

THE CORE CASE FOR WEAK-FORM JUDICIAL REVIEW

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This Article contributes to debates over the democratic desirability of judicial review, by stating a quasi-general case for the desirability of judicial review that is “weak”—or broad but non-final—rather than “strong”—form in nature. Judicial review of this kind, the article argues, can help counter blockages in the legislative process—such as legislative “blind spots” and “burdens of inertia”—that can otherwise impair the enjoyment of individual rights even of a kind recognized by democratic majorities. This, the Article suggests, provides an important, if contingent, outcome-based case in favor of courts exercising powers of weak-form review. The case for weak judicial review of this kind may be combined with a theoretical case for strong, or even super-strong, judicial review in more pathological democratic cases, and must ultimately be assessed based on the actual history and practice of legislative and judicial constitutionalism in a particular country. But it provides a relatively general argument for why those persuaded by Waldron’s Core Case should distinguish between judicial review that is strong and weak in form when assessing both the legitimacy and desirability of judicial review from a democratic perspective.

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INTRODUCTION

Debates about the democratic legitimacy of judicial review generally have as their "target" the idea of United States-style (US-style) strong-form review. In his seminal article, *The Core of the Case Against Judicial Review (Core Case)*, Jeremy Waldron expressly notes that his argument applies to "judicial review of legislation . . . as a mode of final decisionmaking in a free and democratic society," or to systems of "strong judicial review" (strong-form review), in which court decisions cannot be overridden by ordinary legislative majorities.¹ Similarly, in the United Kingdom, Richard Bellamy has criticized "strong constitutional review," and argued that "courts should not have the power to strike down legislation on substantive as opposed to procedural grounds."²

Indeed, both critics *and* defenders of judicial review generally suggest that they agree on the democratic legitimacy of "weak" forms of judicial review, in which courts lack final authority to define and enforce constitutional guarantees.³ Richard Fallon, for instance, in

¹ Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1348, 1353–56 (2006).

² Richard Bellamy, *Political Constitutionalism and the Human Rights Act*, 9 INT'L J. CONST. L. 86, 92–93 (2011) [hereinafter Bellamy, *Political Constitutionalism*]; see also RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY (2007) [hereinafter BELLAMY, REPUBLICAN DEFENCE]; cf. Adam Tomkins, *The Role of the Courts in the Political Constitution*, 60 U. TORONTO L.J. 1, 3 (2010).

³ See, e.g., Jeffrey Goldsworthy, *Judicial Review, Legislative Override, and Democracy*, in PROTECTING HUMAN RIGHTS: INSTRUMENTS AND INSTITUTIONS 263 (Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone eds., 2003); Adrienne Stone, *Judicial Review Without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review*, 28 OXFORD. J. LEGAL STUD. 1 (2008).

defending *strong*-form judicial review suggests that he can “see no plausible objection of political legitimacy” to “nonentrenched judicial review as a means of protecting nonentrenched rights.”⁴ Waldron himself also explicitly concedes that his democratic objections to judicial review apply to “strong”—not “weak”—form review.⁵ This concession, however, largely glosses over the need for proponents of judicial review to articulate an *affirmative* case for the desirability of weak-form review.

Weak-form review is an increasingly common feature of constitutional systems worldwide, especially in the context of constitutional rights protection.⁶ Yet it remains distinctly controversial in many constitutional democracies.⁷ The leading existing theoretical defenses of judicial review also do little to defend judicial review of the kind that is broad but non-final in nature. Fallon’s *Core Case* for judicial review depends on the idea of courts serving as an additional veto over the legislative infringement of rights, and thus that judicial review “ought to have some degree of invulnerability to override by ordinary legislation.”⁸ It also posits a relatively narrow scope for review, as limited to cases in which there is no direct conflict between

⁴ Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1720 (2008).

⁵ Waldron, *supra* note 1, at 1354.

⁶ See STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE (David Dyzenhaus & Adam Tomkins eds., 2013) [hereinafter GARDBAUM, THEORY AND PRACTICE]; Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001) [hereinafter Gardbaum, *New Model*]. Many of the arguments made in the Article apply to structural constitutional provisions, or at least hybrid rights-structural claims, see, e.g., Erin F. Delaney, *The Federal Case for Judicial Review: From Structure to Rights* (unpublished manuscript), https://www.buffalo.edu/content/www/baldycenter/events/speakers/_jcr_content/par/download_461378164/file.res/FederalCaseDelaneyDraft.pdf; Stone, *supra* note 3, but the question of what if any differences there might be in this context is left for another day.

⁷ For examples of debates in the United Kingdom, see, for example, MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (2008); Bellamy, *Political Constitutionalism*, *supra* note 2; Stephen Gardbaum, *What’s So Weak about “Weak-Form Review”? A Reply to Aileen Kavanagh*, 13 INT’L J. CONST. L. 1040 (2015); Aileen Kavanagh, *What’s So Weak about “Weak-Form Review”? The Case of the UK Human Rights Act 1998*, 13 INT’L J. CONST. L. 1008 (2015). For similar debates in Canada, see, for example, Rosalind Dixon, *The Supreme Court of Canada, Charter Dialogue, and Deference*, 47 OSGOODE HALL L.J. 235 (2009) [hereinafter Dixon, *Charter Dialogue*]; Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)*, 35 OSGOODE HALL L.J. 75 (1997); James B. Kelly & Matthew A. Hennigar, *The Canadian Charter of Rights and the Minister of Justice: Weak-form Review Within a Constitutional Charter of Rights*, 10 INT’L J. CONST. L. 35 (2015); Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights—and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813 (2003) [hereinafter Tushnet, *New Forms of Judicial Review*].

⁸ Fallon, *supra* note 4, at 1733.

constitutional norms.⁹ Similarly, arguments by Matthias Kumm for the role of courts in promoting public reason largely turn on the idea of courts engaging in a narrow form of Thayerian-style “unreasonableness” review, rather than judicial review that is broad but revisable in scope.¹⁰ Arguments by Harel, Kahana, and Shinar for judicial review as providing a “right to a hearing” likewise assume the desirability of strong, rather than weak, forms of review, and focus on quite narrow forms of as applied, rather than facial, judicial review.¹¹ And while Waldron and Fallon both make passing reference to what a normative case for weak-form review might look like, they also make no attempt to defend it in detail.¹²

This Article thus attempts to articulate a clear affirmative case for weak-form judicial review in respect of rights, which is consistent with the basic assumptions that motivated Waldron’s *Core Case* against strong-form review *and* the idea that judicial review is both broad and penultimate in character.¹³ In doing so, the Article does not necessarily endorse or accept all of these assumptions. Rather, it attempts to show that one can accept these assumptions *and* the idea that court decisions are subject to override by ordinary legislative majorities, and still identify an important role for courts in promoting a more individual rights-respecting form of democratic constitutionalism.

At its core, this Article argues that weak-form review has an important capacity to counter “blockages” in the democratic political processes, which can otherwise impair the enjoyment of individual rights, even of a kind supported by democratic majorities.¹⁴ Blockages of this kind include both legislative “blind spots” and “burdens of inertia,” and are so sufficiently routine and predictable that, in modern legislatures, they do not amount to true “pathologies” of the kind that

⁹ *Id.* at 1712–13.

¹⁰ Matthias Kumm, *Institutionalizing Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review*, 1 EUR. J. LEGAL STUD. 153 (2007); *see also* Alon Harel & Tsvi Kahana, *The Easy Core Case for Judicial Review*, 2 J. LEGAL ANALYSIS 227 (2010) (discussing arguments for narrow but strong-form review, as providing an individual “right to a hearing”); *infra* Part I.

¹¹ *See* Harel & Kahana, *supra* note 10; Alon Harel & Adam Shinar, *Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review*, 10 INT’L J. CONST. L. 950 (2012).

¹² *See* Fallon, *supra* note 4, at 1710; Waldron, *supra* note 1, at 1370.

¹³ An important further question relates to the scope of the argument in the context of structural constitutional guarantees. *See, e.g.*, Stone, *supra* note 3; Waldron, *supra* note 1, at 1358. This is a question, however that is left for another day.

¹⁴ In this respect, the theory departs directly from the “partial” or contingent case made for the legitimacy of political constitutionalism by Cormac Mac Amhlaigh, who argues that legislatures will often be presumptively best positioned to realize the goods of “the political” in a particular society. *See* Cormac Mac Amhlaigh, *Putting Political Constitutionalism in its Place*, 14 INT’L J. CONST. L. 175 (2016).

would take a democratic system outside the scope of Waldron's *Core Case*. Instead, they arise as a result of ordinary institutional and partisan political dynamics in modern legislatures. Courts exercising concrete powers of judicial review are also generally well-positioned to counter blockages of this kind; and their ability to do so does not depend on their enjoying any final power to invalidate legislation. Instead, it depends on judges' professional expertise and training in applying legislation to concrete factual situations, developing narrow exceptions or procedural protections within substantive legislation, and courts' powers to reinterpret or invalidate legislation so as to change the legal status quo, or draw media and public attention to certain issues.

This, the Article suggests, provides a clear *outcome-based* argument, under certain conditions, for the democratic desirability of judicial review that is broad and weak in scope. It does not show that judicial review will necessarily be democracy-improving in all cases, or even that on average it will be in a particular country. An assessment of this kind will require a comprehensive analysis of the actual practice of legislative constitutionalism and judicial review in a particular country, and the evidence of any downsides to weak-form review in terms of democratic "debilitation" or "distortion."¹⁵ Whether or not an actual constitutional system can be identified as truly weak-form in nature is also a potentially difficult and important question, which the Article does not seek to address.¹⁶ Instead, it simply suggests that as a more abstract theoretical matter, there are good reasons for those persuaded by Waldron's *Core Case* to distinguish between judicial review that is in fact strong and weak (i.e., final and non-final) when assessing the democratic legitimacy *and* desirability of judicial review.

The remainder of the Article is divided into three parts following this introduction. Part I canvases the existing debate on the "core case" for and against judicial review, and its failure to account for the increasing practice of broad but non-final judicial review by courts worldwide. Part II sets out the core democratic argument for weak form-review, based on its capacity to counter various "blockages" in democratic political processes, which can routinely impair the enjoyment of individual rights—even of a kind supported by democratic majorities. Part III contrasts this with other recent defenses of judicial review, in answer to Waldron, and the degree to which they often

¹⁵ See Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245 (1995); see also James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); Waldron, *supra* note 1, at 1403.

¹⁶ Dixon, *Charter Dialogue*, *supra* note 7; Jeremy Waldron, *Some Models of Dialogue Between Judges and Legislators*, 23 SUP. CT. L. REV. (2D) 7 (2004).

depend on narrower or more final forms of judicial decision-making. The final Part offers a brief conclusion, focused on the degree to which any case for judicial review ultimately depends on a contextual assessment of the comparative strengths of different representative institutions at a given point in time, and thus questions of an empirical, and not just a theoretical, kind.

