In Defence of Empirical Entanglement:

The Methodological Flaw in Waldron's Case against Judicial Review

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Abstract—Jeremy Waldron's sustained critique of judicial review has provoked a series of responses endeavouring either to defend that institution or to join in the critique with renewed zeal. All of the responses to date accept the methodological premise of Waldron's intervention – that judicial review may be defended or critiqued in abstract normative terms, once certain assumptions about a society's governing institutions and political traditions hold. This response challenges that consensus and tries to change the terms of the debate. The main contention is that the moral justifiability of judicial review is a mixed normative/empirical question that cannot be satisfactorily answered by confining the empirical component to a set of very broad assumptions and then proceeding in a purely normative vein. This is obviously true (as Waldron concedes) of immature democracies, where problems with the functioning of representative institutions make it impossible to generalize about the relative merits of judicial versus legislative attention to rights. But it is also true of Western liberal democracies – Waldron's main focus – because even in these societies the satisfaction of his assumptions is not uncontroversial and depends on the context-sensitive and historically aware methods that Waldron says he wants to avoid.

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1. *Introduction*

Jeremy Waldron's sustained critique[1] of the moral justifiability of judicial review has provoked, as was no doubt his intention, a series of responses endeavouring either to defend that institution[2] or to join in the critique with renewed zeal.[3] All of the responses to date accept the methodological premise of Waldron's intervention – that judicial review may be defended or critiqued in abstract normative terms, once certain assumptions about a society's governing institutions and political traditions hold.[4] This response challenges that consensus and tries to change the terms of the debate. My main contention is that the moral justifiability of judicial review is a mixed normative/empirical question that cannot be satisfactorily answered by confining the empirical component to a set of very broad assumptions and then proceeding in a purely normative vein. This is most obviously true (as Waldron concedes) of immature democracies, where the wide array of pathologies in the functioning of representative institutions

[1] Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 Oxford J Leg Stud 18; Jeremy Waldron, *Law and Disagreement* (OUP 1999); Jeremy Waldron 'The Core of the Case against Judicial Review' (2006) 115 Yale LJ 1346; Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 9 Int'l J Con L 2.

[2] See, for example, Dimitrios Kyritsis, 'Representation and Waldron's Objection to Judicial Review' (2006) 26 Oxford J Leg Stud 733; Richard H Fallon, 'The Core of an Uneasy Case *for* Judicial Review' (2008) 121 Harvard L Rev 1693; Annabelle Lever, 'Democracy and Judicial Review: Are they Really Incompatible? (2009) 7 Perspectives on Politics 805; Scott M Noveck, 'Is Judicial Review Compatible with Democracy?' (2008) 6 Cardozo Public L, Policy & Ethics J 401.

[3] See Allan C Hutchinson, 'A "Hard Core" Case Against Judicial Review' (2008) 121 Harvard L Rev Forum 57; Mark Tushnet, 'How Different are Waldron's and Fallon's Core Cases for and against Judicial Review?' (2010) 30 Oxford J Leg Stud 49. See also 'On Judicial Review: Laurence H. Tribe, Jeremy Waldron and Mark Tushnet Debate' (2005) 52: 3 Dissent 81.

makes it impossible to generalize about the relative merits of judicial versus legislative attention to rights. But it is also true of Western liberal democracies – Waldron's main focus – because even in these societies the satisfaction of his assumptions is not uncontroversial and depends on the historically aware, context-sensitive methods that Waldron says he wants to avoid.

The response starts by setting out Waldron's critique in its most concentrated form – his 2006 *Yale Law Journal* article on 'The Core of the Case against Judicial Review'.[5] The focus in this section falls on the first of four assumptions that Waldron says need to hold if his argument is to have any force: the assumption that democratic institutions in the society concerned are 'in reasonably good working order'.[6] The role of this assumption in Waldron's argument, the section notes, is primarily methodological in so far as it supports his stated aim of addressing the moral justifiability of judicial review in a way that is 'independent of both its historical manifestations and questions about its particular effects'.[7]

Section 3 questions the workability of this argumentative move by showing how it transforms the question of the moral justifiability of judicial review *in so far as it pertains to any particular society* into a question about the performance of that society's democratic institutions. The first problem with this move is that it requires an assessment that may be just as controversial, even in the Western liberal democracies to which Waldron's argument is principally directed, as the main question of the moral justifiability of judicial review. Secondly, answering this question depends on the deployment of the context-sensitive, historically aware

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[4] See, for example, Fallon (n 2) 1701; Lever (n 2) 808.

[5] Waldron, 'Core of the Case' (n 1).

[6] ibid 1350.

[7] ibid 1351.

methods that Waldron says at the beginning of his article he is keen to avoid. Thirdly, even if we could settle on a group of societies in which this first assumption could be said uncontroversially to hold, that group is likely to constitute quite a small proportion of the whole. Waldron's normative argument is thus largely irrelevant to the really interesting part of the global debate over judicial review – the question of why so many societies have adopted this form of government and the conditions under which it succeeds in achieving its aims.

Section 4 steps away from Waldron's argument to give a brief account of the history of judicial review in India. The purpose of this exercise is to drive home the point that the moral justifiability of judicial review is a sociologically complex question in which empirical facts and normative evaluations need to be combined in a context-sensitive analysis. For long periods in India's constitutional history, judicial review has appeared to shore up rather than undermine democracy. While not refuting Waldron's argument, this experience suggests that, at certain points in the development of a society's democratic institutions, judicial review may be, not just a morally justifiable, but also a morally necessary institution. At present, the impact of judicial review on the functioning of democratic institutions in India is more ambiguous, with the literature pointing to both positive and negative effects. Positively, judicial review has helped to moderate the threat posed to India's democracy by the rise of Hindu fundamentalism. Negatively, the Supreme Court's ongoing interventions in areas such as environmental policy have undermined the capacity of state institutions to fulfil their appointed functions. There is no common currency according to which these effects can be weighed against each other, however, and thus all that can be said is that judicial review as it is practised in India today (1) is not obviously incompatible with democracy, and (2) could be improved by closer attention, on the part of legislators and judges alike, to its impact on democracy.

The last substantive part of the paper (section 5) considers the implications for constitutional design and judicial practice of this more context-sensitive approach to Waldron's question. The heart of the argument here is that, with so many counterfactuals in play, and the conditions for the realisation of Waldron's right to democratic self-government constantly shifting, it is almost always better for constitutional designers in new or otherwise fragile democracies to make provision for judicial review than not. The great advantage of judicial review as an institution is that it is controlled by an arm of government – the judiciary – that is capable of making a difference to the quality of democracy but which is at the same time exposed to the possibility of political clawback in the event of over-reach. This feature of judicial review means that it can act as a sort of pressure valve on a constitutional system, helping to regulate the required balance between the need to enforce democratic ground-rules and the need to ensure that constitutionally compatible majority views prevail.

