

# Duquesne Law Review

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Volume 45  
Number 3 *Judicial Review in the Americas ...  
and Beyond: Symposium Issue*

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Article 6

2007

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D. Brooks Smith

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### Recommended Citation

D. B. Smith, *Judicial Review in the United States*, 45 Duq. L. Rev. 379 (2007).  
Available at: <https://dsc.duq.edu/dlr/vol45/iss3/6>

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# Judicial Review in the United States

*D. Brooks Smith\**

## I. INTRODUCTION

I am pleased to participate once again in a program organized by Professor Bob Barker which brings together jurists and academics with experience and expertise in the legal and justice systems of the Americas. I was flattered to be asked to offer comments on judicial review in the United States, and I am delighted to share this podium once again with so many distinguished speakers.

Flattered though I was by the invitation, the assignment is a daunting one: Examine the role of judicial review in the United States in a single lecture. That calls for some judicious editing. So, what I intend to do is confine my discussion to the costs and benefits of judicial review. My hope is to demonstrate that a modest approach to judicial review best balances the dual needs of maximizing democratic legitimacy and protecting individual rights. I also hope that these remarks will provide some insight into judicial review not only in the United States, but also throughout the Americas.

We should not underestimate the importance of judicial review in fostering vibrant democratic institutions. Judicial review is itself a critical component of the rule of law, both here and abroad. When promoted along with free and fair elections, the creation and development of civil society, and good governance as the rule rather than the exception, judicial review and the rule of law create the potential for rich democratic practices to thrive.<sup>1</sup>

Those of us who have attended law schools here in the States were taught in Constitutional Law 101 that judicial review serves to check and balance the legislature by protecting individual rights from a potential tyranny of the majority. But, there is more

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\* Judge of the United States Court of Appeals for the Third Circuit. This paper is adapted from a November 10, 2006 presentation at the Judicial Review in the Americas . . . and Beyond Symposium. The author acknowledges here the research assistance of Martin Totaro in both delivering and publishing this lecture.

1. Promoting the rule of law abroad has the potential to play a major role in United States foreign policy. See USAID, FOREIGN AID IN THE NATIONAL INTEREST: PROMOTING FREEDOM, SECURITY, AND OPPORTUNITY 38 (2002).

to the story. Both the arguments in favor of and against judicial review are more nuanced than the mainstream “checks and balances” view. My aim in this lecture is to present some of these arguments and to conclude that the benefits of judicial review outweigh any costs. Given that this conclusion comes from a federal appellate judge, I suppose it comes as no surprise. However, in my analysis leading up to that conclusion, I hope to provide a clear picture of the tradeoffs involved in giving an institution comprised of unelected men and women, appointed by the Nation’s Chief Executive, the ability to override laws passed by a democratically elected legislature. This tradeoff can, in turn, inform us about the form that judicial review should take.

## II. THE STAKES

Let me begin with a pragmatic discussion of the relationship between judicial restraint and judicial review. In recent years, Congress — and especially the United States House of Representatives — has increasingly attempted to strip lower federal courts of jurisdiction. The Supreme Court did not examine Congress’ ability to strip jurisdiction from lower federal courts until 1850, in *Sheldon v. Still*.<sup>2</sup> As academics have debated the scope of Congress’ authority to engage in jurisdiction stripping,<sup>3</sup> Congress has gone ahead and tried to do it, notably attempting to prevent lower federal courts from reviewing federal statutes in a number of politically-charged instances.<sup>4</sup> I will mention just a few for illustrative purposes.

Efforts to pass jurisdiction-stripping statutes often follow a typical pattern. First, a federal court will hand down a politically unpopular decision. Then, one or more Members of Congress will make the charge of “judicial activism,” followed by the enactment of a House Resolution that would strip jurisdiction in some form, and concluding with the resolution dying in a Conference Committee or not passing the Senate.

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2. 49 U.S. 441 (1850).

3. For a general, concise and comprehensive overview of congressional regulation of the federal courts, see RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 319-61 (5th ed. 2003).

4. While Members of Congress frequently attempt to alter jurisdiction of lower federal courts, successful bicameral jurisdiction-stripping efforts are rare. Putting aside any statutes that relate to the War on Terror, Congress has only once passed such a statute. Congress stripped the Supreme Court of appellate jurisdiction in *Ex Parte McCordle*, 74 U.S. 506 (1868), although the Court noted that the petitioner could have legitimately sought other habeas corpus relief but had not done so.

