What is the Problem of Judicial Review?

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The "problem" of judicial review turns out to be a number of different problems that should be disaggregated. There are two main categories of such problems. The first concerns the fact that the legal norms being judicially enforced have nondemocratic provenances. I shall call this the "democratic" critique of judicial review. What is important to note about the democratic critique is that democratic majoritarianism comes in various shapes and degrees. The democratic critique may or may not apply to constitutional entrenchments of rights, constitutional entrenchments of powers, bicameralism and even parliamentary systems (as opposed to plebiscitary rule). Moreover, the democratic critique applies, not to the subjecting of legal norms to judicial interpretation, but to the origin of the legal norms so subject.

The second category of problems concerns the fact that it is the courts rather than some other institution that is interpreting the entrenched legal norms. Here, it is important to ask how the problems are affected by (1) whether the norms they are interpreting are entrenched against ordinary democratic repeal; (2) whether those norms deal with the separation of governmental powers, federalism, or individual rights; (3) whether those norms are determinate rules or vague standards; and perhaps (4) whether judges are elected.

In sum, the judicial review "problem" is not one thing but potentially many, some more serious than others.

Jeremy Waldron has been on the warpath against judicial review. In a series of articles and books he has attacked judges' authority to strike down legislation in the name of individual rights.[1] The value that Waldron and

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1 See J Waldron, 'The Core of the Case Against Judicial Review' (unpublished manuscript, dated Mar. 15, 2005, on file with author); Jeremy Waldron, *Law and Disagreement* (1999); J Waldron, 'Precommitment and Disagreement,' in L Alexander (ed), *Constitutionalism: Philosophical Foundations* (1998); J Waldron, 'A Rights-Based Critique of Constitutional rights' (1993) 13 *Oxford Journal of Legal Studies* 18. Others are on the same warpath. See eg, L Kramer, *The People Themselves: Popular Constitutionalism and*

others believe to be imperiled by judicial review is that of democratic self-rule. The people should decide their own fate through voting and majority rule, with everyone's vote counting equally. When judges decide the fate of the people, the judges' votes count for everything and the people's for nothing.

The relation of judicial review to democracy is, however, a complex and multi-faceted one. In this short essay I shall attempt to disaggregate a variety of different "problems" that might be identified as problems of judicial review. Once these problems are distinguished, we shall see that they raise quite different issues. Waldron's critique of judicial review has radically varying force normatively depending on which of these several "problems" he is targeting.

I. The problem(s) of nondemocratic provenance: the democratic critique

Constitutions and the norms they contain are typically -- though not always -- entrenched against majoritarian repeal.[2] That is, most constitutional provisions may be amended or repealed only by contemporary supermajorities.[3] Entrenched constitutional provisions, which represent the will of some past supermajority or majority, can frustrate the will of a current majority and are this antidemocratic in that sense. In a real sense, if constitutional norms are entrenched against majoritarian amendment and repeal, the votes of the constitutional founders count for more than the votes of the people today.

Let us call this antidemocratic feature of entrenched norms the "democratic critique" of judicial review. Are critics of judicial review such as Waldron who enlist the values of "democracy" and "equality" attacking the idea of entrenching norms in constitutions? That is, are they attacking constitutionalism, at least in its entrenched norms form?

Surely some of Waldron's attacks on judicial review can be interpreted as attacks on constitutionalism root and branch. Waldron dismisses the Ulysses-like precommitment strategy as a justification for thwarting the will of current majorities.[4] And he points out that we can reasonably disagree about the various kinds of things that constitutions

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Judicial Review (2004); M Tushnet, *Taking the Constitution Away from the Courts* (2000).

2 See L Alexander, "Constitutionalism," in M P Golding and W A Edmundson (ed), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2004) 248.

