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Randomized Judicial Review

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Abstract

One of the main arguments in support of constitutional judicial review points to the need to curtail the legal and political power of majority rule instantiated by democratic legislative institutions. This article aims to challenge the counter-majoritarian argument for judicial review by showing that there is very little difference, at least morally speaking, between the current structure of constitutional judicial review in the US, and a system that would impose limits on majoritarian decisions procedures by an entirely randomized mechanism. The argument is based on a hypothetical model of a randomized system of judicial review, and proceeds to show that between the actual practices of judicial review in the US, and the hypothetical randomized model, there is not much to recommend the former. The current system of constitutional judicial review is fraught with many arbitrary elements, to an extent that makes the system only marginally better, if at all, compared with an overtly and blatantly randomized system.

Randomized Judicial Review

Andrei Marmor

Any reasonably informed observer of U.S. constitutional cases would have to admit that most of the important constitutional decisions of the Supreme Court are reached on (so-called) ideological grounds.¹ The justices' moral, political, sometimes even religious, convictions tend to influence, not to say determine, the outcome of their decisions on constitutional matters, though, of course, rarely the public reasons given for them. The reasons are always cast in legal terms and phrased as legalistically as possible. But when we hear the outcome of constitutional cases, we are very rarely surprised. To the extent that an upcoming decision is not entirely predictable, the uncertainty is due to one swing vote – at most two – on the Court. I am not suggesting that this is always the case. Some decisions on constitutional matters are not fraught with overt moral, political or religious issues, and sometimes it is difficult to trace the justices' reasons to any particular ideological convictions. But most of them are. And in most constitutional cases, decisions depend on the individual makeup of the Court. In some periods, liberal justices dominate and we get, by and large, liberal outcomes; in others, as nowadays, conservative justices form the majority and we get, by and large, conservative decisions. Either way, surprises are very rare and even if they occur, in retrospect they are often explicable on grounds of political maneuvering in or by the Court.²

None of this is news, of course. On the contrary, the general perception of constitutional cases in the U.S. as ideologically determined is widely known, publically debated and, generally speaking, entirely on the surface of public consciousness. But this begs an obvious question: Why do we go for it? What moral-political reasons can support a constitutional structure that gives an essentially nondemocratic institution, composed of

¹ I use the word “ideology” here only in deference to common usage in American legal and political discourse. The word is not meant to have any relation to the original, Marxist notion of ideology; it should be regarded as no more than a shortcut for what, following Rawls, we can call “comprehensive morality,” encompassing moral and ethical convictions, religious world views, political views and affiliations, etc.

² A nice example is the recent decision on the constitutionality of the Affordable Care Act (“Obamacare”).... Chief Justice Roberts' decision to side with the liberal branch of the Court surprised many, but I think it is clear enough that Roberts's decision was politically motivated, partly, though, by internal Court politics....

a handful of people appointed for life and not (professionally or politically) accountable to anyone, the power to prevail over the decisions of the democratically elected Congress and state legislatures? Considering the enormous resources we spend on maintaining the democratic process, it seems utterly puzzling that we are willing to put the outcome of this process at the mercy of an unelected institution that is not democratically accountable.

Most supporters of constitutionalism in the U.S. tell us that it is precisely the nondemocratic nature of the Court – its detachment from representative democratic procedures – that warrants the current constitutional structure. What we need, we are told by supporters of constitutionalism, is precisely this counter-majoritarian element in the system, in order to curtail, at least to some extent, the political and legal power of the majoritarian decision procedures that are instantiated by the democratic legislative institutions. In other words, and simply put, the idea is that constitutional judicial review is needed as a countermeasure to ordinary democratic procedures, as *a limit on majority rule*. I am not suggesting that this is the only rationale on offer justifying the current U.S. system of constitutional judicial review. But it is the one that I will consider in this paper.

There are, of course, various ways to push back on the counter-majoritarian rationale of constitutionalism, depending on the putative purpose of the limit on majority rule that is envisioned.³ For example, if the idea is that majority rule needs to be limited in order to protect the rights of persistent vulnerable minorities, it would be fair to ask whether constitutional judicial review actually manages to accomplish the task. Or if the putative purpose of the limit on majority rule is to curtail the power of the central or federal government, it would be fair to ask whether a differently structured democratic system would not accomplish the task better. Or if the idea is that we need to limit majority rule in order to secure greater political equality of some sort, then the question arises why differently structured electoral system would not do a better job in that respect. My aim in this paper, however, is to avoid these particular debates about the rationale of constitutionalism. My doubts about particular rationales of these sorts I expressed

³ See, for example, J. Waldron.... [Law & Disagreement, chs...] & M. Tushnet, *Taking the Constitution Away from the Courts...*

elsewhere.⁴ Here I want to begin with realities of constitutional judicial review, as they actually paly out in the US constitutional system, and show that there is very little difference between the current structure of constitutional review in the U.S. and a system that would impose limits on majoritarian decision procedures by an entirely randomized mechanism. Showing that may not amount to a conclusive argument against judicial review, far from it, but I hope it will give us some pause.

