Reassessing the Case for Judicial Review: Judges as Agents and Judges as Trustees

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Abstract

Lawyers, constitutional theorists and political philosophers continue to disagree over the merits and legitimacy of judicial review. Borrowing insights from delegation theory, industrial organization as well as empirical accounts of judicial behaviour, this paper assesses two approaches to the justification of judicial review: (1) Following the Principal-Agent Model, judges are given the authority to review and invalidate legislation to enforce the choices of the constitutional framers over recalcitrant legislative majorities. (2) By contrast, under the Trustee Model, judges are given the power of judicial review to act as trustees of the political system: their task is to ensure that the legislative process produces the “best” outcomes or, at least, policies that are Pareto-optimal. While showing how the two models relate to traditional understandings of the role of judges, the paper assesses the extent to which the organizational setting of courts and the judges’ incentive structure ensure that judicial review works as each model prescribes. It is argued that, from an empirical standpoint, justifying judicial review is easier – albeit by no means unproblematic – under the Trustee than under the Principal-Agent Model.
1 Introduction

Having spread from America to Europe and from Europe to the rest of the world, judicial review – the practice of allowing judges to reverse the choices of democratically elected officials – has become a defining feature of global constitutionalism. In places as diverse as India, Israel, Canada, the United States, South Africa, France, Germany or Hungary, judges have become major political actors, with judicial review affecting virtually every facet of public and private life (Tate and Vallinder 1995; Hirschl 2004; Ginsburg 2003; Stone Sweet 2000; Volcansek 2000; Vanberg 2005; Sadurski 2005).

Even so, more than two hundred years after Marbury v. Madison judicial review remains an eminently contentious practice. Lawyers, constitutional theorists and political philosophers continue to disagree over the merits and legitimacy of judicial review and the proper place of judges in democratic societies. The debate has spawned a vast literature, with countless essays written in defence of the institution (Dworkin 1985, 1990, 1996; Kelsen 1928, 2008) and new normative theories of judicial review steadily adding to the existing stock (Bickel 1961; Ely 1980; Kumm 2009; Eisgruber 2001; Waluchow 2007). Meanwhile, long on the defensive, the detractors of “legal constitutionalism” are striking back, reinvigorated by the work of scholars such as Jeremy Waldron and Richard Bellamy (Waldron 1999, 2005; Bellamy 2007; see also Tushnet 2000; Kramer 2004).

Rich and philosophically sophisticated though it is, this literature has nonetheless failed to appreciate the empirical dimension of the issue. What is
claimed in support or in opposition to judicial review rests on assumptions about the nature of judicial decision-making and the inner workings of judicial institutions that appear largely unwarranted. To be fair, there is increasing recognition that an argument whether pro or contra judicial review needs to be grounded in an account of how real-world judges – not angels in robe – decide cases and interact with their political environment (see e.g. Waldron 2005; Bellamy 2007; Friedman 2005). Still, these efforts have fallen short of bridging the gap between the normative literature and empirical research on judicial behaviour. This is all the more regrettable as the failure to take the empirical dimension seriously makes the normative discussion both less meaningful for the public at large and less relevant for policy-makers. As John Ferejohn points out:

[I]t seems impossible to engage in meaningful normative discourse – to criticize a practice or give advice – without some conception of how political institutions either do or could be made to work. Without some conception of the politically possible, normative advice is inherently vulnerable to utopian impulses. (Ferejohn 1995: 192.)

The present paper seeks to address this shortcoming by bringing insights from delegation theory, industrial organization and the empirical research on judicial behaviour to bear on the normative debate. It draws on delegation theory to contrast two distinct approaches to the justification of judicial review that are taken to be implicit in the debate:

1) Following the Agent Model, judges are given the authority to review and to invalidate legislation to enforce the choices of the constitutional framers over recalcitrant legislative majorities.
2) Under the Trustee Model, judges are given the power of judicial review to act as trustees of the political system: their task is to ensure that the legislative process produces the “best” outcome or, at least, Pareto-optimal policy.

These two models capture two distinct conceptions of the role of judges which differ profoundly in how they relate to notions such as constitutionalism, democracy and the rule of law. Empirically speaking, however, the crucial question is whether the courts’ organizational setting and the judges’ incentive structure actually ensure that judicial review work as the accepted model prescribes. As it exists in today’s democracies, judicial review, we argue, is both closer to and easier to justify under the Trustee Model. The institutional design of courts exercising judicial review does more to ensure independence and output legitimacy than to guarantee that constitutional judges act as indefectible agents of the constitutional framers. Nevertheless, even taking the normative assumptions of the Trustee Model for granted, the case for judicial review is by no means straightforward.

The analysis proceeds as follows. Section 2 sets out the Agent/Trustee distinction applied in the remainder of the paper. Section 3 assesses the distance that separates the Agent Model from the reality of judicial practice. Three factors, it is argued, explain why courts exercising judicial review do not – and, to a certain extent, cannot – operate in a manner consistent with the Agent Model: the indeterminacy of constitutional language, the policy-seeking motivations of judges and the absence of appropriate mechanisms to harness
judicial behaviour to the preferences of constitution-makers. Section 4 then turns to the Trustee Model. As it turns out, much of the empirical support for the Trustee Model stems from the factors that do most to undercut the Agent Model. In many respects, the argument pro judicial review based on the Trustee framework resembles the one economists make for independent central banks. Nevertheless, not unlike the argument for independent central banks, the Trustee Model is vulnerable to a number of objections, both theoretical and empirical. We conclude with some remarks on the limits of institutional engineering and the implications of the analysis for the public debate on and around judicial review.

