

**In Defense of Judicial Review:
An Outcome-Based Argument for Judicial Review in Non-Ideal Theory¹**

Abstract:

In recent years, a number of prominent philosophers, historians and legal theorists have argued that judicial review cannot pass muster with standards of democratic legitimacy. We argue that there are important outcome-based reasons to support judicial review. However, rather than assuming that the training of justices renders them uniquely well-suited to make decisions regarding rights, our argument hinges on (a) the ambivalent and malleable commitment to individual rights of ordinary citizens (documented in public opinion research) and (b) justices' ability to operate much more independently of electoral constraint than members of Congress. Because of this lack of accountability, justices are in much better position than legislators to protect the rights of groups that are neither powerful nor popular. Thus, a consideration of the structural incentives created by the two institutions suggests that a system of judicial review may do better at protecting individual rights than can legislatures. Developing a clear articulation of this position allows us to effectively respond to many of the charges levied by critics of judicial review.

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In recent years, a number of prominent philosophers, historians and legal theorists have argued that judicial review cannot pass muster with standards of democratic legitimacy (prominent examples include Kramer 2004; Tushnet 1999 and 2005; and Waldron 2006). For example, Mark Tushnet recently advocated an amendment to the Constitution banning judicial review:

The basic principle, of course, is that people ought to be able to govern themselves. Judicial review stands in the way of self-government.... The reason is that constitutionalism can be implemented through politics as people listen to arguments about why some policies they might initially prefer are inconsistent with deeper values they hold, values that find expression in the Constitution. (Tushnet 2005)

The basic claim is simply that a system of judicial review is inconsistent with a commitment to democratic rule.

However, given a commitment to individual rights, rejecting judicial review requires that one show more than this. One also needs to demonstrate that the costs incurred by judicial review (in terms of foregone procedural legitimacy) are not outweighed by the gains (in terms of reaching better outcomes) secured by judicial review. Opponents of judicial review, however, insist that:

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. (Waldron 2006, 1375; similarly, see Tushnet 1999, Chapter 6)²

So, the case against judicial review is that the institution (a) has no claim to producing better outcomes than legislatures, and (b) has a far less convincing claim to procedural legitimacy.

The present essay has two primary goals. First, and most importantly, we will argue that there is an important and too often underappreciated outcome-related reason to favor judicial review. The argument for this is in three main steps:

1. Public opinion research indicates that the commitment to individual rights of American citizens is ambivalent and malleable (Section I).
2. Whereas legislators have incentives to attempt to gain popularity by violating the rights of unpopular and marginalized groups, justices are institutionally insulated from such incentives (Section II).
3. Therefore, there are reasons to think that a system of judicial review can – given citizens as they are – do a better job of protecting individual rights than can a governing system without judicial review.

² For the remainder of the essay, we will refer to this piece simply by its pagination. So, (1375) will refer to (Waldron 2006, 1375).

We thus stress the importance of insulating controversial questions of individual rights from immediate public pressure. This provides an outcome-based reason to support the practice of judicial review. Notice that this argument will be consistent with supporting a weaker form of judicial review and/or making it easier than it currently is for legislators to overrule the decisions of justices. Our claim is more modest; it says only that there are indeed outcome-based considerations that speak in favor of judicial review.

The essay’s second goal is to use this justification of judicial review to respond to a number of the further claims of critics of the institution. Section III responds to the claim that this argument shows judicial review to be appropriate for defective societies, ones whose citizens do not internalize a strong commitment to individual rights, but does not apply to ‘free and democratic’ societies (1348). Section IV presents some reasons to think that the process-based reasons in favor of judicial review are less important than opponents of the institution often suggest.

I. Commitment to Rights

In this section, we review empirical data from studies on the political tolerance of U.S. citizens and elites. Our main goal is to document that the broader public’s commitment to the individual rights of those whom they dislike is ambivalent and malleable.

There is substantial evidence that citizens are supportive of individual rights in the abstract. For example, in an influential early study, McCloskey and Brill found that about 90% of the public professed a commitment to freedom of speech regardless of the views held by individuals, agreed that ‘we could never be free if we gave up the right to criticize our government,’ and that without ‘freedom for many points of view to be presented, there is little chance that the truth can ever be known’ (McClosky and Brill 1985, 50).³ These findings have been widely substantiated in the intervening years.⁴

However, widespread commitment to general and abstract norms (such as freedom of speech) provides only one part of the picture regarding the attitudes of the public towards civil liberties. It is also important that support for such norms drops off substantially once citizens are asked whether or not they support extending them to unpopular groups. Table 1 presents data from the most recent General Social Survey on the willingness of American citizens to allow members of various groups to speak in public and support library’s ownership of books expressing ideas to which such groups are committed.

Citizenry’s Support for the Civil Liberties of Various Groups

Table 1

<i>Group</i>	<i>Speak (% Allowed)</i> ⁵	<i>Book in Library (% Not Remove)</i>
Anti-Religionist	70	67
Socialist	80	73
Racist	62	65

³ Other noteworthy studies in this area are Prothro and Grigg 1960 and Stouffer 1955.

⁴ For a summary of main findings of this research, see Finkel *et al* 1999.

⁵ There are always some people whose ideas are considered bad or dangerous by other people. For instance, somebody who is ... If such a person wanted to make a speech in your (city/town/community) against ____, should he be allowed to speak, or not? If some people in your community suggested a book he wrote against ____ should be taken out of your public library, would you favor removing this book or not?