3 See *United States Constitution*, art 5.

4 See, eg, Waldron, 'Precommitment and Disagreement', above n 1.

entrench, raising (for him) the question of why past generations' resolutions should trump those of the present generation if both resolutions are reasonable.[5]

It will be helpful in assessing the democratic critique to think about the various kinds of things constitution might and do entrench. Take the U.S. Constitution, for example. It, of course, entrenches various rights -- free speech, freedom of religion, privacy, equal protection, due process, just compensation for takings of property, and the like. But it also entrenches many other things. For example, it establishes the various branches of the federal government, their powers, and to some extent their procedures. It regulates (to some extent) federal elections and sets forth the criteria determining eligibility for federal offices. It limits the powers of the federal government vis-a-vis those of the states and vice versa (federalism). And so on. The result is that many, many norms that regulate life in the United States beyond norms establishing "rights" may not be changed by current majorities -- life-tenure for judges, presidential appointment and removal powers, bicameralism, the presidential veto, the make-up of the Senate, the age and birth requirements for the office of President, just to name a few.

The democratic critique potentially applies to all such constitutional norm entrenchments. What is important to note is that the democratic critique is a critique of judicial review only derivatively: if there were no objection to an entrenchment, there would be no objection based on the democratic critique to judges' enforcing the terms of the entrenchment. Indeed, if judges, influenced by the opinions of current majorities, did not strictly enforce but rather distorted the terms of the entrenchment, they would be criticizable for undermining the entrenchments and not lauded as democrats.

Once we focus on constitutional entrenchments and the variety of norms that constitutions such as that of the United States entrench -- and once we recognize that the democratic critique is a critique of judicial review only derivatively -- how powerful should we regard the democratic critique version of the attack on judicial review? First, the idea of a system of government that lacks entrenched norms seems to me to be beyond undesirable: it seems to me to verge on incoherence. Will there be no entrenched norms establishing who is eligible to vote and on what?[6] Will the rules governing speech and debate be subject to majority will at every instant? Will every issue be put to a plebiscite, or will there be institutions of representative democracy defined by at least somewhat entrenched

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5 Ibid; Waldron, 'The Core of the Case Against Judicial Review', above n 1.

6 See also J Raz, 'Disagreement in Politics,' (1998) 43 *American Journal of Jurisprudence*. 25; D Smith, 'Disagreeing with Waldron: Waldron on Law and Disagreement,' (2001) 7 *Res Publica* 57.

norms? Is entrenched bicameralism ruled out because it thwarts majority rule? May a bill that is passed and becomes law, or one that fails, be voted upon again seconds thereafter? Can there be no entrenched rules regarding agenda control to combat Arrovian cycling? Entrenchments that qualify and compromise pure majoritarianism are not only ubiquitous, but their complete absence is inconceivable.

Now, to be sure, entrenchments of these types might be informal rather than formal. Thus, it may be a matter of the political-legal culture generally or the rule of recognition that officials follow that one may not continually propose reconsideration of a bill that has been rejected, or that agendas are controlled in a certain way, or that Parliament may not abolish itself, and so on. And because rules of recognition and more generally the political-legal culture rest on moment to moment acceptance of the norms in question, those norms are not entrenched in the way that formal constitutional rules are entrenched against majoritarian repeal. Nonetheless, were there to be less stability or homogeneity in the political-legal culture than currently can be found in some relatively small, non-federal, ethnically, religiously, and culturally homogenous societies, a need for formal rather than informal entrenchments would quickly be apparent.[7]

Waldron and his allies might concede this point and narrow the democratic critique to a subset of entrenched norms, such as those entrenching rights, or those defining the boundaries of federalism. And indeed, Waldron in particular seems exercised by judicial enforcement of entrenched constitutional rights and says little if anything about other entrenched norms. Unfortunately, however, most of his critique of judicial review focuses on the *interpretation* of entrenched rights in courts versus in legislatures rather than an entrenchment per se. In other words, he seems concerned with the *entrenchment* of rights only insofar as the authoritative *interpretation* of the entrenched rights is in the hands of judges and not the people (through their legislative representatives). So let me turn now to the interpretation aspect of the attack on judicial review.

II. The problem of nondemocratic interpretation: the "standards" critique

In this section I need to introduce two sets of distinctions. First, I shall distinguish between those entrenched legal norms that can be properly interpreted formalistically or nonevaluatively – that is, by reference solely to facts such as dictionary meanings, historical intentions of texts' authors, and so forth -- and those norms the proper interpretation of which requires

7 I owe this paragraph to comments on an earlier draft by Richard Bellamy and Tom Campbell.

resolution of moral questions. For ease of reference, and quite unoriginally, I shall call the former entrenched legal norms "rules" and the latter "standards."