2 Agents and Trustees: Judicial Review through the Lens of Delegation Theory

First developed in organizational and transaction costs economics from common law concepts of agency (Moe 1985; Thatcher and Stone Sweet 2002: 3), delegation theory is not really a theory as it does not spell out tight propositions or predictions about when, why and how delegation will take place. Rather it serves primarily as a heuristic device to problematize the phenomenon of delegation, the transfer of authority by one party to another. Only when combined with

1 In some contexts, though, delegation theory and the principal-agent framework take the character of ontological assumptions. A principal-agent relationship is first posited and the task of the empirical scholar is then conceived as that of unraveling the hidden mechanisms by which the principal achieve or fail to control the agent, see e.g. Garrett and Weingast (1993). For a discussion of the problems raised by such use of delegation theory see Alter (2008).
additional assumptions to formulate concrete hypotheses about the behaviour of the parties to a specific delegation scheme, as in the present paper, does it become a theory truly amenable to falsification in the scientific sense of the term.

2.1 The Principal-Agent Framework

The Principal-Agent (P-A) framework constitutes undoubtedly delegation theory’s most prominent offshoot. It addresses the difficulties that may arise when a party, the principal, hires another, the agent, to act on her behalf. As in employer/employee relations, the agent’s preferences and interests may differ from those of the principal. Hence the famous principal-agent problem: what mechanisms can the principal use or devise to ensure that the agent act in accordance with the terms of the delegation? The analysis of particular delegation schemes thus becomes a study of the various incentives and control mechanisms – the combination of carrot and stick – that principals have at their disposal to control the behaviour of their agents: commissions, profit sharing, re-contracting, threat of dismissal, etc.

2.2 The Trustee Framework

Less familiar, the Trustee framework presents itself as an alternative to the P-A Model. In common law, a trust is a contract by which a party, the settlor, grants some property or good to be administered by a second party, the trustee, on behalf of a third, the beneficiary. A typical example is a will trust, whereby a testator designates a trustee for the execution of his will. Other illustrations are pension and charitable trusts. The trustee is not meant to take her cue from the settlor but to act in the beneficiary’s “best interest”, which does not necessarily
coincide with what the beneficiary sees as her short-term best interest. It is why the crucial issue in setting up a trust are not the available prods that would ensure that the trustee’s behaviour is aligned with the settlor’s preferences or the beneficiary’s. Instead, the crucial issue is the personality of the trustee herself. Trustees are supposed to be wise and prudent – “trustable” – persons. Fees and other sweeteners may constitute an additional motivation to act in the beneficiary’s best interest. But the rationale for entrusting the administration of a property to a trustee rather than to its beneficiary results primarily from a consideration of the trustee’s personal reputation. Setting up a trustee makes sense only insofar as the person or institution acting as trustee is held to have a sense of prudence or an ability to exert her expertise superior to the beneficiary and the settlor. For the purpose of the present paper, it is also worth noting that in a Trustee scheme the settlor and the beneficiary can be one and the same person.

In economics, it has been argued that independent central banks fit a Trustee rather than a P-A model. Independent central banks are entrusted with the power to set interest rates and issue bank regulations for the citizens’ best interest. Independence is meant to insulate central bankers not only from the pressure of the settlor, the elected government who set up the bank, but also from the citizenry, as both may be tempted to sacrifice long term interests for short term benefits (Rasmussen 1997). Similarly, in political science, Giandomenico Majone has argued that the European Commission, the European Central Bank and the European Court of Justice are best thought of as trustees rather than as agents of the Member States and their citizens. Far from
reflecting any failure of the control mechanisms established by the Member States, the remarkable degree of independence enjoyed by EU institutions results from the very act of delegation, the Treaty provisions that created them. By enshrining the institutions’ authority in European Treaties and by making Treaty amendments difficult to pass, Member State governments have deliberately relinquished the powers to control their course of action (Majone 2005: 64-82, 1996).

2.3 Delegation, Legitimacy and Courts

As with central banks and regulatory agencies, delegation theory can be applied to courts and judges to problematize the decision of constitution-makers to entrust judges with the power of invalidating the laws enacted by elected officials. The P-A and Trustee framework help contrast two distinct logics of delegation to judicial institutions, which in turn identify two ways of justifying judicial review. Under the P-A approach, constitutional framers, acting as principals, delegate to judges, who thus become their agents, the power to invalidate legislative acts to prevent violations of the constitution. The logic of delegation here is essentially one of precommitment. It rests on three assumptions. First, the constitution-makers want the legislature to comply with the constitutional norms they have enacted. Second, it is believed that legislators may at times be tempted to disregard their constitutional obligations. Third, it is believed (a) that judges are more likely than legislators to have preferences congruent with those of the framers, and/or (b) that the judges’ expertise and incentive structure as well as the courts’ institutional design make judges more
likely to behave in accordance with the choices made by the constitution-makers. Within the P-A framework, the case for judicial review will turn on the validity of these assumptions. In short, if judicial review is legitimate it is not because it produces good or optimal policies, but because it ensures that laws are made in accordance with the rules and principles spelled out in the constitution. What counts as legitimate judicial behaviour is fully defined ex ante by the rules that the judicial agents are in charge of enforcing.