I. THE CORE CASE FOR AND AGAINST JUDICIAL REVIEW: THE DEBATE THUS FAR

In setting out the *Core Case* against judicial review, Waldron stipulates four broad assumptions about the nature of political institutions and culture in a particular society—i.e., that there are

- (1) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage;
- (2) a set of judicial institutions, again in reasonably good order, set up on a nonrepresentative basis to hear individual lawsuits, settle disputes, and uphold the rule of law;
- (3) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and
- (4) persisting, substantial and good-faith disagreement about rights (i.e., about what the commitment to rights actually amounts to and what its implications are) among the members of the society who are committed to the idea of rights.¹⁷

Given these assumptions, Waldron further argues, there are potentially two key democratic objections to US-style strong-form judicial review. First, judicial review does not involve direct engagement with the actual terms or source of moral or political disagreement about rights. Rather, it involves engaging with rights-based disagreements in narrower, more legalistic terms, which often involve a near exclusive focus on “side-issues” about text and precedent, rather than the reasonableness of legislation. Second, given reasonable disagreement about rights, the fairest and most principled way of resolving such disagreements will generally be by reference to ordinary norms of majority decision-making among citizens. This is the only basis for resolving disagreements among citizens that fully respects norms of *equality* in the process of self-government. This, in a representative democracy, will also generally mean decision-making by ordinary legislative majority. It will *not* involve final decision-making by

¹⁷ Waldron, *supra* note 1, at 1360; cf. Bellamy, *Political Constitutionalism*, *supra* note 2, at 91.

unelected, independent judges. “By privileging majority voting among a small number of unelected and unaccountable judges,” Waldron notes, judicial review of this kind “disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights.”¹⁸

A. *Answers to the Core Case: Proportionality and Weak-Form Review*

There are, however, two potential answers to these objections. In many countries, judicial review does not in fact take the “narrow legalistic” form that is the basis of Waldron’s critique.¹⁹ Instead, courts exercising powers of rights-based review generally adopt a quite broad and generous, rather than pedantic or legalistic, approach to the *prima facie* scope of protected rights, and then ask whether specific limitations on rights can be justified according to norms of *proportionality*.²⁰

Proportionality, as Matthias Kumm has noted, has been a defining feature of democratic constitutionalism in Europe, post-World War II.²¹ It is also an increasingly common feature of rights-based judicial review in most other constitutional democracies worldwide: it is the basis of judicial review in Canada, under section 1 of the Canadian Charter of Rights and Freedoms; in South Africa, under section 36 of the 1996 Constitution; in Israel, under section 8 of the 1992 Basic Law; in Hong Kong under the Basic Law;²² in Taiwan, under article 23 of the Constitution of the Republic of China;²³ in South Korea, under article 37 of the 1987 Constitution;²⁴ and in Latin America, as part of the “new constitutionalism” endorsed by courts such as the Constitutional Court of Columbia,²⁵ and Supreme Court of Brazil.²⁶ A test of proportionality also involves four basic stages, whereby courts ask whether: (i)

¹⁸ Waldron, *supra* note 1, at 1353.

¹⁹ *See id.* at 1367.

²⁰ *See* Matthias Klatt & Moritz Meister, *Proportionality—A Benefit to Human Rights? Remarks on the I-CON Controversy*, 10 INT’L J. CONST. L. 687 (2012); Kumm, *supra* note 10.

²¹ Kumm, *supra* note 10, at 154.

²² *R v. Sin Yau-Ming*, [Ct. App. 1991] 1 HKPLR. 88, 90–91 (China).

²³ *See* J. Y. Interpretation No. 476 (CONST. CT. Jan. 29, 1999), <http://jirs.judicial.gov.tw/eng/FINT/FINTQRY03.asp?Y1=1999&M1=&D1=&Y2=&M2=&D2=&cno=476&kw=&btnSubmit=Search&sdate=19990000&edate=99991231&keyword=&total=1&seq=1>.

²⁴ Constitutional Court [Const. Ct.], 92Hun-Ga8, Dec. 24, 1992 (S. Kor.).

²⁵ Corte Constitucional [C.C.] [Constitutional Court], junio 5 de 1992, *Ciro Angarita Baron*, Sentencia No. T-406/92, CORTE CONSTITUCIONAL, <http://www.corteconstitucional.gov.co/relatoria/1992/t-406-92.htm> (Colom.).

²⁶ *See* JULIANO ZAIDEN BENVINDO, *ON THE LIMITS OF CONSTITUTIONAL ADJUDICATION: DECONSTRUCTING BALANCING AND JUDICIAL ACTIVISM* ch. 3 (2010).

legislation has a legitimate purpose; (ii) there is a “rational connect[ion]” between the legislature’s purpose and the means it has selected to pursue that objective (“suitability”); (iii) a law is “narrowly tailored” to its purpose (“minimal impairment”); and (iv) a law is truly proportionate, in the sense that it achieves greater benefits in terms of its objective, than costs to other constitutional commitments (true proportionality, or proportionality *stricto sensu*).²⁷

All of these stages are, in effect, directed toward determining whether a law limiting individual rights is in fact truly necessary from the standpoint of a democratic majority, and its legitimate desire to pursue certain collective goals. They thus go directly to the underlying sources of moral and political disagreement among citizens and not simply to what Waldron suggests are “side-issues” about legal text and precedent.²⁸

A second answer to Waldron-style democratic objections to judicial review is that, in many countries, judicial review is not in fact “final” or strong-form in nature, as it is in the United States, but rather formally or *de facto* “weak” in form. In many countries, rights-based judicial review now occurs within the context of constitutional or quasi-constitutional statute.²⁹ This, in most constitutional systems, means that legislatures retain broad power both to amend or repeal rights-based guarantees *and* expressly suspend their operation via the passage of a legislative “override.” This is simply a logical corollary of the doctrine of parliamentary supremacy.³⁰ This is true, for instance, in the United Kingdom, in the context of the Human Rights Act 1998 (HRA), in New Zealand under the Bill of Rights Act 1990 (NZBORA), and in Australia,

²⁷ See, e.g., MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 2 (2013); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3150 (2015); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 72, 75–76 (2008); DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 160 (2004).

²⁸ Waldron, *supra* note 1, at 1353.

²⁹ See GARDBAUM, THEORY AND PRACTICE, *supra* note 6; see also Zachary Elkins, Tom Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT’L L.J. 61 (2013); David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277 (2008).

³⁰ See, e.g., Janet L. Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance when Interpreting Rights?*, 82 TEX. L. REV. 1963, 1964 (2004); Julie Taylor, *Human Rights Protection in Australia: Interpretation Provisions and Parliamentary Supremacy*, 32 FED. L. REV. 57, 58 (2004); Nicholas Stephanopoulos, Comment, *The Case for the Legislative Override*, 10 UCLA J. INT’L L. & FOREIGN AFF. 250, 262 (2005). For exceptions, see Israel and Mizrahi. Rivka Weill, *Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care*, 30 BERKELEY J. INT’L L. 349 (2012); Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L.Q. 457 (2012).

under various State-based charters, namely the Charter of Rights and Responsibilities 2006 (Vic.) and Human Rights Act 2004 (ACT).³¹

In other countries, judicial review occurs within the context of a formally entrenched document, but there is express provision for a power of legislative override. In Canada, for instance, section 33 of the 1982 Charter of Rights and Freedoms expressly provides that Parliament and provincial legislatures may override the operation of most Charter rights via laws expressed to operate “notwithstanding” those provisions.³² This has also been understood by the Supreme Court of Canada (SCC) to give the Parliament and provincial legislatures the power to effectively suspend the operation of Charter rights—and the Court’s interpretations of those rights—for a five-year, renewable period.³³ Similar powers of override have also been adopted, at various times, in the constitutions of Poland, Mongolia, Belgium, Luxembourg and Finland.³⁴

Weak-form review of this kind, as Waldron himself acknowledges, is largely immune to democratic objections based on a commitment to majority-based decision-making. It is only “strong,” not “weak,” judicial review, Waldron notes, that is the target of his objections.³⁵ Similarly, in U.K. debates on political versus legal constitutionalism, Adam Tomkins has suggested that, “[w]here a court finds that a power conferred on government does not appear to be necessary,” or “where a case reveals that the government has acted without parliamentary authority,” the court should “refer[] questions back to Parliament” in order to “support and nourish the political constitution.”³⁶ Bellamy has also accepted that “weak review . . . has always been necessary.”³⁷

Admittedly, Waldron uses the term “weak” here in a somewhat different way to most other leading scholars of weak-form review: his focus is primarily on the scope of powers of judicial review *ex ante*, or whether “courts have the authority to decline to apply a statute in a particular case,”³⁸ when most scholars (including Mark Tushnet,³⁹

³¹ See GARDBAUM, *THEORY AND PRACTICE*, *supra* note 6.

³² Canadian Charter of Rights and Freedoms sec. 33, Part I of the Constitution Act, 1982 *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

³³ On the difference and its potential significance, see Rosalind Dixon & Adrienne Stone, *Constitutional Amendment and Political Constitutionalism: A Philosophical and Comparative Reflection*, in *PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW* 95, 103 (David Dyzenhaus & Malcolm Thorburn eds., 2016); Goldsworthy, *supra* note 3, at 263.

³⁴ See GARDBAUM, *THEORY AND PRACTICE*, *supra* note 6, at 5–6.

³⁵ Waldron, *supra* note 1, at 1354.

³⁶ Tomkins, *supra* note 2, at 20–22.

³⁷ Bellamy, *Political Constitutionalism*, *supra* note 2, at 86.

³⁸ Waldron, *supra* note 1, at 1354.

³⁹ See Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781 (2003).

Stephen Gardbaum,⁴⁰ Aileen Kavanagh,⁴¹ and myself⁴²) focus on whether legislatures have formal power *ex post* to override a decision of a court to invalidate a particular statute. There may in some cases also be important differences between the two understandings of judicial review that is “weak” in form. Judicial review that is truly narrow in scope may at times be too weak to counter the most powerful legislative blockages; whereas judicial review that is broad but non-final in scope will almost always be sufficient for this purpose.⁴³

The two concepts, however, are closely related in practice. The U.K.’s HRA is a good example. The HRA contains quite explicit, narrow or weak, judicial remedies: section three of the HRA empowers U.K. courts, “[s]o far as it is possible to do so . . . to read and giv[e] effect” to legislation “in a way which is compatible with the Convention rights” protected by the HRA.⁴⁴ But where a court finds that it is unable to reach such an interpretation, section 4 of the HRA imposes explicit *ex ante* limits on the scope of courts’ powers: courts may issue “declaration[s] of incompatibility” that indicate to Parliament an area of inconsistency between legislation and Convention rights, but declarations of this kind have no effect on the legal rights and liabilities of parties before a court.⁴⁵ Section 4 is thus a clear *ex ante* limitation on the scope or strength of judicial review under the HRA, but also an additional mechanism by which the Westminster Parliament may “override” court decisions interpreting various Convention rights, at least at a national level: all Parliament must do is choose not to respond to the making of such a declaration.⁴⁶

Waldron himself also goes on to identify formal powers of legislative override, such as those found in section 33 of the Canadian Charter, as in principle relevant to the strength of judicial review. Canada, he suggests, is in fact an “intermediate” case between a model of true strong and weak judicial review, in which courts do enjoy powers to invalidate legislation for inconsistency with constitutional rights, as they define them, but legislatures may also override such decisions by

⁴⁰ See GARDBAUM, *THEORY AND PRACTICE*, *supra* note 6.

⁴¹ See Kavanagh, *supra* note 7.

⁴² See Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT’L J. CONST. L. 391 (2007) [hereinafter Dixon, *Creating Dialogue About Socioeconomic Rights*]; Dixon, *Charter Dialogue*, *supra* note 7.

⁴³ See Dixon, *Creating Dialogue about Socioeconomic Rights*, *supra* note 42.

⁴⁴ Human Rights Act 1998, c. 42, § 3 (UK).

⁴⁵ Human Rights Act 1998, c. 42, § 4 (UK).

⁴⁶ See, e.g., Bellamy, *Political Constitutionalism*, *supra* note 2; Rosalind Dixon, *A Minimalist Charter of Rights for Australia: The UK or Canada as a Model?*, 37 FED. L. REV. 335 (2009) [hereinafter Dixon, *Minimalist Charter of Rights for Australia*]; K.D. Ewing, *The Human Rights Act and Parliamentary Democracy*, 62 MOD. L. REV. 79 (1999).