1.

Imagine that we could construct the following system: Instead of a constitutional court or supreme court with constitutional judicial review, we design a randomized system of judicial review. Here is how it might work (hypothetically, of course): Every new law enacted by the legislature is automatically submitted to the “judicial review computer.” Similarly, every constitutional challenge to a governmental policy or practice is filed with the same computer system (instead of the courts). Let us assume that a panel of lawyers feeds the computer with the set of possible legal outcomes of each challenge. Normally the set would be either pass or fail constitutional muster, but sometimes it could be a bit more complex, perhaps dividing the challenge to several options. As a simplifying assumption for now, we will postulate that the set of outcome options is both very limited in scope and fairly technical.⁵ Then, at the end of the year, the computer runs a program that yields a totally random selection of “cases” that it strikes down as “unconstitutional” and therefore legally invalid. How many of them? Well, we can easily determine some formula in advance, say, a certain number of cases based on factual parameters gleaned from the history of judicial review in the last century or so⁶ – or any such mechanical, but essentially randomized, method. Let me call this the Randomized

⁴ See my *Interpretation and Legal Theory*, revised 2nd ed, chapter 9, and *Law in the Age of Pluralism*, chapter

⁵ I realize that this is a very simplified assumption and that it ignores familiar problems of agenda settings and framing effects. However, there is no need to worry about it too much in the present context, as we will see in the sequel, a modified version of the hypothetical (that will be called RJR*) avoids these problems.

⁶ We would not want the formula to pick out a certain percentage of challenges because there may not be a check on the number of such challenges filed. A fixed number of decisions on “unconstitutionality” would be more sensible.

Judicial Review process, or RJR, in contrast with the actual Constitutional Judicial Review system we have, which I will henceforth label as CJR.

Obviously, the RJR system would have to be a bit more sophisticated and complex for it to be plausible, even as a hypothetical. For one thing, we would need some initial screening procedures. For another, we would need some process, judicial or other, to determine some basic factual findings that would be needed to ground the constitutional challenges. Both of these issues can be resolved, however, without insurmountable difficulties. We can imagine a system whereby lower courts would have to certify constitutional challenges, and determine their factual groundings, before they can be filed with the randomizing computer.

So here is the question I would like to pursue in this essay: How would RJR differ, in significant moral-political ways, from CJR? I will try to show that between the hypothetical RJR and the actual CJR the differences are rather insignificant, morally speaking, and, in any case, provide no good reasons to prefer the actual to the hypothetical. At this point you might think that the issue is moot because there is absolutely nothing to support a randomized process of judicial review; it is just too crazy. Well, crazy it might be, but two considerations lend it some support: First, just like the current CJR, it puts a limit on majority rule. It curtails, to the same extent, at least quantitatively (ex hypothesis), the majority's ability to enact laws or implement policies by a regular majority vote. Second, a consideration of fairness may count in favor of a purely randomized system. When you have a winner and a loser in a legal battle, and neither side is obviously right or wrong (more on this later), a randomized decision procedure gives each side an equal chance of success or failure. In any case, it is not my argument to recommend RJR. The argument is to show that compared with RJR, CJR is not really superior – not by much, anyway.

Before we proceed, an obvious objection needs to be answered. Surely, people would think, it matters what the constitution *says*. After all, there is a written constitution, with some determinate legal content, and it is the constitutional text and its legal content that judges need to implement by their decisions. Cases ought to be determined by the legal content of the constitutional text (and perhaps well-entrenched constitutional

doctrines and precedents). Therefore, the argument would go, the main difference between RJR and CJR consists in the fact that RJR is totally insensitive to the legal prescriptions embodied in the Constitution, whereas CJR is guided by the constitutional text, even if imperfectly so. Let me call this the obvious objection.

It is difficult to answer the obvious objection in the abstract. The extent to which the content of constitutional documents actually guides constitutional decisions of courts varies a great deal between different jurisdictions. I will confine myself here to the U.S. model, and to the realities of constitutional judicial review in the United States.⁷ So, here is the answer to the obvious objection: It is true that the constitutional text matters; the legal content expressed in the U.S. Constitution is not without significant legal ramifications. But the difference the constitutional text makes is rarely in play in the kind of cases that the U.S. Supreme Court decides on constitutional matters, for two main reasons: First, when the constitutional text evidently determines a given outcome, litigation is very unlikely to ensue. Parties have no money to waste on, and courts no patience and resources to deal with, cases in which a legal outcome simply follows from the public meaning of the relevant legislative text, be it constitutional or ordinary legislation. To put matters simply: Easy cases do not make it to the Supreme Court. If litigation makes it to the Supreme Court as a constitutional case, it is almost invariably because the text is not clear enough to dictate a particular result. I am talking about “the text” here, but we can easily extend the argument to include not only the text of the written Constitution but also deeply entrenched constitutional doctrines or precedents as well.⁸ The point holds true, even more so, actually, if we allow for a much broader sense of what constitutes “the constitutional text.”