The Trustee Model, by contrast, casts the case for judicial review in terms that are unambiguously consequentialist. The function of a constitutional court is not to enforce the preferences of the members of the constitutional convention who set it up. Nor is it to cater to the will and desires of the beneficiaries of the constitutional contract, the people. Instead, the function of such a trustee court is to improve the quality of legislation, to enhance the efficiency of public policies and, if possible, to facilitate the smooth functioning of the political system.

3 Challenges to the Agent Model: Incomplete Contracts, Multiple Principals and Judicial Drift

Of the Agent Model, it can be said that it captures traditional understandings of the role of courts in a constitutional democracy committed to the rule of law and the separation of powers. Constitutionalism emphasises the notion of limited government. In short, constitutionalism recommends that the rules constituting the polity and establishing its citizens’ basic rights be entrenched to secure the stability of the political system as well as its commitment to individual freedom.
To the extent that judicial review has a place in traditional constitutionalist thinking, it is as a means to achieve these ends. Another key tenet of political liberalism is the rule of law. It stresses the ideal of “government by law” and sees courts as crucial in protecting citizens against arbitrary governmental decisions. From this perspective, granting judges the power to review legislative acts is naturally viewed as a means to consolidate the rule of law by subordinating the entire state apparatus to government by law. Seen through the prism of the Agent Model, judicial review sits equally well with conventional interpretations of the doctrine of the separation of powers. The doctrine of the separation of powers is widely believed to entail the commandment that the function fulfilled by the judiciary be distinct from the other two branches. Judges should neither “make” nor “execute” the law but merely apply it. A further attractive feature of the Agent Model is that it seems to avoid the so-called “counter-majoritarian” difficulty (Bickel 1961: 16), thus presenting judicial review as fully compatible with democracy. After all, if the job of a court exercising judicial review is only to enforce the rules enacted by the constitution-makers and if the rules in question were themselves adopted through a democratic procedure, there should be little to object to about judges occasionally disallowing the policies of popularly elected legislators. As a staunch advocate of judicial review puts it:

By granting to a non-legislative body that is not electorally accountable the power to review democratically enacted legislation, citizens provide themselves with a means for protecting their sovereignty and independence from the unreasonable exercise of their political rights in legislative processes...By agreeing to judicial review they in effect tie themselves into
their unanimous agreement on the equal basic rights that specify their sovereignty. Judicial review is then one way to protect their status as equal citizens. (Freeman 1990: 36.)

Finally, the Agent Model fits the rhetoric judges typically appeal to to justify their rulings. When coming under attack from other political actors, courts almost invariably retort that “they’re only applying the law”. In the United States, where the confirmation hearings for Supreme Court nominees are a highly politicised affair, John Roberts, later confirmed as Chief Justice, famously compared the role of a judge to that of an umpire in a ball game in his opening statement before the Senate Judiciary Committee:

Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire.²

In a similar vein, on its official homepage the German Federal Constitutional Court insists that, whatever the consequences of its decisions, its function is not “political” but purely “legal”:

The decisions of the Court do have political consequences. This is most evidently the case when the Court declares a statute unconstitutional.

However, the Court is not a political body. Its sole standard of review is the Basic Law. Considerations of political expediency do not play any role for the Court.  

Equating juridical reasoning with syllogistic logic and portraying courts as the mere “mouth of the law”, many Enlightenment thinkers – among them Becarria, Kant, Hamilton, Condorcet and Montesquieu – espoused a legalistic conception of judging similar to that which underpins the Agent Model (La Torre 2002). Their enduring influence combined with the belief that a commitment to these values necessarily entails a commitment to a legalistic conception of adjudication explains why many in modern democracies see judicial institutions through the lens of the Agent Model.  

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4 Studies examining public attitudes towards the judiciary show that people who are more educated and more attentive to the courts also tend to be more favourably oriented towards them. Interestingly, this line of research reveals that respondents who are more knowledgeable about courts and things judicial are more likely to subscribe to the mythology of judicial neutrality and objectivity in decision-making. Gibson et al. suggests that one reason why greater awareness of judicial institutions creates a less realistic view of the nature of judging is that more familiarity with the court system implies more exposure to judicial rhetoric: “to know courts is to love them, because to know them is to be exposed to a series of legitimizing messages focused on the symbols of justice, judicial objectivity and impartiality” (Gibson et al. 1998: 345).
The political and judicial rhetoric notwithstanding, there are good reasons to reject the Agent Model as providing an accurate description of how judicial review works in practice.

3.1 Constitutions as Incomplete Contracts: Law’s Indeterminacy and the Overrepresentation of Indeterminate Cases in Constitutional Adjudication

The first reason arises from the indeterminacy of constitutional language. Of course, not all constitutional norms are indeterminate. The requirement in the US Constitution that the person occupying the office of president be at least 35 years of age is quite straightforward; as is the formula by which the German Basic Law sets the number of votes for large and small Länder in the Bundesrat. Nor does the clause fixing the number of rounds in the presidential election in the French Constitution, to give another example, leave much wiggle room for “creative” interpretation. Generally speaking, when constitutional rules have a constitutive character, as opposed to a regulatory one, they tend to be relatively clear and straightforward. The rules that create the office of president, establish courts, confer upon the actions of a group of individuals the meaning of a legislative act, etc., do not – and for that matter cannot – leave much to

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5 Article 52 Basic Law:

Each Land shall have at least three votes; Länder with more than two million inhabitants shall have four, Länder with more than six million inhabitants five, and Länder with more than seven million inhabitants six votes.
ambiguity. So there are indubitably some constitutional questions for which there is a single right answer.

