

Is Judicial Review Undemocratic?

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Jeremy Waldron has long argued that judicial review is inconsistent with the importance that democracies properly attach to political participation and to equality. This paper looks at those arguments as recently summarised in a paper called “The Core of the Case Against Judicial Review”.¹ Waldron’s arguments highlight the apparent incongruity of a democracy giving a small group of unelected judges the last word on matters which concern citizens and legislators, and on which citizens and legislators may be at least as well-informed, and capable of reasoned decisions, as judges. In addition to a properly functioning judiciary, Waldron believes, democracies should normally be expected to have citizens and legislators who care about, and are capable of protecting, the basic rights of members. Hence, he claims, there is no compelling reason to prefer the decisions of judges to legislators where rights are at stake, and good reasons to believe that doing so detracts from important democratic values and rights.

I am not so sure. While I do not believe that judicial review is necessary for democracy, I am unpersuaded that it is undemocratic whenever people are fortunate enough to live in a reasonably functioning democracy. Waldron underestimates, I will

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¹ “The Core of the Case Against Judicial Review”, presented to Dworkin’s seminar at UCL in April 2005, and published in (2006) 115 No. 6 *Yale Law Journal*, 1346-13-6. I focus on Waldron’s arguments in this paper, rather than in his other work, because he really does present the heart of the case against judicial review intellectually and emotionally, and it is a very powerful case indeed.

argue, the extent to which democratic forms of politics can be judicial, rather than legislative, and overestimates the importance of voting to democratic ideals of freedom, equality, and political participation. Hence, judicial review, like elected legislatures themselves, I will suggest, is a fallible, but potentially democratic, solution to problems of constitutional government.

Two claims are essential to Waldron's argument. The first is that it is impossible to decide whether or not we do better to protect rights by adopting judicial review or not, because the evidence on the matter is inconclusive (p.1375). We can call this the "inconclusive outcomes" thesis. The second claim is that if we want to decide who should have the last word, when people disagree about rights in our society, legislatures are overwhelmingly superior to courts from a procedural perspective. This is because legislatures are more legitimate, egalitarian and participatory than courts, according to Waldron, and so embody crucial democratic rights and values to an extent that is impossible for the latter - however well-intentioned, wise and perspicacious their members (pp. 1353). We can call this the "legislative legitimacy thesis".

This paper concentrates on the latter claim. I agree with Waldron that there is no conclusive evidence to suggest that courts or legislatures are better at protecting individual rights, although I worry that Waldron tends to pathologise judicial reasoning in the process of demolishing the more hagiographic claims on its behalf.² Still, in the

² See p. 1373 and part iv, pp. 1376-1386 on "outcome-related reasons" for Waldron's response to the argument that judges are likely to produce better decisions about rights than legislators. Waldron is, surely, right to say that judicial reasoning about rights can only be as good as the Bill of Rights that they are working with (1382-3) – or, we might add, the statutes and decisions of prior judges in the case of the

interests of brevity and clarity, I will concentrate on Waldron's procedural arguments against judicial review. Some of the difficulties with Waldron's procedural claims have implications for the way that we think about the outcome-related arguments against judicial review. But my concern is not simply that we might improve judicial reasoning by including more members of previously disadvantaged groups within its ranks. Rather, I want to make two points about Waldron's picture of democratic legitimacy. First, that he gives voting for legislatures a quite disproportionate weight in our judgements about the legitimacy and democratic credentials of a society and its government. Second, that Waldron is insufficiently sensitive to the ways that judicial review might provide a legitimate avenue of political activity for those seeking to rectify historic injustice, and might promote political equality and participation even in democracies with a perfectly adequate, conscientious and hardworking legislature.

Finally, I will suggest that Waldron's arguments against judicial review raise important questions about the ability of democracies to institutionalise protection for rights within a competitive party system. Waldron contrasts British legislation on abortion favourably with what he sees as the deficiencies of *Roe v. Wade*. (pp. 136-8).³ However, Waldron is unusually uncritical, here, and overlooks salient facts of British

common law. And he is also right that judges are, properly, concerned about the legitimacy of their own decision-making, and so are likely to give this a great deal of attention in their reasoning and decisions. (p.1381, and especially 1383-4) But if, as Waldron claims, "courts are expected to behave in the ways that I have criticized, focusing on precedent, text, doctrine and other legalisms", and these are also to constitute inherent defects in reasoning (p.1381), there seems to be a permanent problem in letting judiciaries decide questions of rights.

³ For similar claims in his other work, see *Law and Disagreement*, (Clarendon Press, Oxford, 1999), p.290 and 'Judicial Review and the Conditions of Democracy' (1998) *The Journal of Political Philosophy*, Vol. 6, No. 4, pp. 339-40.

legislative history and of institutional structure.⁴ Once we allow that judicial review is not a prerequisite of democratic government – even if we disagree with Waldron that it is, itself, undemocratic – we need seriously to consider how protections for rights might be strengthened and institutionalized within a competitive party system. And that, I will conclude, is one of several important issues to which Waldron draws our attention.

To avoid confusion I should emphasise that I do not believe judicial review is generally necessary for democratic government, because I agree with Waldron that judicial decisions about rights are not evidently better than legislative ones. However, the judicial process may prove more accessible and efficient than the legislative one, and it enables citizens to hold their government to account in a manner that is relatively direct, appealing and reflective of democratic ideas about equality of rights and status. So I do not want to foreclose the possibility that judicial review can be democratically justified. On the contrary, I suspect that the relative merits of judicial review, of proportional representation, and different party systems, are all issues on which democracies can, quite properly, disagree because none of the available options is evidently superior to the others.

⁴ For example, Waldron gives no sense that until David Steel's bill became law, in 1967, the law governing abortion in England and Wales dated from 1861 and left it wholly unclear in what circumstances, if any, abortion would be justified. (22 July 1966, 732 *Parl. Deb., H.C.* (5th Ser.) p.1069-70. David Steel notes that the need for reform was apparent since before the second world war, and would likely have occurred but for the war. But because such matters are typically left to Private Member's Bills, prior efforts to reform the law had failed. Steel makes it plain that he deplores the way that important social legislation of this sort depends on such a haphazard form of legislation as the Private Member's Bill. (p.1068) I would like to thank Lorraine Sutherland, the editor of *Hansard*, who helped me to find a copy of this debate.

I will start by reviewing Waldron's arguments against judicial review before turning to his assumptions about democratic legitimacy. With Waldron, I will be assuming that opponents, as well as proponents, of judicial review value rights and seek to protect them, so that the issue between them is not whether rights ought to be protected, but how such protection should be institutionalised. (p 1360 and 1364-5) I will also be assuming, with Waldron, that what we are concerned with – at least for the moment – is the justification for the judicial review of legislation, rather than of the executive or administrative functions of government. (p. 1353) That said, I believe that Waldron tends too readily to assume that we know what is meant by people caring for rights, and being willing to protect them (p.1364-5).⁵ His paper raises important questions about the sacrifices – personal and collective – that people should be willing to bear before it makes sense to say that they care about rights, or before others would be justified in believing them. But, I will have to set these questions aside, as I am afraid that I have nothing very useful to say about them at present.