Communist	63	64
Militarist	61	64
Homosexual	75	66
Anti-American Muslim	43	50
<i>Average (Tolerant)</i>	<i>65</i>	<i>64</i>

The important point is that support for norms of political tolerance drop off substantially once we move from general norms to applications of those norms. Once again, this is a non-controversial claim in the literature, now supported by a bevy of studies (Gibson and Bingham 1982; Gibson 1987; Gibson 1992; Sullivan *et al* 1979; and Sullivan *et al* 1982).

Dennis Chong conducted a series of in-depth interviews in order to investigate the way citizens reason about civil liberties, and to explore the apparent discrepancy between support for general norms of tolerance and the willingness to abridge the liberties of particular groups. He found when citizens consider issues of individual rights they often focus on the people or groups in questions and the threats they may pose:

In the realm of civil liberties, there are two broad classes of considerations that stand out in the views of virtually all subjects. These are (1) considerations about the applicable legal norm or principle on the issue and (2) considerations about the people or groups that are involved in the issue. The latter category includes personal references to how one's self or one's own group is affected by the issue. (Chong 1993, 878)

For example, Chong finds that when presented with a question on rights of the accused, many respondents were quick to deny rights to suspected murders, rapists, and drug dealers. In sum, although citizens are generally supportive of individual rights in the abstract, when presented with scenarios in which they are asked to extend these rights to hated or physically or morally threatening groups, support for civil liberties drops substantially.

Moreover, there is evidence that citizens have been quite willing to put those attitudes into action. Barbara Gamble's study of three decades of referendums and initiatives, for example, demonstrates that 'anti-civil rights initiatives have an extraordinary record of success: voters have approved over three-quarters of these, while endorsing only a third of all substantive measures' (Gamble 1997, 261).

This brings us to the second important point about the citizenry's support for civil liberties. In particular, that support is malleable; its strength depends upon the way in which the issue is dominantly framed. Is it, for example, an issue of civil liberties or an issue of public safety? Chong explains that:

People are clearly susceptible to framing effects on these matters, so it is likely that the public can be persuaded to interpret an issue in different ways, with potentially significant implications for how they choose sides. (Chong 1993, 898)

So, although there is significant broad support for the general principles of political tolerance on which civil liberties depend, citizens' commitment to those liberties is ambivalent and likely to be affected by the way in which the issue is discussed.

Public opinion research beginning with Converse has found that public opinion is frequently unstable and for many citizens their opinion on political issues is shaped by considerations of groups associated with those issues (Converse 1964; Conover 1984; Conover 1988). Political conflicts over individual rights and liberties are often complicated issues that

require citizens to balance considerations stemming from different values as well as consider the effect a policy is likely to have on different groups. The way in which the issue is framed substantially affects attitudes of citizens on the issue (Nelson, Clawson and Oxley 1997). Nelson and Kinder argue that:

Frames influence public opinion by circumscribing the considerations citizens take seriously. Arguments or images that spotlight social groups may activate stereotypes and prejudices. Group sentiments then become the dominant guideposts for the evaluation of public policy, crowding out other, perhaps more worthy considerations. (Nelson and Kinder 1996, 1074)

Given the instability and malleability of opinion and the tendency of citizens to evaluate issues through an assessment of the favorability of groups involved, it is risky to leave the protection of individual rights solely in the hands of officials directly accountable to the public.

In addition to the ambivalent and malleable commitment of the general citizenry to individual rights, it is worth noting that there is strong evidence that the political elite is far more likely to be committed to upholding the rights of minority groups than is the general public. This is a well-established finding in the literature:

Since the earliest days of behavioural research in the United States, scholars have discovered regular and substantial differences in political tolerance between samples of the general public and various political elites and community leaders. The public has tended to be fairly intolerant, while community elites have been more tolerant. (Sullivan *et. al.* 1993, 51-52)

Likewise, Chong explains that better educated participants were more likely to independently frame issues in terms of civil liberties.

We have tried in this section to briefly summarize important findings from studies of public opinion in order to substantiate an important premise of our argument. Most crucially: although the American citizenry is committed to civil liberties in the abstract, their willingness to defend those liberties when they conflict with other interests and/or when they are lodged by groups whom they dislike suffers significantly. Moreover, the willingness of citizens to support civil liberties critically hinges on (a) the extent to which they sympathize with or, are threatened by, the group in question and (b) the way in which the issue is presented, framed or debated.

II. Justices vs. Legislators

In considering which institution does best in terms of outcomes, we would perhaps ideally compare countries with and without judicial review, control for differences between them, and then ask which has better protected individual rights. Unfortunately, there are two barriers to such an approach. First, it presents enormous technical measurement problems in terms of isolating the differences in outcome that are due solely to differences in judicial practices. Second, and more fundamentally, such an approach requires that we have a background correct theory of rights against which to measure outcomes. But, of course, if we could agree on the correct theory of rights, the questions about the suitability of judicial review would be moot. These problems make a straightforward empirical consideration of the issue (e.g., does Great Britain or the United States do a better job of protecting individual rights?) impossible.