My second distinction is between two arguments in favor of democratic interpretation over judicial interpretation. One argument is "epistemic": representative bodies acting by majoritarian processes are better at discovering the proper interpretation of legal norms than courts. The other argument is one of "democratic primacy": even if courts are better at interpreting legal norms than democratic assemblies, the people, acting through such assemblies, have a right to be wrong.

With these two distinctions in hand, let us consider the democratic case against judicial review on the assumption that it is not a case against constitutional entrenchment but only a case against judicial interpretation of the entrenchment. To begin with, suppose the constitutional provision in question is a rule, and it pertains to structural matters. (For example, it defines the office of the President and who is eligible for it, or it defines the composition of Congress, or it sets term limits on offices.)[8] How strong is the case against judicial review of such a provision?

The epistemic argument for democratic interpretation and against judicial review is so weak that it hardly bears mentioning. Surely, if the question is what rule did the constitutional founders enact and how does that rule apply in the circumstances, a court acting in its normal adjudicative mode is much superior to a democratic assembly epistemically speaking. And remember that we are assuming the constitutional provision is a rule, not a standard, so that the court need not engage in controversial moral inquiries in determining what the rule requires.

What about the democratic primacy argument? Even if courts are superior to democratic assemblies epistemically, can a case be made for the latter on the ground that it is democratic in constitution and procedure?

I cannot see how such a case can be made out. For if we assume the epistemic superiority of the courts in ascertaining the rule and its applications, then arguing for the interpretive primacy of democratic assemblies is tantamount to rejecting the constitutional entrenchment of the rule. If, however, we accept the rule's entrenchment against current majority will, then we should accept whatever is the superior mechanism for its interpretation.

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[8] I realize that the line between structural provisions and rights provisions is contestable. For example, many arguments for federalism and separation of powers sound in the rights-protective benefits those structures confer. Of course, that their end is rights protection does not negate their being structural.

I conclude, then, that once constitutional entrenchments are accepted, neither the epistemic argument nor democratic primacy argument has force against judicial review when it comes to structural rules. But what if the entrenched rule is a rule about rights rather than about structure? A rule can be quite determinate and capable of mechanical application even if it concerns moral rights, privileges, and duties. Many believe that the free speech clause of the U.S. Constitution was meant to be a rule, and one concerned only with having to obtain permission from a censor in order to publish (that is, a rule against "prior restraints"). How do the epistemic and democratic primacy arguments fare with respect to interpreting rules against rights?

I cannot see how they fare any better than with respect to other entrenched rules. If the First Amendment is a rule, not a standard, then the epistemic argument again comes out in favor of courts, not democratic assemblies. And the democratic primacy argument again seems directed at the First Amendment's entrenchment rather than its interpretation. Of course, a democrat might argue that although rules about structure may properly be entrenched, rules about moral rights and duties should not be. That's a plausible argument perhaps, though I believe it to be overstated. After all, there is a moral case for settling moral issues, which means converting them into rules and entrenching them to some degree. In any event, the argument, even if valid, belongs in the case against entrenchment, not in the case against judicial interpretation of entrenched rules. In any event, I shall take up the argument against entrenching rights more fully in the next section.

Now suppose that the constitutional founders "entrenched" a standard. When that happens, the founders can be viewed as having delegated the evaluative questions to future decision-makers. The standards might deal with rights, liberties, and so forth. Or they might deal with structural matters such as federalism or separation of powers. How do the epistemic and democratic primacy arguments come out when standards, not rules, are entrenched?

To begin with, to speak of the entrenchment of standards is somewhat misleading precisely because a standard effectively delegates authority from those who promulgate the standard to some other decisionmaker. It is the latter who determines what the standard means by resolving the delegated evaluative issue. If constitutional standards were given their authoritative meanings by legislatures rather than by courts, they would in a very real sense be unentrenched, for they would not prevent the legislatures from following their own evaluations. (At most, the "entrenchment" of standards would prevent legislatures from *ignoring* the entrenched standards and the evaluative questions they raise.)