As far as judicial practice is concerned, the main implication of this more context-sensitive approach is that the strength of judicial review should be calibrated to the quality of democracy in a society, not in the either/or way Waldron proposes, but in a more graduated way, according to the changing performance of democratic institutions. This part of the argument applies to both new and old democracies in so far as it suggests that judges in societies that have already established a system of judicial review can meet the moral objection to this institution by adjusting the strength of their review powers in line with the inclusiveness and quality of the democratic process informing the policies they are reviewing. The problem with judicial review, in short, is not an intrinsic institutional problem but a problem with the way judges exercise (or fail to exercise) this power.

2. *Waldron's Qualified Case against Judicial Review*

Waldron's argument in the *Yale Law Journal* piece goes something like this: The central problem with judicial review in its 'strong' form[8] is that it undermines the political value of democratic self-government. Though he is not entirely clear on this point,[9] democratic self-government in Waldron's usage appears to be both a collective right that the people exercise jointly and also the sum total of their rights as individuals to participate in the making of decisions that affect them.[10] Any system that gives judges the power of judicial review, Waldron argues, undermines this right by giving the power finally to settle major policy questions (such as whether or not to provide for same-sex marriage, women's right to an abortion, or the regulation of political-party campaign funding) to what amounts to a group of unelected people deciding by majority vote.[11]

For the rest, Waldron's case against judicial review is a skittle-type argument in which he sets up and then tries to knock down the positive case. If the best moral justification for judicial review can be shown to be fallacious, he contends, the default position must be parliamentary sovereignty.[12] In proceeding thus, Waldron divides the reasons for preferring judicial review into 'outcome-based' and 'process-based reasons'.[13] He then claims that the best defence of judicial review is the argument that the weight of the former type of reasons favours the adoption of this

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[8] Waldron makes it clear that his objection lies only against forms of judicial review that give judges a final decision-making power over the constitutionality of legislative action. Thus, he has no objection to the weak-form UK model, for example. See Waldron 'Core of the Case' (n 1) 1353-9.

[9] See Fallon (n 2) 1713.

[10] Waldron 'Core of the Case' (n 1) 1353.

[11] ibid.

[12] ibid 1375-6.

[13] ibid 1372.

institution, overcoming a certain admitted weakness with respect to the latter. Waldron's main target here is Ronald Dworkin,[14] who famously argued that judges were more likely than legislatures to give the right answers to questions about what rights people have, and that there was no detraction from democracy when judges did this.[15]

Having set the skittles up in this way, Waldron proceeds to attack the outcomes-based case for judicial review by showing that it depends on demeaning the role of legislatures by falsely making them out to be an arena of naked partisan-political interests.[16] Using examples from the way the debate over abortion was handled in the UK as opposed to the US, Waldron tries to show that legislatures are capable of debating morally-loaded policy choices like this in a principled way.[17] Indeed, he argues, one of the major advantages legislatures have over courts is that when they debate issues of fundamental political morality they are not hampered by legalism – the need to pay attention to precedent and the argumentative requirements of a particular legal tradition.[18] Rather, Waldron claims, legislatures can approach such questions as questions of pure political morality and thus are in fact better (and certainly no worse) at answering these questions than courts. Since proponents of judicial review concede that the process-based arguments all clearly favour legislatures, this conclusion means that the preponderance of the argument is against judicial review.[19]

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[14] ibid 1399-1401.

[15] ibid 1399 (citing Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard UP 1996) 32-3).

[16] Waldron, 'Core of the Case' (n 1) 1377.

[17] ibid 1349-50.

[18] ibid 1383. Waldron has elaborated on this part of the argument in Waldron, 'Judges as Moral Reasoners' (n 1).

[19] Waldron 'Core of the Case' (n 1) 1375-6.

In the course of setting out this case, Waldron makes a key concession about its scope. It does not apply, he says, when one or more of four assumptions do not hold: (1) democratic institutions are 'in reasonably good order'; (2) judicial institutions are in 'reasonably good order'; (3) most members of society and officials are committed to minority and individual rights; and (4) there is persistent good-faith disagreement about the policy-implications of rights in the society concerned.[20] This concession is not simply some throwaway remark, but a central part of the argument to which Waldron devotes a number of pages.[21] Nevertheless, as Richard Fallon has pointed out,[22] the relationship between these assumptions and Waldron's main normative claim is not entirely clear. Their function appears to be largely methodological rather than substantive. At the start of his article Waldron thus tells us that he wants to 'identify a core argument against judicial review that is independent of both its historical manifestations and questions about its particular effects'.[23] He then makes some approving remarks about Mark Tushnet's and Larry Kramer's work on judicial review, but says that their 'theoretical critique of the practice' is 'entangle[d] with discussions of its historical origins and their vision of what a less judicialized U.S. Constitution would involve'.[24] By contrast, Waldron says, he wants 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'.[25] Seen against that background, the

[20] ibid 1360.

[21] ibid 1359-69.

[22] See Fallon (n 2) 1702.

[23] Waldron, 'Core of the Case' (n 1) 1351.

[24] ibid (citing Larry D Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (OUP 2004); Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton UP 1999)).

[25] Waldron, 'Core of the Case' (n 1) 1351.

purpose of the four assumptions appears to be to isolate a group of societies that share broadly similar institutions and political traditions so that the case against judicial review in those societies can be pursued in a purely normative register.

My interest in this piece lies in pressing down on this methodological part of Waldron's argument rather than tackling the normative part head on. What methods do we need to use when inquiring whether a particular country's democratic institutions are 'in reasonably good order'? Is it really possible to isolate a core group of societies in this way, or is there likely to be disagreement about the status of even seemingly obvious cases? If so, has Waldron not simply shifted the focus of the debate, in so far as it concerns any particular society, from the moral justifiability of judicial review in that society to the question whether democratic institutions are in reasonably good order? Even if we concede that a group of societies exists in respect of which it is possible to say that their democratic institutions are in reasonably good working order, what proportion of the whole does this group represent? If it in fact represents a very small proportion, is Waldron's 'core' case really a peripheral case?[26] How productive is it, in any event, to pursue the question of the moral justifiability of judicial review in the empirically stripped down terms that Waldron proposes?

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[26] Note that Waldron uses the word 'core' to mean either the essence of the argument against judicial review or the 'core' of countries to which his argument applies. Compare, for example, Waldron, 'Core of the Case' (n 1) 1351 ('What I want to do is identify a core argument against judicial review') with ibid 1359, where he prefaces the discussion of his four assumptions as being driven by the need 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'. In that formulation, the 'core case' means not the essence of the case against judicial review but the group of societies in which his four assumptions hold.