It is sometimes suggested that these problems render it *impossible* to decide the question on the basis of outcome-based considerations. For example, Waldron insists that ‘the existence of controversy about the rights associated with democracy means that a results-driven approach

is unavailable' (Waldron 1998, 352). He explains that 'we cannot use a results-driven test, because we disagree about which results should count in favor of and which against a given-decision procedure' (Waldron 1998, 347-348). Although it is true that disagreement about the appropriate theory of rights indeed makes a straightforward empirical consideration of the issue impossible, it is a mistake to think that such disagreement renders outcome-based considerations 'unavailable'. Instead, the argument we put forward insists that the incentive structure of justices puts them in a position to get to better judgments about individual rights than legislators. This point can be assessed without agreement on any background theory of individual rights. Accordingly, in this section, we present an argument intended to show that – given the tenuous and malleable commitment of ordinary citizens to individual rights – there is reason to think that courts will do a better job of protecting individual rights than will legislators.

In order to rank institutions in terms of their ability to protect individual rights, we must consider how different sets of institutions are likely to interact with the tenuous commitment of ordinary citizens to such rights. This requires an assessment and comparison of the incentives faced by justices and legislators. Most importantly, there is a difference in the distance in accountability to mass publics between legislators and judges. This difference shapes the interests that each needs to take into account as they make decisions, and – as a result – the kinds of outcomes that the two institutions are likely to beget.

Legislators have strong incentives to seek reelection, and much of congressional behavior and organization can be explained via legislators' commitment to this goal (Mayhew, 1974; Fenno, 1973; Krehbiel, 1992; Rohde, 1991; Cox and McCubbins, 2005). Because reelection is a prerequisite of fulfilling other policy goals, the drive for reelection is strong even among those politicians who care deeply about crafting good public policy (Mayhew 1974). Politicians must remain attuned to reelection if they want to continue making policy into the future. Indeed, elections serve as a selection mechanism to weed out those legislators who do not take seriously the interests of constituents.

Although Poole and Rosenthal have found that the majority of voting behavior can be explained through a single dimension- ideology (Poole and Rosenthal),⁶ there is also evidence indicates that legislators will diverge from ideology in order to serve their electoral interests.⁷ Ideology and policy goals are constrained by electoral considerations. Legislators seek reelection in a context in which their principals, the constituents, frequently hold intolerant group-based views on policy issues. Within this context, legislators are in a position to potentially gain at the ballot box by enacting punitive policies that infringe on the rights of out-groups in society. Ingram and Schneider argue that, when crafting policy, elected officials consider the power of the target population (votes, wealth, potential for mobilization) and whether the broader public will approve or disapprove of the policy being directed at that target (Schneider and Ingram, 335). Elected officials have an incentive to provide beneficial policy to powerful, popular groups (such as the middle class and elderly) and punitive, potentially rights-

⁶ By ideology, Poole and Rosenthal mean constraint in issue positions. Basically, that given legislators hold a particular position on an issue they will hold a complementary position on related issues. Poole and Rosenthal also find that at particular points in history Congressional behavior can be understood on a second dimension- race.

⁷ For example, Andrea Campbell has found that legislators who are conservative and generally opposed to social spending support expansions to Social Security when there is a significant senior presence in their districts.

infringing policy to weak out-groups (Schneider and Ingram, 334-335). This is especially so when the out-groups in question are without electoral power, as in the case of criminals, illegal immigrants, and the like.

In contrast, judges – appointed for life terms and without electoral constraints – are free of accountability to a public with a tenuous commitment to the rights of disliked groups.⁸ Although it of course remains possible that the decisions of justices may conflict with the rights of deviant groups (and, of course, there are many such examples), the important point is that there is nothing in their position as judges that incentivizes them to do so. Unlike legislators, they may come to the defense marginal and disliked groups in society without being in danger of sacrificing their positions of power.⁹ This differentiates justices from legislators, and provides one kind of outcome-based reason to favor judicial review. On this view, we can understand judicial review as a commitment to decide controversial questions about individual rights in a forum that is deliberately held institutionally separate from the whims of public opinion.

Thus, judges and elected officials face different sets of incentives as they make decisions about rights. To live another day in politics, elected officials must consider the views of a largely intolerant public, and may find it difficult (because of electoral constraints) to rise to the defense of marginalized out-groups in society. In addition, elected officials have incentives to exacerbate divisions in society by infringing upon the political rights of some for electoral gain. They can capitalize on fear and societal out-groups in the pursuit of power.

A simple illustration of the dissimilar incentives created by the two institutions can be taken from the 1982 Supreme Court case, *Plyler v. Doe*. In May 1975, the Texas legislature decided to withhold state money from local districts serving illegal immigrants, and authorized districts to deny enrollment to such children. There were two primary public justifications proffered for the legislation. It was meant both to save money for the state, and to deter future illegal immigration. However, on the one hand, as the Court noted, denying employment opportunities to illegal immigrants would have been far more effective as a deterrent. Of course, such a policy would have been opposed by powerful business interests who depend on the labor of illegal immigrants. On the other hand, the state was without evidence that significant revenue could actually be saved by denying education to children of illegal immigrants. For these reasons, it is easy to instead see the act as a symbolic policy meant to show the legislature taking a stand on salient policy issues (illegal immigration and budget problems).