Here are a few examples from the 109th Congress:

- House and Senate attempts to prevent federal courts from deciding any cases that address the constitutionality of the Pledge of Allegiance;<sup>5</sup>
- a House Resolution to prohibit federal courts from holding state statutes that regulate pornography unconstitutional for First Amendment reasons;<sup>6</sup> and
- a House Resolution to deny federal court jurisdiction over the constitutionality of the Defense of Marriage Act.<sup>7</sup>

None of these initiatives ever became law. None even passed both houses of Congress. Yet there is no guarantee that future efforts will not meet with greater success.

From a judge's perspective, there are two unfortunate consequences of successful jurisdiction-stripping statutes. First, and most obvious, they impinge on the independence of the federal judiciary, a co-equal branch in our constitutional order. Removing even the possibility of judicial review gives Congress the incentive to pass potentially unconstitutional statutes that are politically popular, or at least popular with powerful interest groups. Second, the actual effect of successful jurisdiction-stripping statutes will be to give fifty different states the ability to interpret a federal statute in various ways.

For our part, the federal judiciary must recognize that Congress does not act in a vacuum. The instances I have just referred to arise out of politically unpopular federal court decisions that often touch upon "hot-button" issues that many believe are better left to the political branches of government — not life-tenured, unelected judges.

This is not to say that the branch of government intentionally shielded by the Framers of our Constitution from political reprisal ought to back away from politically unpopular cases. It is to suggest, however, that when we approach the political thicket, our decision-making must be clear, articulate, and logically defensible so that we are less susceptible to the always predictable charges of judicial activism. While jurisdiction stripping is viewed by most critical observers as a "bad thing," the mere threat of it may at least provide incentive to judges to provide the strongest possible jurisprudential justification for politically unpopular decisions.

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5. S. 1046, 109th Cong. (2006); H.R. 2389, 109th Cong. (2006).

6. H.R. 5528, 109th Cong. (2006).

7. H.R. 1100, 109th Cong. (2006).

## III. THE BEGINNINGS OF JUDICIAL REVIEW

Judicial review has become so embedded in the United States that it would be easy to take for granted. But, we need to keep in mind that *Marbury v. Madison*<sup>8</sup> was not decided until 1803, well over a decade after the states ratified the Constitution. The concept of judicial review had been part of the ratification debates, but I challenge anyone to point to a clear statement in the Constitution that justifies the form of judicial review we see today.

We must also remember the precarious situation that the judiciary found itself in at the turn of the nineteenth century. The climate toward the federal judiciary during the Adams/Jefferson years can be described as hostile. In 1802, the House and Senate, with a Republican majority, repealed the Judiciary Act of 1801. The reasons for this action are diverse, but one key element driving Republican opposition to the Act was that it provided federal courts with broad jurisdiction over land title disputes that most Republicans felt should remain the province of state courts.<sup>9</sup> It did not help matters that the debate over the role of the federal judiciary was embedded in an ongoing and rancorous political fight between Republicans and Federalists. Thankfully, one man, a moderate Federalist, rose above mere partisan politics and pushed toward the creation of a powerful and independent federal judiciary.

Chief Justice John Marshall believed that parts of the Judiciary Act of 1802, which replaced that of 1801, were unwise. This Act resurrected the practice of making the Justices ride circuit, which Marshall "considered . . . a conflict of duty since the justices would be trying cases that they might later hear on appeal."<sup>10</sup> Some radical Republicans thought that Marshall might "head a judicial revolt" and refuse to ride, but later went on to praise him for subordinating his personal views to the dictates of the Act.<sup>11</sup> Indeed, several Federalists had attempted to convince the Justices not to ride circuit with the express purpose of instigating a constitutional crisis.<sup>12</sup> However, through Chief Justice Marshall's leadership, the Justices refused to listen to those entreaties. The fact that powerful members of the Republican and Federalist parties

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8. 5 U.S. 137 (1803).

9. See JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 302 (1996).

10. *Id.* at 306.

11. *Id.* at 308.

12. *Id.* at 310.

thought that the nation's leading jurist would simply ignore congressional instructions speaks volumes about the unsettled role of the federal judiciary at the time.

