them from forces that often tempt reasonable people to mistake self-interest for moral principles’. (60). The implication of my argument, however (and of Eisgruber’s, too, I suspect) is that legal expertise may be unnecessary to Supreme Court judges, so long as they have professional help in drafting their opinions, and are able to consult legal experts as needed.

¹¹ Corey Brettschneider has a fairly extensive discussion of these 140-146. In footnote 12, (146) he claims that ‘There is some ambiguity about whether Jeremy Waldron holds a pure procedural view...’ I do not think Waldron is as ambiguous as Brettschneider suggests. Democracies can make bad decisions, and those decisions can undermine important democratic rights, values and procedures. But he thinks this no more justifies judicial review than it justifies deferring to a democratically elected dictator. But this is because of the special value of democratic participation, according to Waldron, and not because democracy is just about procedures, rather than values or outcomes.

¹² See, for example, Robert Dahl, *Democracy and its Critics*, (Harvard University Press, Cambridge, 1980), and John Hart Ely, *Democracy and Distrust*, (Harvard University Press, Cambridge, 1980).

persuasively criticized by Joshua Cohen.¹³ He shows that it mischaracterizes the democratic justification for non-political liberties, such as freedom of religion; misrepresents the ways we habitually use the word ‘democratic’; and overlooks the ways in which arguments about procedures reflect conflicting views of the values – such as freedom and equality – which explain why democratic government is valuable.

We cannot decide the democratic credentials of judicial review by avoiding discussion of the forms of equality, freedom and participation, which democratic procedures are supposed to protect. But whether that means judicial review has a democratic justification remains to be seen – and Cohen explicitly leaves that question unanswered.¹⁴ As he says, ‘the virtues of a court as a device for protecting rights are a matter of controversy’.

Some proponents of judicial review, such as Ely, are notorious for insisting that judicial review can be justified in purely procedural terms. This is not Waldron’s argument – nor, indeed, that of Bellamy. Their objections to judicial review do not depend on the belief that there is some purely procedural account of democratic government which means that we need not argue about the best interpretation of substantive democratic rights and values.¹⁵ Rather, they maintain, whatever interpretive, conceptual or institutional arguments are necessary to determine what democracy requires, these arguments should be undertaken and decided by *citizens* or their elective

¹³ Joshua Cohen, ‘Procedure and Substance in Deliberative Democracy’, in T. Christiano, ed. *Philosophy and Democracy: An Anthology* (Oxford University Press, 2003), pp. 17- and Joshua Cohen, ‘Pluralism and Proceduralism’, *Chicago-Kent Law Review* 69 3 .(1994) 589-618

¹⁴ J. Cohen, Footnote 80, p. 605 ‘Pluralism and Proceduralism’

¹⁵ Bellamy registers his dissatisfaction with Ely’s arguments at pp. 107-119

representatives, and not by unelected *judges*. That is why their arguments against judicial review centrally depend on their claims about the nature and value of representation, participation and accountability. So, the procedural thesis can be understood and evaluated without any special knowledge of contemporary debates about proceduralism in political philosophy or legal theory. In my view, the procedural thesis is all the stronger for that.

Strong v. Weak Judicial Review

Judicial review comes in *strong* and *weak* form. It is the former, not the latter, that is the object of democratic antipathy. The difference between the two is that in systems with strong judicial review – such as the United States, or the Federal Republic of Germany – Courts 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*... a law that they have refused to apply becomes in effect a dead letter’.¹⁶ Weak judicial review, by contrast, may involve ex-ante scrutiny of legislation by courts, in order to determine whether or not it is unconstitutional, or violates individual rights, ‘but [courts] may not decline to apply it (or moderate its application) simply because rights would otherwise be violated’.¹⁷ Britain, after the incorporation of the ECHR into British Law, by the Human Rights Act of 1998, is an example of weak judicial review. As is

¹⁶ Waldron, p. 1354. His critique of judicial review is concerned with judicial review of *legislation*, although as he says, his arguments may well apply to judicial review of administrative decisions. (1353) Whether or not Waldron is right to suppose that judicial review of executive decisions is less problematic than that of legislative or administrative decisions, it is with review of legislation that this paper is concerned.

¹⁷ Waldron, p. 1355

customary in this debate, I will refer to strong judicial review simply as ‘judicial review’, unless otherwise stated.

Waldron’s Five Assumptions

Waldron makes five assumptions, when presenting the core case against judicial review. The first, is that proponents and opponents of judicial review value rights and seek to protect them. The issue between them, therefore, is not *whether* rights ought to be protected, but *how* such protection should be institutionalized.¹⁸ This strikes me as a helpful way of framing the debate. It means that the democratic critique of judicial review is rights-based, and so confronts the case for judicial review in its strongest form. Whatever else may be said about judicial review, it is its consonance and consequences for *rights*, rather than efficiency, wisdom, virtue or beauty which are essential to its justification.

However, no sharp distinction between legal and moral rights can be drawn for the purposes of this debate. Controversy over the best way to interpret constitutions means that debates about the scope and justification of judicial review cannot be separated from debate over the relationship between legal rights and extra-legal rights and values. Consequently, unless otherwise specified, references to ‘rights’ throughout this paper refers to legal and moral rights so as not to prejudge complex questions of legal interpretation that sometimes motivate and underpin competing positions on judicial review.¹⁹

¹⁸ Waldron, p. 1360 and 1364-5

¹⁹ Waldron, 1385 footnote 110

Waldron also makes four idealizing assumptions about democracies. These are (1) that there exists a representative legislature, elected by universal adult suffrage, in which debates about how to improve society's democratic institutions 'are informed by a culture of democracy, valuing responsible deliberation and political equality'. (2) That judicial institutions are in reasonably good order, and are set up on a non-representative basis to hear individual law suits, settle disputes, up-hold the rule of law and so on. (3) That most members of society and most officials are committed to the idea of individual and minority rights. (4) That there is 'persisting, substantial and good-faith disagreement about rights...among those members of society who are committed to the idea of rights'.

I think we should adopt these assumptions, too, even if they provide a somewhat idealized picture of democratic politics. There is enough truth in them that we can recognise most democratic societies in this conception of democracy. Moreover, where it is hard to see our societies in this description – because of the role of money in politics, say, or because of extremist or politically intolerant movements – we can endorse the ideal of democracy reflected in these assumptions, as something to which our societies should, and often do, aspire.

Like Waldron, I assume that the claim of ordinary people to participate in government is essential to democratic government, and helps to distinguish it from alternatives. However, democrats can accept Waldron's assumptions wholeheartedly and still support judicial review, because the procedural case for judicial review does not

impugn the motivations, values or abilities of democratic citizens, or the legislators who are supposed to represent them.

I will start by examining the descriptive difficulties of the procedural thesis before turning to its normative problems. The procedural case for judicial review paves the way for greater citizen participation in judging, as well as legislating, and casts doubt on the idea that the precise balance of power between judicial and legislative institutions is critical to a democratic society. The conclusion draws out the significance of these claims.

B. The Procedural Thesis: Descriptive Problems

Democratic objections to judicial review imply that even when legislatures make the wrong decision about the rights we have, they have one enormous advantage over judiciaries, even when the latter make the right decision: that they are legitimate in ways that the latter are not. This legitimacy resides in the fact that they have been elected by citizens based on the egalitarian principle of one person one vote, and majority decision to resolve disputes; and because legislators are themselves bound to resolve their disagreements about rights by making decisions based on one person one vote and majority decision.