In *Plyler v. Doe* the Court overturned the legislation. However, it is not the outcome, but the reasoning (on both sides of the decision) to which we want to draw attention. The Court's opinion (delivered by Brennan) begins by explaining that:

The question presented by these cases is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens. (*Plyler v. Doe*, 1982)

⁸ Tushnet objects to this line of argument by insisting that 'judges are not entirely disinterested either ... they may want to build a reputation among one or another group of people they hang out with...'. (Tushnet 1999, 108). Although it is of course true that justices have reputational concerns, the question is whether these concerns raise the same kinds of problems provoked by legislative incentives. Nothing Tushnet says establishes this.

⁹ This is not to say that justices are likely to be able to uphold a policy position that strongly conflicts with the preferences of the broader public for a sustained period of time. Nevertheless, the relative insulation of justices does provide them with more leeway.

Likewise, members of the Minority explain that:

The dispositive issue in these cases, simply put, is whether, for purposes of allocating its finite resources, a state has a legitimate reason to differentiate between persons who are lawfully within the state and those who are unlawfully there. (*Plyler v. Doe*, 1982)

Although the Court mentions matters of policy (including, for example, the likely cost of educating illegal immigrants and the long-term costs of an uneducated class of permanent residents), its focus is on whether or not the children of illegal immigrants have a right to publicly provided education.

Turning its attention to this question, the majority opinion insists that:

Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. (*Plyler v. Doe*, 1982)

Alternatively, the dissenting Justices argue that:

The Equal Protection Clause protects against arbitrary and irrational classifications, and against invidious discrimination stemming from prejudice and hostility; it is not an all-encompassing ‘equalizer’ designed to eradicate every distinction for which persons are not ‘responsible’. (*Plyler v. Doe*, 1982)

Thus, the disagreement between the Justices turns on the question of what rights the children of illegal immigrants have, and on the significance of their not being responsible for having this status.

Notice that our point is not that the Court came to the right decision and the Legislature the wrong decision. Rather, we are interested in how the different institutional incentives faced by legislators and justices lead them to focus on different issues and concerns. In particular, whereas legislators face strong incentives to enact policy that addresses salient policy concerns by imposing costs on marginalized (and electorally powerless) minorities, justices – insulated from public pressure – were able to address questions regarding the appropriate interpretation of the rights of the minority group in question (here, school-aged illegal immigrants). The different incentives faced by the two groups render it likely that the Courts will be more attentive to, and better able to protect, the rights of marginalized minorities. Here, insulation from electoral accountability renders the Court free to pursue issues of principle in a way that legislators – concerned with their electoral future – cannot easily be. On this view, we can understand judicial review as a commitment to decide controversial questions about individual rights in a forum that is deliberately held institutionally separate from the whims of public opinion.

There are good reasons to ensure that ordinary political legislative decisions are made by agents whom the public can hold accountable (Sen 1994). This ensures, for example, that

political leaders have the information they need to make effective decisions, and self-interested reason to do so. Although Amartya Sen famously argues that democracy has an important role (both epistemic and incentive-based) in combating broad public evils (such as famine), he also insists that ‘when a minority forms a highly distinct and particularist group, it can be harder for it to receive the sympathy of the majority, and then the protective role of democracy be particularly constrained’ (Sen 1994, 36). In other words, the very mechanisms of accountability that render legislators well-suited to address broad public concerns render it difficult for them to uphold a set of principles or rights in dealing with minority groups, especially if those groups are small, distinct and marginalized. Here, the relatively politically insulated forum of the Court has an important outcome-based advantage.

Notice also that this discussion provides a different and more plausible way of understanding the claim that justices are better suited to deliberate on moral issues (such as the protection of rights) than are legislators. Although this position is sometimes interpreted as a claim about the training and background of justices, it is – in our view – more plausible as a claim about the kinds of incentives that they face. Whereas elected politicians – even when committed to a certain set of principles – must be attuned to the electoral implications of upholding those principles, Supreme Court justices are primarily accountable to concerns about their legacies and preferences. It is this dissimilarity in the structure of incentives that renders the Court, in Dworkin’s famous phrase, a ‘forum of principle’ on matters related to the protection of individual rights, and so preferable for outcome-based reasons. So, this argument gives clearer meaning to Dworkin’s claim that ‘judicial review insures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not political power alone, a transformation that cannot succeed, in any case not fully, within the legislature itself’ (Dworkin 1985, 70).

Let us briefly consider two objections to this line of argument. First, it is sometimes said that the tenuous commitment to individual rights of the citizenry will pollute the process by which justices are selected, just as it pollutes the decisions of the legislature:

If the circumstances are such as to warrant minority distrust of a dominant majority, they will certainly arouse misgivings about the basis on which judges are selected and the social and political culture that is likely to inform their decisions. So there is no reason whatever to think that, in a case of this sort, the democratic objection to judicial review has been weakened or undermined. (Waldron 1998, 351)

There are two important problems with this argument. First, selection mechanisms are largely separate from specific political issues and disliked groups, and instead framed in terms of upholding Constitutional commitments. Again: these are commitments that citizens, at least in this abstract sense, share. As a result, there is less reason to think that such processes will be contaminated by the tenuous commitment of citizens to individual rights than legislative decisions on particular issues. Second, although it is true that if we measure legitimacy as a dichotomous variable, the issues that lead us to worry about majority rule will also be reasons to worry about judicial review, surely we should recognize differences in *degree* here. Although it is of course true that judicial review cannot be a perfect safeguard of individual rights in a society marked by a fragile commitment to such rights, the insulation of the judiciary from popular opinion puts them in comparatively better position to uphold commitments to individual rights.