⁵ As Waldron says, if a society is committed to the protection of individual and minority rights - as it should be in a democracy - people must believe that

“individuals have certain interests and are entitled to certain liberties that should not be denied simply because it would be more convenient for most people to deny them. They believe that minorities are entitled to a degree of support, recognition and insulation that is not necessarily guaranteed by their numbers or by their political weight”. (1364) This commitment “is not just lip service” because people

“take rights seriously: they care about them, they keep their own and others' views on rights under constant consideration and lively debate, and they are alert to issues of rights in regard to all the social decisions that are canvassed or discussed in their midst”. (1365)

But while it is hard to go much further without courting distracting controversy, the idea that what is at stake in protecting rights is “convenience” does seem a bit misleading. The sacrifice need not be society-wide, or fall with equal weight on everyone. So a great deal turns on people having the disposition to protect rights. Some people might feel that this is more critical than knowledge, however vague, “that human rights conventions have become ascendant in the world since 1945, and that their history reaches back to the sort of conceptions of natural right alluded to in documents such as the 1776 Declaration of Independence and the 1789 French Declaration of the Rights of Man and the Citizen”. (Footnote 51, p.1365)

Waldron's Argument Against Judicial Review

Two Types of Judicial Review

According to Waldron, in a reasonably functioning democracy strong judicial review of legislation by courts is unjustified. By "strong judicial review", Waldron refers to a system in which

"courts have the authority to decline to apply a statute in a particular case (even though the statute on its own terms plainly applies in that case) or to modify the effect of a statute to make its application conform with individual rights (in ways that the statute itself does not envisage)". Courts also have the authority "to establish as a matter of law that a given statute or legislative provision will not be applied, so that as a result of stare decisis and issue-preclusion a law that they have refused to apply becomes in effect a dead letter". (p. 1354)⁶

Weak judicial review, by contrast, may involve ex-ante scrutiny of legislation by courts, in order to determine whether or not it is unconstitutional, or violates individual rights, 'but [courts] may not decline to apply it (or moderate its application) simply because rights would otherwise be violated'. (p.1355). Examples of strong judicial review are America, and Canada.⁷ Examples of weak judicial review are the United Kingdom and New Zealand. (pp. 1355-6)

⁶ Waldron notes that some European courts, though not American ones, also have the authority to strike a piece of legislation out of the statute-book altogether, although he thinks that the 'real effect' in America is to give courts authority that "is not much short" of this. (p.1354-5).

⁷ Waldron discusses the Canadian "Notwithstanding clause" pp. 1356-7. Because the clause is rarely invoked, he treats Canada as an example of strong judicial review, rather than as an "intermediate case".

Four Assumptions

According to Waldron a reasonably functioning democracy can be assumed to have four features that, together, make strong judicial review an insult to democratic citizens and legislatures. The first is a representative legislature, elected by universal adult suffrage, in which debates about how to improve society's democratic institutions "are informed by a culture of democracy, valuing responsible deliberation and political equality" (pp.1360 and more generally 1360-2). The second assumption is that judicial institutions are in reasonably good order, and are set up on a non-representative basis to hear individual law-suits, settle disputes, uphold the rule of law, and so on (pp. 1360, 1363-4). This assumption has no bearing on Waldron's conclusions, but is meant to show even-handedness as between those who favour and those who oppose judicial review. The third assumption is that most members of society and most officials are committed to the idea of individual and minority rights (pp.1360, 1364-6). The fourth assumption is that there is "persisting, substantial and good-faith disagreement about rights....among those members of society who are committed to the idea of rights" (pp.1360 and 1366-9).

Given the first assumption, Waldron believes, the burden of proof is on those who would justify judicial review, not those who would oppose it. Given the third assumption, he claims "there is no need for decisions about rights made by legislatures to be second-guessed by courts" (p.1360). Given the fourth assumption, he argues that "allowing decisions by courts to override decisions...by legislatures fails to satisfy important criteria of political legitimacy" (p.1360). Hence, he concludes, it is only in non-core cases of democratic government – cases where these assumptions do not hold –

that strong judicial review can be reconciled with democratic commitments to the equality and political participation of citizens. As Waldron summarises his argument,

“judicial review is vulnerable to attack on two fronts. It does not, as is often claimed, provide a way for a society to focus clearly on the real issues at stake when citizens disagree about rights....And it is politically illegitimate, so far as democratic values are concerned: by privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality...” (pp. 1353).

But what are the “important criteria of political legitimacy” that strong judicial review fails to satisfy in the core cases where a democracy is functioning reasonably well? The answer is to be found in Waldron’s claim that while outcome-based criteria fail to tell decisively in favour of judicial review, procedural concerns tell almost overwhelmingly against it. The heart of Waldron’s core case against judicial review, then, is this: that evaluating the goodness or badness of judicial review based on the decisions or outcomes that it produces is inconclusive; but procedural concerns for equality, participation and fairness tell decisively against judicial review and in favour of legislative sovereignty. (pp. 1375,1393, 1386)

The “Legislative Legitimacy” Thesis or Judicial Review and the Vote

According to Waldron, even when legislatures make the wrong decision about the rights we have, they have one enormous advantage over judiciaries, even when the latter make the right decision: that they are legitimate in ways that the latter are not. This legitimacy resides in the fact that they have been elected by citizens based on the egalitarian principle of one person one vote, and majority decision to resolve disputes; and because legislators are themselves bound to resolve their disagreements about rights by making decisions based on one person one vote and majority decision. (p.1388) In the real world, Waldron notes,

“the realization of political equality through elections, representation, and legislative process is imperfect. Electoral systems are often flawed...and so are legislative procedures” (p.1389).

But we are assuming a reasonably functioning democracy, not a perfect one, and so these defects need not undermine the legitimacy of a legislature and, therefore, the core case against judicial review.

There are several puzzles here. First, governments very often are not the product of majority voting, not even a majority of those who actually voted, let alone a majority of those eligible to vote. One might think of this as a defect of a particular voting scheme - for example, of first past the post in a system dominated by two parties, as in Britain - except that it seems to be such a natural consequence of the system, that calling it a defect seems misleading.⁸ Something similar happens with proportional representation, too,

⁸ The effects of “first past the post” mean that governments can, and have, won a Parliamentary majority while gaining fewer votes than their main opponent. This happened to Labour in 1951, when they lost to

which makes it likely that people's beliefs about the legitimacy of their governments depend on something more than simply universal suffrage and majority rule; and are likely to be more contingent, and much more a matter of degree, than Waldron implies.