Nevertheless, the fact is that these questions are seldom raised in constitutional litigation. The rules making up a legal system address all sorts of real or merely potential social conflicts. But not all these social conflicts are brought before a judge and those that are appear to be precisely those vis-à-vis which the law is the most indeterminate. Other things being equal, a case that admits of several, equally right answers seems more likely to be brought before a court and to make it to highest rung of the judicial hierarchy than a clear, straightforward one. It is so because litigants have to weigh the probable gain from a favourable ruling against the potential cost in time, money, effort and reputation associated with an adverse decision. So, to the extent that a clear and unambiguous rule may indicate high probability of a favourable or, on the contrary, high probability of an unfavourable ruling, the degree of determinacy of the law is likely to affect a litigant’s cost-benefit analysis and, therefore, her litigation strategy. Other things being equal, as long as courts are expected to uphold the law in cases where it is clear and unequivocal, litigants who expect to lose will have an incentive to renounce bringing a suit.^[6]

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[^6]: There is a substantial law and economics literature relying on game-theoretic models to study the behaviour of litigants at the several stages of the litigation process (for a review see Kessler and Rubinfeld 2007). These models typically treat judicial decision-making as an exogenous parameter to the plaintiff-defendant game and few explicitly address legal indeterminacy and the role courts might play in either reducing or augmenting it. Most of them, though, emphasise the
As suggested by Figure 1, considering all possible social disputes and not just the cases brought before a tribunal, it is quite possible that there is overall more clear cases – i.e. social disputes vis-à-vis which the law is determinate – than indeterminate ones. But we should expect the share of indeterminate cases to be much bigger when we consider only the cases that are actually brought before the courts, and the more so as we go up the court hierarchy all the way to the constitutional judges.\(^7\)

Figures reveal that over the 1973-1995 period the French Constitutional Council invoked the “principle of equality” as a basis for its decision in 39 % of its rulings (Mélin-Soucramanien 1997: 17). Equality, the “fundamental principles recognized by the laws of the Republic” and other similarly indeterminate constitutional provisions are the most frequent legal grounds in Council decisions pronouncing the unconstitutionality of a statute (Favoreu 1994: 4). The equality clause also tops the list of most popular constitutional provisions in litigation before the Constitutional Court of Austria (Jakab 2007: 288). In Germany, meanwhile, the most frequently recurring constitutional clause in the jurisprudence of the Federal Constitutional Court turns out to be Article 2 (1) of

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\(^7\) This argument was made early on by American legal realists who argued that adjudication made legal rules appear more indeterminate than they really are because clear cases are settled outside the court system (Llewellyn 1931: 1239; Radin 1942: 1271).
the Basic Law, which provides for the indefinite right to “the free development of one’s personality” (Dyevre 2008). Based on information from the Supreme Court Database, Figure 2 lists the constitutional clauses most frequently considered in US Supreme Court decisions. Like constitutional provisions regularly litigated in other jurisdictions, these provisions are phrased in vague (“speech”) or evaluative (“due”, “unreasonable”, “equal”, “cruel”) language. Put together, the twin Due Process Clauses of the Fifth and Fourteenth Amendment account for more than 15% of the constitutional provisions dealt with by the Supreme Court over the last 60 years.

FIGURE 2 ABOUT HERE

Every time a court strikes down a law, the alleged justification is virtually always that the legislature has violated the constitution. Yet these figures suggest that most of the time what the court is really doing is substituting one linguistically possible reading of the constitution, its own, for another linguistically possible reading of the constitution, the legislature’s.

3.2 Constitutional Judges Are Policy-Seekers

The Agent Model assumes that judging is essentially about legal expertise and that ideology and attitudes do little to explain judicial behaviour. However, there is compelling evidence that this is wrong and that judicial outcomes vary significantly depending on who is sitting on the bench.

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The effect of ideology on judicial outcomes is well established by research on the US Supreme Court. Using newspaper editorials to rank judges on a liberal-conservative scale, Spaeth and Segal find a strong correlation between the attitudes and the votes on the merits of Supreme Court Justices. On this measure, ideology alone explains 57 per cent of the variance in the votes cast (Spaeth and Segal 2002). Recent studies have shown that the preferences of individual judges constitute a good predictor of judicial outcomes on courts outside the United States too. Taking the political orientation of the appointing authority as proxy for the judges’ attitudes, research on the Portuguese and Spanish constitutional courts (Magalhães 2003), the French Constitutional Council and the German Federal Constitutional Court (Hönnige 2007, 2009; Brouard 2009; Frank 2009) as well as the European Court of Human Rights (Voten 2007) has found significant correlations between ideology and judicial decision-making. Christoph Hönnige demonstrates that the probability of the Constitutional Council annulling a law goes down when the number of judges appointed by the legislative majority goes up. For instance, when five judges (out of nine) have been appointed by the opposition and the odds that the Council annuls a law are one to one (i.e. a probability of 50%) the legislative majority may lower the odds to one to two (33% probability) by appointing one more judge to secure a 5:4 majority (Hönnige 2009).