3. *Pressing Down on the First Assumption*

Waldron does not explain in so many words how we are meant to go about identifying societies whose democratic institutions are in 'reasonably good working order'. Rather, he describes in very general terms a society that 'has a broadly democratic political system'[27] in the sense that it is one in which (1) there is a legislature staffed by representatives elected in regular free and fair elections, (2) the 'procedures for lawmaking are elaborate and responsible and incorporate various safeguards', and (3) the party political system operates to ensure that the people's representatives represent both the views of their 'immediate constituents' and broader sectional interests.[28] In this imagined society, democratic institutions 'may not be perfect', but there exists 'a culture of democracy' that values 'responsible deliberation and political equality'.[29] The importance of this last point is that it means that the society is presumptively attuned to instances where democratic institutions may not be functioning properly. Where this is detected, it is further assumed, efforts will be made by the legislature to identify and correct the problem.[30] Finally, Waldron says, by 'reasonably good working order' he means to refer to the process rather than the substantive outcomes of lawmaking, so that whether or not a society satisfies this condition is not measured by the substantive justice of legislation, but by whether the process for law-making conforms to the process he has described.[31]

There are a few obvious problems with the way Waldron sets out this first assumption.

[27] ibid 1361.

[28] ibid.

[29] ibid.

[30] ibid 1362.

[31] ibid.

For example, one might ask whether the form/substance separation he posits really holds. Is it possible to assess whether democratic institutions are functioning well without having regard to the moral rightness of the outcomes they produce?[32] My interest, here, however lies in something else – in asking what methodology we need to use when assessing whether a particular society's democratic institutions are in reasonably good order and how controversial this judgment is likely to be even in the core group of societies to which Waldron's argument is principally directed. My hunch is that if we can get some clarity on this issue certain points will follow about the scope and implications of Waldron's argument.

In form, the question whether democratic institutions are in reasonably good working order is a mixed normative/empirical question. To answer it, we must have a sense of what the 'good' in 'reasonably good order' means. We must also have a way of empirically examining the functioning of democratic institutions in the society in which we are interested to determine whether they are serving this good. In his treatment, Waldron asserts, rather than argues for, the normative part of this mixed question – the values of deliberation and political equality he says democratic institutions must serve.[33] Granting for the sake of argument that these are the correct

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[32] See Aileen Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 Law and Philosophy 451 (responding to the earlier version of Waldron's argument on this point in Waldron, *Law and Disagreement* (n 1)).

[33] Waldron 'Core of the Case' (n 1) 1361. On Dworkin's view, respect for a much wider range of rights is integral to proper democratic functioning. See, for example, Dworkin (n 14) 7-12. Waldron challenges this aspect of Dworkin's defence of judicial review at length elsewhere in his work (see, for example, Waldron, *Law and Disagreement* (n 1) 294-5 (arguing that Dworkin's 'result-driven' standard cannot be used to design a 'decision-procedure' given reasonable disagreement over rights). The point here is simply that Waldron's first assumption is framed in a way that favours his particular side of this dispute.

values, the problem with Waldron's first assumption remains that any judgment about whether these two values are being served in any particular society, even the Western liberal democracies he has in mind,[34] is likely to be quite controversial. There is also considerable scope for disagreement about whether legislatures have the capacity for self-correction that is an essential part of his first assumption.

In one of his footnotes, Waldron cites one of his own papers on New Zealand as suggesting that the 'unicameral arrangements' in that country have 'exacerbate[d] other legislative pathologies' in a way that may take it 'outside the benefit of the argument developed in this Essay'.[35] This footnote should immediately sound some alarm bells in the attentive reader's ears. If even so stable a democratic society as New Zealand may not qualify for inclusion in Waldron's core group, how large is it really? Does the United States, for example, with its entrenched two-party political system,[36] partisan redistricting,[37] and long-standing struggle to contain the distorting influence of powerful corporate interests on democracy qualify?[38] What about the United Kingdom, where the 2015 general election saw the Conservative Party win a majority of the seats in the House of Commons with just 34.6% of the popular vote and an even smaller percentage of the eligible vote? The moral justifiability of this

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[34] From the examples Waldron cites, these are the US, the UK, Canada, Australia and New Zealand.

[35] Waldron 'Core of the Case' (n 1) 1361 n 47 (referring to Jeremy Waldron, 'Compared to What?—Judicial Activism and the New Zealand Parliament' [2005] New Zealand LJ 441.

[36] See Samuel Issacharoff and Richard H Pildes, 'Politics as Markets: Partisan Lockups of the Democratic Process' (1998) 50 Stanford L Rev 643.

[37] ibid.

[38] This issue was most recently considered by the US Supreme Court in *Citizens United v Federal Election Commission* 558 US 310 (2010).

outcome was not just an academic question as the day of rioting in London in protest against the election result showed.[39] And what about the fact that the United Kingdom Independence Party, with 12.6% of the popular vote spread across a large proportion of the country, won just one seat, whereas the Scottish National Party, with 4.7% of the popular vote almost all concentrated in one particular part of the country, won 56 seats? Are these relatively minor problems or major democratic pathologies? And is the UK Parliament likely to fix them of its own accord?

Australia provides another illustration of the problem. Like the UK, it is a country in which there is no judicial review of the kind Waldron dislikes.[40] That allows us to examine the functioning of its democratic institutions without the distorting effects of the institution whose moral justifiability is in question. Does that make the analysis easier? Australia's democratic system is certainly stable, but there are evident problems. The Senate, with its provision for equal state representation notwithstanding sizeable differences in population is a clearly (and deliberately) anti-democratic institution.[41] The proportional representation voting system in the Senate is also arguably anti-democratic in as much as it allows very minor parties and independents to control the balance of political power, not just in the Senate, but in the country

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[39] ABC News, 'UK Election: Riot Erupts in London against Re-election of Conservative Prime Minister David Cameron' (10 May 2015).

[40] Strictly speaking, there are no individual rights in the Australian Constitution , merely limits on legislative power. See, for example, the High Court's approach to the freedom of interstate trade and commerce in *Betfair Pty Ltd v Racing New South Wales* (2012) 286 ALR 221, 232-34, as explained in George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (6th edn, The Federation Press, 2014) 1223-4.

[41] Australian Constitution, s 7.

as a whole.[42] Finally, the value of political equality in Australia is upheld in the breach in so far as Indigenous Australians and lesbian and gay people are concerned. Both those groups are currently beholden to the majority for recognition, not just of their interests, but of their core identity.[43] In light of these problems, can we say that Australia's democratic institutions are in reasonably good order? The answer is at least as controversial as Waldron assumes the answer to the equivalent question in New Zealand to be.

One could go on in this vein to interrogate whether there is any actually existing society in which Waldron's first assumption clearly holds. But enough has been said to illustrate that he has created a condition that eliminates very many, perhaps most, Western liberal democracies and the vast majority of other societies. Perhaps this was partly his intention. As noted, he says at the beginning of his article that he wants to make a 'normative' case against judicial review that 'is independent of its historical manifestations and questions about its particular effects'.[44] The

[42] This is true, for example, of the current Senate where the Greens, four smaller parties and four independents hold 18 seats, with the Liberal/National Party Coalition on 33 and the Australian Labor Party on 25.