Even if we abstract from these worries, however, there is something strange about Waldron's insistence that the mere fact of being elected gives legislatures a legitimacy that judiciaries do not have and cannot have. To the familiar point that judges are, typically, appointed and approved by decision-makers who have been directly elected, Waldron responds that legislative elections, though imperfect, are

“evidently superior as a matter of democracy and democratic values to the indirect and limited basis of democratic legitimacy for the judiciary. Legislators are regularly accountable to their constituents and they behave as though their electoral credentials were important in relation to the overall ethos of their participation in political decision-making. None of this is true of judges”(1391).

This assumption that legislators are obviously legitimate in a way that judges cannot be pervades Waldron's paper, and not merely his procedure-based arguments against judicial review. It is reflected in Waldron's assumption that the burden of proof is on those who favour judicial review, rather than those who reject it, because once we have assumed that a society has a democratically elected representative legislature

Churchill and the Conservatives; and again in 1974, when they lost to Thatcher. Bingham Powell assures me that Britain is in no way peculiar in these respects. Apparently even in “majoritarian” systems a single party “very rarely” wins a majority of votes; and in 10% of the cases the plurality winner comes in second in the legislature, as has happened in Australia, New Zealand, Canada and France, as well as Britain. See Bingham Powell, *Elections as Instruments of Democracy*, (Yale University Press, 2000), ch. 6.

“what reason can there be for wanting to set up a non-elective process to review and sometimes override the work that the legislature has done?” (p.1362).

Even if we share his assumption that a reasonably functioning society has a judiciary that cares about rights, and is generally able to protect them, he supposes that the judiciary should have only a minimal, and largely advisory, function in resolving disputes about rights between citizens and legislature. No argument is given for assigning the burden of proof this way, just as none is given for supposing that judges must be less legitimate than legislators simply because they are not elected representatives of the people. Instead, Waldron seem to believe that the relative legitimacy of legislature and judiciary is self-evident in a reasonably functioning democracy.

Waldron assumes that because judges are not legislators they are somehow deficient from a democratic perspective. But this overlooks the possibility that courts and legislatures might have ways of being democratic or undemocratic that are distinctive to themselves, given their respective functions and powers, as well as ways that they share. What distinguishes democratic from undemocratic judicial bodies, one might think, is not that the former are elected and the latter are not. Rather, the difference resides in such things as the content, purpose and likely consequences of the rules that bind them, of the rights that they seek to enforce, and of the manner in which they seek to do so. We might also want to include the ethos with which the judiciary operates and the ways in which they are recruited and promoted. So while directly electing a judiciary may be one

way of constituting a democratic judiciary,⁹ it seems unlikely that it is a requirement for selecting a democratic judiciary. This being so, there is no reason to suppose that a judiciary is less democratic than a legislature simply because the latter, but not the former, is elected by universal suffrage.

Nor is it clear why the fact that legislatures have the duty to represent the interests of their constituents – and, collectively, of the country as a whole – renders legislatures more democratic than judiciaries who do not have the duty to represent anyone. When we think of a democratic, as opposed to an undemocratic, judiciary it seems natural to think of the difference between a society where legal professionals of all ranks come from all ranks of society, and where access to legal education, information, legal advice and expertise and a legal career are all widely dispersed, rather than being the prerogative of a small or relatively small group of people. We can share Waldron's assumption 'that judges are typical of the high-status and well-educated members of their society – and have a high status in the political system and a position that insulates them from specific political pressures' (1364) - although I, for one, am sceptical that a democratic society can have large differences in the power and status of its members without undermining the ability of people to care about each others' rights. But, even granted Waldron's assumption, it matters whether the society they come from is highly stratified by birth, so

⁹ Larry Alexander, "What is the Problem of Judicial Review?" (2006) 31 *The Australian Journal of Legal Philosophy*, I am grateful to Prof. Alexander for sending me a copy of this article in advance of its publication. On elected judges see section v, pp. 16-17

that judges are likely to come from high-status and well-educated homes, or whether such high-status and superior education is an *achievement* rather than an *inheritance*.¹⁰

It seems possible, therefore, that judges can be representative and democratic even if they are not elected *in order* to be representative. They can be selected from a people that is not segregated by lines of race, religion, income and wealth, for instance; they can see themselves as striving to personify what is best in their society, or in its legal system and judiciary; and their actions and deliberations may reflect an ethos of equality and a democratic regard for the rights of all people. In short, there are a variety of ways in which judges can represent democratic ideas and ideals in their person and behaviour; and there are, in addition, a series of institutional features that are likely to shape the ways that democratic, as opposed to undemocratic, judges select cases, think about them, and present their decisions.¹¹

That is not to dispute Waldron's point that many, perhaps most, of these may be controversial, because people often disagree over what constitutes democratic manners, procedures and ideals, as well as democratic rights. The point, rather, is this: that it seems likely that judiciaries and legislatures can each be democratic or undemocratic in their own way, and it remains unclear why we should identify the ways that legislatures can be democratic with the proper way of being democratic. Without some arguments on

¹⁰ It not evident what sort of legal training and experience judges ought to have. Indeed, in Britain, now, there are proposals to allow people to become judges who have a law degree, but have never practiced law.

¹¹ On accountability, for example, see "Developing Mechanisms for Judicial Accountability in the UK" by Andrew Le Sueur, (2004) 24 *Legal Studies*, pp. 73-98.

this score, therefore, there seems no reason to suppose that legislatures are more democratic than judiciaries – however that should be understood.

If we drop that assumption, there is no reason to adopt the burden of proof that Waldron suggests – a burden of proof that, in and of itself, implies that judicial review of legislation is a departure from a democratic standard of decision-making instantiated by the legislature. Instead, one might look at matters the other way: that if the judiciary is in reasonably good working order, what reason would there be to hand over the task of judging disputes about rights to a body whose principle tasks would seem to lie elsewhere? But rather than place the burden of proof on one side or another, I think it best to place it as equally as possible: for what is at issue is how the relative tasks of judiciary and legislature should be described, evaluated and institutionalised in a democracy. And it seems a fair bet that there is reasonable controversy on this matter, and that it precludes favouring one or the other side in the debate over judicial review.

The first difficulty with the legislative legitimacy thesis, then, is that it depends on an exaggerated sense of the importance of voting to the legitimation of power in a democratic society. Though voting is important in representative democracy, it is not clear that Athenian democracies were undemocratic because they preferred lotteries to elections - although it is clear that democracy here applied only to free men, and so excluded most of the Athenian population. Indeed, as Bernard Manin has shown, in classical democracies, and in the renaissance republics, elections were thought of as aristocratic devices, because they enabled some people to be repeatedly selected to the

exclusion of others. By contrast, lotteries were thought of as democratic ways to distribute power because, in principle, they gave everybody an equal probability of holding office, and enjoying the power, prestige and responsibilities that accompanied it.¹² Indeed, lotteries are still crucial to the selection of juries in the Anglo-American world, in part for that reason, and are often thought to be a quintessentially democratic institution. Universal adult suffrage, therefore, is but one of several democratic mechanisms for distributing and legitimizing power, and so cannot support the assumption that legislatures are *ipso facto* more democratic and legitimate than judiciaries.