We should further distinguish cases where what we need is an entrenched rule -- we need settlement -- even if the settling rule is suboptimal, from cases where the need for settlement and thus the need for a rule is less urgent. If the constitutional founders entrenched a standard, and what we need is an entrenched rule, then either the courts or the legislature should both "rulify" the standard -- convert it into doctrinal rules[9] – and entrench it. Usually legislatures lack the power to entrench their laws against future legislatures. That is why the courts when engaging in constitutional decisionmaking have a settlement advantage over legislatures, at least if the courts follow a moderately strong doctrine of precedential constraint.

On the other hand, courts lack any clear epistemic advantage over legislatures in converting standards into the best possible rules. And legislatures, of course, have a democratic advantage. So the case for judicial review of constitutional standards regarding matters that call for entrenched settlement is a mixed one: legislatures have democratic and perhaps epistemic advantages over courts, but courts can more easily entrench their doctrinal rules. (Perhaps if legislatures were to exercise self-restraint and not overturn their own "precedents" merely upon concluding that those precedents could be improved, the courts would lose their entrenchment advantage; after all, the judicial doctrine of precedent rests ultimately on judicial self-restraint in overturning precedents.)

In cases where the constitutional founders entrenched a standard and there is no compelling case for settlement, the argument against judicial review is at its strongest. If there is no need to settle an issue, and the founders did not in fact settle but rather delegated it, the only conceivable reason for turning the issue over to the courts acting in the mode of authoritative constitutional expositors would be an epistemic one: the courts do a better job than democratic assemblies in resolving the evaluative questions that such standards raise. If that is the case, then the epistemic argument is pitted against the democratic primacy argument. Moreover, because we are assuming that there is no need for settlement, the twin costs of settlement -- any rule settling an issue will be blunt and have mistaken applications even if it is an ideal rule, and most rules will turn out not even to have been ideal -- militate against entrenching judicial decisions through operation of the doctrine of precedent. Thus, the only argument courts have going for them is the epistemic one if, indeed, they have that.[10]

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9 For an excellent discussion of courts' translating the meaning of constitutional provisions into doctrinal rules and decision rules (rules about burdens of proof), see M N Berman, 'Constitutional Decision Rules' (2004) 90 *Virginia Law Review* 1.

10 See also L Alexander and L B Solum, 'Popular? Constitutionalism?' (2005) 118 *Harvard Law Review* 1594; L Alexander, 'Constitutional Rules,

III. Entrenching moral rights

Let us apply the foregoing points to the specific questions of whether moral rights should be constitutionalized and, if so, whether their authoritative interpretation should be the province of the courts or that of the legislature. There are three possibilities to consider. First, the constitutional founders may have attempted to settle what our rights require and entrenched that settlement through constitutional *rules* implementing those rights. Because the rights would be entrenched in the form of rules, they would clearly warrant judicial interpretation and enforcement. Such a constitutional entrenchment through rules has clear settlement advantages. Moreover, it has some epistemic advantages -- the "constitutional moment" of the founding may have produced unusually widespread and thoughtful deliberation -- and some democratic warrant, particularly if ratified by a supermajority.[11] Those advantages pass through to the courts that apply the constitutionally entrenched rules.

Second, the constitutional founders may have entrenched rights in the form of standards, and the courts, in interpreting and implementing those standards, might translate them into rather determinate doctrinal rules. In this scenario, because the courts are both resolving controversial evaluative

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Constitutional Standards, and Constitutional Settlement: *Marbury v. Madison* and the Case for Judicial Supremacy' (2003) 20 *Constitutional Comment*. 369. Ronald Dworkin argues famously that because courts are 'forums of principle,' they *do* have an epistemic advantage over legislatures in ascertaining our moral rights. See, e.g., R Dworkin, *Freedom's Law* (1996); R Dworkin, *A Matter of Principle* (1985). J Waldron, on the other hand, argues that legislatures can function quite well epistemically if not foreclosed from doing so by judicial review. See, e.g., Waldron, *Law and Disagreement*, above n 1.