A second objection to this line of argument holds that legislatures fail to address questions of rights because they assume that the courts will ensure that legislation does not violate individual rights. The claim is that in the absence of judicial review the legislature would in fact more carefully consider rights issues. Two responses are relevant. First, it is worth noting that it at least sometimes happens that the fact that judicial review exists acts as a constraint on legislators, limiting the kinds of propositions they will put forward (since they can anticipate that extreme measures will be overturned by the courts). The existence of judicial review can, in other words, strongly discourage legislators from pursuing rights-infringing policy. This is especially the case when the Court has established strong and clear precedents. Such precedents render it relatively pointless for legislators to pursue some types of policies, and so affect what gets on the legislative agenda.

Second, the objection is highly speculative. Abandoning judicial review will not importantly alter electoral incentives. It will continue to be the case that when there is a conflict between the individual rights of marginalized groups and questions of broad social welfare, legislators will face incentives to give less weight to individual rights than we – abstracted from the particular case – would prefer such rights to have. It is not clear why we should suppose that the absence of judicial review would importantly change this.

Notice that our claim is not that abandoning judicial review will bring widespread, constant and gross infractions of individual rights. Instead, more moderately, the claim is that abandoning the institution amounts to foregoing one important institutional mechanism for safeguarding the individual rights of unpopular groups (especially when they come into conflict with concerns grounded in the general welfare). Ronald Dworkin notes that:

There would be no point in the boast that we respect individual rights unless that involved some sacrifice, and the sacrifice in question must be that we give up whatever marginal benefits our country would receive from overriding these rights when they prove inconvenient. (Dworkin 1977, 193)

The commitment to deciding conflicts between individual rights and the general good in a forum insulated from electoral pressure is one way of rendering it more likely that rights will not be discarded when inconvenient.

III. The Ideal of a ‘Core’ Case

Whereas defenders of judicial review have often depended on the claim that the moral reasoning of justices renders them particularly well-suited to protect individual rights, the argument that we have presented instead hinges on the different institutional incentives faced by legislators and justices. However, these differences in incentives are only important if the commitment of citizens to individual liberties is ambivalent, tenuous, or questionable. We reviewed evidence in support of that view in Section I. It might seem, though, that insofar as this argument hinges on the willingness of citizens to violate the rights of their compatriots, it only shows that judicial review is an appropriate institution for *defective* democracies. It is not, in other words, part of the institutional structure of a well-ordered society.

A position of this sort has been developed most carefully by Jeremy Waldron, who allows that:

There are circumstances – peculiar pathologies, dysfunctional legislative institutions, corrupt political cultures, legacies of racism and other forms endemic prejudice – in which these costs of obfuscation and disenfranchisement are worth bearing for the time being. (1406)

However, he insists that:

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. (1352)

So, one way in which opponents of judicial review might respond to our argument is by saying that, even if true, our account only shows that the United States is a ‘non-core’ case in which unfortunate pathologies render judicial review necessary.

So, Waldron distinguishes between core and non-core cases, suggesting that judicial review is illegitimate in cases of the former type. There are four main characteristics of societies that meet Waldron’s specification of ‘core’ cases. First, such societies feature legislative institutions in good working order. Waldron explains that this is not ‘meant to be controversial; it picks out the way in which democratic institutions usually operate.... They may not be perfect and there are probably ongoing debates as to how they might be improved’ (1361). Second, such societies have ‘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’ (1363). Third, in such societies ‘there is a strong commitment on the part of most members of the society ... to the idea of individual and minority rights’ such that ‘general respect for individual and minority rights is a serious part of a broad consensus in society’ (1364-1365). Fourth, such societies are characterized by disagreement about what this commitment to individual rights comes to. In other words, there is ‘substantial dissensus as to what rights there are and what they amount to’ (1367). This disagreement is simply the inevitable result of the protection of the basic liberties; that is, in circumstances marked by reasonably free speech, religion, association and press, reasonable people will come to disagree about the appropriate application and content of individual rights (Rawls 1993). Although Waldron is notable for the clarity with which he puts forth the assumptions on which the argument hinges, similar assumptions are common in the skeptical literature on judicial review (see, for example, Tushnet 1999, 107-108). However, there is an ambiguity in the deployment of the distinction between core and non-core cases that allows it to be understood in at least two different ways.

First, sometimes the suggestion is that core cases are simply normal cases, and the assumptions invoked (in regards to a general commitment to individual rights, disagreement about those rights, and reasonably functioning political institutions) are simply shorthand characterizations of typical democratic societies. Second, sometimes the suggestion is that the distinction between core and non-core cases is more methodological than substantive. The idea is that we should first argue about the institutions that we would have in an ideal or well-ordered society, and only secondarily discuss how the existence of particular pathologies or shortcomings might affect our judgments about appropriate institutions.

Neither of these interpretations of the appeal to the distinction between core and non-core cases can vindicate skepticism about the legitimacy of judicial review in modern democratic societies. The former interpretation hinges on an empirically indefensible characterization of the societies in question, and the latter interpretation misunderstands the role of idealized assumptions, or so we will argue.