3.3 Divisions among Multiple Principals: Constitutional Rigidity and Judicial Activism

The judicial politics literature implies that a change in judicial personnel may often produce a change in judicial outcomes. In a sense this is not a very
surprising finding. Indeed, French and American Presidents, Spanish and German parliamentary groups and those holding the power to appoint judges in general, all seek to promote – at least so is the impression – candidates who share their policy preferences on some key or salient issue. Why would they care about appointing judges if policy-preferences did not play any role in adjudication? This is the core of the Principal-Agent problem. If judges decide cases in light of their policy preferences and these preferences vary from judge to judge and over time, then there is no guarantee that a constitutional court’s agenda will coincide with the framers’ agenda.

Is there any mechanism to prevent what we might call “judicial drift”? Ex ante procedures like having judicial appointees take an oath of allegiance to the constitution do not look very effective. In fact, to suggest, as part of a defence of judicial review, that a mere oath to observe the constitution will suffice to dissuade judges from deviating from the framers’ position seems self-defeating. Were an oath of office enough to ensure that officials behave in accordance with constitutional norms, judicial review would be little more than an expensive superfluous, for compliance with the constitution could be achieved with the same effectiveness and at a lesser cost by requiring legislators and cabinet members – as is the case in some countries\(^9\) – to take an oath of allegiance to the constitutional compact.

\(^9\) E.g. US Constitution, Article VI clause 3:

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution;
On the face of things, ex post procedures offer a more effective means to rein in the judges. The ex post control mechanisms constitution-makers have at their disposal resemble those available to legislators overseeing regulatory agencies. Sitting as constitution-amending power, they can, in principle, respond to any ruling they dislike by passing an amendment overriding the decision, rolling back the court’s jurisdiction or lowering the judges’ salary. Moreover, we should expect the mere threat to change the constitution to feed back on judicial decision-making, deterring judges from straying in the first place.

However, the effectiveness of the mechanism presupposes that the threat is a credible one and may really be put to execution. Yet constitutions are often difficult to revise. When modifications to the constitutional charter are subject to prior approval by a supermajority in both the lower and the upper chamber of the legislature and ratification by popular referendum, amendments are unlikely to be successfully enacted unless there is a broad consensus on the necessity of constitutional change. Generally speaking, the more rigid the constitution, the more actors will be in position to block an attempt to override the courts. This clearly favours judges. A more rigid constitution means they will have less reason to worry about override amendments and will have more room to pursue their own policy agenda. Figure 3 helps grasp the logic of the argument.

<<Figure 3 about here>>

It depicts a policy space in which the actors have preferences along two dimensions – here decentralisation and property rights, two issues commonly debated in constitutional conventions. Each actor is assumed to prefer an
outcome closer to her ideal-point to an outcome further from her ideal-point. Here three political parties – A, B and C – agree on constitutional compromise D which the Court is then responsible to apply to concrete cases. In case the Court moves away from D, the three parties may pass a constitutional amendment by unanimous approval. Yet we can see that all outcomes within the ABC triangle are Pareto-optimal. This means that any change to an outcome within the triangle will necessarily make one of the parties less well off. So if the Court moves the outcome to E, the outcome closest to its ideal-point in the Pareto set, party C will want to push for an override amendment, since E is farther from its ideal-point than D (from C’s perspective: E < D). A and B, though, will have an incentive to oppose an override amendment because E is closer to their preferred position than D (E > D). Note that the Court does not even need two parties on its side. The support of only one party will be enough, as long as the party in question is better off with the judicially enacted outcome.

More constitutional rigidity means more actors involved in the constitution-amending process, which in turn means a higher probability that an actor will prefer the judicial outcome to any override amendment proposed. Put in the language of delegation theory, a more rigid constitution means that multiple principals will be involved in monitoring the activity of the judicial agents. So whenever re-contracting is contemplated in response to an instance of judicial drift, disagreement is more likely with the effect that the agents are effectively protected from punishment.
This argument is buttressed by empirical evidence showing a clear correlation between constitutional rigidity and judicial activism. Using data from Lijphart (1999), Figure 4 shows the relationship between constitutional rigidity and judicial activism in 35 countries.10

<<Figure 4 about here>>

The correlation is statistically significant.11 The fit is not perfect ($R^2 = 0.228$) but we clearly see that the most activist courts (USA, Germany, India, and Canada) tend to cluster in the upper right corner of the panel while the least activist ones (such as New Zealand and the UK) tend to cluster in its lower left part.

These measures are certainly not indisputable. One may be surprised for example to find Israel’s judiciary among the least activist or the French constitution as so flexible in comparison with Germany’s. However, the correlation is preserved when we use measures developed by other authors, such as Lutz (1994) and La Porta et al. (2004) for constitutional rigidity and Cooter and Ginsburg (1996) for judicial activism.

These findings suggest that, if the relationship between constitution-makers and constitutional judges is a P-A relationship, then it is a rather

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10 Lijphart’s original dataset had 36 observations. We removed Switzerland, which, because of its very rigid constitution and highly deferential courts, proved to be an outlier disproportionately influencing the results. Note, too, that Lijphart has its Constitutional Rigidity and Activism scales ranging from 1 to 4, whereas these are normalised to lie between 0 and 1 in our analysis.