Second, and this may be more unique to the U.S. model, the Supreme Court itself gets a huge amount of discretion in determining the cases it is willing to hear. Only a

⁷ By this I do not want to suggest that the constitutional systems prevalent in most countries are just slight variations on the U.S. model, far from it. The U.S. model of constitutionalism is unique in many respects, and probably more problematic than most. Some of these differences I highlighted elsewhere and I will not reiterate them here. See my *Law in The Age of Pluralism*, ch 4. In any case, for whatever it is worth, my analysis in this essay is confined to the U.S. example.

⁸ True, it sometimes happens that a long-held precedent is overturned by the Court, but that hardly ever happens without prior warning; it normally comes after years of uncertainty, following signals that the current Court is not happy with the doctrine or precedent in question and might be willing to change it.

small fraction of constitutional challenges filed get certified by the Court itself for hearing.⁹ So the Court sets its own agenda, year by year, choosing from a wide variety of options. How does it make the choice? Obviously, the Court tends to choose the kind of cases in which it can make a difference. Naturally, those are the kind of cases in which reading the text and understanding what it says is just not going to suffice for a clear inference to the outcome. The Court would tend to grant cert in cases in which some reasonable argument can be made that the Constitution prescribes X rather than Y, or Y rather than X. In short, again, the Court would hardly ever grant cert to hear an “easy case,” one in which every competent lawyer would reach the same legal conclusion. That just does not happen.¹⁰

To recap, briefly: The first assumption I make here, and one that I think is hardly controversial, is that if a constitutional case makes it to the Supreme Court it is not going to be the kind of case in which the constitutional text and deeply entrenched precedents, if you will, are simply going to determine a legal outcome. Constitutional cases at the Supreme Court level, at least, tend to be those in which plausible arguments can be made to interpret the Constitution one way or another, whereby none of the plausible readings is obviously dictated by the text. So there is that. And then, as we mentioned at the beginning, the result of the case is typically a function of the individual composition of the Court. Different justices would reach different conclusions, depending on their comprehensive moral, political and religious convictions. I am sure that one could give some exceptions and counterexamples. But I think we are entitled to assume here that, by and large, very few constitutional cases are actually determined, legally speaking, by the meaning of the text, by what the U.S. Constitution simply says.¹¹

⁹ It is difficult to separate the data on constitutional certiorari; overall, the U.S. Supreme Court gets about 9,000 to 10,000 petitions a year and grants cert to about 100 cases.

¹⁰ It may be worth keeping in mind that differences in decisions between Circuit Courts of Appeal constitute one of the main reasons for the Supreme Court to grant cert; thus, many of the constitutional cases heard before the Supreme Court have a history of split decisions in lower-level appellate federal courts.

¹¹ I should not protest too much if all this sounds like a superficial recount of ideas floated almost a century ago by the American Legal Realists. I am not endorsing their view wholesale, far from it. My comments above are confined to constitutional cases that make it to the U.S. Supreme Court. For reasons I have explained elsewhere in detail (*The Language of Law*), the reality in ordinary cases of statutory interpretation is very different. But that is not our concern here.

The obvious objection may have a point, however, when you think about the legal impact of the constitutional text in those cases that do not make it to appellate courts, because the legal content of the Constitution is just clear enough to determine particular outcomes. In other words, supporters of CJR could claim that, even if my previous argument is correct, and easy constitutional cases do not make it to the Supreme Court, countless legal issues are determined by the Constitution simply because it is clear enough what the Constitution mandates or requires. That, of course, is quite true. The constitutional text, and probably even more so, the well-entrenched constitutional doctrines and precedents, make a significant legal difference in countless cases in which the legal content of the constitutional law is not in any serious doubt.