“legislat[ing] ‘notwithstanding’ the rights in the Charter.”⁴⁷ It is only the fact that section 33 has rarely been used in practice, not that Canadian courts enjoy broad powers of judicial review *ex ante*, that leads Waldron to suggest that “the Canadian arrangement” should be counted as strong-form in practice.⁴⁸

Weak-form review of the kind defended in this Article, therefore, is best understood as judicial review that is both relatively broad in scope *ex ante*, and non-final in nature *ex post*. In some ways, it may be misleading to call review of this kind “weak” in nature: it combines elements of strong review *ex ante* (i.e., broad and coercive judicial review power) with a susceptibility to override, in ways that may make it closer to review that is “dialogic” or “responsive” rather than weak in nature. The term “weak,” however, has been widely understood in the comparative literature as encompassing broad but revisable review of this kind, and thus is used for the purposes of this Article. Many U.S. readers, however, may find it easier to understand the case for review it makes as in fact a case for dialogic or *responsive* judicial review.⁴⁹

II. THE CORE CASE FOR WEAK-FORM REVIEW

This concession to the democratic *legitimacy* of weak-form review, however, does not provide any affirmative account for why weak-form review should be considered *desirable* in a democracy. This also has clear practical consequences.

In developing a “stripped down” theoretical justification for judicial review of this kind, it is not necessary to show that any real-world constitutional systems actually conform to this model.⁵⁰ But in related work, I show how judicial review of this kind may in fact be more common globally than Waldron’s own account suggests—i.e. present in a range of cases where a bill of rights is formally entrenched, but constitutional amendment procedures are relatively flexible,⁵¹ courts consistently rely on sub-constitutional doctrines,⁵² and/or show a

⁴⁷ Waldron, *supra* note 1, at 1356.

⁴⁸ *Id.* at 1356–57.

⁴⁹ See Rosalind Dixon, *Responsive Judicial Review* (working draft 2017) [hereinafter Dixon, *Responsive Judicial Review*].

⁵⁰ See discussion *supra* note 33.

⁵¹ See, e.g., Mark Tushnet & Rosalind Dixon, *Weak-Form Review and Its Constitutional Relatives: An Asian Perspective*, in *COMPARATIVE CONSTITUTIONAL LAW IN ASIA* 102 (Rosalind Dixon & Tom Ginsburg eds., 2014).

⁵² *Id.*

willingness to defer to legislative “sequels” or responses to prior decisions.⁵³

The starting point for this Article is thus an attempt to develop a theoretical defense of this kind. In earlier works, I attempted to provide an outcome-based account of this kind, specific to particular countries including Canada and South Africa.⁵⁴ This Article is thus an attempt to extend and generalize that argument, to show that it can apply in almost all well-functioning democracies, or at least, all those with a system of concrete judicial review.⁵⁵

The basic argument for weak-form review made by this Article in this context is essentially three-fold: (1) that even relatively well-functioning legislative processes are routinely subject to “blockages,” or “blind spots” and “burdens of inertia,” which can impair the enjoyment of rights by democratic majorities; (2) that courts exercising concrete powers of judicial review are relatively well-positioned, both professionally and institutionally, to counter such blockages; and (3) that courts’ ability to play this role does not depend on their having any final power to invalidate legislation, or enforce their decisions (though it may depend on them having relatively broad substantive authority and remedial powers, *ex ante*).

The argument has some support in Waldron’s *Core Case* itself, and is also fully consistent with Waldron’s four key starting assumptions in the *Core Case*.⁵⁶ The argument, for instance, assumes that, in general, Waldron is correct to suggest that ordinary majority-based decision-making is the rule that best approximates a commitment to equality among citizens in the resolution of disagreements about rights.⁵⁷

⁵³ *Id.*; see also Dixon, *Minimalist Charter of Rights for Australia*, *supra* note 46; Dixon, *Charter Dialogue*, *supra* note 7; Rosalind Dixon, *Weak-Form Judicial Review and American Exceptionalism*, 32 OXFORD J. LEGAL STUD. 487 (2012); Dixon, *Responsive Judicial Review*, *supra* note 49.

⁵⁴ See, e.g., Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947 (2008) [hereinafter Dixon, *A Democratic Theory of Constitutional Comparison*]; Dixon, *Minimalist Charter of Rights for Australia*, *supra* note 46; Dixon, *Charter Dialogue*, *supra* note 7; Dixon, *Creating Dialogue about Socioeconomic Rights*, *supra* note 42; see also MARK TUSHNET, *ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW* (2014); Mark Tushnet, *How Different Are Waldron’s and Fallon’s Core Cases for and Against Judicial Review*, 30 OXFORD J. LEGAL STUD. 49 (2010) [hereinafter Tushnet, *Waldron’s and Fallon’s Core Cases*].

⁵⁵ On the importance of context when considering judicial review, see Theunis Roux, *In Defence of Empirical Entanglement: The Methodological Flaw in Waldron’s Case Against Judicial Review* (UNSW Law Research Paper, No. 73, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2712058.

⁵⁶ *Cf.* Waldron, *supra* note 1, at 1378.

⁵⁷ *Contra* Dixon & Stone, *supra* note 33 (questioning this assumption in certain cases, such as where certain individuals tend to consistently vote as a bloc, and thus enjoy a quite different degree of *substantive* voting power in practice). There might also be cases in which there are

Similarly, it does not depend on any assumption that “the legislative and electoral systems [in a country] are pathologically or incorrigibly dysfunctional,” in ways that take them outside the scope of the *Core Case*.⁵⁸ The whole idea behind “blind spots” and “burdens of inertia” is that they are blockages that can arise in the legislative process as a result of ordinary institutional constraints, individual limits on cognition, or partisan political dynamics. Except in the most severe cases, they are not true “pathologies” that reflect a break-down in ordinary democratic functioning.⁵⁹

This understanding of judicial review has important similarities with several leading theories of judicial review in the United States, which show how judicial review by the Supreme Court can promote individual constitutional rights while still addressing Waldron-style concerns about the so-called “counter majoritarian difficulty” or the democratic legitimacy of judicial review.⁶⁰ Cass Sunstein, for instance, has famously sought to defend a form of “democratic minimalism” on the part of the Supreme Court, as a practice that can “trigger or improve processes of democratic deliberation,” without foreclosing space for further reflection and debate by elected representatives at the local, state, and national level.⁶¹ This idea also has clear overlap with the idea that weak-form review may help overcome blockages in the political process, by forcing consideration of issues previously subject to legislative inertia, or legislative blind spots.⁶²

Similarly, in observing the Court’s approach to various cases under the Eighth and Fourteenth Amendments, David Strauss identifies the “modernizing” function played by judicial review in the United States, according to which courts “invalidat[e] laws that would not be enacted today or that will soon lose popular support,” or “bring statutes up to

such different intensities in the preferences, or viewpoints, of citizens that it would more closely approximate a commitment to *substantive* equality among voters for representative decision-making to take place on the basis of some form of weighted, super-majority rather than simple majority rule. Cf., e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962).

⁵⁸ Waldron, *supra* note 1, at 1389; cf. Matthew C. Stephenson, *Corruption and Democratic Institutions: A Review and Synthesis*, in *CORRUPTION: GLOBAL INFLUENCES, POLITICS AND THE MODERN STATE: ESSAYS IN THE POLITICAL ECONOMY* 92 (Susan Rose-Ackerman & Paul Lagunes eds., 2015) (justifying judicial review in terms of its capacity to overcome corruption or severe public choice problems in the political process).

⁵⁹ See Waldron, *supra* note 1, at 1389.

⁶⁰ See, e.g., CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859 (2009).

⁶¹ SUNSTEIN, *supra* note 60, at 27.

⁶² *Id.*

date.”⁶³ This role, Strauss suggests, means “th[at] judicial review has, in principle, a more comfortable place in democratic government” than many existing theories of judicial review suggest.⁶⁴ But Strauss also connects to this to a form of judicial review that is weak or responsive in practice: a truly modernizing court, Strauss suggests, “must be prepared to change course—and uphold a statute that the court previously struck down—if it becomes apparent that popular sentiment has moved in a different direction from what the court anticipated.”⁶⁵

These theories, however, do not seek explicitly to justify the *existence* of judicial review in different constitutional democracies, or explain the desirability of weak-form as well as strong-forms of review. The argument in this Part is thus an important extension of these existing theories, in a direction that seeks to provide a more general, transnational defense of the idea of weak-form review.

The argument is not a *truly* general defense of weak-form review; following Waldron, it assumes that judicial review is Anglo-American in style—i.e., concrete in nature, and practiced by courts staffed by former lawyers, not more abstract and squarely “political” in character.⁶⁶ Many of the same arguments, however, could in fact be made for more Kelsenian, continental-style forms of judicial review—providing that in such a model, as noted in the Conclusion, court decisions are in some way made responsive to political disagreement, such as via flexible procedures for formal constitutional amendment.⁶⁷

Equally, this Article does not address the *limits* of weak-form review as a normatively desirable model of judicial review. In some cases, where Waldron’s assumptions do not hold, or disagreement about rights is *not* in fact reasonable, there may well be cases in which stronger forms of judicial review are not only justified, but in fact normatively desirable. Waldron himself recognizes the idea that there might be certain pathological cases in which strong-form judicial review is not only morally acceptable, but in fact desirable as a means of protecting the political process.⁶⁸

Similarly, in making the case for judicial review, Richard Fallon suggests that strong-form review will be far more desirable than weak-

⁶³ Strauss, *supra* note 60, at 861, 897.

⁶⁴ *Id.* at 861.

⁶⁵ *Id.*

⁶⁶ On the distinction generally, see, for example, Victor Ferreres Comella, *The Rise of Specialized Constitutional Courts*, in *COMPARATIVE CONSTITUTIONAL LAW* 265, 270–71 (Tom Ginsburg & Rosalind Dixon eds., 2011).

⁶⁷ See *infra* Section II.B. The major difference will be in respect of blind spots of application, which depend squarely on courts exercising concrete powers of review, *ex post*. See *infra* Section I.A.

⁶⁸ See Waldron, *supra* note 1, at 1362, 1389.

form review when it comes to protecting aspects of the political process.⁶⁹ Cass Sunstein makes similar arguments in defending a general preference for judicial minimalism.⁷⁰ These arguments themselves also have a long lineage in U.S. constitutional law: they draw on *Carolene Products* footnote number 4, and arguments by John Hart Ely in favor of a process-based, or representation-reinforcing, approach to (the scope of) strong-judicial review.⁷¹ These ideas have themselves also been developed and refined by scholars such as Sam Issacharoff, Richard Pildes, and Pam Karlan in their work on politics as markets.⁷² The arguments in this Article should also be seen as entirely consistent with these understandings.

In previous work with David Landau, I have suggested that there are in fact circumstances in which a commitment to political democracy might favor judicial review that is *super-strong*, not simply strong in form.⁷³ One example is where dominant political elites are seeking to use processes of constitutional amendment to entrench their hold on power, or erode basic commitments to electoral democracy, and courts have the capacity to prevent this via a doctrine of unconstitutional constitutional amendment. As Landau and I note, a doctrine of this kind establishes a form of judicial review that is quintessentially strong in nature: it makes judicial decisions immune to ordinary legislative override and formal constitutional amendment.⁷⁴ It thus also presents all of the same dangers for democracy as more ordinary forms of strong review: it has the capacity to give courts formal finality in deciding questions that are the subject of reasonable democratic disagreement. But if appropriately targeted, a doctrine of this kind can also deter or slow down attempts at abusive constitutional change, in ways that ultimately help preserve the minimum core of competitive democracy, or the basic assumptions on which Waldron's *Core Case* rests.

It may well be, therefore, that the core case for weak-form judicial review in non-pathological cases should best be understood as

⁶⁹ Fallon, *supra* note 4.

⁷⁰ SUNSTEIN, *supra* note 60.

⁷¹ See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). For criticism of Ely's claim to create an objective theory, see Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063 (1980).

⁷² See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *STAN. L. REV.* 643 (1998); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 *TEX. L. REV.* 1705 (1998); see also SAMUEL ISSACHAROFF, *FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS* (2015).

⁷³ See Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 *INT'L J. CONST. L.* 606 (2015).

⁷⁴ See *id.*

combined with a core case for *super*-strong review in certain other, more limited and pathological cases. The aim of this Part, however, is to show that there are in fact persuasive general arguments in favor of weak judicial review in relatively well-functioning, not just pathological, democracies.