11 The coefficient of the linear regression is significant by conventional cut-points ($p = 0.004$).
dysfunctional one. Most of the time the principal is simply not in position to control her agent. Inasmuch as we are interested in finding a rationale for judicial review as it exists in today’s world, this should prompt us to reject the Agent Model and to look for an alternative approach.

4 Strengths and Weaknesses of the Trustee Model:

Judges as Policy-Optimizers

The considerations that give the Trustee Model its strength are in large part the mirror image of the Agent Model’s weaknesses:

1) Unlike the Agent Model, it does not assume nor require full determinacy of constitutional language. Thus it fits better with the nature of modern constitutions as incomplete contracts.

2) It does not require that judges be apolitical, but only “mainstream”. As such, it offers a more adequate justification for the appointment mechanisms currently in place in constitutional systems around the world.

3) Nor does the Trustee Model assume that constitution-makers can prevent judicial drift. On the contrary, it presupposes that constitutions are sufficiently rigid to protect judicial independence.

As we shall see, however, an approach that seeks to take constitutional judges seriously as policy-optimizers faces serious theoretical and empirical challenges.

4.1 Judges Need Not Care for the Framers: the Living Constitution, Balancing and the Demise of Originalist Theories of Interpretation
If judges really cared about the framers’ preferences, as the Agent Model says they ought to, then they should follow something resembling an originalist theory of interpretation. It is not quite what we see in practice. Many important constitutional decisions appear to fly in the face of the original understanding of the provision they purport to apply. The Due Process Clauses of the Fifth and Fourteenth Amendments were meant to apply exclusively to matters of procedure (Harrison 1997). Yet countless are the decisions where the Supreme Court applies them to matters of substance. The oxymoron “substantive due process” has become one of the Court’s most salient doctrines (Ely 1980; Harrison 1997). Likewise, the reference to the Declaration of the Rights of Man and to the Preamble of the 1946 Constitution in the Preamble of the Constitution of the Fifth Republic was thought of as a reverential homage carrying no legal weight. But the Constitutional Council turned it into hard law, with the 1946 Preamble and the Declaration serving as justification for the Council’s activist jurisprudence (Stone 1992).

Generally speaking, courts have favoured loose constructions and flexible standards over rigid doctrines and strict interpretive regimes. The dominant interpretative paradigm of global constitutionalism is the “living constitution” rather than the originalist approach defended by Justice Antonin Scalia in the United States (Scalia 1997). The Canadian Supreme Court has made its adherence to this judicial philosophy explicit:

The “frozen concepts” reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a
living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.\textsuperscript{12}

Writing for the Court in the case \textit{Re B.C. Motor Vehicle Act}, Justice Antonio Lamer made no bones that this approach to adjudication entailed a complete disregard for the intent of the framers of the Canadian bill of rights, the Canadian Charter of Rights and Freedom:

If the newly planted “living tree” which is the Charter is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth.\textsuperscript{13}

In the same vein, the tendency of judges to rely on balancing and means/ends standards like proportionality to frame constitutional issues has made constitutional law even more indeterminate than it already was (Stone Sweet and Matthews 2008).

Since what matters is ultimately the courts’ output, not the will of those who established them, the fact that courts frequently invoke a hypothetical “living” or “unwritten constitution” to justify their more controversial rulings is much less of a problem under the Trustee than it is under the Agent Model.

\textbf{4.2 Acting as Autonomous Trustees: The Parameters of Judicial Independence}

\textsuperscript{12} \textit{Re Same-Sex Marriage}, [2004] 3 S.C.R 698.

\textsuperscript{13} [1985] 2 S.C.R. 486, para. 53.
The Trustee Model, however, raises the crucial question: Why should we think that giving courts the right to veto legislation will improve public policy?

In its most panegyric moments, the rhetoric of the rule of law portrays judges as benevolent, virtuous decision-makers endowed with semi-divine wisdom. Ronald Dworkin, for instance, characterizes the Supreme Court as the “forum of principle” (Dworkin 1985: 69-71). Yet the belief that judges can sometimes make more prudent choices than other officials need not rest on the irrational assumption that people somehow become superior beings when they don the judicial robe. An interesting attempt to work out formally the conditions under which decision-making by independent judges may outperform other decision-making arrangements is offered by Maskin and Tirole (2004). Their formal model of the political process serves to compare the welfare effect of decision-making through direct democracy, elected officials and unaccountable judges. Depending on whether elected officials are ready to pander to the electorate to gain re-election, the probability that judicial preferences are congruent with those of the population, the policy expertise of the average citizen and the cost of acquiring information, they demonstrate that there are indeed circumstances in which a country may be better off with judicial decision-making than with other forms of decision-making. To reach these conclusions, though, Maskin and Tirole do not posit that judges possess some special or superior degree of policy expertise. More plausibly, they assume that judges, as other state officials, are specialists in public decision-making. As such they are more likely to have the experience and information to make wise choices than the average citizen, though not necessarily more so than elected representatives.
What makes judges different from elected officials is that they have less incentive to pander to the public when they know that a particular action, though popular, is wrong. Independence gives them a longer time-horizon than politicians periodically facing elections. For this reason, they are less likely to postpone decisions that are unpopular but necessary or to sacrifice long-term benefits for reasons of political expediency (Maskin and Tirole 2004).