[43] Witness the ongoing travails of both the 'Recognise' campaign and the same-sex marriage debate. The former was established to encourage public debate over the recognition of Indigenous Australians in the Constitution, but progress has been repeatedly stalled by lack of political will on both sides of politics to drive the issue to a head and by the feeling among some members of the Indigenous community that any changes introduced are likely to be cosmetic. See Megan Davis and Marcia Langton, 'Constitutional Reform in Australia: Recognition of Indigenous Australians and Reconciliation' in Patrick Macklem and Douglas Sanderson (eds), *From Reconciliation to Recognition: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (University of Toronto Press, 2015). Several same-sex marriage bills have been introduced in the Australian federal Parliament over the last few years, but none has as yet been taken to the vote. In *Commonwealth v Australian Capital Territory* [2013] HCA 55, the High Court struck down an Australian Capital Territory same-sex marriage bill on federalist grounds.

[44] Waldron, 'Core of the Case' (n 1) 1351.

question, however, is whether that is a viable way of proceeding. By so stripping the argument of empirical flesh, Waldron simply relocates the debate over the moral justifiability of judicial review, in so far as it concerns any particular society, to a debate about whether his four assumptions hold in that society. The debate over that issue is likely to be just as controversial as the debate over the moral justifiability of judicial review in the societies concerned. This problem would not be so bad if Waldron's intention had been to offer a purely philosophical thought experiment. But he clearly did want to influence ongoing debates in the US, Canada, the UK, Australia and New Zealand about the legitimacy of judicial review. If his normative argument does not apply to those societies, or applies only subject to a controversial debate over the satisfaction of his conditions, what has he actually achieved?

The question whether judicial review would be morally justified if various assumptions hold is in any case not the question that these societies actually confront. The question that these societies actually confront is either whether they should dispense with a system of judicial review that they have already adopted or whether they should adopt such a system in the future. That question is not typically asked in the two-stage way that Waldron's methodology requires – first determining whether democratic institutions are in reasonably good order and then considering the reasons for and against judicial review in a purely normative register. In the case of societies that already have a system of judicial review this is because the question involves a counterfactual: whether functioning badly or well, democratic institutions are functioning in the presence of judicial review and thus any judgment about whether they are in reasonably good order is going to be skewed by this fact. In the case of societies that do not have judicial review, even societies where democratic institutions are in fairly good shape, it is impossible to know what the actual impact of the introduction of judicial review will be. Perhaps societies with

minor democratic deficiencies could eliminate even those few deficiencies by adopting judicial review? Or perhaps Waldron's nightmare scenario would instead ensue, in which the adoption of judicial review had a 'disenfranchis[ing]' effect?[45] Only a deep, contextualized understanding of the society and the particular form of judicial review proposed would assist with that question, and even then answering it would be fraught with difficulty.[46]

Even if there were not profound problems in determining whether a particular society satisfied Waldron's first condition, and even if we simply accepted arguendo that it was likely to be satisfied in at least some cases, what proportion of the whole would this core of societies represent? Clearly, as we move away from the familiar set of Western liberal democracies, the chances of the first condition being satisfied diminish quite rapidly. If it is hard to determine whether New Zealand satisfies the first condition, what about Colombia, Mexico, Indonesia or South Korea? At what point would this become a problem for Waldron – when his argument covered only 20% of societies, 10%, or 1%? Would he really be content with having made an argument that applied only to a very small proportion of societies, and even then in no kind of conclusive way but only after a separate, controversial case for satisfaction of his four conditions had been made out?

The dimensions of this separate problem of what we might call the scope or coverage of Waldron's argument may be gleaned from a recent book written by his NYU Law School colleague, Sam Issacharoff. In that book (*Fragile Democracies*[47]), Issacharoff argues, in part

[45] ibid 1353.

[46] See the discussion of the Indian case in Section 4 below.

[47] Cambridge UP 2015.

contra Waldron,[48] that judicial review, as exercised by constitutional courts in particular, has been central to democratic stabilisation in many countries after 1989. In countries as diverse as Colombia, India and South Africa, Issacharoff tries to show,[49] constitutional courts with strong judicial review powers have been playing a role in helping democracies first to survive, and then to function better. This is no small achievement, he thinks, given the record of democratic retrenchment all around.[50] Indeed, if Issacharoff is correct, his claim goes not just to the moral justifiability of judicial review in the societies concerned, but to its moral necessity. Judicial review in these societies is not merely less objectionable, but actually essential to the satisfaction of Waldron's first condition.

Of course, the well-known role played by constitutional courts in stabilizing fragile democracies is precisely why Waldron qualified his argument in the way that he did. By limiting his normative argument to the English-speaking, Western liberal democracies that principally concern him, he likely thought, he could head off arguments of the kind Issacharoff makes. But in so doing, Waldron cut himself off from the really interesting part of the global debate over judicial review, which even before he wrote in 2006 had moved on from American agonizing

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[48] ibid 17.

[49] I say 'tries to show' rather than 'shows' because Issacharoff's book has its own methodological problems in as much as he does not convincingly explore the central causal question of what effect on democracy the constitutional courts he discusses have had. As he says in his Introduction, his 'is not so much the political science account of the institutional role of courts, but the constitutional lawyer's concern for what courts should do when called upon to play [a role in limiting political power]' (ibid 14). But it is not enough to ask the question of what constitutional courts should do without also asking the question of what happens when they do what the author thinks they should do. Here, too, in other words, normative and empirical questions are closely bound up.

[50] ibid 1-2.

about the counter-majoritarian dilemma to focus on the politico-legal dynamics of judicial review in the rest of the world.[51] By drastically reducing the scope of his argument with his first assumption, Waldron's *Yale Law Journal* piece has almost nothing to contribute to these debates.

I say 'almost nothing' because Waldron's argument does have one interesting implication for scholars working on judicial review outside the Western core. If he is correct that the moral justifiability of judicial review is contingent in part on how effectively democratic institutions are functioning, then the strength of judicial review should be calibrated – not in the either/or way he suggests, but in a more graduated way – to the quality of democracy in a society. Thus, where judicial review is adopted, as it so frequently is today, to assist in the transition to and stabilisation of democracy, the operation of this institution should change to the extent that it produces its intended effects. Legislatures, on the one hand, should be assessing the role of courts in the democratic system and amending governing statutes, including constitutional provisions, to ensure that judicial review serves its intended purposes. Judges, for their part, should be thinking about the quality of democracy in the society in which they are operating and adapting their role to changing democratic pathologies, or downgrading that role to the extent that the democratic system begins to function better.[52]

The broader usefulness of Waldron's argument, in other words, is that it points the way to the questions that need to be asked when considering how best to design or engage in the practice of judicial review. How should judicial review be structured so as to maximize its

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[51] See, for example, Diana Kapiszewski, Gordon Silverstein and Robert A Kagan (eds), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge UP 2013).

[52] For a longer version of this argument, see Theunis Roux and Fritz Siregar, 'Trajectories of Curial Power: The Indonesian Constitutional Court after Mochtar' *Australian Journal of Asian Law* (forthcoming).

democracy-promoting effects? How should the functioning of democratic institutions be assessed, by legislatures and judges alike, so as to serve the values of deliberation and political equality Waldron posits? And how should judges adjust their decision-making practices so as to promote the proper functioning of democratic institutions while respecting the value of democratic self-government?