In the real world, Waldron notes, ‘the realization of political equality through elections, representation and the legislative process is imperfect. Electoral systems are

often flawed...and so are legislative procedures'.²⁰ Still, he maintains, we are assuming a reasonably functioning democracy, not a perfect one, and so these defects need not detain us. Likewise, Bellamy suggests that

'the very mechanical and statistical features of a majoritarian system based on one person, one vote guarantee[s] that individuals play an equal "part" [in politics] and, because each counts for one and no more than one, ensures them an equal "stake" in which their views are treated on a par with everyone else's'.²¹

Even on idealized assumptions, however, governments do not inevitably reflect a majority of voters, let alone a majority of those who were eligible to vote. Electoral systems with first-past-the-post regularly result in a government elected with a minority of votes cast. Under systems of proportional representation governments are typically made up of a coalition of different parties. Nonetheless they may not jointly represent a majority of those who voted.

According to Bingham Powell, even in 'majoritarian' political systems, a single party 'very rarely' wins a majority of votes in an election; and in 10% of the cases, the plurality winner comes in second in the legislatures, as has happened in Australia, New Zealand, Canada, France and Britain.²² Out of forty five elections, Powell shows, 'only in Australia in 1975 and France in 1981 did a party or pre-election coalition win a clear voter majority; Canada in 1984 and Australia in 1972 are very close'.

²⁰ Waldron, 1388-9

²¹ Bellamy, p.95

²² See Bingham Powell, *Elections as Instruments of Democracy*, (Yale University Press, 2000), ch. 6. The quotation, "very rarely", was made in a comment on an early draft of this paper. Powell's finding cast considerable doubt on Bellamy's confidence that 'under the proportional representation systems that characterize most advanced democracies policy decisions are likely to reflect the views of an overwhelming rather than a bare majority of the population'. Bellamy, p. 38

Far from majority government being the norm, then, Powell points to ‘the persistent refusal of voters to deliver majority support for a single party or even a pre-election coalition’.²³ This makes it likely that people’s beliefs about the legitimacy of their government depend on something more than universal suffrage and majority rule, and are likely to be more contingent and variable than the procedural thesis implies.

Moreover, even under idealized assumptions the legacy of inequality and undemocratic government will likely dog democratic politics for a long while yet. This means that, through not fault of their own, some people will find it harder to organize politically than others, although they will likely suffer from a legacy of unjust laws and of ignorance that make political mobilization especially important, even if we abstract from problems of prejudice.²⁴

At a minimum, some groups, such as churches, have more political and economic clout than others simply because they are already organized.²⁵ The fact that unions and employers’ organizations exist, for instance, may be good luck for their current members, but it is rarely the result of their own efforts or, it should be said, of principles of political equality. Indeed, the shape of most contemporary political organizations – even radical

²³ Bingham Powell, p. 129.

²⁴ Compare Bellamy on political participation and poverty, p. 116. ‘The problem for the poor lies not in the blocking of formal channels or deliberate discrimination but in their social powerlessness leading them to fail to exploit fully the political power formally open to them.’ (p. 116). Judicial review in America has been very disappointing in its treatment of poverty, but this perspective overlooks the way homelessness, or frequent changes of address, can deprive the poor of the vote. It also seems naïve about the power of an equally weighted vote in a society of rich and poor.

²⁵ Garrow chillingly documents the readiness of the Catholic Church in New England to use its power to prevent the liberalisation of laws on contraception. See D. J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (University of California, 1998), especially ch. 2. By contrast, the Church of England was in favour of reforming the death penalty, abortion law and the law of homosexual offences, in order to reinforce the distinction between sin and crime. See P. G. Richards, *Parliament and Conscience*, (Allen and Unwin, London 1971).

or ‘oppositional’ ones – has been deeply affected by their formation at the end of the nineteenth and beginning of the twentieth centuries, prior to universal suffrage; and most associations continue to be affected by the near-exclusion of women and racial minorities from roles of power and authority until recently.

There are, then, considerable descriptive difficulties with the procedural case against judicial review. Democratic elections, for all their virtues, are likely to be tainted by a history of un-freedom and subordination and, even at their best, rarely provide the unquestioned mandate and legitimacy which the procedural thesis implies. So, even if one doubts that judicial review is a cure for political inequality, there are good empirical reasons to be skeptical of the procedural thesis. Inequalities of wealth and power profoundly affect legislative and judicial bodies in most modern democracies. Contra the procedural thesis, then, a commitment to social equality may prove more significant for the democratic character and functioning of these institutions, than the precise division and balance of power amongst them.

C. The Procedural Thesis: Normative Problems

The descriptive difficulties of the procedural thesis reflect the conceptual and normative problems with a conception of democracy that places so much emphasis on voting as a way to secure representation, accountability, participation and equality. Quite apart from the obvious point that how democratic any procedure actually is depends on the environment in which it operates, it is simply false that voting is uniquely democratic

- despite its real and unquestioned importance to representative conceptions of democracy.

Democratic Legitimacy and Voting

Voting is one of several devices that democracies can use to select people for positions of power and responsibility. Alternatives include lotteries and appointments. Off hand, there is no reason to suppose that one of these is intrinsically more democratic than others, although we often share Waldron's tendency to identify democracy with voting. This is a mistake. As Bernard Manin has shown, in classical democracies and renaissance republics, election was thought of as an *aristocratic*, not a *democratic* device, because it enabled some people repeatedly to hold office, while others had no chance of doing so. In contrast, they thought of *lotteries* as distinctively democratic, because they gave all eligible citizens a mathematically equal chance of holding office.²⁶ From this perspective, elections suffer from the same flaws as appointments: that they enable favouritism to affect the outcome of political selection. Indeed, it is for that very reason that juries nowadays are chosen at random, rather than by election.²⁷

A common problem with lotteries, of course, is that their randomness makes them unsuitable when one needs people with special expertise, or where a job requires its occupant to hold a special relationship with someone else – special trust, or confidence,

²⁶ Bernard Manin, *Principles of Representative Government*, (Cambridge University Press, 1997)

²⁷ For contrasting views of what counts as random selection, and its implications for the racial selection of juries see A. Lever, 'Racial Profiling and Jury Trials' in 'Debate: 'Ethical Issues in Racial Profiling', *The Jury Expert* (Vol. 21, 1. Jan. 2009), 20-35

say. In such cases, appointment can be preferable both to lotteries and elections. Moreover, lotteries preclude holding anyone responsible for the selection of public officials, whereas elections tend to disperse and obscure individual responsibility - and the greater the electorate, the worse the problem. For this reason, appointment in the selection of military and judicial leaders can be preferable to either elections or lotteries, even if it fails to promote better leadership or greater harmony and cooperation amongst the different branches of government.

The fact that legislatures are elected, then, whereas judges are generally not, is insufficient to show that the former are more democratic than the latter. After all, it is possible - not to say likely - that legislatures and judiciaries have ways of being democratic or undemocratic which are distinctive to themselves.