However, we can easily accommodate this concern by revising the hypothetical structure of RJR. Instead of assuming that all constitutional challenges are automatically submitted to the randomizing computer, we can confine the randomization mechanism to those cases that do make it to appellate courts, under the current CJR system, and fail to muster unanimous decision at the appellate level.¹² The idea here involves a great simplification. It would take the unanimity of the decision by the appellate court as a proxy for cases in which the constitutional text, and perhaps deeply entrenched constitutional doctrines, are clear enough to determine particular results. And then, failure of unanimous consent on a constitutional case would be taken as an indication of some plausible controversy. Randomization would kick in, according to this revised system, only in cases of some actual legal controversy at the appellate courts level. Let us call the revised system RJR*. As I said, the use of unanimity at the appellate courts or the Supreme Court level should not be taken to be more than a simplifying assumption. It should be seen as a proxy for drawing the line between cases in which no serious legal doubt about the constitutional legal content can be raised, and those in which some plausible legal argument can be made to decide the case one way rather than another. It is not a perfect proxy, for sure, but good enough to make the argument here. Therefore, if you take the obvious objection to have a point, just think about RJR* instead of the original scheme; assume that randomization kicks in only in those cases in which there is

¹² And perhaps when there is a split in the decisions of circuit courts on the same constitutional matter.

some actual doubt about constitutional requirements. That would still cover the vast majority of cases that make it to the Supreme Court under the current CJR.

2.

Having answered the obvious objection only takes us so far. We need to consider more serious objections to RJR. In what follows, I will consider four main arguments purporting to show the superiority of CJR: the argument from public perception, the argument based on the rule of law, the argument from incentives and the social consensus argument. I will try to show that none of these arguments provides a compelling reason to prefer CJR over RJR.

Let me begin with the problem of public perception: I would not deny the allegation that RJR is not going to be popular with the general public. People would find it very difficult to accept, as a matter of political legitimacy, any system of constitutional review that is so overtly random and, thus, arbitrary. We would like to think that the boundaries of political legitimacy are not set by a computer program that strikes down, randomly, some democratic decisions as legally invalid. In short, it is difficult to imagine that anything like an RJR system would be socially and politically acceptable. And, of course, I am not claiming that it is a realistic, feasible scheme that can be implemented. But the question is whether this is a serious worry in the dialectical context of the argument, and I do not quite see how it would be, for two main reasons: First and foremost, because the point of the thought experiment I suggest here is not to convince us that we could actually replace our constitutional law with something like RJR. Since the argument is not based on the actual feasibility of RJR, the fact that it would be unlikely to be accepted by the public is neither here nor there. The second problem is that the public-perception argument does not go very deep. It does not give us any substantive reasons to prefer CJR over RJR, apart from the fact that CJR looks better, so to speak. Looking morally better does not make something morally better; it just makes it easier to live with it. And the fact that something is generally accepted by the public, as U.S. constitutionalism undeniably is, is not really an argument in its favor. One should always

keep in mind that many things that are widely accepted by the public, even for a very long time, can turn out to be wrong and morally misguided. To conclude: The fact that RJR cannot be publically accepted is not going to tell us why CJR is preferable to RJR.

Perhaps a more serious objection to RJR can be drawn from the ideal of the rule of law. *The rule of law* means a lot of different things to different people, but at least we all share the view that it purports to capture the idea that it is good to be governed by law. I would not want to deny that this is a commendable ideal and that governance should always be subject to law and constrained by it.¹³ The question is why would RJR violate the rule of law? Surely RJR does not violate it simply on grounds of employing a randomized mechanism for yielding some legal results. Various randomized mechanisms for allocating burdens or entitlements are often employed by legal systems in ways that are largely deemed fair and proper. Lotteries, of various kinds, are legal in many jurisdictions, and even if we have all sorts of reservations about some of them, violation of the rule of law is not one of those qualms. More to the point, licenses for various scarce resources, for example, are sometimes allocated on the basis of a lottery system, and often that is precisely the fair and equitable way of reaching the relevant outcome. For example, a municipality that allocates, say, some building permits, or taxicab licenses, on the basis of a fair lottery would clearly not violate the rule of law. So it is not the randomization element, per se, that would seem to violate the rule of law in RJR.

Perhaps the problem is not randomization, per se, but the sense that randomizing legal outcomes in such a way amounts to a form of *arbitrary* decision-making; the thought might be that RJR is overtly not responsive to reasons, legal or other, whereas CJR, even if random to some extent, and not quite constrained by law, is at least responsive to reasons. Remember, however, that if legal norms actually determine a constitutional result, it is very unlikely to be litigated at the Supreme Court level. So we are initially not considering here cases in which the relevant legal reasons fully determine a particular result. Nevertheless, I can see why a process that is clearly not even purporting to be responsive to reasons might seem very suspect from the perspective of

¹³ In fact, I defended this position in my “The Ideal of the Rule of Law”....