These are all mixed normative/empirical questions that depend on a detailed understanding of the functioning of democratic institutions and the role of courts in the society in question. Moreover, they are questions to which the answers in any particular society are constantly changing as the quality of democracy in that society improves or declines. In short, they are context-sensitive questions that need to be answered through an empirically grounded, historically aware method – the very method that Waldron was at pains to move way from in his *Yale Law Journal* piece.

The rest of this paper looks first at India as an example of the sorts of issue at stake, and then works back from there to the constitutional design and judicial practice questions.

4. *Considering the Indian Experience*

India is famously not only the world's largest democracy but also a country that defies virtually every political science rule about the conditions under which stable democracies arise and endure.[53] With 1.2 billion people, two major and several other significant religions, 20 officially recognized languages and many more dialects, and enduring class, caste and gender inequalities, the country is simply not meant to be democratic. And yet it stubbornly refuses to slide into

[53] Sumit Ganguly, 'India's Unlikely Democracy: Six Decades of Independence' (2007) 18 J Democracy 30.

authoritarianism.[54] At the last general election in May 2014, 930,000 polling stations opened for one month to accommodate 814.5 million eligible voters voting electronically for 8,251 candidates representing over 300 political parties contesting 543 parliamentary seats. This was not a minor undertaking.

Democracy in India still faces many challenges, of course. In addition to long-standing problems of public service corruption and inefficiency,[55] the post-1980 rise of the Hindu nationalist movement, Hindutva, continues to threaten the secular foundations of the post-1947 Indian state.[56] The Bharatiya Janata Party's victory in the 2014 general election triggered a renewed debate over this issue.[57] But no one can deny the vigour of India's democracy or the fact that it goes beyond mere proceduralism to a profound and culturally embedded commitment to the value of democratic discussion.[58] More pertinently, the Indian Supreme Court is generally agreed to have played a central role in this achievement. Roundly condemned for its capitulation to the executive during the 1975-1977 Emergency,[59] the Court's star began to rise again after the

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[54] See Alfred Stepan, 'India, Sri Lanka, and the Majoritarian Danger' (2015) 26 J Democracy 128.

[55] See Ramachandra Guha, *India after Gandhi: The History of the World's Largest Democracy* (Macmillan 2007) 682-91.

[56] See Martha Nussbaum, *The Clash Within: Democracy, Religious Violence, and India's Future* (Harvard UP 2007).

[57] See, for example, Eswaran Sridharan, 'Behind Modi's Victory' (2014) 25 J Democracy 20; Ashutosh Varshney, 'Hindu Nationalism in Power' (2014) 25 J Democracy 34.

[58] On this tradition in Indian political culture, see Amartya Sen, The Argumentative Indian: Writings on Indian History, Culture and Identity (Picador 2005).

[59] The classic study is Upendra Baxi, *The Indian Supreme Court and Politics* (Eastern Book Co 1980). See also SP Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (OUP 2002).

restoration of constitutional government in 1977.[60] Its Public Interest Litigation (PIL) jurisprudence, developed in the 1980s to make the Constitution more accessible to marginalized groups, is internationally celebrated as a major example of the role progressive judges can play in driving pro-poor social reform.[61] While the Supreme Court today is more ideologically diverse and focused on middle-class concerns,[62] including most notably environmentalism,[63] it continues to play an important role in protecting the democratic system against sectarianism and the worst effects of corruption and maladministration.[64]

That the Indian Supreme Court has played a central role in shoring up India's democratic institutions does not refute Waldron's case, of course. Given the many challenges India's

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[60] See Manoj Mate, 'Public Interest Litigation and the Transformation of the Supreme Court of India' in Kapiszewski and others (eds), *Consequential Courts* (n 51) 262.

[61] See PN Bhagwati, 'Judicial Activism and Public Interest Litigation' (1984) 23 Columbia J Transnat'l L 56; Upendra Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' (1985) 4 Third World Leg Stud 107.

[62] See Balakrishan Rajagopal, 'Pro-Human Rights but Anti-Poor? : A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective' (2007) 18 Human Rights Rev 157; Manoj Mate, 'Elite Institutionalism and Judicial Assertiveness in the Supreme Court of India' (2014) 28 Temple Int'l & Comp LJ 360.

[63] Armin Rosencranz and Michael Jackson, 'The Delhi Pollution Case: The Supreme Court of India and the Limits of Judicial Power' (2003) 28 Columbia J Environmental L 223 and Lavanya Rajamani, 'Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation Equity, Effectiveness and Sustainability' (2007) 19 J Environmental L 293.

[64] See Pratap Bhanu Mehta, 'India's Judiciary: The Promise of Uncertainty' in Devesh Kapur and Pratap Bhanu Mehta (eds), *Public Institutions in India: Performance and Design* (OUP 2005) 158; Nick Robinson, 'Expanding Judiciaries: India and the Rise of the Good Governance Court' (2009) 8 Washington U Global Stud Law Rev; Mate, 'Public Interest Litigation' (n 60).

democracy faces, his first assumption, he would likely say, does not hold. But that again simply illustrates the restricted scope of Waldron's argument. Any contemporary theorisation of the moral justifiability of judicial review must surely grapple with the experience of societies like India. It is not enough simply to relegate such societies to the 'not in reasonably good order' basket so that the debate can be conducted within the philosopher's comfort zone of purely normative argument.

What does a more context-sensitive approach to the history of judicial review in India reveal about the moral justifiability of this institution? The decision to adopt American-style judicial review in the 1950 Constitution certainly marked a bold departure from the British Westminster tradition.[65] While some of the foundations for federal government had been laid by the 1935 Government of India Act,[66] the powers conferred on the Supreme Court in 1950 went far beyond anything previously attempted. That there was very little opposition to the fettering of democracy in this way was a function partly of the desire to use judicially enforced rights as the 'conscience' of the Constitution – the moral engine that would drive India's progress away from colonialism towards social and economic justice – and partly of the need for an institution to settle disputes between the Union government and the states.[67]

One of the most influential voices during the constitutional negotiations process was that of B. R. Ambedkar, the *dalit* ('untouchable') politician who chaired the Constituent Assembly's

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[65] See Rajeev Dhavan, 'Borrowed Ideas: On the Impact of American Scholarship on Indian Law' (1985) 33 Am J Comp L 505, 511-512.

[66] This Act established a Federal Court – the forerunner to the Supreme Court – with the power to make declaratory orders in respect of federal matters. There was no provision for judicial review of fundamental rights.

[67] See Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Clarendon Press 1966) 164-75.