(Metaethical differences may affect Dworkin's and Waldron's different conclusions regarding the epistemic advantages of courts relative to legislatures on moral questions. Dworkin is a moral cognitivist, Waldron a noncognitivist.). Compare R Dworkin, 'Objectivity and Truth: You'd Better Believe It' (1996) 25 *Philosophy and Public Affairs* 87, 89 with J Waldron, 'The Irrelevance of Moral Objectivity', in Robert George (ed), *Natural Law Theory* (1992).

Some theorists support judicial review in cases of constitutional standards that refer to moral rights on grounds of judicial insulation from biasing factos. W Waluchow, for example, stakes out such a position, though he couples it with a very weak doctrine of precedent; see W Waluchow, 'Constitutions as Living Trees: An Idiot Defends' (2005) 18 *Canadian Journal of Law and Jurisprudence* 207.

[11] Ratification by a supermajority carries epistemic advantages as well as democratic warrant. See, eg, J O McGinnis and M B Rappaport, *A Pragmatic Defense of Originalism* (Forthcoming).

matters and then "legislating" -- coming up with implementing rules -- in a way that trumps the legislature itself, the courts are on weaker ground than in the first scenario. The courts have no democratic warrant, not even from a ratifying supermajority, as the founders delegated the rights questions rather than resolved them. As for the epistemic case, the courts may or may not have an epistemic advantage over the legislature, depending on whether you believe Dworkin or believe Waldron.[12]

Third, the constitution may either entrench standards regarding rights or be silent regarding rights, and the content and implementation of moral rights is not left to courts but is left entirely to contemporary democratic bodies acting in their ordinary legislative modes. Those bodies will, of course, have democratic warrant for their decisions about rights. And they may have some epistemic advantages over courts -- for example, they are unconstrained by the adjudicative form -- and over the constitutional founders (they have more history to draw upon and live in the circumstances to which their legislation will apply). These are Waldron's points. But these bodies will also have epistemic disadvantages vis-a-vis courts (Dworkin's point) and vis-a-vis the founders (they are less behind a morally useful veil of ignorance, they are quite likely to be less deliberative, and they will face various distorting pressures from perhaps rights-insensitive majorities or minorities).

In assessing which of these three alternatives is preferable, one not only has to weigh the epistemic and democratic advantages and disadvantages, but one also has to determine how desirable or undesirable is the entrenchment through rules of the resolutions of controversial moral questions. Entrenchment through rules has the ordinary advantages of settlement -- predictability, coordination, and decision-making efficiency. And it has the ordinary disadvantages of settlement as well -- the settling rules will be blunt (over and underinclusive) even if ideal as rules; and given human fallibility, they will almost surely *not* be ideal. What degree of entrenchment do our resolutions of moral questions call for? Not absolute entrenchment for sure. Entrenchment that only supermajorities can overturn? Entrenchment that only supermajorities or courts overruling judicial precedents can overturn? Or no entrenchment whatsoever?

I shall not attempt to resolve whether moral rights should be entrenched in rules by constitutional founders, entrenched in standards and "rulified" by courts, or left entirely to the judgment of contemporary democratic bodies. My goal is the more modest one of drawing distinctions and revealing what hangs on them.

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12 See above n 10.

IV. The democratic primacy argument: a closer look

To this point I have been assuming that the democratic primacy argument carries some weight, and that the fact that a decision-making body is democratic is a moral advantage that might outweigh any epistemic disadvantages that body faces relative to some non-democratic decision maker. But many doubt that this is so, and I am among the skeptics. I do not here refer to the fact that some non-democratic decision maker might be accepted as authoritative by the people. As Waldron rightly points out, acceptance of an autocrat does not change the fact that he is an autocrat; and in any event, surely not everyone accepts the legitimacy of judicial review.[13] The skepticism I refer to here assumes that the institution in question, even if "accepted," is non-democratic and questions the moral significance of that fact relative to the institution's epistemic virtues. Richard Arneson, for example, believes that epistemic considerations should be dispositive.[14] For Arneson, whatever decision-making form produces the morally best decisions should be chosen, democratic or not. Democracy is only a means to an end, and if another means is instrumentally better, so much the worse for democracy.