Mirroring the argument put forth by economists for the creation of independent central banks, this analysis presupposes that constitutional judges are to some extent insulated from external political pressures. Though all institutions are ultimately endogenous to the political process, several institutional design features seem to afford courts a high degree of political autonomy.

In discussing judicial independence, care should be taken to distinguish between independence understood as the independence of the individual judge from independence understood as independence of the court or the judiciary as a whole. As to the former, it bears emphasis that, except for a small number of American states, judges in general are not democratically accountable. They are appointed, not elected, and cannot be removed once in office. High court judges enjoy life tenure (as in the United States) or serve fixed terms. At European constitutional courts, judges serve an average nine year term. Fixed terms are generally non-renewable, which removes an incentive for the individual judge to
try to please her appointing authority as a way of securing re-appointment. As for the independence of the institution as a whole, it is a matter of degree and is bound to vary from country to country. But two factors contribute to strengthen it. One, previously discussed, is constitutional rigidity. When political forces are divided and fragmented, a high level of constitutional rigidity means that courts have fewer reasons to fear the wrath of legislative majorities when they make decisions on controversial issues. The other factor, less intuitively, is public support. At first glance, it would seem that judicial autonomy cannot depend on public support, because, if so, judges would have an incentive to pander to the public. But this is not so. Research on the legitimacy of national high courts  

14 There is empirical evidence that term renewability does influence judicial behaviour, see Magalhães (2003) for the Portuguese Constitutional Court and Voeten (2008) for the European Court of Human Rights. In the absence of separate opinions, however, term renewability does not seem to affect the conduct of judicial appointees. This applies for the European Court of Justice (ECJ). Given the secrecy surrounding deliberation in the European Court, national governments, who are responsible for appointing ECJ judges, cannot monitor the behaviour of “their” judges and are thus unable to use the power to refuse renewal as an instrument of control.

15 Strictly speaking, what matters is the number of real veto-players in the constitution-amending process, for which constitutional rigidity is merely a proxy. Arguably, the number of real veto-players in the constitution-amending process is likely to result in large part from the formal constitutional arrangements in place, thus reflecting, to some extent, the number of “institutional” veto-players (see the discussion in Dyevre 2010; and Tsebelis 2002). What justifies the emphasis on constitutional rigidity in the context of the present essay is that, unlike political fragmentation and the number of real veto-players, which also depend on the distribution of preferences in the electorate as well as among political actors, constitutional rigidity is the product of deliberate institutional design and of deliberate institutional design only.
show that citizens do not automatically withdraw their support when their courts make decisions they dislike. The explanation lies in the difference between specific support, i.e. support for particular decisions, and diffuse support, support for the institution. Unpopular decisions may score very low on specific support without affecting the court’s level of diffuse support (Gibson et al. 1998). As demonstrated by Vanberg (2005), this may even protect the courts from legislators who would otherwise be in position to reverse their decisions.

4.3 Congruent Courts: Appointing Mainstream Judges

This being said, in the analysis developed by Maskin and Tirole judicial power outperform representative democracy only when judges are not ideologically out of step with the citizens they are meant to serve. This points to one of the major downsides of decision-making by unaccountable officials: if a judge turns out to have a policy-agenda diametrically opposed to the preferences and values of the rest of society, there is no way to screen her out, at least until the end of her tenure (which often means until her death for federal judges in the US). However, in real-world democracies, the impossibility to weed out noncongruent judges ex post is mitigated by the appointment procedure. The power to appoint constitutional judges usually belongs to the legislature and the head of the executive. Giving elected representative an input in the selection of candidates ensures that judicial appointees are not too far from the ideological
mainstream. In Europe, the absence of life-tenure also reduces the risk that ideological discrepancy may result from the passage of time.

On this score too, the Trustee Model makes better sense of existing institutional arrangements than the Agent framework. The latter implies that constitutional judges should be selected (a) on the basis of their legal expertise alone if the principals have enough control over the courts to prevent judicial drift, or (b) at least chosen so that the courts’ preferences reflect those of their principals. While (b) suggests that judicial appointees should be picked by the constitution-makers themselves (hardly a workable proposition when the framers passed away two centuries ago), (a) would be compatible with selection by competitive examination as is common in civil law judiciaries. Neither option, however, constitutes an accurate description of how constitutional judges are appointed, even in continental Europe, although some countries give the judiciary a say in the selection of constitutional court judges. In any case, the weight typically given to elected officials in the appointment process is more in line with the Trustee Model.

4.4 Pursuing Efficiency: Does Judicial Review Really Improve Policy Outcomes?

In defending judicial review and the creation of a constitutional court, Kelsen had already argued that constitutional judges should be appointed by members of parliaments (Kelsen 2008, 1928).

In Italy and Bulgaria, for example, one third of the constitutional court judges are appointed by supreme court magistrates.
Were it only for the judges’ incentive structure and institutional environment, the foregoing discussion would suffice to demonstrate that the Trustee Model constitutes a plausible rationale for the existing practice of judicial review. For the Trustee approach to work, though, it must also be shown that courts do indeed improve policy outcomes and that policy outcomes are susceptible to improvement in the first place.