So, Waldron sometimes suggests that core cases are simply typical cases. He says that arguments about the importance of judicial review in ‘societies in which the commitment to rights is tenuous and fragile ... [do] not go to the heart of the case that is made for judicial

review in countries like the United States, Britain, or Canada' (1366). Likewise, he insists that the assumption of a general commitment to rights in society 'is fairly easily satisfied' (1402) and apply 'in most circumstances' (1352). He also makes clear that his argument is meant to apply to the large and diverse modern Western democracies. For example, he insists that 'the people deserve a forum for working through their disagreements about rights that is more inclusive than majority voting among nine unelected justices' and he 'applauds' a proposal to amend the United States Constitution to abolish judicial review (Waldron 2005). Similarly Tushnet says that:

Perhaps senators—or the constituents to whom they respond—really are not committed to norms of fair procedure, or are not committed them strongly enough to justify ... complete judicial restraint ... One would have to be far more skeptical than I think sensible to assume that senators would routinely disregard the ... Constitution's values. (Tushnet 1999, 107)

However, for anyone familiar with the vast empirical literature describing the intolerance and ignorance of citizens in democratic societies, it is hard to take seriously the idea that this account of the behavior of citizens is 'core' in the sense that we can take it as a reasonable approximation of how citizens in normal democracies behave.

Unfortunately, judicial review skeptics provide no evidence that the assumptions are 'not unrealistic' (1402), or that they allow us to get 'to the heart of the matter' rather than getting distracted by 'exceptional' reasons (1352). Instead, as we saw in section I, there is substantial evidence that the commitment of ordinary citizens to civil liberties is fragile and malleable. Moreover, the existing evidence does not suggest that American citizens are importantly distinctive in their ambivalent and malleable commitment to civil liberties (Gibson 2007; Sullivan *et al* 1993).

That individuals are torn between protecting civil liberties and repressing offensive groups seems as likely to be a permanent fact about human beings as anything in political life. As Oliver Wendell Holmes famously wrote:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. (Holmes 1919)

This is what renders tolerance a thorny problem and a tenuous achievement. In the absence of evidence that the claims we made in the previous sections are distinctively applicable to the U.S. citizenry, an argument against judicial review hinging on these assumptions is of little interest. It does not seem to apply to the countries with which we are familiar.

Waldron allows that judicial review might be appropriate in non-core cases as an 'anomalous provision to deal with special pathologies' (1359). But to say that something is anomalous is to say that it is irregular or deviates from the common order. Likewise, 'pathologies' are aberrations. But, we have no reason to think that the assumptions that mark out Waldron's core case are anything like a normal or standard condition. We are therefore without reason to believe that Waldron's argument is a 'core argument' in the sense that it applies to a wide range of recognizable or normal cases. The difficulty with this approach is that we are without evidence suggesting that the relevant assumptions obtain in normal democratic societies or even that they have ever obtained in *any* large and diverse modern democratic society.

Consider the following conditional argument against judicial review:

Premise: In core cases, citizens are purely altruistic and will go to all possible lengths to avoid violating the rights of others.

Conclusion: In core cases, there is no need for judicial review because citizens will not violate the rights of their compatriots.

Although this is a *valid* argument against judicial review, it is unsound because no evidence has been provided in favor of the premise on which it hinges. Because of this, the argument has – practically speaking – no institutional implications.¹⁰ Instead, it only applies Madison’s reasoning (‘if men were angels, no government would be necessary’ (Hamilton 1982, 262)) to a particular case.

Unfortunately, there are times when the arguments presented against judicial review look similar to the one above. Waldron says, for example, that:

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. (1365)

It may well be true that in such a society, the institution of judicial review would be superfluous. However, just as Madison’s argument does not show that government is unnecessary, the claim that judicial review would be unnecessary in a society in which people were strongly committed to rights, kept them under ‘constant consideration’, and policed them independently, does not show that the institution is illegitimate in our very different circumstances.

There is, however, a second way in which the appeal to core and non-core cases is sometimes deployed. On this view, the approach is ‘similar to that of John Rawls’ in that it employs the ‘device of the core case to define something like a well-ordered society with a publically accepted theory of justice’ (1366n53). In Rawls’s work, a well-ordered society is:

A formal ideal of a perfectly just society ... It is a society where (a) all citizens agree on the same conception of justice and this is public knowledge; moreover, (b) society enacts this conception in its laws and institutions; and (c) citizens have a sense of justice and willingness to comply with these terms. (Freeman 2007, 484)

The conditions characterizing a well-ordered society (a-c) are constitutive of full compliance and, so, describe the parameters of ideal theory. Although Rawls allows that ‘the problems of partial compliance are the pressing and urgent matters,’ he works from the assumptions of full compliance because ‘it provides ... the only basis for the systematic grasp’ of the pressing problems faced in a world of partial compliance (Rawls 1999, 8). Translated into more straightforward language, Rawls is simply saying that the only way to think rigorously about the injustices of existing society is to have a picture of a well-ordered society against which to

¹⁰ Roughly the same point is made by Waldron himself in a paper on different topic. There, he explains that ‘even if a well-ordered society could dispense with laws prohibiting group defamation, it would be wrong to infer from this that the societies we know must be prepared to dispense with those laws, as a necessary way of *becoming* well-ordered. Societies do not become well-ordered by magic’ (Waldron 2009, 9).

measure them. We cannot know, for example, if the distribution of wealth in our society is unjust until we have a plausible sketch of a just distribution of wealth.