I have expressed the same skepticism regarding any non-instrumental value in democracy through the following example drawn from Walter van Tilburg's novella *The Ox Bow Incident*.[15] In the story, a posse captures some men suspected of stealing cattle and killing some cowboys in the process. Most members of the posse believe, after some interrogation, that the captured men are guilty of the crimes, and most want to hang them on the spot rather than to escort them many miles to the nearest court for trial. Some members of the posse, however, dissent from this plan and argue for turning the captives over to the legal authorities. A vote of the posse is taken, and it comes out (overwhelmingly) in favor of immediate hanging.

In the story, the hanging occurs. (It is later discovered that the hanged men were innocent.) My question, however, is this: If the dissenters could have pulled their guns on the majority and thereby obtained custody of the captives, with the object of taking them to the lawful authorities, would they have acted wrongly in so doing? My answer is that even though they were outvoted, the dissenters would have been doing the right thing. Does that mean that democrat decision-making carries *no* moral weight? I don't know. But when, from one's all-things-considered epistemic vantage,

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13 See Waldron, *Law and Disagreement*, above n 1.

14 R J Arneson, 'Democracy Is Not Intrinsically Just,' in K Dowding, R Goodin and C Pateman (eds), *Justice and Democracy* (2004). .

15 (New York: Random House, 1940).

it appears that a democratic decision will trample on others' moral rights, I, like Arneson, cannot see why that decision should be given more moral weight than its epistemic credentials warrant.[16]

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[16] Here is some of what I have said elsewhere on this point:

"I think it is a mistake to posit democratic decision-making as a deontological side-constraint on governance. The case for democracy that I favor is the Winston Churchill one -- it's better than the competitors. And if it's better as a general matter, it might be better still if it is representative rather than direct, if it has separated powers, and if it is limited by rights that are judicially enforced.

In short, I reject a moral right to democratic decision-making, except as an infelicitous way of claiming democracy's superiority on consequentialist grounds, including a consequentialism of rights protection. The alleged moral right to democracy surely does not follow from any plausible egalitarianism. It does not follow from equality of welfare (or the opportunity therefore), nor from equality of resources, both of which might be better secured in a benign despotism. Nor does it follow from equality of respect; for what is up for respect here is not other people's welfare, but other people's *judgments* about what everyone's moral rights and duties are. Those judgments may be wrong, in which case respecting them may entail allowing those whose judgments they are to impose immoral constraints and duties on other people. Respect for persons does not extend to respecting their violations of others' rights, and respect cannot be demanded for erroneous moral judgments in the form of acceding to them. There is no right to violate others' rights so long as enough people agree with you.

Thus, consider the implications of a moral right to democratic decisionmaking. Where A believes morality dictates policy X, and B and C believes it dictates policy Y, B and C would have a moral right to have policy Y prevail *even if* (from the God's-eye point of view) *policy X is morally correct and policy Y is morally flawed.* Assuming both X and Y affect the lives of those who oppose them, the moral right of B and C to have incorrect policy Y prevail is then a moral right to commit moral wrongs against others. The right to democratic decisionmaking is, on this argument, a right to do wrong.

Now I believe there indeed are some rights to act immorally. But this argument goes far beyond that limited set of rights and applies to all moral wrongs so long as the democratic majority votes to permit or compel them. But such a right to do wrong is untenable.

To see this, imagine that for A, what Waldron calls the circumstances of politics do not exist because A can enforce his will against B and C. (He is endowed with superior strength and technology.) And suppose A believes -- we shall assume correctly -- that what B and C propose is profoundly unjust. On the argument under consideration, A must let B and C have their way, despite the fact that what they propose is morally wrong, and even though A can prevent the immoral outcome. But such a moral "must" is quite implausible. Numbers do not, any more than might, make right.