Drafting Committee and is acknowledged, even more so than Jawaharlal Nehru, as the Indian Constitution's main architect.[68] For Ambedkar, the fundamental rights were required to guarantee marginalized Indians a threshold of protection from which they could engage the political process and lobby for improvements to their situation. Had he had his way, the Directive Principles of State Policy in Part IV of the Constitution would have been framed as enforceable rights alongside the comprehensive set of negative guarantees in Part III.[69] He lost this particular argument, but there was never any doubt about the fundamental rights, which the drafters 'quickly' decided should be fully justiciable.[70]

The alacrity of this decision cannot be ascribed to ignorance about the role that judicial review might play in interfering with majority decision-making. When drafting the Constitution, the Indian Constituent Assembly had before it the recent experience of the US Supreme Court's *Lochner* jurisprudence. The Assembly was also specifically advised by Justice Felix Frankfurter that 'the power of judicial review implied in the due process clause' was 'undemocratic'.[71] Nevertheless, it decided to include a comprehensive set of rights in the Constitution and to give expression to the democratic principle by providing for reasonable limitations. The property clause, for example, was heavily qualified,[72] while article 21, the right to life and liberty, was deliberately drafted so as to exclude reference to the American notion of due process.[73] What this

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[68] See KL Bhatia (ed), *Dr B.R. Ambedkar: Social Justice and the India Constitution* (Deep and Deep Publications 1995).

[69] Austin, *The Indian Constitution* (n 67) 78.

[70] ibid 63.

[71] ibid 103.

[72] Indian Constitution, art 31 (repealed by s 6 of the Constitution (Forty-fourth Amendment) Act, 1978.

[73] Austin, *The Indian Constitution* (n 67) 103-104.

suggests is that the Constituent Assembly was fully aware of the democratic objection to judicial review, but decided that, carefully crafted, judicially enforced fundamental rights could make a vital contribution to the remoralization of the legal and political order without fatally compromising the right to democratic self-government.

The story of how the Supreme Court went about exercising its review powers has been told on many occasions.[74] There is space here just briefly to highlight the impact of the Court's decisions on the functioning of democratic institutions. During what we might call its establishment period (1950-1967), the Court took a legalist approach to its mandate, and exercised its power of judicial review to thwart the 'zamindari abolition' laws – state land reform statutes that were aimed at breaking up the larger estates.[75] Taken at face value, those decisions certainly undermined democratic policy choices. Nor could the Court really claim to have been ensuring equal concern and respect for the rights of property owners, since the effects of its decisions clearly contributed to the overall frustration of the land reform programme at the expense of its intended beneficiaries. The Court's impact on democracy during this period was not wholly negative, however. Through exactly the sort of textualist interpretive methods that Waldron decries,[76] the judges gave effect to the literal terms of the Constitution, and in this way honoured the Constituent Assembly's drafting choices in a number of areas.[77] Also, as much as

[74] See the literature cited in nn 59 and 60 above.

[75] See HCL Merillat, 'The Indian Constitution: Property Rights and Social Reform' (1960) 21 Ohio State LJ 616.

[76] Waldron, 'Core of the Case' (n 1) 1383.

[77] In *AK Gopalan v State of Madras* 1950 SCR 88, for example, the Supreme Court interpreted art 21's guarantee against deprivation of 'life or personal liberty except according to procedure established by law' to mean that no one could be detained except on the authority of a duly enacted law, but beyond this that there was no requirement that the law should conform to the principles of natural justice. This legalist reading gave effect to the Constituent

the Congress Party might have been inconvenienced by the Court's property rights decisions, the Court's legalist stance helped to legitimate the vast majority of the democratic social reforms that the Court did not overturn.[78]

After the *Golak Nath* decision in 1967,[79] the Court's relationship with the political branches deteriorated. This was partly because that decision changed the terms of the *modus vivendi* that had developed between Nehru and the Court, and partly because Nehru's eventual successor as Prime Minister, his daughter Indira Gandhi, was far less inclined than Nehru had been to respect the Court's independence.[80] In *Golak Nath*, the Court decided by a narrow majority that constitutional amendments were subject to the fundamental rights. This decision overturned two earlier decisions in which the Court had essentially given Parliament carte blanche to amend the Constitution as it saw fit.[81] Given the ease with which Parliament had been able to overturn the Court's decisions on property rights before this point,[82] 1967 was the real moment when counter-majoritarian judicial review in India began to bite. The ensuing struggle

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Assembly's wish that India should not go down the route of the American due process clause. Here, legalist methods tied the Court to the express terms of its democratic mandate – a point Waldron suppresses in his attack on legalism (Waldron, 'Core of the Case' (n 1) 1383).

[78] This is an often ignored majoritarian benefit of judicial review, i.e. the way the availability of judicial review helps to legitimate majoritarian decision-making that passes constitutional muster.

[79] *Golak Nath v State of Punjab* 1967 (2) SCR 762.

[80] See Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (OUP 1999) 174, 328, 516-17.

[81] *Sri Sankari Prasad Singh Deo v Union of India* AIR 1951 SC 458; *Sajjan Singh v Rajasthan* AIR 1965 SC 845.

[82] According to art 368, amendments to the Indian Constitution require a bare majority decision of two-thirds of the members present. The Congress Party was easily able to satisfy the requirement between 1950 and 1967.

between the Court and Indira Gandhi's Congress Party may appear to be a classic instance of a popularly elected government trying to wrest back control of policy-making from an overzealous Court, but the democratic ledger does not balance as neatly as that. From the very beginning of her prime ministership, Gandhi showed authoritarian tendencies,[83] and thus the Court's attempt to immunize parts of the Constitution against constitutional amendment in *Golak Nath*, and later in its famous *Kesavananda* decision,[84] were as much about preserving democracy as they were about asserting its final decision-making powers.[85]

During the 1975-1977 Emergency, the Court is generally agreed to have been shamefully quiescent.[86] In the *Shivkant Shukla* decision,[87] in particular, the Court appeared to capitulate to the executive over the suspension of the writ of *habeas corpus*. Note, however, that the complaint here is not that the Court's powers detracted from democracy, but that it failed to exercise them forcefully enough. Before that decision, in the *Indira Gandhi Election Case*,[88] the Court had upheld *Kesavananda* in extremely difficult circumstances. In that decision the Court had to weigh the impact on democracy of allowing a retrospective amendment to the Election Law against the impact of possibly losing its power to moderate the Congress Party's attack on fundamental rights.

From 1977-1989, when Justices P.N. Bhagwati and V.R. Krishna Iyer were on the Bench, the Court's doctrines were targeted at making the Constitution more accessible to the poor. As

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[83] Austin, *Working a Democratic Constitution* (n 80) 174, 328, 516-17.

[84] *Kesavananda Bharati Sripadagalvaru v State of Kerala* AIR 1973 SC 1461.

[85] The subsequent acceptance and legitimation of Kesavananda tends to confirm this view.

[86] See, for example, Baxi, *The Indian Supreme Court and Politics* (n 59); Sathe (n 59).