Judicial Review, Equality and Fair Play

The second difficulty with the legislative legitimacy thesis is that it treats the desire to use judicial rather than legislative means in rectifying perceived wrongs as a form of bad sportsmanship, an unwillingness to play fair, or to accept that one has lost; an example of an undemocratic attitude to politics and to the resolution of conflicts of rights. Thus, while claiming to be sympathetic to the argument that judicial review can provide “an additional mode of access for citizen input into the political system”, (1394-5)

Waldron rejects this argument on the grounds that

“this is a mode of citizen involvement that is undisciplined by the principles of political equality usually thought crucial to democracy. People tend to look to judicial review when they want greater weight for their opinions than electoral politics would give them. Maybe this mode of access can be made to seem

¹² Bernard Manin *The Principles of Representative Government*, (Cambridge University Press, 1997), pp. 39-41 and ch.2.

respectable when other channels of political change are blocked...But the attitudes towards one's fellow citizens that judicial review conveys are not respectable in the core cases we are considering, in which the legislature and the elective arrangements are in reasonably good shape so far as democratic values are concerned" (1395).

Waldron is right that sometimes appeals to the judiciary are simply an unwillingness to accept that one has lost, an effort to prolong the fight, and perhaps an effort to punish one's opponents by forcing them to submit to the expense and worry of a court battle as well as a legislative one. But it is scarcely credible that this is all that motivates appeals to courts against legislative decisions. For instance, this story fails to distinguish between someone who challenges legislation in court after it has just triumphed in a hard-fought electoral and legislative campaign, and someone who is challenging legislation from decades past. As one may never have had the chance to win or lose, in the latter case, Waldron's objections can scarcely apply. Although he assumes that one should then try and rectify this past legislation through the current legislative process, he provides no reasons why this should be preferred to doing so through the courts, or why we should think of the use of judicial politics in this case as "undisciplined by the principles of political equality".

As I hope to show, the idea that judicial politics is somehow less egalitarian than legislative politics is debatable; and it is often far more accessible, participatory and direct than the latter. Moreover, Waldron seems indifferent to the problem that some

groups, rather than others, face the burden of removing unjust laws and customs from the past, in addition to pursuing their other political interests.

This is not because judges are so wonderful – after the disasters of *Bowers v. Hardwick*,¹³ or the blind spots of *Geduldig v. Aiello*, one can scarcely suppose that appeals to judicial review are always beneficial. But even when the results are bad, they can be illuminating as well as motivating in a way that may not true of legislative errors. Despite Waldron’s claims, responsibility for legislative injustice can be quite hard to identify;¹⁴ one’s chances of holding the culprits responsible for what they have done can be slim; and the resources to launch another fight may be hard to come by even if the likely pressures on the legislative agenda did not preclude a return to the issue. By contrast, judiciaries are relatively small and discrete; judges tend to publish their opinions

¹³ *Bowers v. Hardwick*, 478 U.S., 186 (1986) was a 5-4 Supreme Court decision which upheld a Georgia anti-sodomy law that outlawed both homosexual and heterosexual anal and oral sex on the grounds that there is no right to privacy covering homosexual sodomy, and that there is no violation of equality if the law is interpreted to apply only to homosexual, rather than heterosexual, sodomy. *Geduldig v. Aiello*, 417 U.S., 484 (1974) was a 6-3 decision in which the Court upheld a California disability insurance scheme that excluded disabilities relating to normal pregnancies from its coverage because not all women get pregnant. Hence, they concluded there is no sex discrimination against women, although it is only women who can get pregnant, and suffer its attendant disabilities.

¹⁴ At p. 1391 Waldron notes that
 “legislators are regularly accountable to their constituents and they behave as though their electoral credentials were important in relation to the overall ethos of their participation in political decision-making. None of this is true of judges”.

But it is far harder than Waldron implies to hold legislators accountable for rights violations. Apart from the difficulty of determining why most MPs voted as they did, the damage caused by a law may only be apparent much later. Even if one blames a party, rightly, for violating rights it does not follow that one should refuse to elect them again, even if one cares about rights. One may think them less likely to do so than the alternatives and, on important matters where one is not actually sure about how issues of rights will play out, (which may be most matters of any importance and complexity), one may have compelling reasons to prefer them to the alternatives. Elections are a very blunt and imperfect instrument if what you want to do is provide accountability for rights-violations and deterrence for the future. For similar concerns see Laura S. Underkuffler, “Moral Rights, Judicial Review, and Democracy: A Response to Horacio Spector, in (July 2003) *Law and Philosophy*, Vol 22. Nos. 3 – 4, pp.348-9

in some detail, whereas legislators often vote without explaining their position;¹⁵ and the resources necessary to bring a case to court, or to bring variants of an old case, are likely to be smaller than anything that is required to fight a legislative battle in most countries. It therefore strikes me as deeply unreasonable to insist that people trying to overturn unjust legislation should have to take a legislative rather than a judicial route.

Waldron's response, I would imagine, is that people disagree about what legislation is unjust, and so this argument simply enables everyone – whether or not they are members of historically disadvantaged groups, and regardless of the sort of legislation they are challenging – to take a pot shot at the decisions of democratically elected legislatures. That is true. However, there can be significant differences in the legitimacy of different pieces of legislation passed by the same democratically elected legislature, because of the inevitable role of technicalities, misunderstandings and strategic errors, exhaustion, chance and, of course, the very human tendency to find arguments that are familiar and congenial more persuasive than ones we find alien.¹⁶ So it is really not clear

¹⁵ At p. 1382 Waldron notes that legislative debates are published in Hansard or the equivalent – and, we might add, that at least with Hansard, these contain a record of how legislators voted, and whether or not they abstained. However, most MPs vote without contributing to the debates that are published in Hansard. Nor does Hansard contain a record of the important strategising, compromising and lobbying that is critical to the success of controversial legislation. There need be nothing disreputable about any of the latter. My point, simply, is that it is probably far easier for citizens to find out the public justification that judges give for their decisions than it is for them to find out what legislators would say, or have said. For an entertaining picture of some of the strategizing and compromising involved in passing Private Member's Bills in Parliament, see Leo Abse's *Private Member* (Macdonald, London, 1973). Abse must count as one of the most skilful users of the Private Members' Bill, and was intimately involved in legislation on the death penalty, (chs. 4 - 6), homosexuality, (ch. 9), Divorce, (ch. 11) Abortion, (ch. 13).