For example, judges can be representative and democratic even if they are not elected *in order* to be representative. They can be selected from a people that is not segregated by lines of race, religion, income and wealth; they can see themselves as striving to personify what is best in their society, or in its legal system and judiciary; and their actions and deliberations may reflect an ethos of equality and a democratic regard for the rights of all people.²⁸ In short, there are a variety of ways in which judges can

²⁸ This is rather different from the way Eisgruber thinks of judges representing people. For Eisgruber, 'the power of judicial review presupposes only that judges can usefully speak on behalf of the people with respect to some important issues of political principle'. (57). Personally, I find it hard to see anyone speaking on behalf of '*the* people', in modern democracies, given the fundamental and various conflicts of interest and belief that characterise them. More specifically, however, I see no reason to equate the desire for a judicial decision with the desire for judicial representation *of one's political principles*. Self-interest, as much as the vindication of principle, may motivate judicial appeals against the government, as against individuals or associations. And people are unlikely to think of judges representing them, so much as deciding for or against the lawyers or advocates who function as their legal representatives. So, I am

represent democratic ideas and ideals in their person and behaviour; and there are, in addition, a series of institutional features that are likely to shape the ways that democratic, as opposed to undemocratic, judges select cases, think about them, and present their decisions.²⁹

The procedural case against judicial review, then, depends on an exaggerated sense of the importance of voting to the legitimation of power in a democratic society. Though voting is important in representative democracy, it is not clear that Athenian democracies were undemocratic because they preferred lotteries to elections - although it is clear that democracy here applied only to free men, and so excluded most of the Athenian population. Nor are elections always the most suitable mechanism for securing important democratic goods, such as accountability, competence, probity and trust. Universal adult suffrage, therefore, is but one of several democratic mechanisms for distributing and legitimizing power, and so cannot support the assumption that legislatures are *ipso facto* more democratic and legitimate than judiciaries.

Electoral and Descriptive Representation

In representative democracies there are good, indeed compelling, reasons why election is preferable both to lotteries and appointments in selecting a legislature. Although election is insufficient to ensure that legislatures represent their constituents, it seems a necessary condition if political representation is to reflect people's own

uncomfortable with the empirical, as well as the normative, implications of Eisgruber's picture of judicial representation.

²⁹ On accountability, for example, see "Developing Mechanisms for Judicial Accountability in the UK" by Andrew Le Sueur, (2004) 24 *Legal Studies*, pp. 73-98.

understanding of their interests, given the available alternatives, and of their weight and significance for collective affairs. Once we adopt this view of politics, it is clear that lotteries and appointment are both unsuitable ways to select legislative representatives.

But just because elections are necessary for *legislative* representative, it does not follow that they are necessary to democratic representation in *other* areas of life. As we now know – for reasons connected to Greek views on the difference between lotteries and elections – electoral representation is often at odds with descriptive or ‘mirror’ representation, and thus with efforts to ensure that all sections of the population hold legislative power roughly in proportion to their numbers in the population.

Recent work on the under-representation of women and racial minorities has suggested that established notions of electoral representation need serious revision if they are to be consistent with the ideals of inclusion, reason, fairness, freedom and equality which inspire democratic ideas about politics.³⁰ This work has also pointed to a variety of ways in which, or mechanisms through which, electoral representation might be reformed to secure the participation of politically disadvantaged groups. For example, Melissa Williams discusses different forms of proportional representation, and proposals for cumulative voting, group vetoes and super-majority requirements;³¹ and Dennis

³⁰ M. S. Williams *Voice, Trust, and Memory: Marginalized Groups and the Failings of Liberal Representation*, (Princeton University Press, 1998); Anne Phillips, *The Politics of Presence*, (Oxford University Press, 1995); Iris Marion Young, *Inclusion and Democracy*, (Oxford University Press, 2000) and Jane Mansbridge, ‘Should Blacks Represent Blacks and Women Represent Women? A Contingent “Yes”’ in *Journal of Politics*, 61 (1999), 628-57 and ‘Rethinking Representation’, *American Political Science Review*, 97, (2003) 515-28. For the reasons to prefer thresholds to strict proportionality as a way of thinking about representation, see Phillips, p.67

³¹ Williams, ch. 7.

Thompson's highlights the significance of electoral reform.³² Hence, there are forms of democratic representation which we might want our major institutions to secure, whether or not their purpose is self-consciously representative, and regardless of their dominant form of selection and decision.

Descriptive representation may be important to democratic politics for several reasons. Melissa Williams and Iris Marion Young draw attention to the ways that descriptive representation might improve the quality of democratic deliberation, by facilitating the representation of hitherto marginalized or subordinate social groups.³³ For others, such as Anne Phillips, descriptive representation is a fair test of the extent to which political opportunities are, in fact, equal, as well as an integral element of equal representation.³⁴ However, common to all advocates of descriptive representation, or what Phillips describes as a 'politics of presence', is the belief that all sections of the citizenry ought, in principle, to be found in positions of power and responsibility roughly in proportion to their numbers.

This is not merely a matter of equality of opportunity – though it is certainly that.³⁵ Rather, it is because the fundamental social and political cleavages, characteristic of modern democracies, have epistemological, as well as moral and political consequences. As Young says, 'special representation of otherwise excluded social

³² Dennis F. Thompson *Just Elections: Creating a Fair Electoral Process in the United States* (University of Chicago Press, 2002).

³³ Williams, especially chapters four and six; Iris Marion Young, especially chapters 2 and 3.

³⁴ As Phillips puts the matter: 'If there were no obstacles operating to keep certain groups of people out of political life, we would expect positions of political influence to be randomly distributed between the sexes'. P.63 That is not what we see. 'Equal rights to a vote have not proved strong enough to deal with this problem: there must also be equality among those elected to office', she concludes. P.65

³⁵ Phillips, pp. 62-64

perspectives reveals the partiality and the specificity of the perspectives already politically present'; or as Williams puts it: 'since members of privileged groups lack the experience of marginalization, they often lack an understanding of what marginalized groups' interests *are* in particular policy areas'.³⁶ So, we cannot expect our legislators to be representative, or our judges adequately to interpret and apply the law, if they are selected from a privileged elite, however competent and well-meaning, and however ideal the procedures by which they were selected.

Implications for Judicial Review

The implication of these points for judicial review are these:

- 1) Social equality matters to democratic representation, whether descriptive or electoral. In its absence, it is difficult to sustain the claim that people are adequately represented by those with power and authority over them, however perfect their institutions in other respects.
- 2) There are at least two forms of representation consistent with democratic government, and though both are desirable and important from a democratic perspective, *it will be difficult to realize each fully in one and the same institution.*
- 3) Ideals of representation can differ, and this can generate conflict between, as well as within, democratic institutions.

There is, therefore, no warrant for the view that legislatures are more representative than judiciaries on democratic grounds, or for supposing that judicial review is a threat to democratic forms of representation. Put simply, we can value

³⁶ Young, p. 144; Williams, p. 193, emphasis in the text.

democratic government, and the scope for representation that it presents, without supposing that democratic government mandates only one form of representation, or any particular balance between judicial and legislative institutions.

Legislative and Judicial Accountability

The democratic case against judicial review trades on a familiar contrast between unelected and unaccountable judges and elected and accountable legislators. But if elections are imperfect means to democratic representation, the same applies to democratic norms of accountability. Elections are too blunt, too infrequent, and typically raise too many issues for electoral consideration to provide a good means of holding legislators accountable for violations of rights – or, indeed, for much else.³⁷

Elections are not sufficient for accountability, then, nor are they necessary. Accounting does not require us to ‘chuck the bastards out’, nor is this much of an accounting mechanism. The Greeks, rather, thought that a settling of accounts was both possible and desirable by requiring those who had completed their term of office – whether elected, appointed, or selected by lot – to answer for their use of public monies and power.

It makes sense, then, to consider what forms of accountability are possible or desirable in a democratic judiciary. I will assume that judges cannot be removed except by impeachment for gross derelictions of duty – although, as we know, judges in lower

³⁷ Similar concerns are raised by L.S. Underkuffler, ‘Moral Rights, Judicial Review, and Democracy: A Response to Horacio Spector’ in *Law and Philosophy*, 335, (2003), pp. 348-9.

courts in the States are elected to finite terms, in much the same way as candidates for other local offices. We might want to focus, as does Le Sueur, on the way judiciaries might be made financially accountable.³⁸ However, it also sense to consider the role of accountability *within* the process and procedures of judging, itself.