[87] *ADM Jabalpur v Shivkant Shukla* (1976) 2 SCC 521.

noted, this represents the clearest example in comparative law of progressive judges' capacity to give voice to marginalized groups who have little access to the democratic process.[89] The PIL doctrines the Court adopted during this time restored its public support, but at the same time deepened India's democracy, giving the poor an additional forum through which they could pursue their interests and opening out political representation beyond the upper-caste Hindu elite. This achievement is today reflected in India's complex coalition politics in which caste-based and regional parties often hold the balance of power.[90]

After 1991, the composition of the Supreme Court Bench became more ideologically diverse, and the Court broadened its mandate beyond pro-poor rights to enforce good governance standards more generally.[91] In this guise, the Court addressed, and is still addressing, many of the pathologies of India′s democracy. For example, in the so-called Hindutva cases, the Court was asked to decide whether various Hindu fundamentalist politicians had violated the ban on the use of religious speech in electioneering in s 123 of the Representation of the People Act, 1951.[92] Although the Court in the end overturned most of the convictions, it upheld the Act′s commitment to secularism. In another case, *Bommai*,[93] the Court upheld the dismissal of three

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[88] *Indira Nehru Gandhi v Raj Narain* AIR 1975 SC 2299; 1976 (2) SCR 347.

[89] R Sudarshan, 'Courts and Social Transformation in India' in Roberto Gargarella and others (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate 2006) 153.

[90] See Surya Deva, 'The Indian Constitution in the Twenty-First Century: The Continuing Quest for Empowerment, Good Governance and Sustainability' in Albert HY Chen (ed), *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge UP 2014) 343, 345.

[91] See Robinson, 'Expanding Judiciaries' (n 64).

[92] *Joshi v Patil* (1996) 1 SCC 169 and eleven other cases decided by the Supreme Court in 1995.

[93] *SR Bommai v Union of India* (1994) 3 SCC 1.

state governments on the grounds that their failure to prevent the destruction of the Babri Masjid in Ayodhya in 1992 constituted a threat to the secular foundations on which the Constitution had been built and which now formed part of its 'basic structure'.

The interventionist style that the Court developed during the 1980s, however, means that it also sometimes wields its powers in democracy-inhibiting ways. In the case of environmental rights, for example, the Court has been charged with undermining the role of representative institutions. By taking over whole areas of regulation, such as pollution control and forest management, the Court has allegedly 'compromise[d] the development of sustained environmental management in India'.[94] There is also now growing discontent over the 'imprecision and intellectual fuzziness'[95] of the Court's jurisprudence and with the fact that the Court exercises great influence over the judicial appointments process.[96]

In 2014, the Indian Parliament passed the Constitution (Ninety-Ninth Amendment) Act, which provides for the establishment of a National Judicial Appointments Commission.[97] If the Amendment Act survives a challenge currently being heard in the Supreme Court,[98] the Commission will replace the collegium system for the selection of judges that the Court

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[94] Rosencranz and Jackson (n 63) 254. See also Rajamani (n 63).

[95] Lavanya Rajamani and Arghya Sengupta, 'The Supreme Court' in NG Jaya (ed), *The Oxford Companion to Politics in India* (OUP 2010) 80. See also Mehta, 'India's Judiciary' (n 64); Pratap Bhanu Mehta, 'The Rise of Judicial Sovereignty' (2007) 18 J Democracy 70.

[96] *Supreme Court Advocates-on-Record Association v Union of India* (1993) 4 SCC 441 and *In re Special Reference No 1 of 1998* (1998) 7 SCC 739; AIR 1999 SC 1.

[97] Section 3 of the Act inserts a new art 124A in the Constitution to this effect.

[98] See Chintan Chandrachud and Rahul Bajaj, 'Debating the NJAC: Framing a Remedy' in *Indian Constitutional Law and Philosophy Blog* (27 July 2015) https://indconlawphil.wordpress.com/.

established in the so-called *Second* and *Third Judges' Cases*.[99] Parliament is also currently considering the Judicial Standards and Accountability Bill 136 of 2010, which proposes the establishment of a National Judicial Oversight Committee and a Complaints Scrutiny Panel for the Supreme Court and each High Court.[100] The introduction of these constitutional and legislative changes suggests that Parliament is not entirely satisfied with the way the Court is operating. Neither statute comes anywhere close, however, to abolishing judicial review or challenging the Court's power to oversee the constitutionality of constitutional amendments. Rather, they amount to attempts to rebalance the constitutional system to ensure that the Court is properly responsive to democratic choices.

Waldron's two-stage methodology provides few tools for assessing the dynamically evolving relationship between the Supreme Court and representative institutions in India. At the foundation of the Indian state in 1950, as we have seen, the decision to adopt judicially enforced rights was a considered attempt to provide a moral basis for the Indian legal and political order after two centuries of colonial rule. Far from standing in the way of the Indian people's desire for democratic self-government, the Court was thought to be central to achieving it. The fact that the Constitution could be so easily amended helped to establish a balance of constitutional power until this arrangement was terminated by the Court in the *Golak Nath* decision. Thereafter, the relationship between the Court and the political branches became more turbulent, and power shifted back and forth until a new equilibrium was established around the *Kesavananda* decision. While that decision continues to undergird the Court's role in the democratic system, there are signs that the balance may be shifting again – towards a new accommodation in terms of which

[99] See n 96 above.

the Court's power of judicial review will be respected subject to greater political control over the appointment and disciplining of judges.

What all of this suggests is that the question whether judicial review undermines the right to democratic self-government cannot be answered by separating the analysis into a threshold question about how well democratic institutions are functioning and a purely normative analysis of the impact of judicial review on a decontextualized right. Whether democratic institutions are functioning properly is something that varies over time, and the impact of judicial review on such institutions may only be assessed with regard to the circumstances in which a society finds itself. At certain periods during India's constitutional history, judicial review has been central to democracy's very survival. At other periods, its effects have been more mixed, with the Court's decisions both supporting and undermining democratic institutions. Since there is no common currency according to which we might determine the overall effects of judicial review on the realisation of the foundational right to democratic self-government, the kind of democratic ledger-keeping that Waldron's analysis requires does not work. Does the role of the Court in combating more extreme forms of sectarianism, for example, cancel out the negative effects of its usurpation of the political branches' role in environmental regulation? There is no way of answering this kind of question. There is also no way of knowing whether things would have been better or worse from the point of view of realizing the right to democratic self-government had the Constituent Assembly not opted for judicial review. After 1977, judicial review certainly seems to have been vital to the restoration of constitutional democracy, but would the Emergency have occurred without the existence of this power in the first place?

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[100] See Deva (n 90) 360-61.

5. *Implications*

Two sets of implications flow from this more context-sensitive approach to the moral justifiability of judicial review: one that concerns the way constitutions ought to be designed and the other the way judges should approach the practice of judicial review.

A. *Constitutional-design implications*

In an ideal Waldronian world, we would (1) institute a system of judicial review if democratic institutions were not in reasonably good working order, (2) monitor the changing quality of democracy, and (3) dispense with judicial review once democratic institutions reached the required performance threshold. In practice, however, it would be hard to determine whether this point had been reached. The question is a counterfactual: would democratic institutions be in reasonably good working order if judicial review were not in place? What would happen to the functioning of democratic institutions if judicial review were removed? There is also the problem that, on Waldron's argument, judicial review produces a kind of dependency effect in terms of which the destructive impact of this institution on the functioning of democratic institutions provides a moral justification for its continuation.