It was within this uncertain and tension-filled climate that *Marbury v. Madison* was handed down. While the idea of judicial review had been floating around for some time, it took a seemingly minor dispute about some midnight appointments by President Adams prior to President Jefferson taking office for the Third Branch of government to take its proper role in our system of government.<sup>13</sup> I will not restate the facts of the case, with which you are no doubt familiar. The main point is that the Supreme Court had to decide whether it could issue a writ of mandamus commanding Secretary of State Madison to deliver a commission to Mr. Marbury as a justice of the peace that President John Adams had signed but not delivered just before leaving office.<sup>14</sup> Not helping matters any, James Madison did not even bother to show up at trial to defend his office's position — as you'll remember, the Justices sat as a trial court because the case was an original action under Section 13 of the Judiciary Act of 1789.<sup>15</sup>

I would like to note anecdotally that Chief Justice Marshall probably should not have been involved with the case in the first place, because he was actually the Secretary of State under President Adams, who had failed to deliver the commission to Mr. Marbury.<sup>16</sup> Chief Justice Marshall, however, has not asked me for my ethical opinion, and the counter-factual exercise of asking if and how the federal judiciary would be different today had he recused himself is best left to another day.

Thankfully, Chief Justice Marshall did author the opinion in *Marbury*. The opinion goes through a series of twists and turns. Chief Justice Marshall begins by showing how Marbury was entitled to his commission because it was a vested legal right.<sup>17</sup> He then moves to how the judiciary must be able to supply remedies to harmed individuals when such remedies are provided by law,<sup>18</sup> shifts to both respecting the sphere of the Executive Branch while

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13. *But see* Saikrishna Prakash & John Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 914-26 (2003) (arguing that the original meaning of the Constitution permitted state and federal courts to act as the final arbiter of potentially unconstitutional statutes).

14. *Marbury v. Madison*, 5 U.S. 137 (1803).

15. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80.

16. *Marbury*, 5 U.S. at 624 n.44.

17. *Id.* at 162.

18. *Id.* at 163 ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

still curtailing Executive action on purely administrative duties,<sup>19</sup> and finally asks whether Section 13 of the Judiciary Act of 1789 — which provided the Court with the power to issue the writ to Madison — was unconstitutional.<sup>20</sup> He concluded for a unanimous Court that Congress had impermissibly expanded the original jurisdiction of the Court by allowing it to issue writs of mandamus.<sup>21</sup>

We might argue the logic used to reach this result, but over the past two centuries judicial review has become a foundation not only for the judiciary but also our system of republican government.

My point with this mini-history is that, through the efforts of men like Alexander Hamilton — in Federalist No. 78, for example<sup>22</sup> — and Chief Justice John Marshall in *Marbury* and other decisions, this country now has a firmly established jurisprudence and legal culture that affords the judiciary the power to overturn legislative enactments. I would like to now take a closer look at the costs and benefits of this practice. Part of the problem with taking judicial review for granted is that we have the tendency to overlook the costs associated with it.

#### IV. THE COST OF JUDICIAL REVIEW

Professor Alexander Bickel once wrote that it is an “essential reality that judicial review is a deviant institution in the American democracy.”<sup>23</sup> While one might not go so far as to label judicial review as “deviant,” it is no minor thing that a small number of unelected judges can invalidate bicameral legislative enactments. A single federal district judge may do so with respect to statutes passed by a state legislature and signed by a governor or passed by Congress and signed by the President. A federal court of appeals panel can overrule a federal district judge who has upheld a statute against constitutional challenge. And the Supreme Court, with a five-person majority, can invalidate a state or federal law upheld by the legislative branch and two levels of the federal judiciary. So, as Professor Bickel often emphasized, there is at work here a kind of “counter-majoritarian difficulty.”

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19. *Id.* at 165-66.

20. *Id.* at 174-80. *See also* Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80.

21. *Marbury*, 5 U.S. at 174-80.

22. THE FEDERALIST NO. 78 (Alexander Hamilton).

23. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 17-18 (2d ed. 1986).

And while I am discussing legal theorists, judicial review has more directly come under attack by Jeremy Waldron and others.<sup>24</sup> While I conclude that most of Waldron's thesis does not properly weigh the multitude of benefits of judicial review, he does raise several points which are worthy of discussion.

I do not wish to shortchange the complexities and nuances of Waldron's arguments, but in the interest of time I will distill them to their bare essence. He gives a logically powerful demonstration of the limitations of judicial review. His attack on judicial review contains two prongs. First, Waldron contends that judicial review "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; on the contrary, it distracts them with side-issues about precedent, texts, and interpretation."<sup>25</sup> Second, judicial review is "politically illegitimate" because "it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights."<sup>26</sup> This critique suggests that inherent in judicial review is a distrust of democratic majorities to respect the rights of minority groups who cannot attract sufficient electoral support to have a particular right encoded in law. A hypothetical illustrates Waldron's point:

Assume that I am part of the majority and that a group in the minority would like to pass a law recognizing Right X. Right X would not directly affect me in any way. Why, then, should we assume that the minority group could not win my vote through persuasive arguments based on reason and logic? Analogously, why should we assume that courts employing judicial review will reach a better result?

