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## The Core of the Case Against Judicial Review

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

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

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**INTRODUCTION**

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

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

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

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

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

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

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6. The locus classicus for this concept is John Locke, *The Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* 265, 366–67 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).
  7. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–17 (2d ed. 1986) (“[J]udicial review is a counter-majoritarian force in our system. . . . [W]hen the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of representatives of the actual people of the here and now. . . .”).
  8. *Id.* at 17–18.
  9. Abortion Act, 1967, c. 87; Sexual Offences Act, 1967, c. 60; Murder (Abolition of Death Penalty) Act, 1965, c. 71.

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

By contrast, in the United States the people or their representatives in state and federal legislatures can address these questions if they like, but they have no certainty that their decisions will prevail. If someone who disagrees with the legislative resolution decides to bring the matter before a court, the view that finally prevails will be that of the judges. As Ronald Dworkin puts it—and he is a *defender* of judicial review—on “intractable, controversial, and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries,” the people and their representatives simply have to “accept the deliverances of a majority of the justices, whose insight into these great issues is not spectacularly special.”<sup>10</sup>

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

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

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

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

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

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

intervention? I have written plenty about this myself already.<sup>14</sup> Why another article attacking judicial review?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## I. DEFINITION OF JUDICIAL REVIEW

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

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

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

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

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

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

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

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

authority.<sup>23</sup> It appears that American courts do not,<sup>24</sup> but the real effect of their authority is not much short of it.<sup>25</sup>

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

23. See Mauro Cappelletti & John Clarke Adams, Comment, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207, 1222-23 (1966). There are further complications in regard to whether the statute declared invalid is deemed to have been invalid as of the time of its passage.
24. The matter is not clear-cut. In support of the proposition that unconstitutional statutes are not struck out of the statute book, consider *Dickerson v. United States*, 530 U.S. 428 (2000), in which the Supreme Court by a majority held that a federal statute (18 U.S.C. § 3501) purporting to make voluntary confessions admissible even when there was no *Miranda* warning was unconstitutional. The closing words of Justice Scalia’s dissent in that case seem to indicate that legislation that the Supreme Court finds unconstitutional remains available for judicial reference. Justice Scalia said: “I dissent from today’s decision, and, until § 3501 is repealed, will continue to apply it in all cases where there has been a sustainable finding that the defendant’s confession was voluntary.” *Id.* at 464. A contrary impression may appear from *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004), in which the Fifth Circuit held that the Texas abortion statute at issue in *Roe v. Wade* must be deemed to have been repealed by implication. A close reading of that case, however, shows that the implicit repeal was held to have been effected by the Texas statutes regulating abortion after *Roe*, not by the decision in *Roe* itself. (I am grateful to Carol Sanger for this reference.)
25. See Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1339-40 (2000).
26. See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001).
27. Human Rights Act, 1998, c. 42, § 4(2), (6).
28. *Id.* § 10.

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

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

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29. New Zealand Bill of Rights Act 1990, 1990 S.N.Z. No. 109, § 4 (“No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), . . . [h]old any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or . . . [d]ecline to apply any provision of the enactment—by reason only that the provision is inconsistent with any provision of this Bill of Rights.”).
30. *Id.* § 6 (“Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.”).
31. See *Moonen v. Film & Literature Bd. of Review*, [2000] 2 N.Z.L.R. 9, 22-3 (C.A.).
32. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 33(1)-(2) (U.K.). The full text of the provision reads:
- (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
- (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
33. When it has been invoked, it has mostly been in the context of Québécois politics. See Tsvi Kahana, *The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter*, 44 J. INST. PUB. ADMIN. CAN. 255 (2001).

form of strong judicial review, with its vulnerability to my argument affected only slightly by the formal availability of the override.<sup>34</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## II. FOUR ASSUMPTIONS

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

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

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

41. See *infra* Section IV.A.

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

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

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

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

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43. See *infra* text accompanying note 136.

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