Waldron sometimes suggests that he is interested in arguing that judicial review is an inappropriate institution for a well-ordered society. It is important, however, that – on Rawls’s account – ideal theory is a tool for developing the appropriate *principles* around which to organize a society. Once we are in possession of the principles of justice and interested in turning to questions of institutional design (that is, questions about the kind of institutional structures that are most likely to allow us to approximate a well-ordered society), Rawls drops the idealized assumptions:

Since the appropriate conception of justice has been agreed upon, the veil of ignorance is partially lifted.... [agents] now know the relevant general facts about their society, that is, its natural circumstances and resources, its level of economic advance and political culture, and so on.... Given their theoretical knowledge and the appropriate general facts about their society, they are to choose the most effective constitution, the constitution that satisfies the principles of justice and is best calculated to lead to just and effective legislation. (Rawls 1999, 172-3)

What is important here is that although it is useful to adopt realistically utopian assumptions for the purpose of selecting principles of justice, once we move to questions of institutional design it is crucial to consider general facts about the society. This includes facts about the political culture and the incentives facing particular actors. Questions of institutional design are centrally questions about how best to approximate the principles of justice *given* the relevant facts about the society in question.

Alternatively, critics of judicial review sometimes seems to want to ask institutional questions given assumptions parallel to those made by Rawls in ideal theory. Thus, Waldron dismisses those who would examine:

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.... 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. (1360, emphasis added)

The difficulty is that the validity of an argument is insufficient when considering institutional questions.

As Rawls says in the passage above, a good constitution is a constitution that can be trusted to lead towards the fulfillment of the principles of justice *given* accurate assumptions about the society. Political institutions are tools that groups use to help realize justice, solve collective action problems, pursue their joint interests, and so on. Their appropriateness crucially depends on the particular circumstances of the society. Unfortunately, the assumptions that guide Waldron’s inquiry do not accurately reflect the conditions of modern democratic societies, and as a result are inappropriate for questions of institutional design. Although there is good reason to abstract from certain imperfections in society when asking about the *principles* that we ought to use to regulate that society, the same cannot be said of *institutions*. Instead, political institutions recommend themselves only if they fit well with the existing conditions of society.

Previously, we argued that the interaction between the ambivalent and malleable commitment to individual rights amongst ordinary citizens and the electoral incentives of

legislators combine to render legislators more apt to violate the rights of marginalized citizens than justices. One way to respond to this argument is by dismissing it as ‘non-core’ because it only applies in cases in which citizens are not themselves strongly committed to rights and alert to their violation. Critics of judicial review who adopt this tack must *either* forego claims about the institutional implications of their argument for societies with which we are familiar *or* show that the assumptions on which his argument hinges actually obtain in the communities in question. Unfortunately for critics of judicial review, the former tack robs the argument of its interest, while the evidence that we have presented above suggests that the latter tack is unlikely to succeed.

IV. The Weight of Procedural Legitimacy

It is important that we have only so far argued that there are outcome-based reasons that weigh in favor of judicial review. It remains possible to grant this point and nevertheless hold that the institution ought to be rejected because judicial review is undemocratic, and this process-related cost outweighs the benefits in terms of better outcomes that the institution can secure. Indeed, it is this procedural claim – that judicial review is *undemocratic* – that fuels criticism of it. Alexander Bickel argues that ‘the root difficulty is that judicial review is a counter-majoritarian force’ (Bickel 1962, 17). The claim is that legislatures have a much stronger claim to procedural legitimacy than do courts.

This point can be usefully put slightly differently. Citizens concerned about process-based legitimacy in regards to legislatures can reasonably wonder: 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?’ (1387). Waldron answers this query 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 person the greatest say possible compatible with an equal say for each of the others. That is our principle. (1388-1389)

So, the process-based worry simply says that our governing institutions ought to equally take into account the voice of each citizen.

It is important that accepting this norm does not lead as quickly to the conclusion that judicial review is inferior in terms of procedural legitimacy as it might at first seem. There are two reasons for this. First, the procedural argument against judicial review is, in large part, a red-herring. Judicial review is not inherently undemocratic. It is easy to imagine a system of judicial review in which justices are elected. The system would be democratic in that justices were elected, but would retain insulation from political pressure by maintaining life terms. If the procedural complaint is satisfied by this arrangement, then the argument of skeptics is revealed not to be a rejection of judicial review, but instead a rejection of a particular selection process that has been (but need not be) associated with judicial review.

It is unclear on what procedural grounds opponents of judicial review could reject this type of arrangement.¹¹ One natural argument to try out is that this system would not be

¹¹ Sometimes the procedural argument against the legitimacy of judicial review is instead laid out in terms of a concern with the importance of the social bases of self-respect. The charge is that publically

genuinely democratic because justices would not be electorally accountable to citizens. Once elected, they would hold their positions forever. Notice, though, that the arguments typically given against such arrangements are outcome-based. They purport to show that unaccountable officials will make *worse decisions* than will accountable ones. Of course, we have argued that in this particular instance, distance from the electorate has an important outcome-based advantage.¹² Although one might disagree with us, the disagreement will ultimately be a disagreement about the likelihood of different institutions to produce favorable outcomes. This is because the system of judicial review run by elected justices is just as compatible with the procedural norm¹³ as is rule by an unchecked legislature. So, the first problem with the procedural argument against judicial review is that it purports to discard the whole institution of judicial review as a result of a feature that is but an incidental characteristic of the institution.