Democratic opponents of judicial review are perfectly aware that judges are often elected themselves, or appointed by politicians who have, themselves been elected.³⁹ But this, they believe, has no bearing on the accountability of judges *once* they have been selected and sworn in. So, while Eisgruber is right that judges are typically selected by people who are electorally accountable, this clearly does little to alleviate the worry that, once appointed, judges can do pretty much whatever they want, with no penalties for overstepping their powers, reasoning poorly, or being lazy, foolish and prejudiced. (64-68)

The comments below are, necessarily, sketchy and are meant to be suggestive, not definitive. However, it is desirable to reexamine, and if necessary to reinterpret, familiar features of judging with concerns for democratic accountability in mind. Accountability is not the only thing we should desire in judicial decisions.⁴⁰ Still, it is a central tenet of democratic government that power entails responsibility and accountability. Our models of accountability tend to be rather unimaginative and bureaucratic – and, as Onora

³⁸ A. le Sueur, 'Developing Mechanisms for Judicial Accountability in the UK', *Legal Studies*, 24, (2004),73

³⁹ Waldron, 1391 and 1394, where he explicitly refers to Eisgruber's views.

⁴⁰ Lon Fuller, for instance, was concerned with their consistency and impartiality in Lon L. Fuller, 'The Forms and Limits of Adjudication', *Harvard Law Review*, vol. 92 pp.353-409, (1978-9)

O'Neill has argued, are often counterproductive.⁴¹ It does not follow, however, that these demands are illegitimate, or that we could not improve judicial decisions and procedures through greater attention to their significance for judicial accountability.

Accountability Within The Judicial Process

For example, publishing decisions, whether *seriatim* or as a Court, helps to reveal the reasoning behind a judgement.⁴² It implies that if these reasons are wrong, judges will have to reconsider their opinion. This practice fosters accountability as well as political participation because the public or their legal agents, can bring new cases based on a court's reasoning in previous cases, and therefore test judges' understanding of, and commitment to, the principles that they have enunciated.

The *explanatory* role of judicial decisions is often doubtful,⁴³ but their role in *justifying* a decision is clear, and fosters accountability regardless of the motivations that actually drive a decision. Judges can be challenged on their reasoning, their conclusions, or the relationship between these – as often happens in the US – and when these challenges take the form of further legal cases, judges will not easily be able to duck or ignore those challenges.

⁴¹ Onora O'Neill, *A Question of Trust: The BBC Reith Lectures, 2002*, (Cambridge University Press, 2002), ch. 3.

⁴² Friedman, p. 284 notes that English judges still recite their opinions, analogous to *seriatim* opinions, whereas American courts give a single opinion for the whole Court, even if there are also dissenting and concurrent opinions. See also Kornhauser and Sager, 'The One and the Many: Adjudication in Collegial Courts', *California Law Review*, 8, 1. (1993) pp. 12 – 13. See Barry Friedman, 'the Politics of Judicial Review', *Texas Law Review*, vol. 84, No. 2, (Dec. 2005). All references here are to this piece. However, his earlier 'Dialogue and Judicial Review', 91, *Michigan Law Review*, (1992-1993), pp. 577-682 is also of interest.

⁴³ Waldron, p. 1379 complains about the idealisation of 'deliberation' on the Supreme Court, and footnote 88, p. 1379 refers to Kramer's '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'.

By contrast, records of legislative debate are less informative. Legislative records contain the opinions of those in a debate: but not all legislators participate, even if they vote. Most MPs, for instance, vote without contributing to the debates that are published in Hansard. Nor is it clear how far legislative debates are meant to provide a *justification* of a particular decision, rather than *strategic considerations* that would lead one to support a particular outcome. For that reason the grounds of legislation are notoriously hard to determine, whether we consider legislative intentions, legislative motivations, or the role of non-legislative actors.⁴⁴

Publishing judicial decisions, then, can foster accountability as well as publicity – and can foster accountability by creating publicity for Court rulings. The price judges pay for sloppy reasoning, or for inflammatory language, is not purely reputational, however.⁴⁵ It may take the form of endless lawsuits, and styles of argument for which they lack sympathy, or from which they feel the need to dissociate themselves. Scalia’s complaints about the politicization of Court rulings on abortion, quoted by Waldron, suggest that these consequences can be real and burdensome, even when they are self-inflicted, and

⁴⁴ Bellamy, p. 84

⁴⁵ Eisgruber seems to think that the main- perhaps the sole- penalties faced by judges are harms to their conscience and to their reputation. But while these clearly matter, I think he exaggerates the extent to which judges’ reputations are ‘on the line’ in each case; or how adequate this is as a form of accountability. We generally want a good reputation with those we respect, and are not too bothered – may even celebrate – the low opinion of those we hold in low respect. Concern for reputation, therefore, may make judges even more preoccupied with the views of a narrow group of people, and even less sensitive to justified complaints from other sources. This, of course, is one of the difficulties with proposals for open voting, such as John Stuart Mill’s in ch. 10 of *Considerations On Representative Government*, or of Geoffrey Brennan and Philip Pettit’s ‘Unveiling the Vote’, in *The British Journal of Political Science*, 20. 32. (July, 1990), discussed in A. Lever, ‘Mill and the Secret Ballot: Beyond Coercion and Corruption’, *Utilitas* 19.3. (Sept. 2007), footnote 29, p. 374.

are not associated with financial penalties or the likelihood of losing votes on critical issues.⁴⁶

Likewise, rules of precedent and *stare decisis* can promote accountability, as well as the impartiality, uniformity and consistency of legal judgement with which they are more usually associated. Following their own precedents – if not those of other judges or other courts⁴⁷ – makes it harder for judges to tailor verdicts to suit particular plaintiffs, because it exacts a price for each decision in terms of constraints on future cases.

These constraints are insufficient to prevent ideology influencing judicial opinions – or, better, judicial interpretations of law.⁴⁸ But whether or not it is possible and desirable for judicial opinions to be free of ideological assumptions, *stare decisis*

⁴⁶ Waldron, 1390-1391. Waldron appears to take Scalia's complaints at face value, and to endorse them. I think that this requires us to ignore Scalia's own role in fomenting dissatisfaction with the Court's rulings on abortion, and to suppose that prior to the issue of abortion, people were under the illusion that conflicting political and moral perspectives had nothing to do with Supreme Court judgements. There is no warrant for such an assumption.

⁴⁷ Friedman, p. 275. Eisgruber's views on *stare decisis* can be found at 69-71. For the most part, he thinks of it as promoting fairness and stability, and as improving the quality of judicial reasoning on balance. But he is careful to note that appeals to precedent often enable judges to avoid taking responsibility for their judgements, and so can be a bit of a 'double-edged sword'. But this is because Eisgruber is concerned with deference to collective reasoning and decisions, and not to the way individual judges, themselves, can be constrained by their own rulings.

⁴⁸ 'For Rehnquist, Blackmun, Brennan and Marshall, simply knowing that a case involves search and seizure would lead to correct predictions of votes between 78% and 90% of the time', according to Segal and Spaeth, quoted in Friedman, p. 273. However, I am not sure that this really threatens the views of those, like Dworkin, who assume that judges will have to draw on extra-legal values and beliefs much of the time.