A. *Blockages in the Political Process*

Even well-functioning legislative processes in a democracy are often subject to “blockages” that impair the enjoyment of individual rights. Blockages of this kind take at least two forms: *blind spots* and *burdens of inertia*.⁷⁵ They can also affect the rights asserted by both “topical” minorities *and* majorities—or rights asserted by groups that are both a statistical minority and majority in demographic terms. The only rights claims that are *not* subject to potential blockages are those asserted by a topical minority or majority, and affirmatively rejected by a “decisional” majority.⁷⁶ Recognizing rights claims of this kind might well be justified in a range of circumstances,⁷⁷ but would also be directly contrary to Waldron’s commitment to majority decision-making in the interpretation of rights.⁷⁸

1. Legislative Blind Spots

The first, most straightforward cause of legislative blind spots will be the time-pressured nature of legislative deliberation. As Guido Calabresi has noted: “Legislatures often act hastily or thoughtlessly with respect to fundamental rights because of panic or crises or because, more often, they are simply pressed for time.”⁷⁹ Modern legislatures must consider a large number of complex pieces of legislation in any given legislative session, and as a result, they will often lack the time necessary to study individual pieces of legislation in detail. Even if they

⁷⁵ See, e.g., Dixon, *Charter Dialogue*, *supra* note 7; Dixon, *Creating Dialogue about Socioeconomic Rights*, *supra* note 42; see also Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 104 (1991); William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 77 (1994).

⁷⁶ Waldron, *supra* note 1, at 1395–401.

⁷⁷ See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); ELY, *supra* note 71. I leave for another day the task of exploring what it would mean to challenge Waldron’s notion of reasonable disagreement in this context, or develop some minimum core notion of equality rights for minorities.

⁷⁸ Waldron, *supra* note 1, at 1397–99.

⁷⁹ Calabresi, *supra* note 75, at 103–04.

turn their minds to the question, they will also have limited foresight about the full range of circumstances in which a law may affect the enjoyment of individual rights in the future. Legislators, like all of us, can be subject to forms of bounded rationality, which means that they do not anticipate the full range of ways in which legislation may affect rights in the future.⁸⁰ In both cases, the result will be that legislators may vote for laws which impose unintended or unanticipated limitations on rights, or which are subject to *blind spots of application*.

Other forms of legislative blind spot can also arise from limits on the time and expertise of individual legislators, and the institutional structures for legislative deliberation.⁸¹ Time-constraints on individual legislators often mean that legislators will delegate the task of considering whether laws “minimally impair” rights to legislative subcommittees. More than most legislators, members of such committees may also have a disproportionate interest in ensuring the achievement of particular legislative objectives, rather than the accommodation of individual rights.⁸² This may lead legislatures as a whole to overlook opportunities for the accommodation of individual rights—even forms of accommodation that could be achieved at very low cost to relevant legislative objectives, and thus which would almost certainly be supported by a democratic majority (“*blind spots of accommodation*”).⁸³

2. Legislative Burdens of Inertia

Legislative processes may likewise be subject to a range of different forms of *inertia*, including “priority”-driven and “coalition”-driven forms of inertia. *Priority-driven burdens of inertia* will arise even in the most ideal democratic settings, simply as a result of the time-consuming nature of the law-making processes, and the limits this implies on the

⁸⁰ On the notion of bounded rationality, see Eddie Dekel et al., *Standard State-Space Models Preclude Unawareness*, 66 *ECONOMETRICA* 159 (1998) (attempting to account for “unawareness” of consequences as an important aspect of bounded rationality).

⁸¹ In prior work, I have also identified a third potential form of legislative blind spot—i.e., blind spots of perspective—as a potential justification for rights-based judicial review. See, e.g., Dixon, *Charter Dialogue*, *supra* note 7. But I omit that discussion here because it depends in large part on process rather than outcome-based arguments.

⁸² In parliamentary systems, the same will often be true for ministers responsible for drafting particular legislation and scrutinizing it for human rights compatibility. There are, of course, attempts in the Commonwealth to change this, by introducing new legislative committee structures, with specific responsibility for human rights issues. See, e.g., Janet L. Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance when Interpreting Rights?*, 82 *TEX. L. REV.* 1963, 1978 (2004).

⁸³ See Dixon, *Charter Dialogue*, *supra* note 7; Dixon, *Creating Dialogue About Socioeconomic Rights*, *supra* note 42.

number of legislative changes which a legislative majority can enact within any given period. Capacity constraints of this kind will mean that there is little reason—or space—for legislative majorities to give priority to rights-based claims which are advanced by a relatively small minority, if those claims do not command strong majority support.⁸⁴ In a competitive democracy, legislators are supposed to prioritize those issues which are of greatest or strongest concern to a majority of citizens. (The premise of competitive elections is that if they fail to do so, a different majority will be elected.) This need not mean that a majority of citizens would necessarily reject or oppose the recognition of a particular rights claim. They may tacitly support the recognition of rights, but treat such recognition as an issue of relatively low priority. Because of this, even well-functioning legislative processes can fail to respond adequately to evolving understandings of rights in the broader culture, in a way which undermines the responsiveness—and legitimacy—of the constitutional system as a whole.

Coalition-driven forms of inertia will arise in the legislative process as a result of more real-world or second-best features of a democratic system relating to the dynamics of competition between political parties. In almost all real-world democracies, affiliation with a major political party substantially increases a candidate's chance of election. Once elected, a legislator's chance of re-election will also depend to a large degree on the broader electoral popularity of his or her political party. Legislators therefore have a strong incentive to promote both the actual and apparent coherence of the party to which they belong. If party members or factions are divided on an issue, this can mean that legislative party leaders have an interest in keeping an issue off the legislative agenda—even in the face of clear demands for legal change from the broader constitutional culture.⁸⁵ If a party is internally divided on an issue, but legal change is nevertheless to be achieved, party leaders face two potential options. One option is to allow a free vote among party members on the basis of their conscience; another is to impose party discipline on members in the minority.

Both options can have real costs for the coherence of the party. Allowing a conscience vote can undermine the public perception of cohesion, or coherent policy, within a party; while imposing party-discipline can erode the actual internal coherence of a party. If party-

⁸⁴ Cf. Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for Courts?*, 38 WAKE FOREST L. REV. 635, 655 (2003).

⁸⁵ See Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 40 (1993); F.L. Morton, *Dialogue or Monologue?*, in JUDICIAL POWER AND CANADIAN DEMOCRACY 111, 115 (Paul Howe & Peter H. Russell eds., 2001).

discipline is imposed frequently enough, members of minority factions may no longer feel it is in their interests to remain part of the broad party-based coalition, and they may split-off from the party as a whole.⁸⁶ As Mark Graber has argued, party leaders are well aware of this political catch-22, and as a result, will “do their best to avoid taking firm public stands on those matters that internally divide their coalition,” and “adopt a variety of ‘defensive’ strategies” to try and depoliticize the issue/keep it off the national agenda.⁸⁷ Again, this need not mean that there is an absence of support for a particular rights claim in the broader culture. A majority of citizens may well support the recognition of a particular rights claim and even feel quite strongly about the need for legal change to give effect to that understanding. However, legislators may still decide that their medium to long-term interests in preserving party integrity outweigh the short-term electoral gains in responding to this demand for legal change. The consequence for the broader constitutional democratic system will be that, absent some breach in majority party-discipline, the legislature will once again fail to respond to evolving democratic understandings of rights—but this time, in the face of even stronger support for the increased protection of rights.

Waldron, of course, notes that there are instances in which political parties choose to relax norms of party discipline, and allow members of parliament (MPs) to vote on issues of constitutional significance based on their individual “conscience.”⁸⁸ In the United Kingdom, for example, important legislative changes to abortion law occurred in 1967, as a direct result of a free vote among MPs. Conscience-based votes of this kind, however, are increasingly rare in many leading constitutional democracies.⁸⁹ They are also often insufficient to *place* an issue on the legislative agenda: norms of party discipline tend to be much stronger at the stage of deciding whether to introduce a bill, or allow it to proceed to a full vote, rather than finally approving it.⁹⁰

⁸⁶ See Tushnet, *New Forms of Judicial Review*, *supra* note 7, at 834.

⁸⁷ See Graber, *supra* note 85, at 39–40.

⁸⁸ Waldron, *supra* note 1, at 1385 n.107.

⁸⁹ On the strength of party discipline in Commonwealth countries such as Canada and the United Kingdom, compared to the United States, see, for example, Michael M. Atkinson & Paul G. Thomas, *Studying the Canadian Parliament*, 18 LEGIS. STUD. Q. 423 (1993) (reviewing literature on strong party discipline the Canadian Parliament); Brian J. Gaines & Geoffrey Garrett, *The Calculus of Dissent: Party Discipline in the British Labour Government, 1974-1979*, 15 POL. BEHAVIOUR 113 (1993) (reviewing strength of party discipline in the United Kingdom compared to the United States, though noting some relative decline in this pattern).

⁹⁰ The Abortion Act 1967 (U.K.), for example, was the product of a private member’s Bill supported by the Abortion Law Reform Association (ALRA). Between 1951 and 1966, three similar Bills were also introduced, but all failed. See, e.g., MICHAEL D. KANDIAH & GILLIAN STAERCK, *THE ABORTION ACT 1967*, at 16–18 (2002); Kate Gleeson, *Persuading Parliament: Abortion Law Reform in the U.K.*, 22 AUSTL. PARLIAMENTARY REV. 23 (2007); David Green, *The*

Blockages of this kind also have clear relevance in many “core” instances of judicial review to which existing theories are addressed: in the context of decisions such as *Roe*, for instance, there was evidence of legislative inertia in the background.⁹¹ While there was a trend toward expanding access to abortion in many states prior to *Roe*,⁹² the scope and pace of this change was quite narrow and slow, compared to background democratic understandings. It was limited to changes allowing access to abortions in the case of rape or incest, or in some cases, to a narrow range of therapeutic abortions, and only to certain states. In the first Gallup polls on abortion, in contrast, fifty-four percent of respondents indicated support for abortion being legal at least “in some circumstances.”⁹³

Similarly, in Canada, the background to the decision in *Morgentaler*⁹⁴ was one of clear legislative inertia. There was growing support for liberalizing access to legal abortion from the 1960s onwards in Canada, and a sustained effort in the 1970s by groups such as the Canadian Medical Association and Canadian Bar Association to achieve this. In 1977, an independent, federally-appointed committee (the Badgley Committee) also recommended major legal change in the area.⁹⁵ The political process, however, was extremely slow to respond: in 1986, Parliament made relatively minor changes to allow broader access to therapeutic abortions, in accredited hospitals, but failed to address the broader issues raised by the Badgley Committee.⁹⁶ As the SCC itself noted in *Morgentaler*, the effect of the 1986 regime was also such that, in practice, abortion was unavailable in large parts of rural Canada—because there were simply no specialized hospitals, or hospitals which had established a therapeutic abortion committee, within the relevant area.⁹⁷

Abortion Act 1967, 8 BRIT. J. CRIMINOLOGY 82 (1968); H.L.A. Hart, *Abortion Law Reform: The English Experience*, 8 MELB. U. L. REV. 388 (1972).

⁹¹ See, e.g., NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES: ELECTED GOVERNMENT, THE SUPREME COURT, AND THE ABORTION DEBATE (1996); Strauss, *supra* note 60, at 906–07.

⁹² DEVINS, *supra* note 91; Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 379 (1985).

⁹³ See *infra* notes 117–18 and accompanying text; see also Ginsburg, *supra* note 92.

⁹⁴ *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (Can.).

⁹⁵ Rebecca J. Cook & Bernard M. Dickens, *A Decade of International Change in Abortion Law: 1967–1977*, 68 AM. J. PUB. HEALTH 637, 640 (1978).

⁹⁶ Rebecca J. Cook & Bernard M. Dickens, *International Developments in Abortion Laws: 1977–88*, 78 AM. J. PUB. HEALTH 1305, 1309 (1988).

⁹⁷ *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 71, 150 (Can.).