Nor does the notion of "respect" morally dictate that A accede to B and C's immoral proposal. A's moral theory may hold that B and C must be

V. Elected judges?

Those like Waldron who attack judicial review as undemocratic do not direct their attention to the possibility that courts authorized to interpret and enforce entrenched constitutional norms might themselves be

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respected as persons, or some such thing; but it would be a strange moral theory that contained a notion of respect that made the moral theory "self-effacing.": L Alexander, 'Is Judicial Review Democratic? A Comment on Harel' (2002) 22 *Law and Philosophy* 277, 281-82 (footnote omitted)); See also L Alexander, 'Constitutionalism', above n 3, 248-58; L Alexander, 'Are Procedural Rights Derivative Substantive Rights?' (1998) 17 *Law and Philosophy* 19. And see L G Sager, *Justice in Plain Clothes: A Theory of American Constitutional Practice* (2004); A Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 *Law and Philosophy* 451; D Estlund, 'Political Quality' (2000) 17 *Social Philosophy and Policy* 127.

Further:

"If democracy is a discrete moral value, then it must have a positive moral weight. If so, then there must be some cases where (1) the minority can impose its will on the majority, (2) the majority has enacted an unjust law, and (3) the minority has a moral obligation to accede to the injustice *because of democracy's moral value as opposed to consequentialist considerations* (e.g., the long-term effects of disobedience or rebellion). I am obviously skeptical regarding the possibility of such cases.' L Alexander, 'Is Judicial Review Democratic? A Comment on Harel' (2002) 22 *Law and Philosophy* 277, 282-283 n 12.

And further:

"Waldron does not deal at length with control of the franchise. But such control affects the moral argument for democratic decision-making. Suppose B, C, and D vote to exclude E from the franchise. (E is uneducated, and B, C, and D enact a franchise restriction excluding the uneducated.) A believes -- correctly, we shall assume -- that such an exclusion is unjust, and votes against the exclusion, along with E. Because the two of them are outvoted, E is excluded. Now B, C, and D vote for another measure (X) that A believes -- again, correctly -- is unjust. Is A bound by such an unjust measure passed by a democratic majority that has unjustly excluded some from the franchise? If unjust measures are morally obligating if democratically enacted, does that apply to democratically enacted limitations of the franchise...? (Remember, E did vote on his own exclusion; he just lost.) Again, it is difficult to see how one can distinguish the two types of unjust but democratically enacted measures. But it is also difficult to believe that democratically enacted but unjust measures are morally obligatory when the democratic franchise has been unjustly restricted": L Alexander, 'Constitutionalism', above n 3, 248, 257 (reference omitted); See also T Christiano, 'Waldron on Law and Disagreement' (2000) 19 *Law and Philosophy* 513.

democratically elected. Of course, in the United States, the Supreme Court and lower federal courts are appointed to life terms by the President and do not stand for election at any time. (In some states, appointed judges must stand for election after a certain period on the bench.) Because so much of the critical literature on judicial review has focused on the United States Supreme Court, the fact that judicial review might be combined with the election of judges is easy to overlook.

How would the democratic argument against judicial interpretive supremacy fare if the judiciary were elected? (It would not touch the democratic critique of entrenchment, of course, except insofar as the entrenched norms were standards rather than rules.) The devil might be on the details of how judges were elected and for how long their electoral mandate lasted. In any event, the possibility of an elected judiciary surely affects the scope of the democratic argument against judicial interpretive supremacy unless the democrat insists that nothing short of a perpetual plebiscite fulfills the right of self-rule.

Now it bears stressing that an elected judiciary is different from a judiciary appointed by an elected official. In the United States, federal judges are appointed by the President and must receive a majority vote of one house of Congress (the Senate). But the judges themselves are never elected.

Still, to the extent that the United States Constitution has come to be viewed as broad standards rather than narrow rules, the judges' moral and political theories have become highly relevant to the elected officials who appoint and confirm them. The current battles in the Senate over the Supreme Court and the circuit courts, as well as past confirmation battles over Justice Clarence Thomas and Judge Robert Bork, all indicate that when the interpretive task of judges moves from the legalistic craft of deciphering the original meaning of rules to the quite different project of deciding what our moral rights are and what judicial doctrinal rules best implement them, the public will demand a much higher degree of involvement in judicial selection. That may not make the courts into democratic assemblies, but it narrows the gap between them, perhaps not enough, but perhaps too much.