For a classic statement of Ronald Dworkin's position on interpretation, see *Law's Empire*, (Harvard University Press, Cambridge, M.A. 1986), especially chapters 2, 6 and 7 and *Freedom's Law: The Moral Reading of the American Constitution*, (Harvard University Press, Cambridge M.A. 1996), pp. 1- 38.

It certainly need not imply that judges are unprincipled in their judicial interpretations – though depending on other evidence, it might cast doubt on the scope for deliberation amongst judges. Still, it is worth noting that talk of 'bargaining' by political scientists describing court behaviour can be misleading. As Friedman says, bargaining in this context may better be described as 'accommodation', akin to the editorial changes academics often make in line with the requests or demands of the journals in which they wish to publish. (286-7).

makes favouritism and corruption more difficult and easier to spot, and forces judges to think more deeply about the grounds of their hunches – at least, on the whole.

Precedent means that judges give past decisions or reasoning presumptive weight. This makes each judge more accountable for his or her own opinion to other judges, to litigants, and to the public at large.⁴⁹ Departures from precedent require special justification, and claims of precedent have to be demonstrated if they are to resist challenge. So I think it worth looking at rules of precedent in light of the normative demands that democracy places on those with power. As Waldron rightly says, those demands include accountability.

Something similar holds for rules of justiciability – or the rules by which Appellate and Supreme courts decide which appeals from lower courts to consider. I am thinking here not simply of procedural rules determining deference to the decisions of lower courts, but also of rules setting the appropriate level of deference due to legislative enactments and other acts of government. An example of the latter might be the differences between strict, intermediate and ordinary scrutiny used by American

⁴⁹ Neil Duxbury pointed out that it would be wrong to say that judges in either England or America ‘bind themselves’ by their own past decisions. Rather, what is at issue is ‘a rebuttable presumption’ that past decisions will determine present ones. I thank him for making this point clear to me during the presentation of a prior version of this paper at the LSE Forum in Legal and Political Theory, (March, 2008). For a fuller discussion see Neil Duxbury, *The Nature and Authority of Precedent*, (Cambridge University Press, Cambridge, UK 2008). Bellamy discusses the role of precedent in judicial decision making at p.85. He is concerned with its ability to render judgements consistent, while allowing for recognition of the characteristics of particular cases.

constitutional courts to interpret the due process and equal protection clauses of the 14th Amendment.⁵⁰

Such rules are not simply helpful ‘rules of thumb’, or devices for coordinating individuals.⁵¹ Rather, they provide the terms in which courts frame their judgements, and set behavioural standards and expectations to which politicians, lawyers and judges, the media and the public all respond. Granted that these procedural rules and standards can often be interpreted in unduly formalistic ways,⁵² they still have important normative implications. Indeed, clarifying their normative significance for accountability may help to avoid and to minimize heavy-handed and formulaic interpretations of judicial procedure by judges and commentators

Were courts unconstrained actors, these devices of accountability - if we may call them that – would have weight only to the extent that judges chose to be bound by them. Nor would there be any penalties for deviance from them. But neither is the case. As is increasingly clear, courts are *not* unconstrained. In ways that are complex and, as yet,

⁵⁰ For these differences see Lawrence Tribe, *American Constitutional Law* (West Publishing Co., Minneapolis), 1996, ch. 10, especially p. 1270 and pp. 1299-1321.

⁵¹ For a collection of essays which illustrates the strengths and weaknesses of rational choice approaches to law see J. M. Maravall and A. Przeworski, eds., *Democracy and the Rule of Law*, (Cambridge University Press, 2003).

⁵² Waldron, p. 1381. This used to be a repeated source of frustration to Thurgood Marshall, and an important component of his many dissents concerning the interpretation of the equal protection clause. See, for example, section II A of his dissenting opinion in *San Antonio v. Rodriguez*, 411 U.S., 1, (1975), protesting ‘the Court’s rigidified approach to equal protection analysis’, and citing his earlier protest in *Dandridge v. Williams*, 397. U.S., 471, 519-521 (1970)

only partially understood, their actions are constrained by legislatures and executives, by lower, as well as higher courts and, importantly, by public opinion.⁵³

Courts cannot enforce their own decisions, and so securing the more or less willing compliance of others is essential to their efficacy as well as to their dignity and legitimacy. Once legal knowledge and information are fairly widely dispersed, courts risk legal and extra-legal punishment for straying too far from public opinion: they can be subject to impeachment, the threat of constitutional amendments, defiance, court-packing and the erosion of their salaries and budgets by inflation. Courts are generally keen to avoid all of these: and so while they may be willing to lead public opinion for a while, they rarely stray from it for too long. Hence, Friedman suggests that we think of public opinion as a bungee cord, supporting the judiciary, enabling it to stray a certain distance from public opinion, before being snapped back into line.⁵⁴

In short, it seems likely that courts are constrained by public opinion, and by the other branches of government, just as legislatures are constrained by the executive and

⁵³ Barry Friedman's work provides an enormously helpful summary and discussion of the empirical and theoretical work on the topic. As he makes clear, 'By seeing the legal landscape from the perspective of the Supreme Court, normative theorists fail...to capture the true content of constitutional law', p. 307. He quotes Sanford Levinson and Reynolds and Denning to make his point. According to Levinson, 'The behavior of the roughly 100 circuit judges and 500 district judges is, for most citizens, most of the time, far more likely to count as "the law" than the pronouncements of the denizens of the Supreme Court' and Reynolds and Denning note that 'For the vast majority of litigants, the courts of appeal represent the real last word in constitutional law'. Indeed, Friedman notes, lower courts have a great deal of discretion and there is some evidence of them trying to force the Supreme Court's hand in matters of civil rights and of federalism, and then diverging from the Supreme Court's lead thereafter. (302-4) Friedman comments, 'Apparently, revolutions not only can begin in the lower courts, they can end there too'. Friedman, pp. 306-7

⁵⁴ Friedman (323-327) He notes that how far courts are allowed to stray is hard to determine, and that American courts seem to have more latitude in First Amendment cases than in others, cases which primarily concern freedom of the press and of expression. Moreover, he notes, 'public support for the judiciary is subject to manipulation by politicians, by interest groups and by the media, (328), so the politics of judicial review are highly complex.

judiciary, as well as by public opinion. These constraints foster the demands for accountability, on the one hand, and the desire to publicise the rightness or appropriateness of one's judgements and actions, on the other. So there is no reason to adopt the familiar assumption that legislatures are more accountable and democratic than judiciaries – whether we adopt a fairly idealized view of politics, or look at the way that legislatures and judiciaries actually work.

Feminists have long insisted that moral and political demands for responsibility and accountability apply to the family, as to other institutions which shape people's life chances, and determine the legitimate exercise of power.⁵⁵ So while judges and legislators are unlikely to be subject to the same norms of accountability, or the same mechanisms of accountability as each other – let alone those applicable to families, churches and businesses- they are no more exempt from the need to explain and to justify their decisions than other groups, or to render account for their use of public powers and resources.

Implications for Judicial Review

The implications of these arguments are these:

- 1) Judges do not have to be elected in order to be accountable, because they have their own demands of accountability to meet, and these are properly different from those of elected legislators.

⁵⁵ See, for example, Susan M. Okin, *Justice, Gender and the Family*, (Basic Books, NY, 198) ch.6 ; Catherine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, (Harvard University Press, 1987), ch. 8; and Morris B. Kaplan, *Sexual Justice: Democratic Citizenship and the Politics of Desire*, (Routledge, 1997), especially chapters 1 and 7.