If we accept this critique of judicial review, our system has institutionalized distrust of the citizenry — a systemic hesitance to recognize that members of a majority will be able to elect legisla-

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24. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006). See also MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Larry D. Kramer, *The Supreme Court, 2000 Term Forward: We the Court*, 115 HARV. L. REV. 4 (2001). As this list of scholars indicates, critics of judicial review cannot be labeled simplistically as "liberals" or "conservatives." See Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 689 ("The attack on judicial supremacy, today, comes both from conservatives, such as Robert Bork, and progressives, such as Larry Kramer."); Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CAL. L. REV. 1045, 1049 (2004) (stating that "[u]nlike many, perhaps most, constitutional debates, the debate about judicial supremacy does not appear to have an obvious political valence.").

25. Waldron, *supra* note 24, at 1353.

26. *Id.*



tors who will be swayed by reason and logic rather than brute majoritarianism — or worse. One of Waldron's points, then, is that judicial review takes a distinctly paternalistic view of the electorate.

Waldron limits the applicability of his argument to "free and democratic" societies.<sup>27</sup> One of the four assumptions on which his argument depends is that there is "a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights."<sup>28</sup> This limitation has the probable effect of circumscribing his theory to Western liberal democracies. Even with this caveat, Waldron still suggests a radical change in the role of the federal judiciary branch in the United States.

A major point made by critics of judicial review like Waldron is that, in a society so committed to democratic institutions and the rhetoric that supports it, any deviation toward paternalism must be clearly justified. Most importantly, these critics would say, even granting that the lack of judicial review might, in some cases, violate individual rights, in order for a system of judicial review to be justified, it must demonstrably make such mistakes less often.

## V. THE BENEFITS OF JUDICIAL REVIEW

On the whole, what we have in the United States is a robust system of judicial review. And it should not surprise you that I consider this system to be preferable to one in which state and federal legislatures have the last word on whether statutes pass constitutional muster.

There is ample evidence to support the conclusion that judicial review *does* protect individual rights and that it serves other democracy-promoting ends better than would a system with no such review. Among that body of evidence are examples of federal courts stepping in to protect individuals against odious legislative enactments. Foremost among these examples is, of course, *Brown v. Board of Education*.<sup>29</sup> That case and its progeny solidified in the public mind the notion of federal courts as guarantors of individual rights.

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27. *Id.* at 1348.

28. *Id.* at 1360.

29. 347 U.S. 483 (1954). *But see* GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* (1991) (providing an influential argument that judicial review plays less of a role in changing societal norms than is typically believed).

Historically, our record has not been perfect — *Korematsu v. United States*<sup>30</sup> comes readily to mind — but on the whole, and especially from the mid-twentieth century onward, federal judges have vindicated their constitutional ability to correct legislative mistakes which infringe individual liberties, and have sometimes done so courageously.

Let me discuss, then, what I see as three main benefits of judicial review. First, as seen in *Brown* and other decisions, the judiciary can fulfill a role as protector of individual rights when the two political branches fail to do so. Or putting it another way, the outcome of having a system of judicial review is that individual rights are more likely to be protected, especially considering that judges are far more insulated from political pressures than the political branches. This benefit has sometimes been characterized as an independent judiciary protecting against the tyranny of the majority. I find that characterization to be too pejorative. Waldron has a point when he argues that the tyranny of the majority argument has the potential to be abused. There can be, as he puts it:

allegations of tyranny on both sides of a rights issue. Defenders of abortion rights think the pro-life position would be tyrannical to women; but the pro-life people think the pro-choice position is tyrannical to another class of persons (fetuses are persons, on their account). Some think that affirmative action is tyrannical; others think the failure to implement affirmative action programs is tyrannical. And so on.<sup>31</sup>

Waldron is making a powerful point here, which should be heeded by every participant in the democratic process: We need to closely scrutinize such competing claims because every legislative victory which benefits some group, or even the majority, does not necessarily amount to tyranny.<sup>32</sup> Often, it is just plain old democracy at work. But, in those instances where the result of the legislative process does amount to a violation of individual rights, then the fact that judicial review exists to protect those rights offers a far better alternative than not having judicial review at all.