¹⁶ Indeed, legislation that Waldron and I both otherwise approve – such as the voting on the Lord Arran/Leo Abse's Sexual Offences Act (1967), involved several of these misunderstandings and strategic errors at key moments. For example, Barbara Castle's Diary for Tuesday, 20 Dec. 1966 says:
 "I asked Dick [Crossman] how the Sexual Offences Bill got through without a vote. He said that Dance, leader of the opposition to it, has been so sozzled that he failed to rise at the right moment".

that there is something particularly reprehensible about thinking that there are various laws passed by democratically elected legislators that should be modified or overturned as soon as possible, and so for thinking that a judicial rather than a legislative route should be available to do so. The reasons to seek the speedy modification or reversal of laws that one thinks unjust are particularly pressing when they are the product not of democratically elected legislatures, but of legislatures where blacks, Catholics, Jews and women or homosexuals were unable to get elected and, in some cases, were even denied the vote.

But what of the claim that judicial politics is undisciplined by principles of political equality that legislatures have to obey? It seems that all Waldron means by this is that legislators are elected by one person one vote, and then vote on such a basis themselves. But quite clearly that is not much of a constraint on legislative and electoral politics, however well-intentioned voters and legislators generally are. At a minimum, some groups have more political and economic clout than others simply because they are already organised. The fact that unions and employers' organizations exist, for instance, may be good luck for their current members, but it is rarely the result of their own efforts or, it should be said, of principles of political equality. Indeed, the shape of most contemporary political organizations – even radical or “oppositional” ones – has been deeply affected by their formation at the end of the nineteenth and beginning of the

(I have an excerpted copy of the Castle Diaries that does not contain this entry. However, it is quoted, and available, on the internet at http://myweb.lsbu.ac.uk/stafflag/sexual_offencesact_67.html. The same events are described, less colourfully, on pp.78-9 of Stephen Jeffery-Poulter's excellent *Peers, Queers and Commons: The Struggle for Gay Law Reform from 1950 to the Present*. (Routledge, 1991). It is clear that, but for Abse's command of Commons procedure, the bill would have been defeated yet again.

twentieth centuries prior to universal suffrage, and most associations continue to be affected by the near-exclusion of women and racial minorities from roles of power and authority until very recently.

This is especially true of the political weight of the Anglican Church in Britain, of the Catholic Church in most countries, and true of other religious groups to different extents. Waldron tends to ignore such matters when discussing abortion politics or the rise in interest-group pressure on the Supreme Court.¹⁷ But while there is, undoubtedly, a genuinely democratic element to both – reflecting the ways that the feminist movement and the religious right have each succeeded in organising and mobilising people who were previously more or less ignored by Democrats and Republicans – it would be naïve to think that we can understand the complexities of these phenomena simply in those terms. After all, black people are notable by their absence from most antiabortion organizations in the U.S., yet many black people are firmly opposed to abortion on both

¹⁷ It is notable that the Church of England was in favour of reform of the death penalty, of abortion law and of homosexual offences, in part because it believed that doing so would help to reinforce a distinction that it cared about: namely, the difference between sin and crime. See Peter Godfrey Richards, *Parliament and Conscience*, (Allen and Unwin, 1971) pp. 47 and 49 on capital punishment and pp. 66, 68, 81 on homosexuality. The Catholic Church, too, supported reform, although insisting that the age of consent for homosexual sex should be 21, and that like other voluntary sexual activity outside marriage, such sex was sinful. (p.69) On abortion, see pp. 105. Moreover, while the Catholic church was opposed to abortion reform at all - as it did not believe that a mother's life should take priority to that of a foetus on principle, if the two conflict (p.90) – it did not seek to foment or to organize opposition to the law. Nor, of course, did it threaten to excommunicate Catholic politicians, as has happened in America. Perhaps this is because its position in England is more vulnerable than that in America. (p.97, 108-9) But it may also be that the political culture of all religious groups in Britain differs substantially from the culture that is prevalent in America. See David Steel's comments, (22 July 1966, 732 *Parl. Deb., H.C.* (5th Ser.) p.1072 that "In recent years, the Churches have added their weight to the demands for reform – the Church of England Assembly, the Methodist Conference and, this year, the General Assembly of the Church of Scotland". See also David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe. V. Wade*, (University of California, 1998), especially ch. 2 on the role of the Catholic Church in the struggle over legal access to contraception in Connecticut).

racial and religious grounds.¹⁸ An antiabortion movement that really appealed to black people, it seems likely, would look very different from the one we now have in the U.S., where anti-abortion politics are so firmly tied to “states-rights”, to support of the Republican Party, and to a right-wing legislative agenda.

Electoral and legislative politics, therefore, are often distressingly unconstrained by principles of political equality. With the best will in the world it will still be a mammoth task to redress this in most countries, even if we had a good idea how to do so. So while judicial decisions may reflect out-dated and unattractive Bills of Rights, in most countries the “dead hand of the past” is stamped on the lives of those who would pursue a career in electoral and legislative politics. Constitutional amendments, of course, are generally quite difficult to achieve, and designedly so.¹⁹ But when we consider what it would take to give most social groups a roughly equal shot at organizing politically on

¹⁸ Thus, I do not think we should follow Waldron in endorsing Scalia’s interpretation of the political pressure now falling on the Supreme Court. According to Scalia

“As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers’ work up there – reading text and discerning our society’s traditional understanding of that text – the public pretty much left us alone...But if in reality, our process of constitutional adjudication consists primarily of making value judgments...then a free and intelligent people’s attitude towards us can be expected to be (ought to be) quite different...” (1390-1)

Waldron appears to believe that Scalia is right on this. But large groups of people have always been unhappy with Supreme Court decisions, and many of those were under no illusions about the role of personal experience and predilection in those decisions. It is only recently, however, that Courts have been subject to organized and repeated campaigns on such matters as abortion, gay rights, women’s rights, religion in schools and public spaces. Perhaps this should be treated as a now-permanent feature of American politics. But even if it is – the matter is unclear – the reasons behind this development, and its timing, suggest that matters are far more complicated than either Waldron or Scalia are inclined to think.