B. *Court's Capacity to Counter Legislative Blockages*

Identifying legislative blockages of this kind does not, of course, by itself make the case for a departure from pure legislative supremacy in favor of a greater sharing of responsibility for the protection of individual rights between courts and legislatures. This requires showing that, at least as a general matter, in exercising concrete powers of judicial review courts are well-positioned both to *identify* and *counter* blockages of this kind.

The argument for weak-form review in this context, however, is that courts exercising concrete powers of judicial review do in fact have these attributes. As already noted, the assumption in this context is that judicial review takes the form that is the target of Waldron's *Core Case* against judicial review—i.e., judicial review of legislation on a concrete or “a posteriori” basis, in the tradition of judicial review in the Anglo-American world, and carried out by ordinary, as opposed to constitutional courts, who can be expected to approach constitutional questions by reference to traditional legal methods.⁹⁸ It is also quite possible, however, that specialized constitutional courts exercising more abstract powers of review will also have the ability to perform many of the same functions, particularly in regard to legislative inertia.

A number of generalizations can be made about the professional and institutional orientation of judges on courts of this kind. First, judges are generally distinguished lawyers, with significant prior experience as practicing lawyers or lower court judges. While they may have clear ideological commitments, and informal ties to particular political parties, they are also generally both personally and institutionally independent from partisan political dynamics. At an institutional level, courts conduct processes of judicial review at the instigation of specific parties, and in a way that involves the consideration of legislation as applied to particular concrete cases. They conduct their proceedings largely, if not exclusively, in public; are subject to a duty to give reasons; and are often the subject of significant media scrutiny and attention.⁹⁹ At an ultimate appellate court level, they also generally have a caseload that allows them to give careful consideration to each case, and to deliberate in a way that is not strictly

⁹⁸ Waldron, *supra* note 1, at 1359–60.

⁹⁹ Cf. Kent Roach, *Dialogic Review and its Critics*, 23 SUP. CT. L. REV. (2D) 49, 54, 69 (2004); see also Roy B. Flemming et al., *Attention to Issues in a System of Separated Powers: The Macrodynamics of American Policy Agendas*, 61 J. POL. 76, 84 (1999) (providing compelling empirical evidence of the link between judicial and media attention that has been demonstrated most definitively in the U.S. context).

time limited. And they generally reason in a way that involves some form of a “tiered,” or proportionality-based approach.¹⁰⁰ These features combine to make courts well positioned both to identify and respond to legislative blockages.

1. Blind Spots

For blind spots, judges have the advantage of considering legislation both after it is passed, and in the context of particular concrete cases. This is generally true even in cases where courts entertain facial, as well as as-applied, challenges to legislation, because in doing so courts often require an individual plaintiff to show some concrete injury giving rise to standing, or some number of concrete cases in which the law is overbroad compared to relevant constitutional standards.¹⁰¹ This, as Fallon notes, also means that judges have the ability to assess legislation after “potentially unforeseen [rights based] implications have manifested.”¹⁰²

In systems of concrete review, as former lawyers or lower court judges, most judges will also have the benefit of significant experience in *applying* laws to particular concrete cases and considering whether, in a particular case, there are various procedural protections, or substantive exceptions, that can benefit one or other side of a legal dispute. At an appellate level, they are also accustomed to judging the constitutionality of legislation by reference to a standard of proportionality, or similar form of heightened scrutiny, which invites attention to the question of whether laws are in fact narrowly tailored to the achievement of their objectives. This also gives judges both the expertise and institutional framework necessary for identifying blind spots of accommodation—or ways in which particular laws could be more narrowly tailored to protect individual rights either at the level of statutory (re)interpretation or re-drafting. Further, courts have two broad tools by which to counter blind spots of this kind. They can rely on processes of statutory

¹⁰⁰ Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2014).

¹⁰¹ See, e.g., *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). On face and as-applied challenges to legislation, see, for example, *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000); Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657 (2010); Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773 (2008); Roger Pilon, *Foreword: Facial v As-Applied Challenges: Does It Matter?*, 2008–2009 CATO SUP. CT. REV., at vii.

¹⁰² Fallon, *supra* note 4, at 1697.

“interpretation” to ensure that legislation applies in a way that gives increased protection to individual rights, in a particular case. Or, in systems with broad or strong judicial remedies, they can invalidate legislation as it applies to a particular case or set of cases, or read in additional protections within existing legislation so as directly to counter blind spots of accommodation.

Judicial review, in this context, could be understood to perform a function similar to that of a judge in a jury trial, or academic referee in a process of peer review, or alternatively a procedure for cloture in a process of extended legislative deviate. In defending a stronger form of judicial review, Fallon, for instance, suggests that a useful comparison can be drawn between the role of courts and that of juries in criminal trials. By requiring that juries reach a unanimous verdict, based on a “beyond a reasonable doubt” standard, the jury system helps protect individual liberty, or “skew[s] the system in a pro-defendant direction based on the premise that errors resulting in mistaken convictions of the innocent are morally worse, and thus more important to avoid, than erroneous acquittals of the guilty.”¹⁰³ Judicial review, Fallon further suggests, performs a similar function—it creates an additional check, or veto, on legislative action, which reduces the chance that it will impose unjustified limitations on individual liberty.¹⁰⁴

In a weak-form theory of judicial review, however, courts are far from a true “veto” player. They are more like a trial judge giving instructions to a jury; a judge in this context may help avoid a range of flaws in processes of jury deliberation, including the capacity for certain modes of reasoning or deliberation to involve unforeseen prejudice to the defendant (blind spots of application), or the possibility of entering an alternative, lesser verdict in certain circumstances (blind spots of accommodation). They also enjoy an important degree of legal authority.¹⁰⁵ But they have no role to play in determining ultimate questions of guilt or innocence; this is a question entirely for the jury. Similarly, the argument for weak-form review does not depend on an assumption that “legislative action is more likely to violate fundamental rights than is legislative inaction,” or that it is better to let ten guilty people go free than convict one innocent person.¹⁰⁶ A weak-form theory of review is equally capable of recognizing rights to individual liberty, dignity and equality; it treats harms to individual liberty caused by

¹⁰³ *Id.* at 1695–96.

¹⁰⁴ *Id.* at 1695.

¹⁰⁵ *Cf.* Kumm, *supra* note 10, at 165 (defending the role of courts as similar to that of trial counsel, in asking questions designed to expose flaws and inconsistencies in a witness’s argument).

¹⁰⁶ Fallon, *supra* note 4, at 1696, 1710.

legislative blind spots *and* harms to individual dignity and equality caused by legislative inertia as equally important in the argument for judicial review.

Another way of thinking about the role of weak-form review in this context might be via comparison to the role of an academic referee or reviewer. In defending the idea of judicial review as a form of Socratic contestation, for example, Kumm suggests that courts play a role similar to that of a commissioning “editor” for a book: they ask questions designed to test the aim of a book and its intended audience.¹⁰⁷ In a weak-form theory of judicial review, courts will also play both this *and* a much broader “editorial” role: they will engage in a close reading of a law to determine whether it is truly narrowly tailored to its objective. This, in effect, will mean playing a role much closer to that of referee, or even copy-editor, than commissioning editor: it will mean identifying potential issues or approaches an author has overlooked, or even alternative ways of expressing particular ideas or aims, and then inviting an author to address them.

Waldron himself in fact explicitly acknowledges the capacity of courts of this kind to counter blockages of this kind. In the *Core Case*, he notes his “respect” for the argument for weak-form judicial review that

[i]t may not always be easy for legislators to see what issues of rights are embedded in a legislative proposal brought before them; it may not always be easy for them to envisage what issues of rights might arise from its subsequent application. So it is useful to have a mechanism that allows citizens to bring these issues to everyone’s attention as they arise,

and that this itself may provide an argument for weak judicial review, or “something like the system in the United Kingdom, in which a court may issue a declaration that there is an important question of rights at stake.”¹⁰⁸ He does not, however, provide a fully fleshed out account of how both blind spots of application and accommodation may arise even in relatively well functioning democracies, or where they do, how courts can use a variety of different legal tools in order to counter them.

2. Burdens of Inertia

For burdens of inertia, courts have access to much of the same information as legislators regarding trends in democratic constitutional opinion. They can consider public opinion polls, evidence of social

¹⁰⁷ Kumm, *supra* note 10, at 172.

¹⁰⁸ Waldron, *supra* note 1, at 1370.

movement activism on an issue, and legislation (or judicial decisions) from other jurisdictions or at a sub-national level.¹⁰⁹ They may also have access to additional information regarding the views of various groups in civil society, via the process of amicus submission. Compared to legislatures, courts also have greater scope to consider issues of importance to relatively small minorities. They have greater freedom than legislators to weigh the claims to priority of various issues based on their moral and political significance, rather than immediate electoral salience. They also often face less of a direct trade trade-off between addressing issues of concern to electoral minorities and majorities. Even courts such as the U.S. Supreme Court, as Frederick Schauer has shown, generally play little role compared to legislatures in deciding the issues of greatest importance to democratic majorities.¹¹⁰ In selecting cases of concern only to small minorities, therefore, courts will do less to displace attention to issues of importance to democratic majorities. Even where courts do face this trade-off, they may also have greater scope than many modern legislatures to expand the number of issues they consider within a given timeframe: they simply have more scope within existing institutional constraints to expand their “docket.”

Unlike individual legislators, who may be constrained by party leaders or norms of party discipline, judges are also almost entirely free of direct partisan pressure in their ability to consider particular issues.¹¹¹ The nature of court procedures, and their openness to individual constitutional complaints, also provides a natural mechanism by which courts are required to consider the possibility that legislation is subject to burdens of inertia of various kinds.

Again, courts also have two broad tools that can counter legislative inertia, once it has been identified. Often, the very fact that a court hears a case, and thereby publicly considers an issue, will mean that the issue itself attracts significantly more media and public attention. This is particularly true in the United States, given the Supreme Court’s central role in national public life, but also increasingly true in many other constitutional democracies, including those with systems of weak-form review.¹¹² In some cases, this may be sufficient to create pressure on legislators to respond to the demands of certain voters that they revisit an issue in line with evolving democratic majority understandings. And

¹⁰⁹ Dixon, *A Democratic Theory of Constitutional Comparison*, *supra* note 54.

¹¹⁰ Frederick Schauer, *Foreword: The Court’s Agenda—And the Nation’s*, 120 HARV. L. REV. 4 (2006).

¹¹¹ An important exception is, of course, the state judiciary in many U.S. states. Marie A. Failing, *Can a Good Judge Be a Good Politician? Judicial Elections from a Virtue Ethics Approach*, 70 MO. L. REV. 433 (2005).

¹¹² See, e.g., Flemming et al., *supra* note 99; Roach, *supra* note 99.

in other cases, courts will have the power to overcome inertia—simply by substituting a new legal status quo that recasts the effect or direction of inertia within the legislative process. In most constitutional systems, they can also do this either via the reinterpretation, or invalidation, of existing laws, or reading into existing legislation a new legal default position.

Courts also need not self-consciously engage in “modernizing” forms of review in order to counter legislative inertia. Judges may interpret the text of a constitution according to their own best judgments about constitutional language and history, and still in some cases reach a result that effectively updates legislative practices in line with prevailing democratic majority understandings. For judicial review to counter political blockages, all that is required is that judges reach a *result* that effectively overcomes relevant blind spots or burdens of inertia, not that judges themselves are consciously committed to targeting, or even aware of the existence, of such blockages.

Take a case such as *Roe*, which David Strauss identifies as having a distinctly modernizing character.¹¹³ The Court’s opinion in *Roe* clearly went beyond what was justifiable under a modernizing approach, or an approach grounded in the idea of courts countering legislative inertia.¹¹⁴ In endorsing a “trimester framework” in *Roe*, one clear mistake Justice Blackmun made was to fail to anticipate certain medical changes in the years following *Roe*, which meant that abortion both became increasingly safe, later in pregnancy, and the fetus increasingly viable, prior to the third trimester.¹¹⁵ Even from a medical standpoint, this meant that much of the reasoning in *Roe* was “on a collision course with itself” from the 1980s onwards.¹¹⁶ From a democratic perspective, the breadth of the limits imposed by the trimester framework also meant that the decision was, ultimately, seriously at odds with national majority opinion. In 1975, when Gallup first started public opinion polling on the question of abortion, only twenty-one percent of respondents indicated support for the idea that abortion should be “legal under any circumstances.”¹¹⁷ An equal number (i.e., twenty-two percent) supported a ban on abortion in all circumstances, while as

¹¹³ Strauss, *supra* note 60, at 862, 901.