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30. 323 U.S. 214 (1944).

31. Waldron, *supra* note 24, at 1396.

32. See also *id.* at 1368 (“Generally speaking, the fact that people disagree about rights does not mean that there must be one party to the disagreement who does not take rights seriously.”).

Even with this caveat about the “tyranny of the majority,” the role of the judiciary espoused in Hamilton’s Federalist No. 78 remains today as necessary to individual liberties as it was more than two centuries ago: A vigilant and independent judiciary functions to be “an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority.”<sup>33</sup>

The second benefit of judicial review is that, when coupled with the legislative process, it does a better job of increasing individuals’ ability to *participate* in a democracy than a system that does not have judicial review. As I have already mentioned, one of the primary and persistent criticisms of judicial review is that it undermines the democratic process. But in one sense, judicial review actually *further*s that process. Each individual citizen in our democracy has the right to vote for members of state and federal legislatures who will enact laws. But it is unreasonable to assume that every citizen has the time and resources to devote to staying fully engaged.

As Eylon and Harel have argued in a Virginia Law Review article, judicial review permits individuals whose rights have been infringed, and possibly violated, a “right to a hearing.”<sup>34</sup> Judicial review affords to these affected individuals a right to challenge the power of the political branches through an impartial hearing before a neutral arbiter. The consequence of this participatory right for affected individuals has significant implications for how we should view the perceived tension between democracy and judicial review. When viewed from the perspective of who sits on the bench, there is a counter-majoritarian problem because federal judges are appointed and serve for life. But when viewed from the perspective of *who has a right to come before the bench*, the argument that judicial review is inherently anti-democratic is substantially weakened.

Eylon and Harel posit that “[t]he right-to-voice-a-grievance conception of judicial review holds that the purpose of judicial review is to facilitate the voicing of grievances by providing a hearing.”<sup>35</sup> The idea here is that “judicial review is justified because it real-

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33. THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic 2003).

34. This discussion relies heavily on Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991 (2006).

35. *Id.* at 997.

izes the duty of the state to provide a hearing.”<sup>36</sup> Individuals during the legislative process might act rationally ignorant to pending legislation, but when this legislation actually affects their rights in a particularized way, an independent judiciary functions to protect individual rights.

Let me pause for a moment before discussing the third benefit of judicial review. I have described how Jeremy Waldron goes too far in his argument against judicial review by failing to take proper account of the two benefits I have just discussed. But have I gone far enough?

I have noted that, in one respect, it can be argued that judicial review does not respect the ability of the citizenry to be persuaded by minority positions guided by reason and logic. Waldron rejects the notion that there is such a lack of respect when citizens are well-informed and as a general matter respect minority rights.<sup>37</sup> The first benefit that I have embraced — the protection of minority rights — arguably takes a less generous view of the electorate than does Waldron. And sometimes with good reason. The second benefit — the value of individual participation in the lawmaking process — avoids Waldron’s “respect” point altogether. Neither of these benefits really gets to the heart of what Waldron is trying to get at: Do we trust the citizenry and, if so, how much?

A strong belief in humankind’s inherent goodness would suggest that there is no mutual exclusivity between judicial review on the one hand and a trust in enlightened citizens to be guided always by reason and logic. That is, however, a Panglossian view of the world, and one that was certainly not embraced by the Framers of our Constitution.

Yet, even if we believe that people will usually fulfill their civic obligations in a reasonable and responsible manner, there is a final benefit to judicial review that I would like to discuss: pre-commitment.

The Constitution makes it more difficult for government actors subject to judicial review to pass certain types of laws. One scholar, Professor Fred Schauer of Harvard, makes this point in terms of “second-order constraints” and “first-order preferences.”<sup>38</sup> We can roughly define second-order constraints as norms and values enshrined in a foundational document like a constitution that is difficult to change and that trumps the ordinary method of law-

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36. *Id.* at 1002.