¹⁹ In his critique of Mark Tushnet, Walter Sinnott-Armstrong suggests that many of Tushnet’s objections are not really to judicial review but to a system that makes it so difficult to amend the constitution, and therefore, to overturn judicial decisions by legislative means. The argument applies with as much force to Waldron as to Tushnet. Walter Sinnott-Armstrong, “Weak and Strong Judicial Review” in (July 2003) *Law and Philosophy* , 22 Nos. 3-4, pp 387.

matters that they really care about, the task of organizing a constitutional amendment may seem a good deal clearer, and much less daunting.²⁰

In short, a democratic case for judicial review does not depend on the thought that “other channels of political change are blocked”, as Waldron supposes. (1395) It is sufficient that legislative skills, resources and opportunities are generally in short supply, relative to the demands placed on them. While Waldron seems to think that those wishing to remove old laws that discriminate against blacks or women, for example, should simply fight the good fight in electoral politics, I do not see why this should be so. In addition to removing these disabilities, such groups may have very lively and justified concerns about contemporary issues - whether domestic or international, concerned with the wellbeing of their own members, or motivated by concern for others. If legislation is the only means of redress for legislative wrongs, it is all too likely that much demeaning and harmful legislation will remain unaltered, and that important positive rights will continue to go unrecognised.²¹

²⁰ *Why We Lost the ERA*, by Jane J. Mansbridge, (University of Chicago Press, Chicago, 1986) sheds an interesting light on these issues. According to Mansbridge, between *Frontiero v. Richardson* decision, 411 U.S. 677, (1973) and *Craig v. Boren*, 429 U.S. 190 (1976), the Court established a new set of standards for reviewing laws that treated women and men differently, though it still declined to place sex or gender in the same “suspect” classification as race. (46) As a result, though, the Court made it harder to argue that the ERA was really necessary to protect women’s interests in the short term, whereas arguments that it would help to guide the Court in a more egalitarian direction in the long term foundered on the fear of those who opposed the Court’s decisions since *Brown v. Board of Education*, 347 U.S. 483 (1954) and so did not want to give a ‘blank check for the Supreme Court’. (Quoted by Mansbridge, p.47)

²¹ At p. 1382 Waldron rightly notes that “The text of a Bill of Rights may distort judicial reasoning not only by what it includes but also by what it omits”, and adds “A failure to include positive rights may alter (or distort) judges understanding of the rights that *are* included”. The point is important but hardly applies only to Constitutional law. Because the meaning of statutes can rarely be determined in isolation, failures to recognize positive rights here, too, are likely to have deleterious effects that ramify over time. For a poignant example see ch. 7 of Stephen Cretney’s *Law, Law Reform and the Family*, especially pp.180-183. In 1965 Joan Vickers’ used a Private Member’s Bill to highlight the legal inequality of wives and husbands, or the exclusive assignment to the latter of legal guardianship of their children. Her bill finally prompted the Conservative Government in 1973 to remedy the situation. In 1965, for example, mothers still

In this context it is worth noting that legislation that harms people's rights need not violate Waldron's assumption that people generally care about one another's rights. For example, discrimination against women is often justified on paternalist grounds – because women are weaker, or nicer than men, or already face special burdens because of their supposed “domestic duties”. Moreover, legislation, like administrative decisions, can have such a disparate impact on groups that it either prevents them acting on their rights, or threatens their equality and claims to equal treatment with others. An example of this might be the heavy reliance on local property taxes to fund state education in some parts of America. Such means typically advantage children living in wealthy areas relative to those living in poorer areas, because it is easier for those with expensive houses to raise very substantial sums of money from a fairly low tax rate, whereas poorer districts will predictably raise far less, even when their members burden themselves with a far higher rate of tax than wealthier districts. Court handling of these cases has been far from satisfactory in America.²² But even bearing Waldron's assumptions in mind, it is likely that legislative redress would be more precarious, uncertain and expensive for

had no legal right to permit a child to marry, no legal right to authorize withdrawals from a child's Post Office Savings Bank, and no legal right to consent to surgery for her child. Nor could a separated mother independently obtain a passport for her child, because this required the explicit consent of the child's legal guardian. Clearly such disabilities have ramifying consequences for mothers' ability to look after their children, and for their own social status. It took more than 50 years to achieve the 1973 legislation for which the National Union of Societies for equal Citizenship had begun to campaign in 1920. As Waldron accepts, prejudice against sexual equality may mean that legislation for sexual equality falls outside his “core case”. But the point, also, is that between 1965 and 1920 there was no legislation on the issue at all. Presumably this was partly because women may have been unaware of their legal situation until they became mothers, and, in particular, until they began to have marital problems over the care over their children. By that point, they were probably far too overwhelmed by the demands of daily life to organize a successful political campaign on what might well have been an unpopular issue. Significantly, Joan Vickers, herself, was unmarried and childless.

²² *San Antonio v. Rodriguez* 411 U.S., 1 (1973)

members of poorer districts in such cases, and it remains unclear what democratic principle requires us to seek legislative, rather than judicial, solutions to such problems.

So if you think that people should be able to vindicate their rights against the government, as well as against their fellow citizens, there are good reasons to deny that judicial review is undemocratic, and to require governments to provide adequate legal aid for this purpose. It can enable relatively poor, powerless and unpopular people to vindicate rights that they would otherwise have to let go; it can enable oppositional political groups to challenge conventional notions of political activity and political subject-matter; and it can provide a focus for claims of equality, liberty and participation that enlarge our understanding of democratic politics.²³ Electoral commissions and bodies of watch-dogs are necessary to ensure that democratic politics are, indeed, democratic, and to alert people to the need for changes to their political system and favoured practices. (1362,1389)²⁴ But for all its defects, judicial politics enables people to try to vindicate their rights, self-respect and public standing through means that speak to their sense that they have been wronged. This is an aspect of the case for judicial review that Waldron too easily overlooks, and for which weak judicial review provides no ready alternative.

²³ Aileen Kavanagh makes a similar argument at pp.483-5 of "Participation and Judicial Review: A Reply to Jeremy Waldron, (2003) *Law and Philosophy* Vol.22 pp. 451-486.

²⁴ It is worth noting that it was only in 1965, when the Law Commission was finally established, that Britain "had a statutory and professional body charged with the mission of reforming and modernizing its law". For a surprisingly gripping story about how the Commission was established, and what it has done, see Stephen Cretney, *Law, Law Reform and the Family*, (Clarendon Press, 1998). Ch. 3 is on Leo Abse's Forfeiture Act of 1982 – a private member's bill that was critical to justice for women who kill their violent partners; and chs. 2 and 6 on Divorce Reform are relevant.

Weak v. Strong Judicial Review

Take, for instance, the form of judicial review that we now have in the United Kingdom. In 1998 Britain incorporated the European Convention of Human Rights into British Law through the Human Rights Act. The Act authorised the courts to issue a “Declaration of Incompatibility” whenever a legislative provision is incompatible with one of the rights in the European Convention. A Declaration of Incompatibility, however, “does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given: and...is not binding on the parties to the proceedings in which it is made”.²⁵ Although a Declaration of Incompatibility is not binding, and does not invalidate any parts of a law, Waldron claims that “Still it has an effect: A minister may use such a declaration as authorization to initiate a fast-track legislative procedure to remedy the incompatibility. (This is a power the minister would not have but for the process of judicial review that led to the declaration in the first place)”. (1355).