- 2) However, judges and legislators are both constrained by reputational mechanisms, which exact a price for straying too far from public opinion – whether professional or lay.
- 3) The similarity of the reputational and institutional constraints on legislators and judges created by the executive, media, and public opinion makes it difficult to see how counter-majoritarian arguments for judicial review are to work, even in the highly qualified form in which they are found in Eisgruber and Brettschneider.
- 4) Accountability, in democracies, is necessarily constrained by the rights and institutions necessary to secure political participation. This means that winners and losers in electoral competition are able to see and treat each other as equals, and as future partners. Accountability is, therefore, a less determinate, and more complicated value than is implied by procedural objections to judicial review, or the rhetorical contrast between elected legislators and unelected judges.

In short, elections are neither necessary nor sufficient to enable people to judge their judges. This means that judicial review can be consistent with democratic accountability, as well as with democratic representation.

Legislative and Judicial Participation

If these points are right, we can reject the claim that judicial review threatens democratic participation. Courts typically review a small fraction of all legislation and then uphold more than they invalidate, so it would be surprising if judicial review

actually discouraged electoral participation, and there is some evidence that it often provokes and promotes it.⁵⁶

However, according to Waldron, the problem with judicial review is not simply the disincentives to electoral participation that it creates, but the attitude to democratic politics it implies. While claiming to sympathise with the argument that judicial review can provide ‘an additional mode of access for citizen input into the political system’, Waldron rejects this argument on the grounds 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...But the attitudes towards one’s fellow citizens that judicial review conveys are not respectable in the core cases we are considering, in which the legislature and the elective arrangements are in reasonably good shape so far as democratic values are concerned’.⁵⁷

It is possible, as Waldron claims, that those who appeal to judicial review are simply bad losers. However, appeals from legislature to judiciary may reflect reasonable concern for legislative time, priorities and expense. Some injustices are of relatively minor *political* importance, whatever their *personal* significance, or they are a product of legislation from years past, and would take a great deal of legislative energy and attention

⁵⁶In fact, much lobbying of the judiciary, in the form of briefs to the court, unsolicited mail, protest and exhortations in law reviews, are an effort to *inform* the judiciary, and to make it *responsive* to public opinion. They are, in short, efforts to *influence* and to *constrain* its present and future actions, at least as much as they are efforts to reprove, constrain, or side-track legislatures. Georg Vanberg’s *The Politics of Constitutional Review in Germany*, (Cambridge University Press, 2005) provides the wonderful example of the furor over crucifixes in schools, from 1995. Vanberg, pp. 2 – 4. His book provides powerful evidence of the constraints facing even such powerful courts as the US Supreme Court and the German Bundesverfassungsgerecht, let alone the much less powerful courts of Italy and Russia.

⁵⁷Waldron, pp. 1394-5.

to understand and overturn.⁵⁸ So, Waldron's interpretation of people's reasons for seeking judicial review are ungenerous, and insensitive to the differences between the personal and the political weight of injustice.

Stephen Cretney's *Law, Law Reform and the Family*, provides a poignant example of these problems. Thanks to the efforts of Joan Vickers, who used a Private Members Bill (a PMB, for short) to publicise the problem, the Conservative government in 1973 finally gave women, as well as men, legal guardianship of their children. Until that change in the law, married or divorced women had no legal right to permit their children to marry, no right to consent to surgery for their children, or to seek a passport for them.

The period between 1920 and 1975 included Depression, a General Strike, World War and the demands of reconstruction, and it is possible that many men and women were unaware of how cruel the legal situation was for those adversely affected by it. Nor would you have to be indifferent to demands for sexual equality to wonder whether scarce legislative energies and efforts should be expended on such matters for much of that time. It was fortunate, therefore, but by no means predictable, that Joan Vickers and David Steele⁵⁹ were able to use PMBs to rectify some of the serious injustices under

⁵⁸ See also Aileen Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' in *Law and Philosophy*, 22 (2003) especially pp. 483-485. Bellamy objects to Kavanagh, p. 42 because economic inequalities are likely to affect access to the judiciary, as well as to the legislature, whereas 'in electoral politics all citizens are equal in at least one important respect – they all possess the same decisive political resource, a single vote'. However, this begs the question of how adequate the vote is to protect the interests of historically disadvantaged groups – groups who, in addition to the other problems they likely face, have also to contend with the legacy of laws and institutions that predated their acquisition of the vote.

⁵⁹ David Steele's Private Member's Bill was responsible for legalising abortion in Britain, in 1966. Until that point it was unclear whether it was even legal to save a mother's life, except in Scotland where that

which women laboured. But it remains to be seen what democratic principles require women to await a legislative route to the redress of such injustices.

Courts are an appropriate target of political mobilization, organization and expression from a democratic perspective. In a society with a functioning judiciary, after all, it seems at least as natural for people to wish to find a judicial solution to violations of rights as a legislative one. Indeed, as the former, but not the latter, provides the preeminent means for resolving conflicts of rights, it would be odd for people not to wish to use it in their conflicts with their government, as well as with each other. Government officials personally command no special recognition and immunity in democracies, and government offices are justified by their role in pursuing the common good. So there are obvious reasons why democratic citizens should wish to vindicate their rights against legislators in just the same way that they would against other people. To do so, indeed, symbolizes their claims and rights as citizens, quite apart from any advantages that judiciaries may have over legislators in terms of efficiency, transparency, economy or publicity.

was explicitly protected. Waldron tends to hail the use of PMBs as triumphs of democracy, and Bellamy basically endorses this judgement, (253). It is notable that Steele thought it reprehensible that it took a PMB to rectify laws that were simultaneously so ambiguous and so harsh that they had been a cause of concern since the beginning of the twentieth century. See *Hansard*, HC Vol. 732, July 22, 1966). I discuss the difficulties with Waldron's views of PMBs more extensively in A. Lever, 'Is Judicial Review Undemocratic?' *Public Law* (Issue 2, 2007), 280-298. My views have been shaped by the following works: P. Cowley, ed. *Conscience and Parliament* (Frank Cass, 1998); by David Marsh and Mevyn Read, 'British Private Members Balloted Bills: A Lottery With Few Winners, Small Prizes, but High Administrative Costs', no. 21, *Essex Papers in Politics and Government* (University of Essex, Department of Government, January 1985) and P. Norton's discussion in *Parliament in British Politics* (Palgrave, 2005). According to Norton, less than 5% of parliamentary time is spent on PMBs, (p. 74), which is why they are grossly inadequate devices for insulating debate and legislation on fundamental rights from the pressures created by Party discipline and competition.

Here, I believe, we find the distinctively democratic case for judicial review. There are many ways we can structure and constrain legislative power in order to promote people's freedom, equality and their capacity to protect their rights. That is why Waldron and Bellamy are right to maintain that judicial review is unnecessary for democratic government. But whatever the merits of the alternatives – including weak judicial review – strong judicial review has one unique and important advantage: that it enables citizens to challenge their governments in the same ways and on the same grounds through which they challenge other individual and collective agents.