37. See Waldron, *supra* note 24, at 1348, 1360.

38. Schauer, *supra* note 24, at 1045.

creation when the two conflict.<sup>39</sup> First-order preferences can be viewed as policy preferences embodied in statutes. When a first-order preference conflicts with a second-order constraint, the second-order constraint wins out. This analysis is fully consistent with what Hamilton wrote in Federalist No. 78: “the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.”<sup>40</sup>

What should be an indisputable principle is simply this: Constitutional rights trump statutory preferences. Schauer makes a point with which I wholly agree: Second-order constraints and first-order preferences can conflict even when a party subject to judicial review acts honestly, with integrity, and is guided by reason and logic.<sup>41</sup>

Let me provide a modern historical example. The First Amendment instructs Congress to “make no law” that abridges the freedom of speech.<sup>42</sup> The Framers of the Bill of Rights made a strong categorical statement that the benefits of free speech outweigh the cost of censorship in all but the most extreme cases. They also accurately foresaw that some of the general benefits of free speech, like competition in the marketplace of ideas, would be jeopardized by perceived concrete risks. How many state legislators or Congressman these days would vote against a law that prohibited the Ku Klux Klan from assembling a rally where marchers could burn crosses and use racial epithets? No reasonable person with a capacity for good will could regard such speech as anything but offensive, hateful and downright stupid. But the Supreme Court of the United States in *Brandenburg v. Ohio*<sup>43</sup> overturned such a state statute, holding that this type of speech is only unprotected if it incites “imminent” lawless action.

I can only assume that the Ohio Legislature had nothing but the best of intentions in passing the law at issue in *Brandenburg*. Yet, its first-order preference of preventing inflammatory speech conflicted with what the Framers saw as the more important norm

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39. Schauer's argument builds on earlier work done by himself and others. For a list of sources in the legal and political philosophy literature, see *id.* at 1046 n.2.

40. THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., Signet Classic 2003).

41. Schauer, *supra* note 24, at 1055 (“Recognizing that good people doing good things often produce bad collective long-term consequences, or that good people doing good things often neglect nonconsequentialist values, the negative Constitution establishes a series of restrictions targeting good decisions as well as evil ones and functions as a check on even the most well-meaning democratic decision making.”).

42. U.S. CONST. amend. I.

43. 395 U.S. 444 (1969).

of free speech. The second-order constraint to speech regulation comes in the form of the First Amendment. The Framers understood that simple majorities could, over time, chip away at potentially unpopular rights — or at least the unpopular exercise of rights — by criminalizing conduct that implicates free speech, freedom of religion, criminal procedural rights, and due process.<sup>44</sup>

What I am trying to demonstrate here is that our need for judicial review does not necessarily depend upon a mistrust of the citizenry. Constitutional protection through pre-commitment, along with judicial review as the enforcer of this pre-commitment, “establishes a series of restrictions targeting good decisions as well as evil ones and functions as a check on even the most well-meaning democratic decision-making.”<sup>45</sup>

One of my law clerks made this point as only a law clerk can: Pre-commitment is like telling a friend on Thursday to not let you go out drinking on Friday because you have to get up early on Saturday.

## VI. CONCLUSION: JUDICIAL REVIEW AS A MODEST ENTERPRISE

My intention today has been to demonstrate why the benefits of judicial review outweigh the costs. I have also suggested that we should pay careful attention to these costs, not only because they will inform us as to the form judicial review should take in the first instance, but also because the citizenry *will be* paying attention to these costs. Critics of judicial review like Jeremy Waldron instruct us about the type of judicial review that will best maximize the sometimes-competing goals of democratic legitimacy and individual rights-protection. This lesson is important in the United States and throughout the Americas, because debates about the proper role of judges will not be going away any time soon in either arena.

I would strongly suggest that the case *against* judicial review in the United States cannot easily be exported to other contexts. Jeremy Waldron, for example, premised his argument against judicial review on the assumption that individual rights will, for the most part, be protected by the majority through legislatures.<sup>46</sup> Based on my own personal experience in recent years in working with

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44. In Schauer's framework, second-order constraints “are about entrenching those long-term values — not necessarily the most important of our values — that are especially likely to be vulnerable in the short term.” See *supra* note 24, at 1056.

45. *Id.*

46. See Waldron, *supra* note 24, at 1348, 1360.

judges and lawyers in some of the emerging democracies of Central and Eastern Europe, I am skeptical of the assumption that legislatures will be both promulgators of law and protectors of rights when their countries lack a history and tradition of rights-protection. If my skepticism is warranted, the case *for* judicial review is even stronger.

What form, then, should judicial review take throughout the Americas, and what form has it taken? Those are questions for the other presenters for today and tomorrow who are far more qualified than I am to address those questions. My only goal has been to show that any form of judicial review must balance the twin aims of maximizing the protection of constitutional rights and respecting the authority of state and federal political branches. My hope is that judges throughout this hemisphere will face this ongoing responsibility with courage and an abiding commitment to the rule of law.