A Declaration of Incompatibility, therefore, creates a legislative opportunity speedily to rectify an abuse of rights where, otherwise, there would be none. In that sense, it recognizes the urgency of preventing, if possible, and certainly of rectifying, violations of rights and, implicitly, acknowledges that the normal legislative process would make such speedy prevention or rectification impossible. However, there is no guarantee that a minister will take advantage of the opportunity, or will, indeed, do anything to stop rights being violated, to rectify the wrong done to people, and to ensure that such wrongs are not repeated. In that sense, the British system of judicial review still

²⁵ Waldron is quoting from the Human Rights Act itself, c. 42, para 4(2), (6). Waldron pp. 1355

seems quite inadequate if you care about rights. Indeed, in some ways, this seems worse than no judicial review at all: for now we can have a situation where the government need be under no illusion about the rights-violating quality of its legislation; and also has a device that would enable it to diverge from normal legislative procedure in order to amend the offending legislation. And yet, there is no obligation on the government to do anything. Short of taking a case to the European Court of Human Rights, it is not clear what wronged citizens can do to vindicate their rights.

Of course, one might say, “Well, that’s just the Court’s opinion, and the Court may have got it wrong, even if their decision was unanimous”. But that is too simple. Even if the government is inclined to agree with the Court, or is, at any rate, disinclined to mount a defence of its position, it need do nothing. It is likely to want to defend itself in the press, perhaps by saying that even if it violated the European Convention this is because there is some pressing concern that makes protecting Convention rights a secondary matter. National security is normally cited in these circumstances. But this is very different from having to defend its position to the people whose rights the Court believes were violated, or will likely be violated, by the legislation.

But say that the government really disagrees with the Court that its legislation violates rights. This is, clearly, the situation that Waldron envisages, since he seems to believe that governments never knowingly violate rights - although the defence of national integrity or security, and the national interest seem to be an established part of most governments’ repertoires, and politicians do not generally seem embarrassed to

appeal to them.²⁶ The difficulty about weak judicial review, at least in the British case, is that if the government disagrees that it has violated rights, it need do nothing to publicise and defend its judgement. It can simply ignore what the Court has decided. By contrast, a system of strong judicial review at least provides for the public presentation and defence of arguments on the matter. The process of appeal generally means that by the time an ultimate decision is made in court, the government is in no doubt about the arguments that it has to rebut in order to show that its legislation will not violate rights, and has had several opportunities to put its arguments on behalf of the legislation as fully and clearly as possible.²⁷

This is not a perfect proxy for government publicly justifying its decision directly to those who believe that their rights have been violated, but it is probably as good as one can get. In that sense, strong judicial review, by contrast with its weaker counterparts, seems to give effective expression to a society's commitment to the protection of rights

²⁶ Hence his claim that the Notwithstanding Clause insults ministers, by requiring them to claim that they have violated rights when they may believe that they've done no such thing. (Footnote 34, p.1357)

²⁷ Waldron seems to suppose that Courts will reach their decisions without considering what legislatures had to say on behalf of the legislation that they passed. While it is clear that courts ought not to try to second guess the wisdom or likely efficacy of a legislature's reasoning about policy, there is no need for it to ignore the arguments and evidence that were given in their debates. This seems relevant to Eisgruber's point that

“Judges take up constitutional issues in the course of deciding controversies between particular parties. As a result, those issues come to them in a way that is incomplete...Not all interested parties will have standing to appear before the court. Judges receive evidence and hear arguments from only a limited number of parties. As a result, judges may not have the information necessary to gain a comprehensive perspective on the fairness of an entire social, political, or economic system”. (quoted footnote 93. p. 1380 Waldron).

Apart from the fact that one would not generally expect, or desire, judges to decide on the fairness of an entire system, one would expect lawyers for a government that was defending a particular law, to explain and defend the government's position, and to provide the appropriate evidence for their claims. If it does that, it is unclear why the fact that judges cannot listen to everyone should bias their findings in ways that are troubling from a democratic perspective. After all, legislatures do not hear all points of view either – not ever, we might add, all relevant points of view.

by government, as well as by citizens; and by forcing governments to justify a particular legislative provision in terms of rights, it seems to reflect concern for accountability and, even, for equality between government and the governed.

This will be true even if, in the end, people think that the court's decision is wrong, and that the government was right: for the effects of the procedure itself, and the opportunities that it provides for people to vindicate their rights, can be positive even when, as will inevitably happen, the decisions of the court are considered to be controversial at best, or misguided at worst.²⁸ No one expects courts to give the right decision all the time in cases between civilians; nor does their legitimacy rest on their ability to avoid controversy or error. Instead, it seems likely, where people support them it is because they believe that some such institution is desirable in order to protect rights. Those who are more knowledgeable about the workings of the legal system may be inclined also to distinguish between respect for courts as a way of resolving intra-civilian disputes and the quality of the legislation, or judicial procedures, within which they have to operate – all of which may be thought to need reform. And, of course, there is always the well worn idea that one can respect an institution without respecting its current manifestation. If, as seems likely, such considerations explain support for judicial resolutions to conflicts over rights amongst civilians, it is likely that their equivalents explain, with as much justification, what legitimacy people are willing to grant courts engaged in strong, as in weak, review of legislation. So far, Waldron has failed to show

²⁸ Walter Sinnott-Armstrong above, pp.390-91

why we should conclude that such beliefs are misguided in the one, and only the one, case.²⁹

Conclusion

I do not believe, therefore, that the legislative legitimacy thesis withstands critical scrutiny. If it does not, then we have good reason to reject Waldron's conclusion that judicial review is illegitimate and undemocratic. But that does not mean that we should therefore conclude that judicial review is required by democratic government. Absent reasons to believe that courts really do a better job of protecting rights than legislatures, – and it strikes me as deeply improbable that such evidence will be forthcoming – we have no reason to conclude that countries are undemocratic unless they have judicial review of legislation. On the other hand, both the strengths and weaknesses of Waldron's arguments can help us to improve the protection for rights in systems with and without judicial review.

²⁹ Despite my disagreement with Waldron on this matter, I agree with an anonymous reviewer for this journal, who suggested that some of my concerns with weak judicial review in the British case might be met by amending the Human Rights Act to oblige governments to publicise and defend their judgements on rights. This seems an excellent idea and would go some way to alleviating my concerns. However, such an amendment would still leave us with a form of judicial review that precluded individuals, themselves, from vindicating fundamental rights against their government. How serious a problem that is, I suspect, depends on how "open" and accessible the political process is in Britain – or elsewhere with weak judicial review – and how far the political process is designed to identify, express and support citizens' own concerns about the state of their rights.

Take, for instance, the Private Member's Bill (PMB for short) in Britain. As Waldron approvingly notes, it has been used to pass important legislation that, in the States, has been settled in key respects by the Supreme Court. Thus, David Steel's private member's bill was responsible for making abortion legal in Britain in 1966; Leo Abse and Lord Arran's efforts were responsible for liberalizing Britain's antisodomy laws in 1967; and Sidney Silverman's bill was responsible for ending the use of the death penalty in Britain in 1965. Waldron tends to hail these as triumphs of democracy.³⁰ The important thing about them, however, is that they were all passed on a "free vote" by members of both Houses of Parliament, who were free to vote their consciences, rather than to vote a party line, although as might be expected, and as statistics can confirm, MPs consciences tend to divide on party lines.³¹

PMBs are not part of a government's electoral or legislative programme. However, success in passing legislation by this means generally requires government support in order to make the necessary legislative time available, to help with drafting the

³⁰ It should be noted, though, that the complications surrounding the abolition of the death penalty call into question how far either the general public, or a majority in both Houses, actually wanted it abolished for all offences. The problem, in part, was that the previous effort to rationalize the law, in 1957, had led to an Act that was full of anomalies. No one wanted to go back to that. On the other hand, the difficulties of coming up with an alternative that kept capital punishment for some offences, without the disadvantages of the 1957 Act, eventually seem to have determined what happened. See pp. 60-61 of *Parliament and Conscience*, and ch.3 for the full story of the long battle over capital punishment.