the rule of law virtues. But it should not be, at least not without further premises.¹⁴ Here is an example: My teenage daughter likes to buy clothes, lots of them. Normally, I am happy to oblige (with my credit card). Forget the cost, and assume it is not the issue. The main worry I have is that it is not good for her, in the long run, to be able to buy just about any fashionable clothes she fancies. It is not good for her to have no limits. Now suppose that I give my daughter an option: I tell her that either I get to impose a limit, once in a while, based on my own judgment of what she really needs – notice, a judgment that purports to be responsive to reasons – or else I can randomize the system. I tell her that we will input all her requests into a computer program (call it the veto-machine) that will randomly select, once in a while, some items that she cannot buy. And let us assume that we can guarantee that my own decisions and the veto-machine's limits would be comparable in the quantity of the limits it sets. I can assure you that, given this choice -- and assuming no possibility of bargaining¹⁵ -- my daughter would prefer the randomized system. Though clearly not responsive to reasons, the veto-machine is at least more respectful of her own choices. It does not convey the message that she has made a bad choice; it makes no claim to replace her own judgments, only to impose some quantitative limit, as it were. So between my decisions and the veto-machine's arbitrary choices, my daughter would be quite right to choose the one that is less judgmental and more respectful of her own choices, even if, ex hypothesis, the quantitative results are going to be the same. Some of her choices will be vetoed randomly, but respectfully.

But now you might think that another worry comes to the surface: what my daughter loses with the veto-machine is her right to be heard, that is, her right to present her arguments and make her case for her choices and preferences. And this sounds like a serious concern. Many people regard the right to have one's day in court, or the right to judicial hearing, as one of the central principles of the rule of law. And perhaps it is. So now the question becomes whether RJR violates the rule of law because it denies the

¹⁴ Another concern in the vicinity here might be the concern that RJR violates the principle that like cases should be treated alike. But it is far from clear what this principle really is, and what violates it. These are complicated issues that would take us too far from our present concerns; See my "Should Like Cases be Treated Alike?" [*Legal Theory* 2005]

¹⁵ Of course the possibility of bargaining would make the non-randomized system more attractive to my daughter. But we should rule it out; there is no bargaining in constitutional litigation, you cannot seek to trade a decision in one case for a decision in another.

relevant parties, that is, the parties to a potential constitutional litigation, the right to hearing, that is, the right to present their case and make reasoned arguments in a court of law.¹⁶ The answer is tricky: of course that in an obvious technical sense, RJR denies this right; you don't get your day in court, the randomizing computer is doing the work for you. But the real question is whether the relevant parties to constitutional litigation have the kind of right that is claimed to be violated here. I would not want to deny that generally speaking, in most cases, the right to have one's day in court is a very important one. Surely we could not imagine a fair and sensible system of criminal and private law without due process and full implementation of the right to hearing. It is not the general justification of such a right that I would like to call in question. The pertinent question here is whether denying parties a right to *constitutional* litigation is denying people a right that they have. There cannot be a simple answer to this question. To begin with, we wouldn't want to say that in a country like the United Kingdom, where there is no written constitution, and where constitutional litigation, though gradually developing perhaps, is still very limited, people's right to constitutional litigation is violated; if there is no judicial or quasi-judicial decision to be made, you don't have a right to present your case in court. My point is that the right to litigate and have one's day in court in a constitutional matter is entirely parasitic on the desirability of CJR. Since it is the justification of CJR that I am calling into question here, simply assuming that without it the right to have one's day in court is denied, is assuming the very point that needs to be proved.

In other words, there is a serious moral-political question about the right to constitutional litigation. Remember that a constitutional challenge is a legal challenge to a democratic process; what parties litigate in constitutional cases are decisions that resulted from democratic procedures. Of course people should have the right to challenge any public decision, whether democratically made or not. The question is why should they have such a right outside the ordinary democratic processes and institutions? Why should one have a right to challenge a decision that has been reached by democratic means in ways that are essentially non-democratic? Of course this is precisely the

¹⁶ I am grateful to Leticia Morales for pushing this point.

question that goes to the heart of the justification of constitutional judicial review. So once again, just assuming that CJR is preferable to RJR on grounds of the right to hearing, is putting the cart in front of the horse in the dialectics of this argument. If and to the extent that CJR is preferable to RJR, then people's right to have their day in court is one that should be respected. I don't see how one can justify the rationale of having a judicial, as opposed to a democratic decision, on the grounds that one has the right to present one's arguments. Arguments can be presented in a democratic process just as well. What calls for justification here is the exception to democratic procedures, namely, the removal of a decision from it and handing it to the courts, and I fail to see how we can justify this removal by appealing to a right to hearing. First we need to show that there is a justification for removing a certain decision from the ordinary democratic processes by handing them to a court, and then we can talk about the right to hearing and its proper implementation.