Implications for Strong v. Weak Judicial Review

If these arguments are right, strong judicial review has some advantages from a democratic perspective over weak judicial review. Judicial review in Britain can illustrate the point. In 1998 Britain incorporated the European Convention of Human Rights into British law through the Human Rights Act. The Act authorized the courts to issue a '*Declaration of Incompatibility*' whenever a legislative provision is incompatible with one of the rights in the European Convention. A Declaration of Incompatibility, however, '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'. However, a minister may use such a declaration as authorization to initiate a fast-track legislative procedure to remedy the incompatibility. As Waldron says, 'this is a power that the minister would not have but for the process of judicial review that led to the declaration in the first place'.⁶⁰

⁶⁰ Waldron, p. 1355

A Declaration of Incompatibility, therefore, creates a *legislative opportunity* speedily to rectify an abuse of rights where, otherwise, there would be none. In that sense, it recognizes the urgency of preventing, if possible, and certainly of rectifying violations of rights, and implicitly acknowledges that the normal legislative process would make such speedy prevention or rectification impossible. However, there is no guarantee that a minister will take advantage of the opportunity or will, indeed, do anything to stop rights being violated, to rectify the wrong done to people, and to ensure that such wrongs are not repeated.

In that sense, the British system of judicial review still seems quite inadequate if you care about rights. Indeed, in some ways, this seems worse than no judicial review at all: for now we have a situation where the government need be under no illusion about the rights-violating quality of its legislation; and also has a device that would enable it to diverge from normal legislative procedure in order to amend the offending legislation.⁶¹ And yet, there is no obligation on the government to do anything. Short of taking a case to the European Court of Human Rights, it is not clear what wronged citizens can do to vindicate their rights.

Strong judicial review is not a perfect proxy for government publicly justifying its decision directly to those who believe that their rights have been violated. But it is probably as good as one can get. In that sense, strong judicial review, by contrast with its

⁶¹ If the Legislature accepts the Court's judgement, in other words, it need not act; and if it does not accept it, it need not publicise and explain the nature of its disagreement. Neither seems very satisfactory if you care about rights or, indeed, about a politics where people are owed a justification of the uses of collective power and resources.

weaker counterparts, gives effective expression to a society's commitment to the protection of rights by government, as well as by citizens. By forcing governments to justify legislative provisions in terms of rights, it reflects concern for accountability and, even, for equality between government and the governed.

In short, concerns for participation in the legislative and judicial process provide the best justification for judicial review from a democratic perspective. This is particularly true where citizens themselves are entitled to initiate judicial proceedings in constitutional, as well as civil, cases. This participatory role is, inevitably less in other legal settings, though the democratic appeal of judicial review may, nonetheless, be very strong. There is extraordinary symbolic power to the idea that people can hold governments to account in court, just as they can each other. Even if they cannot, themselves, initiate legal proceedings the fact that prosecutors acting on their behalf are entitled to do so reminds people that legislators are subject to the same laws as those they govern, and are susceptible to judgements in the same courts of law, and according to the same legal procedures as everyone else.

Implications for Judicial Review

The conclusions I draw from this are,

- 1) that judicial review can have a democratic justification even though judges are not obviously better than legislators at protecting rights. The point of judicial review is to symbolize and give expression to the authority of citizens over their governors, not to reflect the relative wisdom, trustworthiness or competence of judges and legislators.

Hence the presence or absence of judicial review is not a proxy for people's beliefs about the relative virtues and vices of legislators and judges.

2) Above a threshold level of competence – which may be impossible to determine a-priori – the legitimacy of judicial review does not turn on the special wisdom, virtue or personal qualities of judges. Instead, it reflects the importance that democracies properly attach to the ordinary virtues and competences of individuals in justifying power and authority.

3) There is, therefore, more scope for lay participation in government than is characteristic of modern democracies, and this is as true of the judicial, as of the legislative, executive and administrative features of government. Democracies are not indifferent to the wisdom, consistency or efficacy of their leaders. However, these are not the only properties which they seek in government, nor is there much agreement on how these properties should be identified and institutionalized. That, in part, is why it is hard to justify judicial review on substantive, or consequential, grounds.

It is misleading, therefore, to imply that a preference for legislative over judicial politics follows from a democratic commitment to political participation, or from a republican commitment to the avoidance of domination.⁶² There are many ways to specify the ideal of democratic government, even if one values political participation, because there is no uncontested account of the relative powers of legislatures vis a vis families, churches, trade unions and business associations, or individuals. Hence, democratic concerns for accountability, equality, participation and procedural fairness

⁶² The problem is particularly acute for Bellamy as Pettit, on whom he relies for a democratic interpretation of republican ideals, himself believes that judicial review is justified and promotes self-government. For Pettit's views, and Bellamy's objections to them, see Bellamy, 163-171.

can all be consistent with judicial review, although judges can be as disappointing as legislators whatever one's ideals.

C. Conclusion

I conclude, then, that the procedural case against judicial review fails. Moreover, the reasons why it fails suggest that familiar peculiarities of judicial reasoning and procedure – such as the obsession with precedent, with jurisdiction, and so on – need be much less of a threat to reasoning about rights than Waldron believes.⁶³ Judicial review is not mandatory, because there is not enough evidence that it is necessary to protect rights, though it is sometimes very helpful. However judicial review can be an attractive supplement to otherwise democratic institutions because it enables individuals to vindicate their rights against government in ways that parallel those they commonly use to vindicate their rights against each other, and against non-governmental-organisations. This is normatively attractive on democratic grounds, and is probably quite practical as well.

Strong judicial review means that laws can be overturned by judges and that, short of getting judges to change their mind, the only way to return to the *status quo ante*, or to pass laws that conflict with the judicial decision, is to seek a constitutional amendment. Constitutional amendments, however, are difficult to pass – and designedly so. Walter Sinnott-Armstrong is right that some objections to judicial review are really objections to

⁶³Waldron, p. 1373 and part VI, pp. 1376-1386. While I am sympathetic to Waldron's complaints about some of the more exaggerated claims made on behalf of judicial reasoning, I worry that Waldron tends to pathologise judicial reasoning about rights. After all, if Supreme Court reasoning about rights is so very bad, what should we conclude about the ability of other courts to protect our rights? See also Bellamy, 172.

extremely demanding requirements on constitutional amendments.⁶⁴ Still, strong judicial review, unlike its weaker counterpart, means that some piece of legislation can be struck down, in whole or in part, and when this happens, the legislation cannot be re-authorised by normal legislative means.⁶⁵ This is what seems so outrageously undemocratic to opponents of judicial review.⁶⁶

As we have seen, however, this outrage reflects a picture of electoral and legislative politics in which existing bars to political participation are negligible, and in which there are no obstacles of time, money and political will to refighting old battles. Hence Waldron's assumption that judicial review is unwarranted except where 'other channels of political change are blocked'.⁶⁷

However, significantly unequal access is not the same as blocked access, or no access at all. Nor does democratic theory justify fixing the standard of legitimacy so high. If we care about democratic government, we should care about unequal political power, not merely the lack of power itself. Otherwise what could be the objection to

⁶⁴ In his critique of Mark Tushnet, Walter Sinnott-Armstrong suggests that many of Tushnet's objections are not really to judicial review, but to a system that makes it so difficult to amend the constitution and, therefore, to overturn judicial decisions by legislative means. This point applies with as much force to Waldron as it does to Tushnet. Walter Sinnott-Armstrong, 'Weak and Strong Judicial Review', 22 *Law and Philosophy*, (2003) esp. p. 387.

⁶⁵ Canada's 'Notwithstanding Clause' is a partial exception. It means that Canadian assemblies can legislate 'notwithstanding' rights in the Charter, under some special circumstances and for a limited amount of time. Waldron worries that this requires legislatures to misrepresent their position on rights, by implying that their legislation is at odds with Charter rights, when they may believe no such thing, and when this may then put them in the politically costly position of being at odds with Charter rights. But apart from the fact that legislatures, like other people, may genuinely believe that on occasion Bills of Rights need to take second place to other concerns – in which case there would be no misrepresentation – legislatures are perfectly capable of explaining to the public when and why they have used the notwithstanding clause. So while I see that there may be a problem of misrepresentation in theory, in practice I am unsure how serious it is. Waldron, pp. 1356-7.