³¹ "Voting Without Party?" by Charles Pattie, Ron Johnston and Mark Stuart shows that party is, indeed, the prime determinant of "free votes". But that is what one should expect in a system where parties have an important ideological component. That does not mean, however, that it would not be morally wrong, and politically objectionable, to force party voting on issues such as the death penalty, abortion and homosexuality. So, something like a permission to vote one's conscience must be part of any strong system of party discipline, which conditions promotion, good standing, and favour in one's party on obedience to a party whip. See *Conscience and Parliament*, ed. Philip Cowley, (Frank Cass, London, 1998), pp. 146 – 176, also 187-9 of Cowley's "Conclusion".

details of legislation, and so on.³² PMBs are opportunities for members of both parties to pass legislative reforms that governments are unlikely to sponsor, but of which they may approve. They may not sponsor them because, like laws requiring people to wear seat-belts, they are likely to be unpopular and their advantages, when first proposed, may be sufficiently unclear that governments will want to take up valuable government time on them. But there are also issues, like abortion, the death-penalty and gay rights, which British governments are reluctant to spend time on not simply because they are likely to be unpopular, but because they are the sort of issues on which you simply cannot ask legislators to vote a party line. This, of course, makes it highly unlikely that governments will sponsor such legislation. After all, legislative time is typically short enough that governments have to winnow their list of proposed legislation very severely. In those circumstances, it generally does not make sense for them to spend time on something that they cannot use their majority or credibility to pass, and so cannot easily put on their election manifesto, or submit to the electorate for its prior approval.³³

³² *Parliament and Conscience*, pp.30-31, and at p.33 Richards notes that because the drafting of legislation, in Britain, is such a specialized art,

“No member unaided can hope to produce a draft Bill framed in language that will satisfy lawyers. Even highly qualified lawyers unskilled in draftsmanship fail in this task. The Matrimonial Property Bill, 1968, was prepared by some of the best legal brains in the London School of Economics, yet the quality of the drafting was widely condemned”.

However, members have no constitutional right to assistance in drafting their bills.

³³ Of course, a Party could make an election commitment to giving MPs a free-vote on some proposal. But unless it commits itself to proposing the legislation, for which a free vote will be adopted – even if it simply copies it from some previous PBB – there is no guarantee that the issue will get parliamentary time, or legislative scrutiny. However, in 1964, Harold Wilson, then Leader of the Labour Opposition, explained to the Society of Labour Lawyers that because the 1957 Homicide Act had neither a rational nor a moral basis, being so filled with unexpected anomalies, a Labour Government would be willing to find Government time for a Bill to change it, but would treat voting on the Bill as a matter of conscience. In the Queen’s speech in 1964, after winning the election, Wilson made good on the promise. However, in Peter Richard’s view,

“Here was a constitutional oddity. A Bill was mentioned in the Queen’s Speech on which the Government, as such, did not express an opinion and which was subsequently introduced by a back-bencher, Sydey Silverman. There is no doubt that some of the procedural wrangles that developed over the Bill were due to its curious parentage”. (*Parliament and Conscience*, p.52).

Private Member's Bills, or their equivalents, then, are clearly desirable in democracies that have a competitive party system with fairly strong party discipline, because many issues that are critical to people's rights, are so entangled with people's conscientious convictions that you cannot ask legislators to toe a party line on them. The trouble, in the British context, is that the system does not work particularly well, because there is no obligation on governments to provide time for PMBs and, increasingly, they are not doing so.³⁴ There are other difficulties as well, which follow from the fact that time for PMBs is residual: it is very hard to pass legislation by such means; defeat at one stage means that the bill is lost and the issue must await success in the next lottery for PMBs;³⁵ while MPs are free to vote their conscience, they are also free to be lazy, careless, irresponsible and to make the most astonishingly ignorant and prejudiced remarks in ways that party discipline generally precludes.

Amongst other problems, Richards notes that "one occasion there was such confusion when a vote was taken that the result of the vote was clearly contrary to the wishes of Members and the formal record had to be revised at a subsequent meeting". (p.53) and for further problems, see pp. 60-61.

³⁴ In the immediate postwar period, between 1945-8, the Atlee government provided no time for such bills. The period from 1964-70, when Labour was in power seems to have been the high point, and quite atypical, when it comes to a willingness to make time for PMBs. (p.2 Marsh and Read below). Since then, the Labour party has been willing to grant some time, but after 1970 "the Conservatives have only done so in unusual circumstances", p.25 of "British Private Members Balloted Bills: A Lottery With Few Winners, Small Prizes, But High Administrative Costs" (Jan. 1985) David Marsh and Melvyn Read, No. 21 in the *Essex Papers in Politics and Government*, University of Essex, Department of Government. (The ISBN for this study is 0 9477737 21 9 and it can also be found on Amazon!)

³⁵ According to Philip Norton, "in the twenty-five year period from 1977 to 2002, no fewer than 300 [PMBs] became law.....However, for every private member's bill that passes there are usually about eight or nine others that do not make it". Philip Norton, *Parliament in British Politics*, (Palgrave, 2005), p. 72). According to Norton, less than 5% of Parliamentary time is spent on PMBs (p.74) Hence the title of Marsh and Read's study on PMBs: "British Private Members Balloted Bills: A Lottery With Few Winners, Small Prizes, But High Administrative Costs".

In short, while Waldron's contrast between Britain and America usefully reminds us that legislatures can pass important legislation about rights without the pressure of judicial scrutiny, a closer look at the British case highlights the difficulty of building institutional protection for controversial moral rights into a competitive party system. In this case the problem is not that governments are particularly likely to trample on people's rights. The problem, rather, is that they are unlikely to modify whatever legislation is in place, although commissions of experts may have long condemned the current situation, and have reached considerable consensus on the changes that ought to be made. It seems likely that other democracies with strong party systems face similar problems. Whether or not we are persuaded by Waldron's critique of judicial review, then, it looks as though we have good reasons to improve both our legislative and judicial institutions so that they better protect our rights in their day-to-day functioning. However, I hope also to have shown that despite Waldron's powerful critique, judicial review can be a useful and attractive addition to a democratic legislature, even if judges are no more infallible than legislators.