Perhaps the most plausible concern about the rule of law with RJR is the concern about fair warning: Presumably the idea is that, under a system of RJR, legislatures and the law's subjects would have no way of knowing in advance which laws and regulations might be struck down as unconstitutional and thus legally invalid. The question is, how is that different from the same problem we have with CJR? Constitutional uncertainty is something we have lived with for a long time. In countless cases, legislatures have enacted laws and government agencies have implemented policies that have later been found unconstitutional, sometimes much later, by the Court. If there is a problem of fair warning here, and there probably is, the difference between CJR and RJR is only quantitative, if that. Perhaps somewhat greater uncertainty is to be expected under RJR compared with CJR. But even so, remember that the numbers here are very small. Only a very small number of laws and regulations get struck down as unconstitutional every year; it amounts to a tiny fraction of legislative and administrative output. Furthermore, even if the level of uncertainty with RJR is somewhat higher, we gain something in terms of fairness. Thus, overall, it is not clear that RJR fares much worse compared with CJR on the overall metrics of the rule of law. Perhaps to the contrary: If some random element in a system allocates legal rights and entitlements, ideals of the rule of law would counsel

us to make those elements overt and fair, rather than conceal them under high-minded judicial practices.

3.

Let me turn to the third main problem with the hypothetical system of RJR, namely, that it does not guarantee any form of compliance with constitutional principles, whatever we take them to be. It is, after all, random. In contrast, one can say, in favor of CJR, that it operates as an inducement to compliance. Even if, say, Congress cannot be sure that a proposed piece of legislation would be deemed unconstitutional by the Supreme Court, Congress is at least aware of the possibility that it might be. In other words, CJR operates like a threat looming large over the legislature and other governmental agencies, constantly reminding them, as it were, that whatever they do might come under review, and, if found unconstitutional, would be struck down. One can make an argument, therefore, that, even if the threat is often underspecified, it is an incentive that, generally speaking, in the long run, induces compliance and enhances good constitutional behavior, as it were. It makes other branches of government at least *try* to remain within their legitimate boundaries.

One obvious question here is: compliance with what? We have already noted that, if the constitutional text (broadly construed) is clear and determinate, cases do not tend to make it to the Supreme Court. And we saw that by employing something like RJR*, we can handle the issue of compliance in cases of clear and determinate constitutional prescriptions, where no reasonable argument can be made to understand the constitutional requirements one way rather than another. Now, of course, many constitutional scholars have argued that courts ought to apply or be able to figure out some underlying constitutional principles, even if they are not explicitly prescribed in the constitutional text.¹⁷ I will not try to put pressure on this assumption here (I have done that elsewhere¹⁸). Even if you think there are some determinable answers to what counts as legitimate constitutional practices, CJR is not going to provide the incentive to comply with such

¹⁷ See, for example, W. Walluchow, *A Common Law Theory of Judicial Review: The Living Tree...*

¹⁸ See my *Law in the Age of Pluralism*, ch 4...

principles. In other words, I do not believe that we have an answer to the question of “compliance with what?” but this is not the issue I am going to press here.

The main problem with the argument under consideration consists in its underlying assumption that legislators necessarily want to avoid constitutional challenges to their legislative acts. The assumption is that, if legislators know in advance that a piece of legislation they seek to enact is likely to be struck down as unconstitutional, they would refrain from trying to enact it. But that is just not necessarily, or even typically, the case; scholars have long pointed out that legislators often go ahead with an act they expect to be struck down as unconstitutional because it gives them the populist political benefit vis-à-vis their constituents without actually bearing the responsibility for the unwanted consequences of the proposed legislation.¹⁹ Here is a schematic scenario: Suppose that there is strong popular support for a legal measure, say X, to be enacted. Suppose that X is a questionable measure from a constitutional perspective, one that might be struck down by the Supreme Court. If the legislators believe that voting for X is going to be popular with their constituents, even if they share the qualms about the desirability of X and/or its constitutionality, they would act rationally if they go ahead and enact X. If X is struck down by the Supreme Court, the legislators gain the popularity benefit from their constituency supporting X, while shifting responsibility for the measure’s failure to the Court. If the Court upholds X, the legislators get both the popularity benefit and the legal-moral support of the Court, a kind of vindication that X is not unconstitutional after all. Either way, voting for X is a win-win situation from the legislators’ perspective.

The general lesson from this is simple: Unconstitutionality does not necessarily operate as a sanction; it does not necessarily deter legislatures from enacting questionable measures. It is often to the contrary: Without CJR, legislatures would have to bear full responsibility for the ramifications of the legal measures they enact. With the constitutional guardianship of the Court, legislatures can behave irresponsibly by shifting

¹⁹ See, for example, Garrett & Vermeule, “Institutional Design of a Thayerian Congress,” 50 *Duke Law Rev* 1277 (2001) and references there.

the responsibility to the Court. Therefore, CJR does not typically induce constitutionally responsible behavior; often it does the exact opposite.