¹¹⁴ *Id.*

¹¹⁵ See, e.g., JAY D. IAMS, *Preterm Birth*, in *OBSTETRICS: NORMAL AND PROBLEM PREGNANCIES* 755, 822 (Steven G. Gabbe et al. eds., 4th ed. 2002); Randy Beck, Gonzales, Casey, and the Viability Rule, 103 NW. U. L. REV. 249 (2009); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992).

¹¹⁶ *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 458 (1983) (O’Connor, J., dissenting), *overruled by Casey*, 505 U.S. 833.

¹¹⁷ *Abortion*, GALLUP, <http://www.gallup.com/poll/1576/abortion.aspx> (last visited Feb. 5, 2017).

already noted, fifty-four percent of respondents indicated support for abortion being legal “in some circumstances.”¹¹⁸

The immediate effect of the decision, however, was to force legislatures across the country to revisit and revise their laws regulating access to abortion.¹¹⁹ Following *Roe*, most States enacted or attempted to enact legislation regulating and limiting access to abortions, for example by requiring parental or spousal consent/notification,¹²⁰ imposing mandatory waiting periods before abortions, and restricting the locations in which abortions can be performed.¹²¹ Additionally, federal funding of abortions was barred (with exceptions in cases of rape, incest or endangerment of the mother’s life) through the passage of the Hyde Amendment in 1976.¹²²

Further, courts’ ability to counter blockages in this way will not generally depend on court decisions having any claim to U.S.-style legal finality. To counter legislative blind spots, courts will often need simply to draw the *attention* of legislators to instances of unintended or unnecessary rights infringement, and legislatures will then seek to pass corrective legislation for future cases.¹²³ Similarly, to counter burdens of inertia, courts will need either to draw greater media and public attention to an issue, or change the legal default in a way that recasts the effects of burdens of inertia within the legislative process.¹²⁴ Both of these outcomes can also be achieved by court decisions that are weak-form in nature. In fact, in many cases, courts will be able to play this role even *before, or without*, a case reaching a final court of appeal.

Weak-form review, in this context, could be understood as playing much the same function in the U.S. as procedures for cloture in the

¹¹⁸ *Id.*

¹¹⁹ See DEVINS, *supra* note 91; Susan B. Hansen, *State Implementation of Supreme Court Decisions: Abortion Rates Since Roe v. Wade*, 42 J. POL. 372 (1980); Richard Wasserman, Note, *Implications of the Abortion Decisions: Post “Roe” and “Doe” Litigation and Legislation*, 74 COLUM. L. REV. 237 (1974).

¹²⁰ See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (finding unconstitutional a Missouri statute requiring parental and spousal consent for abortions).

¹²¹ See *City of Akron*, 462 U.S. 416 (finding unconstitutional an Ohio law requiring all abortions after the first trimester be performed at a hospital, a twenty-four-hour waiting period after the pregnant woman signs a consent form, and parental consent for girls younger than fifteen).

¹²² See generally DEVINS, *supra* note 91, at 80; MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* 50 (2015).

¹²³ Cf. FRANCESCA KLUG, *VALUES FOR A GODLESS AGE: THE STORY OF THE UNITED KINGDOM’S NEW BILL OF RIGHTS* (2000); Robert W. Bennett, *Counter-Conversationalism and the Sense of Difficulty*, 95 NW. U. L. REV. 845, 891–92 (2001); Tsvi Kahana, *Understanding the Notwithstanding Mechanism*, 52 U. TORONTO L.J. 221 (2002).

¹²⁴ See, e.g., Flemming et al., *supra* note 99; Roach, *supra* note 99.

Senate.¹²⁵ Waldron himself acknowledges that some counter-majoritarian “checks” on majority decision-making are legitimate and appropriate in a well-functioning legislative system. Indeed, he suggests that in a democratic society with legislative institutions in relatively good working order, procedures for lawmaking will be “elaborate and responsible, and incorporate various safeguards, such as bicameralism, robust committee scrutiny, and multiple levels of consideration, debate, and voting.”¹²⁶ In the US, the most notable guarantee of “multiple levels of consideration [and] debate” of proposed legislation is also clearly the filibuster—or the existence of Senate Rules permitting individual senators, or a group of senators, to speak for an unlimited amount of time on a proposed bill, absent a successful motion for cloture.¹²⁷

Yet as recent U.S. practice demonstrates, if used too consistently or repeatedly the filibuster can also undermine effective legislative decision-making in line with democratic majority understandings. It can prevent legislation with clear majority support from reaching a full vote of the Senate, or a bill with majority support from ever reaching the Senate floor.¹²⁸ By allowing for the ending or override of a filibuster, a motion for cloture is thus effectively a form of super-majority procedure (i.e. a vote of 60 out of 100 Senators, or “three fifths of the Senators duly chosen and sworn”) that helps promote substantive majority rule.¹²⁹ Judicial review, in the argument this Article makes, could also be understood to serve a similar function: it relies on a non-majoritarian procedure to produce a more consistently, pro-majoritarian outcome.¹³⁰

¹²⁵ Another potential analogy might be the role of recess appointments in overcoming the filibuster as an obstacle to the making of judicial or executive appointments supported by democratic majority. The analogy does not involve legislation, but it does have the benefit of highlighting the degree to which simply by changing the legal default, judicial review can often help overcome relevant political blockages or inertia. Ryan C. Black et al., *Assessing Congressional Responses to Growing Presidential Powers: The Case of Recess Appointments*, 41 PRESIDENTIAL STUD. Q. 570, 570 (2011); Pamela C. Corley, *Avoiding Advice and Consent: Recess Appointments and Presidential Power*, 36 PRESIDENTIAL STUD. Q. 670 (2006); Scott E. Graves & Robert M. Howard, *Ignoring Advice and Consent? The Uses of Judicial Recess Appointments*, 63 POL. RES. Q. 640 (2010); Patrick Hein, Comment, *In Defense of Broad Recess Appointment Power: The Effectiveness of Political Counterweights*, 96 CALIF. L. REV. 235 (2008); John Anthony Maltese, *Confirmation Gridlock: The Federal Judicial Appointments Process Under Bill Clinton and George W. Bush*, 5 J. APP. PRAC. & PROCESS 1 (2003).

¹²⁶ Waldron, *supra* note 1, at 1361 (footnotes omitted).

¹²⁷ *Id.*

¹²⁸ See, e.g., MIMI MARZIANI, BRENNAN CTR. FOR JUSTICE, FILIBUSTER ABUSE (2010); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997); Gerard N. Magliocca, *Reforming the Filibuster*, 105 NW. U. L. REV. 303 (2011); Benjamin Eidelson, Note, *The Majoritarian Filibuster*, 122 YALE L.J. 980 (2013).

¹²⁹ STANDING RULES OF THE SENATE, S. DOC. NO. 110-9, at 15–16 (2007).

¹³⁰ Cf. Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361 (2008); Graber, *supra* note 85, at 35.

III. THIS VERSUS OTHER “CORE CASES”

In many ways, this argument for weak review also complements a range of other recent defenses of judicial review, offered by other scholars in response to Waldron. It is, however, also distinctive in offering a defense of judicial review that is both relatively broad and revisable in scope—i.e., weak *ex post* but strong or broad *ex ante*.

Fallon, for example, in *The Core of an Uneasy Case for Judicial Review*, explicitly suggests that his theory of judicial review depends on “judicial decisions defining and enforcing fundamental rights [having] some degree of invulnerability to override by ordinary legislation.”¹³¹ This, Fallon suggests, is the logical corollary of a theory of judicial review as creating “multiple-veto-opportunities” against the legislative infringement of rights.¹³²

Fallon’s theory also provides a defense of judicial review of only a quite narrow or limited kind. A key premise of Fallon’s theory is that “legislative action is more likely to violate fundamental rights than is legislative inaction.”¹³³ This, for Fallon, is a key basis for the argument that courts can serve as an important additional veto on the legislative infringement of rights: “[The] case for judicial review in morally and politically nonpathological societies,” Fallon suggests, “rests on the assumption that if either a court *or* the legislature believes that an action would infringe individual rights, the government should be barred from taking it.”¹³⁴ As Mark Tushnet notes, however, this assumption also limits the relevance of Fallon’s core case as a defense of judicial review in many real-world constitutional systems¹³⁵: as a matter of both constitutional text and history, many constitutional democracies simply do not endorse Fallon’s libertarian-style assumption about the relative priority of liberty-based rights claims, over claims to equality and dignity.¹³⁶ As Tushnet notes, “[a]sserting that governmental failures to protect do not violate fundamental rights is to take a controversial position within modern liberalism.”¹³⁷

¹³¹ Fallon, *supra* note 4, at 1733.

¹³² *Id.*

¹³³ *Id.* at 1710.

¹³⁴ *Id.* at 1706 (emphasis added).

¹³⁵ Tushnet, *Waldron’s and Fallon’s Core Cases*, *supra* note 54.

¹³⁶ See, e.g., MARTHA NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY (2008). It should be noted that Fallon does not purport to make the claim beyond the U.S. context, and thus cannot be criticized for mischaracterizing comparative norms or practices. The only point is that his claims are likely to have limited application outside the U.S.

¹³⁷ Tushnet, *Waldron’s and Fallon’s Core Cases*, *supra* note 54, at 59.

Fallon himself also explicitly acknowledges that this theory does not hold in two cases: first, where legislatures are seeking “to promote the rights of one class of citizens without threatening the fundamental rights of another”; and second, where what is at stake are “zero-sum controversies in which fundamental rights are pitted against one another and the overenforcement of one entails the underenforcement of the other.”¹³⁸ As Tushnet again notes, in many countries the practice of weak-form review also does regularly involve rights conflicts of exactly this kind—i.e., conflicts between rights such as rights to life, dignity and security of the person (abortion), liberty and equality (hate speech), due process and personal security and dignity (criminal justice), and property, contract, and socio-economic rights.¹³⁹ This is in part why doctrines of proportionality are so important in structuring process ease of constitutional decision-making.

Similarly, in defending the idea of judicial review as promoting a form of “Socratic contestation,” Matthias Kumm defends a form of rights-based review that is far narrower than that institutionalized in most contemporary constitutional instruments.¹⁴⁰ One of the key commitments in a constitutional democracy, Kumm argues, is the resolution of questions of fundamental justice by reference to norms of *public reason*-giving. To count as legitimate in a free society, laws need to be capable of justification to individuals subject to them “on grounds they might reasonably accept.”¹⁴¹ For Rawls, this meant that a society needed both to protect certain “constitutional essentials” as the basis for ordinary legislation, and ensure that deliberation on questions of fundamental justice occurred on the basis of a commitment to public reason.¹⁴² Waldron, however, argues that there is broad scope for reasonable disagreement among citizens as to the scope of various constitutional essentials in concrete cases. This means that the key remaining commitment from a liberal political standpoint is to public decision-making based on “collective judgment of reason about what justice and good policy requires.”¹⁴³

Kumm further argues that European-style proportionality-based review directly institutionalizes this form of commitment to reason-based public action. First, he argues,

¹³⁸ Fallon, *supra* note 4, at 1712–13.

¹³⁹ Tushnet, *Waldron’s and Fallon’s Core Cases*, *supra* note 54, at 55–67.

¹⁴⁰ Kumm, *supra* note 10.

¹⁴¹ *Id.* at 155; see also JOHN RAWLS, *POLITICAL LIBERALISM* (1993); T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 12 (1998); Frank I. Michelman, *The Subject of Liberalism*, 46 *STAN. L. REV.* 1807 (1994) (reviewing JOHN RAWLS, *POLITICAL LIBERALISM* (1993)).