The second problem with the procedural argument against judicial review can be illustrated by returning to the citizen who complained about the illegitimacy of the several hundred legislators making decisions on his behalf. Waldron argued that there was no valid complaint based in procedural concerns because the legislature is systemically responsive to all citizens, and is so equally. However, the protestor may reasonably respond to Waldron as follows:

I suppose that if we are going to use a system by which only *some* people get to have a say, I prefer that the people who have a say are elected. But, still, if majority rule is the appropriate procedural principle, why should it be majority rule amongst the members of the *legislature* rather than majority rule amongst the members of the *polity*?

Although there are very good answers to that question, they hinge on the ability of representative institutions to produce better *outcomes* than can direct democracy. Typical lines of argument are as follows:

1. Elections work to select members of the polity that are particularly well-suited for legislative work;

announcing this type of justification for judicial review is tantamount to denouncing citizens as unfit for self-rule, and – as such – constitutes a threat to, ‘perhaps the most important primary good’, the social bases of self-respect of citizens (Rawls 1999, 386). The most important point to make in response to this charge is that if our claims in Section I-II regarding the ambivalent commitment to individual rights of ordinary citizens and the incentives legislators have to prey on this ambivalence are correct, then the threat to individual rights posed by unchecked legislatures is also an important threat to the community’s commitment to equality (similarly, see Freeman 1990, 365). So, if the arguments from Sections I-II succeed, then the self-respect argument works in *favor* of judicial review because it is necessary to protect the rights of citizens, and to communicate their equal moral standing. Thus, considerations regarding the social bases of self-respect are largely supervenient: if there is an outcome-based case for judicial review, then there are also good reasons based on the importance of the social bases of self-respect for favoring judicial review; if not, not. Considerations of the social-bases of self respect do not raise important distinct issues.

¹² Of course, we accept that in typical policy cases, there is important outcome-based reason to have decisions made by legislatures. Again: electoral institutions provide legislators with information and incentives that typically allow them to more effectively pursue the interests of the political community. Reasons to remove decision-making power from the legislature only arise in cases in which insulation from such incentives has a specific point and purpose (such as protecting the individual rights of marginal groups, as described in Sections I-II).

¹³ ‘We give each person the greatest say possible compatible with an equal say for each of the others.’

2. Representative institutions make possible a division of labor that allows those making decisions to gain expertise and make better decisions than could the electorate as a whole;
3. The deliberative process that is possible in a chamber of relatively confined size makes it possible for legislatures to come to better decisions than could the mass public; and
4. Legislatures can reach good decisions about public policy without having to squander the time of the electorate on each particular policy question.

Although the literature on the justification of representative institutions is voluminous,¹⁴ our point here is only that representative institutions *themselves* sacrifice a degree of procedural legitimacy in order to capture superior outcomes.

As a result, insofar as opponents of judicial review are also advocates of representative democracy, they cannot reasonably hold the view that bowing to outcome-based considerations puts one on a slippery-slope towards despotic rule. Instead, the justification of representative legislatures of the kind that opponents of judicial review would like to see gain power are *themselves* justified by their outcome-based contributions. So, because opponents of judicial review accept deviations from unadulterated majority rule for outcome-based reasons, they cannot reasonably impugn judicial review simply because it is a departure from a pure system of majority rule.

It may make sense to say that if neither of two institutions is going to produce substantively better outcomes, then we ought to select the one that best upholds procedural norms. However, this is not – as we have tried to argue – the situation we face in terms of judicial review. Given that even skeptics of judicial review are willing (in the case of representative institutions) to opt for institutions that have less of a claim to procedural legitimacy than do alternatives in order to capture better outcomes, simple appeal to procedural norms cannot carry the day in the argument against judicial review.

We have tried, in this section, to resist some of the strongest procedural worries about judicial review. Although we do not claim that this shows that the outcome-based reasons explicated above necessarily outweigh the process-based reasons to oppose judicial review, we do think that this provides some reason to discount much of the rhetoric of process-based attacks of the institution. As the comparison with representative institutions demonstrates, we often – in ways that even opponents of judicial review typically accept – deviate from simple democratic procedural norms in order to capture better outcomes. The case for doing so is especially strong when individual rights are at stake.

V. Conclusion

We have tried to present one kind of outcome-based argument for judicial review.¹⁵ In particular, we have argued that – at least in the United States – the citizenry at large has only a tenuous commitment to individual rights. This commitment is malleable in a way that is prone to abuse by politicians seeking electoral gain. Given this, the distance in accountability between justices and ordinary citizens can be an advantage in that it makes it easier for the judiciary than the legislature to protect the rights of unpopular groups. We are hopeful that clearly laying out this argument rendered it easier to see how the force of appeals to procedural legitimacy and

¹⁴ For a particularly helpful discussion, see Manin 1997.

¹⁵ We do not claim that this is the only argument for judicial review.

ideal theory can be resisted. Although the arguments that we have proffered are not inconsistent with important changes to the institution of judicial review (e.g., the election of justices, restricting judicial review to cases in which important individual rights are at stake, etc.) and weigh strongly in favor of others (such as a judicial language that expressly addresses the relevant issues of political morality (Dworkin 1996)), they provide important reason to resist casting off the practice altogether.

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