Of course, supporters of CJR may claim that such distorted incentives are the exception, not the rule. Most of the time, they would say, CJR provides the right incentives; it only fails to do so under some specific set of circumstances that are rather exceptional. But I seriously doubt that this optimistic view is also realistic. Remember that we could easily shift the argument from RJR to RJR*: If the unconstitutionality of a proposed piece of legislation is entirely on the surface, in no plausible legal doubt, legislatures would not have the political incentive to go ahead with the legislation. It is difficult to gain political traction with measures that are obviously and transparently unconstitutional. Populist pressure tends to build up around measures that seem constitutional to some, though not to others. Legislators tend to push for enactments that they can present as passing constitutional muster with some, even if strained, plausibility. Having the guardianship of the Supreme Court in the background in such cases only gives politicians the incentive to forge ahead, not to back down, for the reasons mentioned above.

In other words, perhaps unconstitutionality provides incentives to refrain from legislation in the clearest and most transparent cases. But RJR* would not apply there anyway. To make the argument for the preference of CJR to RJR*, proponents would have to show that, even when the constitutionality of a proposed legal measure is in some plausible doubt, the looming threat of the Court rendering the law unconstitutional – even if this threat is vague and uncertain – is likely to keep the legislature in check. I do not quite see what presumed incentive structure completes the argument here. A threat is a threat only if its materialization constitutes a setback for the relevant agents. It is difficult to see what setback to politicians' interests is in play here. If the constitutionality of the measure they seek to enact is in some doubt, why would they refrain from forging ahead?

There might be one type of case in which even a vague and uncertain threat of unconstitutionality provides some incentive to back down, namely, when the relevant measure forms part of a policy change the executive branches of the government seek to implement, and its obstruction by the Court would constitute a serious impediment to the

implementation of the policy. In such cases, the looming threat of unconstitutionality should provide the government with an incentive to avoid the threat and modify its proposed policy accordingly. One should think that this would be the case particularly with policy changes that involve heavy costs. But, even then, it turns out to be difficult to generalize. The executive branches of government are not free of populist temptations. They may also have an incentive to take the risk of obstruction or even failure of the policy they wish to implement if they can blame it on the courts, particularly when the policy in question is very popular with the ruling party's constituency.²⁰

To sum up the argument from incentives, the main problem with the argument in favor of CJR is that unconstitutionality does not necessarily operate like the threat of a sanction that could deter political actors from succumbing to populist temptations. On the contrary, the more populist the temptation for a legislative act, the less likely that CJR's presumed deterrent effect would have any real impact. In terms of incentive structures, there is no advantage to CJR over RJR*.

4.

The intuitive appeal of the argument I try to articulate here crucially depends on the premise that a very significant random element is already present in the current system of CJR. Constitutional decisions of the Supreme Court reflect a certain distribution of ideologies espoused by justices on the Court at any given point in time; furthermore, given the appointment procedures and especially the justices' unlimited tenure on the Court, the particular distribution of moral, political and religious views on the Court is not necessarily representative of the views held by the general population.²¹ Now, of course, supporters of CJR would claim that this is as it should be. After all, if the whole point of CJR is to act as a counterbalance to majority rule, curtailing the populist

²⁰ A good recent example, though technically a legislative product, comes from the Affordable Care Act... The administration and Democratic legislators were fully aware of the fact that a crucial aspect of the law, where constitutional challenge could have been easily avoided by labeling the mandate to purchase insurance as a federal tax, and yet they opted for a much more problematic formulation and only for political reasons.

²¹ As a striking reminder, consider the fact that all the current justices on the U.S. Supreme Court are either Catholics or Jews. There is not a single Protestant justice on the Court.

temptations of such procedures, the fact that the Court is not a representative institution is probably a good thing. But presumably it is a good thing only if it is not essentially random. If there is something both non-representative in the Court's constitution, and yet the likely outcomes of its decisions are random relative to the views and preferences of the majority, then we might as well have RJR, which at least satisfies a certain criterion of fairness. In short, my point is that the non-representative or non-majoritarian nature of the Court is not, by itself, a reason to prefer it over any other randomized non-majoritarian system; it has to be *non-majoritarian in the right way*.

So what makes the Court non-majoritarian in the right way? Some people might find it strange to think of the U.S. Supreme Court as a non-majoritarian institution when its decisions are reached by a regular majority vote. But we can bracket this concern for a while. Let us look at the kind of considerations invoked in support of the idea that the U.S. Supreme Court is non-representative or non-majoritarian in the right way. Some of the familiar points we can dismiss quickly. One consideration often mentioned points to the legal expertise of the justices. Even if we do not doubt that the justices are ideologically divided and often follow partisan political views, they are, after all, great legal minds, endowed with a huge amount of expertise in the law. That is true, of course; I would be silly to deny that the justices are among the greatest legal experts in the country. But the problem is that most constitutional cases, certainly most that really matter, are not about technical legal issues. They pose moral-political problems, and the dilemmas the Court faces are moral and political dilemmas, not legal ones. Expertise in the law does not make anyone an expert in morality, even if there is such a thing, which I doubt.²²