¹⁴² RAWLS, *supra* note 141, at 227.

¹⁴³ Kumm, *supra* note 10, at 166.

the very fact that courts are granted jurisdiction to assess whether acts by public authorities are supported by plausible reasons . . . reminds everyone that the legitimate authority of [the] legal act [in a liberal democracy] depends on the possibility of providing a justification for it based on grounds that might be reasonably accepted even by the party who has to bear the greatest part of the burden

of the law; and second, “it is not at all implausible that in practice the judicial process functions reasonably well to produce improved outcomes,” in terms of an actual connection between law and public reason.¹⁴⁴ European-style judicial review, Kumm notes, is similar to a form of Socratic engagement in its focus on public reason-giving: it requires “[p]ublic authorities . . . to defend themselves, once a plaintiff goes to court claiming that his rights have been violated,” by providing reasons for their actions; and at the heart of the process of judicial review in this context is “the examinations of [those] reasons,” in order to determine their plausibility.¹⁴⁵ This understanding, however, suggests that the focus of judicial review in a Socratic-style approach will be on the first and second, rather than the third or fourth, stages of a proportionality test.

For a law to be consistent with the requirements of public reason, it must have a purpose that any citizen could reasonably be expected to endorse, regardless of their particular worldview. Certain legislative purposes are thus ruled out as illegitimate in this understanding—i.e., purposes that simply reflect animus toward or dislike of a particular group, a wholly traditional or conventional conception of morality, or other religious or comprehensive doctrine. Proportionality-based judicial review can also help “smoke out,” or serve as a check on, this kind of illegitimate government purpose by requiring governments both to articulate the purpose behind a law, *and* show that such a purpose in fact has some actual relationship to the law in question.¹⁴⁶ This, in fact, is the essence of the first and second stages of a proportionality-based inquiry, or what in the U.S. is often called rational basis review “with bite.”¹⁴⁷

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 165.

¹⁴⁶ See WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 263–87 (2005). For the language of smoking out, see *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); cf. Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422 (2011).

¹⁴⁷ See, e.g., Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987);

Judicial review of this kind can also be conducted in ways that are more or less conducive to *actual* public reason-giving by legislators.¹⁴⁸ In identifying the purpose of legislation when conducting a proportionality inquiry, for example, courts may consider the full range of purposes that can plausibly be offered in defense of a law at the time it is challenged (a purely “objective” or “shifting purpose” approach¹⁴⁹), the apparent purpose of a law at the time it is enacted (a “subjective” approach¹⁵⁰), or the range of plausible purposes for a law, which find some support in the actual legislative record (a hybrid approach¹⁵¹). A court is also more likely to invalidate a law as lacking a rational basis under both the second and third of these approaches. This will mean judicial review is more likely to lead to an issue being “remanded” to the legislature for further deliberation, in accordance with the requirements of public reason. And for many deliberative democrats, this form of actual public reason-giving is extremely important to ensuring the legitimacy of legislation.¹⁵²

What a Socratic approach to judicial review does not generally involve, however, is a focus on the *effects* of a law on the enjoyment of individual rights, or the third or fourth stages of a proportionality test. In some cases, as the United States Supreme Court has noted, the fit between a law and its stated purpose may be so poor, or “irregular that, on its face, it rationally cannot be understood as anything other than” a law with a prohibited purpose.¹⁵³ But beyond such cases of bizarre or irregular effects, a focus on legislative purpose does not require consideration of questions of narrow tailoring, or true proportionality. Or at the very least, it suggests that where issues of this kind are at stake, courts should tend to be quite deferential to legislative constitutional

Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769 (2005).

¹⁴⁸ On the relevance of this distinction in political theory, see debates between Rawls and Habermas as to the meaning and requirements of deliberative democracy. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* (1996); Jürgen Habermas, *Three Normative Models of Democracy*, 1 *CONSTELLATIONS* 1 (1994); John Rawls, *Reply to Habermas*, 92 *J. PHIL.* 132 (1995); John Rawls, *The Idea of Public Reason Revisited*, 64 *U. CHI. L. REV.* 765 (1997).

¹⁴⁹ See, e.g., *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (Can.).

¹⁵⁰ The term subjective here is, of course, somewhat misleading, as it is still a matter of construing the collective purpose of a legislature, as a matter of objective interpretation, rather than the subjective intentions of individual legislators. See, e.g., *Bruesewitz v. Wyeth L.L.C.*, 562 U.S. 223, 243–44 (2011) (majority opinion); *Id.* (Breyer, J., concurring); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 *S. CAL. L. REV.* 845 (1992).

¹⁵¹ See, e.g., *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002).

¹⁵² See, e.g., SUNSTEIN, *supra* note 60.

¹⁵³ *Miller v. Johnson*, 515 U.S. 900, 901 (1995); see also *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

judgments. Where there has been “a serious, extended and mutually respectful parliamentary debate” before deciding on a constitutional question, Kumm suggests, this will provide a “good reason for the court to be deferential to the outcome reached” because such an outcome is “highly likely to be based on *plausible reasons*.”¹⁵⁴ In providing a core case for strong-form review, Fallon likewise endorses a quite deferential approach by courts wherever “the legislature has striven conscientiously to determine which of two competing fundamental rights claims deserves to prevail,” or is seeking to advance the protection of one right, absent any serious competing claim to individual rights protection.¹⁵⁵

A great deal of the actual practice of judicial review in countries with both strong *and* weak forms of review, in contrast, involves the third and fourth stages of a proportionality test, and a far less deferential approach by courts to weighing competing constitutional rights and interests.¹⁵⁶

Take judicial review of abortion legislation. For Waldron, the legislative debate on abortion law reform that occurred in the U.K. in 1967 is a key example of the kind of active and wide-ranging debate within legislatures on rights-based questions that underpins the *Core Case*. Judicial decisions on abortion such as *Roe v. Wade*,¹⁵⁷ Waldron argues, compare poorly to this kind of legislative debate. In *Roe*, in striking down a Texas law prohibiting access to abortion, Justice Blackmun, writing for the majority, held that the Constitution does protect a woman’s right to terminate a pregnancy as part of a constitutionally recognized right to “personal privacy,” but provided relatively thin reasons for this conclusion, simply noting that whether a right of this kind is

founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.¹⁵⁸

¹⁵⁴ Kumm, *supra* note 10, at 167 (emphasis added).

¹⁵⁵ Fallon, *supra* note 4, at 1730.

¹⁵⁶ See, e.g., Benjamin L. Berger, *Section 1, Constitutional Reasoning and Cultural Difference: Assessing the Impacts of Alberta v. Hutterian Brethren of Wilson Colony*, 51 SUP. CT. L. REV. 25 (2010) (highlighting the third and fourth stages as important to later Charter cases); Leon E. Trakman, William Cole-Hamilton & Sean Gatién, *R. v. Oakes 1986–1997: Back to the Drawing Board*, 36 OSGOODE HALL L.J. 83 (1998) (highlighting the third stage as critical to Canadian Charter cases); see also Sujit Choudhry, *So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis Under the Canadian Charter’s Section 1*, 34 SUP. CT. L. REV. 501 (2006); Hogg & Bushell, *supra* note 7.

¹⁵⁷ 410 U.S. 113 (1973).

¹⁵⁸ *Id.* at 153.

Similarly, Justice Blackmun explicitly avoided “resolv[ing] the difficult question of when life begins,” or reaching any conclusion as to the rights of the fetus under the Fourteenth Amendment.¹⁵⁹ The Court did not, therefore, engage in an extensive analysis of the moral and political arguments on either the pro-choice *or* pro-life side of debates over abortion, nor did it show explicit respect to dissenting viewpoints on the question, in ways that advanced actual notions of public reason giving.¹⁶⁰

To justify the *result* in a case such as *Roe*, under a Socratic approach, it would further be necessary to show that the criminal prohibition of abortion by states such as Texas was not in fact supported by any legitimate public reason—i.e., based purely, or at least primarily, either on religious (i.e. non-public, reason-type understandings) understandings of the sanctity of fetal life, or “traditional patriarchal views about gender roles that placed central importance on male control over female sexuality.”¹⁶¹

The evidence in the United States, however, suggests this is far from the case. Restrictions on access to abortion are often designed to affirm and promote the value of fetal life, not simply from a religious viewpoint.¹⁶² As the German Constitutional Court suggested in the *Abortion I Case*, a legislative purpose of this kind can simply reflect a shared constitutional commitment to affirming the universal dignity of all human beings, both current and future, actual and potential, and thus not involve any endorsement of a particular religious or comprehensive viewpoint about the point at which human life truly begins.¹⁶³ While laws of this kind may adversely *impact* women’s freedom and equality,¹⁶⁴ they also need not have that purpose, nor the purpose of advancing traditional notions of women’s role.

To justify the Court’s reasoning in cases such as *Roe*, it would also be necessary to account for the Court’s focus on questions of narrow tailoring, or finding that the law in question “swe[pt] too broadly” in

¹⁵⁹ *Id.* at 159.

¹⁶⁰ See Waldron, *supra* note 1, at 1383–85.

¹⁶¹ Kumm, *supra* note 10, at 167.

¹⁶² See, e.g., Frances Kissling, *Is There Life After Roe? How to Think About the Fetus*, 25 CONSCIENCE 10, 11 (2004); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008).

¹⁶³ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVerfGE] 1 (Ger.); see also Rosalind Dixon & Martha C. Nussbaum, *Abortion, Dignity and a Capabilities Approach*, in FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES 64, 64–65 (Beverly Baines, Daphne Barak-Erez & Tsvi Kahana eds., 2012).

¹⁶⁴ See, e.g., R. v. Morgentaler, [1988] 1 S.C.R. 30, 180 (Can.); SUNSTEIN, *supra* note 60, at 18.

seeking to further a legitimate state interest.¹⁶⁵ In *Roe*, Justice Blackmun went far beyond the question of whether the state has a *legitimate* purpose in restricting access to abortion under the Constitution.¹⁶⁶ Instead, he laid out a broad framework, based on the relevant stage (or trimester) of a woman's pregnancy and the particular state interest asserted, for when a state could impose limits on a woman's constitutional right to access an abortion.¹⁶⁷ Abortion could not be prohibited, according to this framework, prior to the end of the second trimester of pregnancy, or the fetus becoming viable (and only then, if the prohibition in question was directed toward protecting fetal life and contained an exception in cases where a pregnancy threatened a woman's life or health). It could also be regulated only after the end of the first trimester, and only with a view to protecting women's health—and not protecting fetal life. While the Court overruled this trimester framework in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁶⁸ it also created a new test—of whether a law regulating access to abortion imposed an “undue burden” on access to abortion—that quite explicitly invited attention to the *impact* of a law on women's access to abortion, pre-viability, or on maternal health, post-viability.¹⁶⁹

Similarly, in its landmark decision in *Morgentaler*, Canada voted to strike down federal law requiring abortions to be performed in specially accredited hospitals and approved by a hospital's therapeutic abortion committee, with several members of the SCC holding that the law in question was “a complete denial of the woman's constitutionally protected right” to access abortion, and thus not narrowly tailored, or consistent with the notion of minimal impairment under section 1 of the Canadian Charter of Rights and Freedoms.¹⁷⁰ Many comparative abortion decisions also have a similar structure: as in the U.S. and Canada, they focus on questions of minimal impairment and true proportionality, not simply whether the legislature's purpose in adopting such laws can be considered legitimate.¹⁷¹ Further, in

¹⁶⁵ *Roe v. Wade*, 410 U.S. 113, 164 (1973).

¹⁶⁶ *Id.* at 163; SUNSTEIN, *supra* note 60, at 37.

¹⁶⁷ For a characterization of the decision as broad, see SUNSTEIN, *supra* note 60, at 18 (“That decision was wide in that it settled a range of issues relating to the abortion question.”).