Given these problems, a preferable option would be to design a system in which judges could adapt the strength of their review powers to the changing performance of democratic institutions, without the need for a once-and-for-all assessment of whether those institutions had passed a certain threshold level. In a legal tradition where it was permissible for judges to justify their decisions by reference to the substantive political purposes underlying the conferral of a power, it might not be necessary to specify the varying strength of judicial review according to democratic performance in so many words. In such a legal tradition, judges would not be tied to

the literal terms of their mandate, but would be free to justify intrusions into the democratic process by reference to the pathologies they were addressing.[101] In a more formalist legal tradition, however, the court's power to vary the strength of judicial review according to changes in the performance of democratic institutions might need to be expressly stated.[102]

As a way of reinforcing this approach, the constitutional amendment procedure might be designed so that Parliament could formally adjust the court's review powers in the event that the judiciary failed to respond to better-performing democratic institutions. Care would obviously need to be taken not to make the amendment procedure too easy, lest the threat of amendment be used to discourage judges from standing up to abuses of the democratic process, or to punish them when they did so. A super-majority requirement necessitating cross-party political support for any such amendment might work here. Something like the Indian basic structure doctrine might also need to be constitutionally codified to ensure that any such amendment, even with the requisite super-majority, did not fundamentally disable judicial review.[103] If the constitutional amendment procedure were carefully designed in this way, it might never need to be used

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[101] In Colombia, for example, the Constitutional Court was able to thwart an attempt by President Alvaro Uribe to serve a third term in office by offering a substantive political analysis of the threats posed to democracy by this proposal. See David Landau, 'Abusive Constitutionalism' (2013) 47 U California, Davis L Rev 189, 202-203.

[102] The use of the term 'reasonable' in the formulation of the socio-economic rights in the 1996 South African Constitution, for example, has allowed the Constitutional Court to vary the level of review according to the performance of democratic institutions. Compare *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) to *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC).

[103] The 1996 South African Constitution, for example, effectively codifies the basic structure doctrine by specifying special majorities for amending the Constitution' founding values.

because rational judges would pre-empt a threatened constitutional amendment by adapting the exercise of their review powers in the required way.

In established democracies, the main constitutional-design implication of the approach suggested here is that decision-procedures for protecting rights should generally be left as they are. In the United States, for example, it is impossible to know for certain whether any negative impact of judicial review on the right to democratic self-government is outweighed by the role of the Court in helping democracy to function better. In the absence of certainty on this issue, it would be foolhardy (and in any case politically impossible) to make a major change to the system. Rather, the focus should fall on judicial practice, and the ways in which the US Supreme Court should go about fulfilling its review function in ways that serve the values of deliberation and political equality that Waldron posits, in addition to other values that might be thought to be relevant.[104] In a country like Australia, the implication of the context-sensitive approach is that a justiciable bill of rights should *not* be adopted at the federal level because the impact of such an instrument on Australia's tradition of political constitutionalism would be uncertain. Here, too, the focus should fall on judicial practice, and on whether there were any opportunities to address gaps in the existing rights-protection system.[105]

B. *Implications for judicial practice*

On the context-sensitive approach, the main advantage of making provision for judicial review is

[104] A vast literature already exists on this. See, for example, Michael C Dorf and Charles F Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 Columbia L Rev 267.

[105] The Australian High Court's implied freedom of political communication jurisprudence, for example, can be understood as addressing a gap in the constitutional structure that the framers failed to provide for.

that judges in theory have the capacity to adjust their role in the democratic system according to how well it is functioning. Where democratic self-government is threatened by the concentration of political power in a single political party, say, or by the emergence of anti-democratic groupings, courts may adapt their doctrines to address these pathologies. Where the democratic system is functioning well, courts may similarly show greater deference to democratically produced outcomes.

While the responsiveness of courts in this way to changes in the functioning of democratic institutions could be supported by certain constitutional-design features, as suggested above, there is an in-built pressure on judges in systems of supreme-law judicial review to behave in this way. Courts that fail to adapt the exercise of their review powers to the changing performance of the democratic system thus typically lose legitimacy and become vulnerable to political clawback.[106] Courts' vulnerability to this kind of clawback acts as a self-regulating mechanism, helping to keep the constitutional system in balance. Waldron's nightmare scenario of disenfranchisement through judicial review ignores this dynamic aspect of constitutional systems and consequently overstates the threat to democracy that judicial review poses. The real problem is not the perpetuation of overzealous judicial review, but the fact that it is often difficult to know whether a particular clawback measure is a genuine response to judicial over-reach by a democratically minded government or the beginning of an authoritarian assault on judicial independence. In Hungary, for example, the governing political party, Fidesz, has significantly curtailed the Constitutional Court's jurisdiction in what appears to be an attempt to redesign the

[106] This, for example, is arguably what is happening in India today with the passage of the Constitution Ninety-Ninth Amendment Act. A similar story may be told in Indonesia, where the Constitutional Court has faced two major sets of amendments to its jurisdiction and powers in 2011 and 2013. See Roux and Siregar (n 52).

democratic system to favour its continuation in power.[107] The repeated attempts in Indonesia to improve judicial accountability mechanisms are, by contrast, not so easy to attribute to authoritarian motives. The Constitutional Court's resistance to these measures, and its failure to adapt its practices to improvements in the functioning of democratic institutions,[108] looks more like an instance of what Stephen Holmes has called 'halfway reform … when the judiciary manages to free itself from authoritarianism without adapting to democracy'.[109]

6. *Conclusion*

Judicial review, this paper has argued, is not an institution whose moral justifiability can be meaningfully assessed in abstract normative terms. Whether or not it impairs the right to democratic self-government is a mixed normative/empirical question that may only be answered in the context of the particular conditions of the society at issue. Judicial review is also an inherently adaptable institution, the strength of which can be adjusted at the point of application to the actual performance of democratic institutions. Systems of judicial review should be designed so as to support this feature, but the politico-legal dynamics of judicial review in any case encourage the adjustment by judges of their powers in this way.

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[107] Miklós Bánkuti, Gábor Halmai and Kim Lane Scheppele, 'Hungary's Illiberal Turn: Disabling the Constitution' (2012) 23 J Democracy 138; Kim Lane Scheppele 'The New Hungarian Constitutional Court' (1999) 8 East European Con Rev 81; Kim Lane Scheppele, 'Not your Father's Authoritarianism: The Creation of the "Frankenstate"' (2013) (Winter) American Political Science Association European Politics & Society Newsletter 5.

[108] See Roux and Siregar (n 52).

[109] Stephen Holmes, 'Judicial Independence as Ambiguous Reality and Insidious Illusion' in Ronald Dworkin (ed), *From Liberal Values to Democratic Transition: Essays in Honour of János Kis* (Central European UP 2004) 3, 9.