Similar considerations apply to the deliberation process in the Court. One might think that the adversarial and intellectual nature of Court deliberations are conducive to reasoned decisions that are likely to result in sound decision. After all, justices are presented with a wide range of arguments from both sides, they get an opportunity to question the attorneys in oral hearings, they have to explain their decisions in a detailed

²² I have elaborated on this and similar arguments in greater detail in my *Interpretation and Legal Theory*, revised 2nd ed, ch 9.

and argumentative manner, and so on and so forth. There is a lot to be said in favor of the relatively intellectual nature of this process. But the truth is that the process makes very little difference. At the end of the day, there is a vote, and the vote, as we noted, almost invariably reflects the moral, political and religious convictions that the justices started with. I am sure that the process helps the justices and their clerks formulate their legal opinions in more reasoned and argumentative manner; it does not help them to see the world differently from what they are used to. If I am wrong about this, we should have seen many more cases in which constitutional decisions of individual justices surprise informed observers. But the fact is that surprises are very rare, and almost always relate to the decision of a swing voter on the Court, the justice who tends to be the ideological independent, so to speak. That does not seem to be anti-majoritarian in the right way; it is anti-majoritarian in a random way, depending on historical circumstances, such as which justice was appointed by whom, when and how long the justice hangs on to his or her job on the Court.

If we want to find some serious considerations that support the idea that the Court's nondemocratic character constitutes some anti-majoritarian limit on democratic procedures in the right way, we need to look at deeper structural factors. We need to look at the kind of constraints that the Supreme Court, as an institution, is likely to impose on majority rule regardless of its momentary, accidental, personal composition. Some rough and vague generalizations are possible; it is generally true that courts tend to be relatively conservative institutions. They tend to reflect elitist world views. Courts typically avoid extreme positions on most social and moral issues and, crucially, they tend not to fall too far out of line with the views and dispositions of the median voters in the country. Courts tend to remain within fairly secure boundaries of social consensus, not statistically and accurately so, for sure, but roughly and generally.²³ That is so mostly because their power base is social acquiescence, not brute force. Courts gain all the power they have from the perception of the population that the power they exercise is legitimate. They cannot act,

²³ The very high likelihood that the US Supreme Court, conservative as it is, is expected to uphold a constitutional right to same-sex marriages later this year is a striking example of the point I make in the text. It shows how justices are willing to sacrifice even deeply held religious and moral conviction in the service of the court's long term social legitimacy.

at least for the long run, in ways that would antagonize their power base, which is, essentially, popular acquiescence in their legitimacy.²⁴

So where does all this lead? Well, it leads to the idea, a kind of reassurance, that, even if there is something random and arbitrary in the outcomes of constitutional cases of the Supreme Court, at least the boundaries are relatively secure. The chits are unlikely to fall far out of line with the national-cultural consensus. Let us suppose that this piece of armchair political science is true. The problem is that it would not support a good argument. If what makes CJR non-majoritarian in the right way is based on the premise that CJR is likely to reflect social-cultural consensus, at least generally and in the long run, as it were, then why do we need it to begin with? It would seem that we lost the underlying rationale of CJR, which is to put some limits on majority rule. Surely the ordinary democratic processes reflect social consensus with greater accuracy than the courts. In short, if the main justification for preferring CJR over RJR rests on the assumption that constitutional decisions are likely to reflect social consensus, the need for any form of constitutional judicial review is cast in serious doubt. Democratic legislative processes tend to do a much better job in that; they tend to be much more attuned to social and cultural trends in society than the courts.

By way of conclusion, let me emphasize again that the argument in this paper is not meant to provide an overall assessment of the arguments for and against constitutional judicial review. It is only meant to suggest that the counter-majoritarian rationale of CJR is seriously wanting. The current system of CJR is fraught with arbitrary elements, to an extent that makes the system only marginally better, if at all, compared with an overtly and blatantly randomized system. As I warned from the start, this is not a conclusive argument against CJR, but it should give us some pause.²⁵

²⁴ This is evident in cases of national emergencies, when courts tend to rally to the flag as quickly and as unreflectively as everybody else in the country. Perhaps you might think that the infamous *Lochner* era is a counter-example. To some extent it is, of course, but not entirely. First, keep in mind that the Court's rulings in this period represented the deeply entrenched ideology of the capitalist elite in the U.S.; it was not out of touch with social realities. Secondly, bear in mind that the *Lochner* era lasted only a couple of decades, eventually succumbing to the progressive movements that came to dominate U.S. political reality.

²⁵ I am grateful to Leticia Morales, Alex Sarch, and the participants of the legal theory workshop at McGill University, for helpful comments on earlier drafts.