¹⁶⁸ 505 U.S. 833, 872 (1992).

¹⁶⁹ See, e.g., *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Casey*, 505 U.S. at 924–25 (invalidating spousal notification requirements).

¹⁷⁰ *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 180, 183 (Can.).

¹⁷¹ See, for example, Colombia and Germany, though note potential differences here in terms of concrete versus abstract review. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Dr. Jaime Araújo Rentería & Dra. Clara Inés Vargas Hernández, Sentencia C-355, CORTE CONSTITUCIONAL, <http://www.corteconstitucional.gov.co/relatoria/2006/c-355-06.htm>; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 88 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVerfGE] 203 (Ger.)

answering this question, courts routinely exercise a significant degree of independent judgment, and do not merely defer to all “reasonable” legislative policy choices.

A third process-based justification for judicial review, advanced by Alon Harel and Tsvi Kahana, likewise defends a form of judicial review that is ultimately much narrower than this kind of broad ranging, effects-based analysis of the reasonableness of legislation imposing limits on rights. A key procedural virtue of judicial review, Harel and Kahana argue, is that it provides individuals harmed by particular legislation with a “right to a hearing”—i.e., an opportunity to voice a grievance, receive an explanation that addresses that grievance, and then to have a particular right respected if the infringement of rights was in fact not justified in circumstances.¹⁷² A right of this kind, however, only justifies judicial review as applied to a particular individual, in a specific concrete case, and not the kind of facial challenge to legislation at issue in cases such as *Roe* or *Morgentaler*. For broader constitutional review of this kind to be justified, as Harel and Kahana acknowledge, there must be some additional, more contingent, outcome-based considerations—such as a particular desire for legal certainty or predictability—that justify giving court decisions *erga omnes* effect.¹⁷³

Similarly, Harel and Kahana specifically suggest that the capacity for judicial review to provide a ‘hearing’ to aggrieved individuals is greatest when judicial review is strong rather than weaker in form. A genuine hearing, they argue, requires “a principled willingness to reconsider one’s decision in light of the moral deliberation” about its correctness.¹⁷⁴ If a court decision can be reversed simply on the basis of *democratic disagreement* with the decision, this will also be directly inconsistent with the notion of a genuine hearing for individuals harmed by government action.

In subsequent work, Harel and Shinar suggest that this may not always be fatal to the ability of weak-form systems of review to provide a hearing to aggrieved individuals. Courts in such systems, they suggest, can play the important role of “facilitating the hearing of grievances and . . . drawing attention to the particularities of such grievances,” or inducing non-adjudicative bodies to be *attentive* to such grievances.¹⁷⁵

[*Abortion II*]; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVerfGE] 1 (Ger.) [*Abortion I*]; see also Jose Manuel Cepeda & David Landau, *Colombian Constitutional Law* (2016) (unpublished manuscript) (on file with author).

¹⁷² See Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991, 997 (2006). See generally Harel & Kahana, *supra* note 10, at 238–51.

¹⁷³ See Harel & Kahana, *supra* note 10, 251–52.

¹⁷⁴ *Id.* at 243.

¹⁷⁵ Harel & Shinar, *supra* note 11, at 973.

But they also emphasize that weak-form systems are likely to perform worse than strong-form systems in promoting the reconsideration of prior decisions. The kind of reconsideration conducted by non-adjudicative bodies, they suggest, is “more remote, diffused and less focused on the particular grievance at stake” than that conducted by courts, and thus generally not as “fully and completely attentive to th[at] grievance” as the judicial process itself.¹⁷⁶

One of the difficulties with almost all existing responses to Waldron, therefore, is that they do not adequately account for both the non-finality *and* breadth of judicial review contemplated by many real-world systems of weak-form review. To be useful, as Kumm notes, theoretical defenses of judicial review also need “to both fit the practice [they] purport[] to defend and articulate what is attractive about it.”¹⁷⁷

CONCLUSION

In the *Core Case*, Waldron distinguishes explicitly between outcome and process-related reasons for judicial review: outcome-related reasons are based on the capacity of a particular institution to do the best job of enforcing fundamental rights, with the fewest side-effects;¹⁷⁸ whereas process-based reasons are concerned with issues of “voice or fairness” intrinsic to different decision-making procedures.¹⁷⁹ The argument in this Article is also exclusively outcome-focused.¹⁸⁰ This means that a number of qualifications are necessary, as to the scope of the argument.

First, it does not purport to make any claim as to the actual benefits versus costs to judicial review in any real-world constitutional democracy. To do so, it would need to engage in a comprehensive empirical analysis of the actual practice of legislative and judicial constitutionalism in a particular country, and then weigh the evidence of relative institutional performance based on this survey.¹⁸¹ Ideally, an assessment of this kind should also include attention to the potential strengths and weaknesses of various other independent institutions, such as equality or human rights commissions, as potential substitutes

¹⁷⁶ *Id.*

¹⁷⁷ Kumm, *supra* note 10, at 154.

¹⁷⁸ Waldron, *supra* note 1, at 1376 (quoting J. Raz, *Disagreement in Politics*, 43 AM. J. JURIS. 25, 45 (1998)).

¹⁷⁹ Waldron, *supra* note 1, at 1386.

¹⁸⁰ For more process orientated versions of the argument, see my previous emphasis on “blind spots of perspective”: Dixon, *Charter Dialogue*, *supra* note 7; Dixon, *Creating Dialogue About Socioeconomic Rights*, *supra* note 42.

¹⁸¹ See, e.g., SADURSKI, *supra* note 146, at 263–87; see also Roux, *supra* note 55.

for, or complements to, rights-based forms of judicial review.¹⁸² And as Waldron, Kumm, and others have noted, an analysis of this kind is necessarily inconsistent with the attempt to develop a general case for judicial review, which can apply across countries.¹⁸³

Second, as argument for judicial review in any real-world setting, the arguments made must be weighed against the potential *dangers* or costs associated with judicial review. One of the key dangers associated with strong-form of review, for instance, is the danger of legislative “debilitation”—i.e., the danger that in the shadow of judicial review, legislators will no longer take seriously their duty to engage in processes of constitutional deliberation. Instead, they will adopt legislation they know to have constitutional defects, in the knowledge that courts will in due course either strike the legislation down, or correct the relevant defects. This danger was first identified by James Bradley Thayer as an argument for narrow or deferential judicial review *ex ante* by the Supreme Court, but has also been made by many contemporary critics of judicial review.¹⁸⁴ As Tushnet notes, it also provides one of the most important outcome-based arguments for weak- over strong-form review: it is much less likely in a system of weak-form review that legislators will be subject to debilitation of this kind. There is much less chance under a system of weak-form review that patent defects will in fact be corrected by courts; there is also greater scope for legislators to give effect to their own constitutional judgments.

In addition, in many real-world systems of weak-form review there are a range of institutional mechanisms designed to promote the chances of active deliberation by legislators. Waldron himself in fact notes these procedures as an argument against strong-form review: many systems with weak judicial review, he notes, “make specific provision in the legislative process for issues of rights to be highlighted” at a pre-enactment stage via a requirement that those introducing legislation make a statement of compatibility in respect of human rights, or that legislation be scrutinized by a legislative committee with responsibility for human rights.¹⁸⁵ Garbbaum also identifies this as one

¹⁸² Cf. David Landau, *Substitute and Complement Theories of Judicial Review*, 92 IND. L.J. (forthcoming 2017); see also Harel & Shinar, *supra* note 11, at 963. My own view is that human rights commissions are extremely important as complements but not substitutes in this context: crucially they often lack the kinds of coercive powers necessary to counter the most powerful forms of legislative blockage.

¹⁸³ See, e.g., SADURSKI, *supra* note 146.

¹⁸⁴ See, e.g., Waldron, *supra* note 1, at 1403.

¹⁸⁵ *Id.* at 1378.

of the two key distinctive aspects of recent models of weak-form review, in what he describes as the “new Commonwealth constitutionalism.”¹⁸⁶

It is also far from clear, however, that these mechanisms for legislative scrutiny have in fact promoted *meaningful* constitutional deliberation about rights on the part of legislators. In some cases, they have not led to quite formulaic consideration of rights-based questions by legislators,¹⁸⁷ and in others to legislators seeking to “litigation-proof” legislation, rather than engage in true deliberation about issues of moral and political disagreement.¹⁸⁸ This, as numerous scholars have noted, is itself also a clear cost to judicial review; distortion of this kind is far less likely under a system of pure legislative supremacy than a system that has some form of strong or weak-form of judicial review.¹⁸⁹

In order to make any meaningful assessment of the overall benefits and costs to weak-form review in any particular context, therefore, it would clearly be necessary to engage in a quite detailed empirical assessment of the actual institutional performance of courts and legislatures, in various contexts. Ultimately, the question would then be whether a court was actually helping to counter legislative blockages, versus creating contributing to legislative debilitation or distortion.

One of the downsides to the *Core Case* is that it takes a quite binary, stylized, and static view of the requirements for a democratic system to have institutions in “relatively good working order.” The reality of most real-world constitutional democracies, in contrast, is that the performance of different institutions will vary across time, and different contexts, so that the desirable scope of judicial review will also vary along with prevailing political conditions.¹⁹⁰

This Article could also be subject to similar objections: it seeks to make a *general* case for the democratic desirability of weak-form judicial review, as a means of countering blockages—i.e., blind spots and burdens of inertia—that routinely arise even in well-functioning democratic processes. In doing so, however, it also seeks to develop a more fine-grained account than Waldron of the actual workings of real-world legislatures “in good working order”—i.e., one that is attentive to the role of workload pressures, behavioral biases, and competition between political parties, as potentially limiting (as well as enabling) the

¹⁸⁶ See GARDBAUM, THEORY AND PRACTICE, *supra* note 6, at 22–24; Gardbaum, *New Model*, *supra* note 6.

¹⁸⁷ See generally JANET L. HIEBERT & JAMES B. KELLY, PARLIAMENTARY BILLS OF RIGHTS: THE EXPERIENCES OF NEW ZEALAND AND THE UNITED KINGDOM (2015). For Australia, see, for example, George Williams & Daniel Reynolds, *The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights*, 41 MONASH U. L. REV. 469 (2015).

¹⁸⁸ See, e.g., HIEBERT & KELLY, *supra* note 187 (Canada).

¹⁸⁹ See GARDBAUM, THEORY AND PRACTICE, *supra* note 6.

¹⁹⁰ See BELLAMY, *supra* note 2; see also Roux, *supra* note 55.

capacity of legislatures consistently to protect rights, even of a kind recognized or supported by democratic majorities.

A great deal more work remains to be done on how constitutional institutions, and doctrines, should be designed so as to respond to these legislative blockages, in different constitutional systems. There is also a need for further work on how commitments to weak-form review should be institutionalized in contexts where there is a clear threat to political democracy, or threat of abusive constitutionalism.

Part of the aim of this Article, however, is to show that ongoing work of this kind is in fact justified—i.e., that there are in fact sufficiently persuasive *general* responses to Waldron as to the democratic desirability of weak-forms of judicial review, that it is worthwhile continuing to develop more context-specific, empirically grounded accounts of this kind as to the desirable role of particular constitutional courts. Accounts of this kind will inevitably vary across countries, depending on the institutional capacity and past performance of courts and legislatures in the relevant system, and the degree of support for constitutional litigation in the broader legal and political culture.¹⁹¹ But one thing they almost all have in common is a belief that, under the right conditions, courts *can* in fact play an important role in enhancing, rather than undermining, overall democratic constitutional performance—even in the face of Waldron-style reasonable disagreement about the scope and content of constitutional rights.¹⁹²

¹⁹¹ See, e.g., Roux, *supra* note 55. On social movements and legal support structures specifically, see, for example, CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998); MICHAEL W. McCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994); *LITIGATING HEALTH RIGHTS: CAN COURTS BRING MORE JUSTICE TO HEALTH?* (Alicia Ely Yamin & Siri Gloppen eds., 2011).

¹⁹² Cf. Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 *GEO. L.J.* 961 (2006).