⁶⁶ Waldron, p. 1394.

⁶⁷ Waldron, p. 1395.

letting men attain the vote at a younger age than women, as was the case in the United Kingdom from 1918-28.⁶⁸ Nor can we simply abstract, as Waldron does, from the fact that legislative time, skills, energy and resources are scarce goods compared to the demands placed on them.⁶⁹

Judicial review can be democratic, then, without being mandatory. The barriers it raises to the rectification of injustice are unlikely to be so bad *absolutely*, or so much worse *comparatively* than those created by the regular legislative process. It is equally doubtful that consideration of the legislative barriers to the rectification of injustice, in Waldron's core cases, will show that judicial review is required on democratic grounds, either. Hence, I suspect, political judgement is unavoidable here, as in the choice of electoral systems, themselves.

Democratic principles support a procedural justification of judicial review, then, and do not require us to show that judges are especially good at protecting rights as compared to either voters or legislators. For all their subtleties, the arguments of Brett Schneider and Eisgruber mistake the protection of certain canonical rights with the protection of democratic government. Their account of democracy, therefore, elevates the formal, legal and rational aspects of government over the spontaneous, competitive and

⁶⁸ The Representation of the People Act, 1918, enfranchised all women over 30; that of 1928 finally ensured equal terms of representation setting the age limit for women to 21, as for men.

⁶⁹ At p. 48 Bellamy notes the pressures on parliamentary time, but it never figures significantly in his arguments. It is all but ignored in Waldron. Of course, judicial time, skills and energy are limited too. However, the tasks that legislatures have to handle, and the complexity and variety of their procedural rules, are infinitely greater than those facing courts.

participatory. There is no conceptual or normative necessity to do this, and the result may be at odds with important and attractive features of democratic politics.⁷⁰

Likewise, the difficulty with Waldron's position is not his skepticism about judicial wisdom and competence, or his faith in democratic majorities, but his belief that the right to vote is the 'right of rights'.⁷¹ Voting for elected legislators is important to representative democracies. But it is a peculiar idea of democracy which supposes that this is either the unique, or the most important act of self-government that citizens can take.⁷² If Eisgruber and Brettschneider exaggerate the legalistic and formalistic aspects of democracy, then, the difficulty with the procedural thesis is the arbitrary moral and political importance it attaches to the moment in which people choose their government.

The procedural justification which I have offered is not the only way to justify judicial review in democracies. We can expect democracies to be characterized by a variety of arguments for and against judicial review – as with any important matter. Liberal egalitarian arguments, for example, are likely to place more weight on the

⁷⁰ This is the implication of Marc Stear's excellent 'Liberalism and the Politics of Compulsion', *British Journal of Political Science*, 37., (2007), 533-553.

⁷¹ Waldron heads ch. 11 of *The Dignity of Legislation*, 'Participation: the Right of Rights'. His argument is not that participation is morally superior to other rights but that 'participation is a right whose exercise seems peculiarly appropriate in situations where reasonable rights-bearers disagree about what rights they have'. (p.232). I am in complete agreement with this. The difficulty, however, is the identification of voting with this right, when there are *so many other ways* in which people can participate in shaping, revising, adjudicating and implementing the rights by which they are governed, given the variety of rights they have as citizens in a democracy.

⁷² Rousseau was famously acerbic on this point. See Jean-Jacques Rousseau, *On the Social Contract*, Book 3, p. 198 in *The Basic Political Writings*, (Indianapolis, 1997). For some examples of the other important things that citizens can do, see Archon gung, *empowered Participation: Reinventing Urban Democracy*, (Princeton University Press, 2004), or the ideas in Joshua Cohen and Joel Rogers, 'Solidarity, Democracy, Association' in Wolfgang Streek, ed. *Staat und Verbände*, special issue of *Politischen Vierteljahresschrift* (Westdeutscher Verlag, Wiesbaden, 1994), 136-59; and their 'Secondary Associations in Democratic Governance', in *Politics and Society*, 20 (Dec. 1992), 393-472.

protection of certain specific rights than I have, and are likely to place considerable importance on the specific knowledge of judges, and the particular institutional environment in which they operate. Such arguments can be made consistent with democratic principles so long as they give sufficient weight to democratic procedures in selecting judges and therefore seek to constrain, as well as to celebrate, the counter-majoritarian role of judges. This, I think, is suggested by the difficulties of the procedural thesis and by the strengths of Brett Schneider and Eisgruber.

In contrast, I have tried to sketch a distinctively democratic justification of judicial review, which reflects the core democratic claim that people are entitled to govern themselves whether or not they are especially wise, knowledgeable, prudent or virtuous. The procedural case I have presented is democratic, not liberal, because the rights it seeks to secure and to instantiate are as much collective as individual; and the judgements it seeks to vindicate are as much lay as professional. Indeed, I must admit to some doubts about the types of expertise necessary for membership of a democratic Supreme Court, even where the documents on which judgements about rights are based are distinctively legal rather than, say, moral, religious or historical.

Court judgements can never be purely legal, for reasons which have been well-rehearsed by Dworkin and Eisgruber, as well as by more radical legal theorists and philosophers.⁷³ So it might well be desirable for Supreme Courts to include members with expertise in other matters, even if this were to come at some cost to their specifically

⁷³ See, for example, R. Dworkin, *Law's Empire*, (Harvard University Press, Cambridge, 1986) and for the more critical version of the claim, see R. Unger, *The Critical Legal Studies Movement*, (Harvard University Press, 1986)

legal training. Professional lawyers might be necessary to help citizens to articulate their judgements, so that these are clear and legally effective – just as, in Britain, professional draughtsmanship is needed to help legislators to frame Bills before Parliament.⁷⁴ But if citizens can be expected to take a lively interest in, and to make considered judgements about, complex legal arguments – whether or not they, themselves, have had legal training – it is unclear why the Supreme Court should be populated only by lawyers, whatever one thinks about the arguments for lay participation in other courts.

Be that as it may, this paper has shown that judicial review can be justified on democratic grounds, although its appeal may be largely symbolic. This democratic symbolism, I suspect, illuminates the attractions of judicial review even to people who are not especially suspicious of their government, solicitous of minorities, or confident that laws, lawyers and judges will impartially protect their rights, or do so better than legislators. Judicial review can instantiate the commitment to citizen judgement, protest, rights, responsibilities, freedom and equality which characterize democratic arguments for electoral representation. It is no surprise, therefore, that judicial review can be justified democratically, even if its benefits are uncertain: for the same might be said of democratic government itself, though we have every reason to cherish that, and to share in the costs of maintaining it.

⁷⁴ Richards, *Parliament and Conscience*, 30 – 31, 33. Richards notes that because the drafting of legislation in Britain is such a specialised art, '[n]o member [of Parliament] unaided can hope to produce a draft Bill framed in language that will satisfy lawyers. Even highly qualified lawyers unskilled in draftsmanship fail in this task. The Matrimonial Property Bill, 1968, was prepared by some of the best legal brains in the London School of Economics, yet the quality of the drafting was widely condemned'. However, MPs have no right to assistance in drafting their Bills – and this, as well as lack of time, is often an insuperable stumbling block to the successful passage of Private Members' Bills which have not received the support and assistance of the Government of the day. Peter G. Richards, *Parliament and Conscience*, (Allen and Unwin, London, 1971).