Arguably, policy optimization should not mean that courts simply redistribute wealth, rights and power from one individual or group of individuals to another. Rather, it should mean that courts improve what everyone gets. This implies that the Trustee Model works better for regulatory than for redistributive policies. As Figure 5 illustrates, regulatory policies can and are supposed to produce outcomes that benefit everyone, whereas redistributive policies necessarily produce winners and losers.

A policy moving the outcome from X to Z is an efficient regulatory policy because it improves the welfare of both individual A and B. It is Pareto-optimal in that it improves the overall welfare without making anyone less well off. By contrast, a policy moving the outcome from X to Y is not a regulatory but a redistributive policy. Its effect is to transfer wealth from B to A.

The Trustee approach works in straightforward fashion for regulatory issues, effectively replicating the argument economists make for independent central banks. Politicians running for re-election, economists say, may be tempted to exploit a possible short-term trade-off between inflation and
unemployment, even though the long-term effect of doing so is that unemployment returns to its initial level and inflation is higher. So, since low inflation benefits everyone in the long-term, a country will make itself better off by entrusting its monetary policy to an independent central bank. Likewise, when elected officials are tempted to pander to the desires of poorly informed voters, an independent constitutional court may be able to veto the adoption of popular but inefficient, or even downright baneful, policies.

The trouble is that in practice constitutional judges do not deal exclusively with regulatory issues. Many questions that judges typically grapple with at the constitutional level involve trade-offs which cannot be addressed without producing winners and losers. Liberty versus security in anti-terrorist legislation is a prime example. Making legislation Pareto-efficient in this context would mean that judges do not go beyond ensuring that the legislature has used the least-restrictive means to achieve its policy goal. Yet courts often go beyond least restrictive means tests, in effect deciding which goal should have priority and which should be sacrificed. This most obviously comes to the fore in cases where judges invoke proportionality (or strict scrutiny in the American context). In the last prong of the proportionality test, sometimes called “proportionality in the strict sense”, judges are supposed to balance the interests at stake (Stone Sweet and Matthews 2008). But there are no intersubjective criteria by which this act of balancing could be called an optimization. In its influential work on rights adjudication, Robert Alexy proposes a “law of balancing”, which resembles the Kaldor Hicks criterion: when two legal principles or policies conflict, the greater the non-satisfaction of one principle, the greater ought to be the satisfaction of
the other (Alexy 2002: 102). Yet he does not offer anything resembling an
intersubjective metric to establish whether the satisfaction of principle A is
greater than the non-satisfaction of principle B (a problem familiar to welfare
economists, see Persky 2001).

Despite these theoretical objections, there are some policy areas where
most people in democratic societies are nonetheless ready to agree that certain
outcomes are better than others. Few would dispute that economic expansion is
better than economic stagnation. Most people agree that arbitrary
imprisonments, torture and extrajudicial killings are bad and should be
prevented to the utmost extent possible. More generally, a relative consensus
seems to exist across countries and international organizations concerning the
provision of basic human rights and freedoms (Landman 2005).

One claim common to virtually all proponents of judicial review is
precisely that judicial review makes for better human rights protection. But does
the empirical evidence support this proposition? Table 1 summarises some of the
data we may use to assess the impact of judicial review on levels of human rights
protection.

<<Table 1 about here>>

Here, human rights practices are measured using data from the Cingranelli-
Richards (CIRI) Human Rights Database (Cingranelli and Richards 2008). The
CIRI Database compiles data from US State Department Country Reports on
Human Rights Practices and Amnesty International’s Annual Reports. It
synthesises overall respect for fundamental rights through two indices. One, the
Physical Integrity Rights Index, is constructed from indicators reflecting the occurrence of acts of torture, the number of extrajudicial killings, the number of people imprisoned because of their religious or political beliefs, and the frequency of disappearance cases. The Empowerment Rights Index, meanwhile, is based on indicators for the protection of rights such as freedom of speech, workers’ rights, freedom of movement, freedom of religion, and rights to political participation. In the present analysis, each country is assigned a score equal to the arithmetic mean of the value of the corresponding Index for the year 1996 to 2005, with high scores indicating better human rights protection.

The main explanatory variable, ‘Judicial Review’, is borrowed from La Porta et al. (2004). Coded mainly from Maddex (1995), it purports to measure the existence and scope of judicial review across 70 countries. It takes the value 0 if courts do not have any authority to review legislative enactments, as in the UK. If access to the constitutional court is restricted and the court’s power of review is limited to certain laws, e.g. laws not yet promulgated, as in France until 2010), then the variables takes the value 1. If judicial review extends to all laws, as in Germany and the US, then the country is assigned the value 2. Of course, it may be objected that the institution’s mere existence is not sufficient to ensure that courts are effective decision-makers. As seen above, some guarantees of independence are also needed. Unfortunately, there exists no appropriate opinion survey that would allow us to compare the interaction effect of judicial review and public support for the courts on policy outcomes. On the other hand, we do have data on constitutional rigidity and, other things being equal, we should expect to observe better records of human rights protection in countries
with judicial review and a more rigid constitution. The Constitutional Review Index is meant to capture this idea. Modified from the index provided by La Porta et al. (2004), it is basically a measure of judicial review with constitutional rigidity operating as a reinforcing factor.\(^{18}\)

<<Figure 6.1 about here>>

How do these measures of judicial review relate to human rights protection?

Figure 6.1 displays the results in the form of scatter-plots. Looking, first, at the two left-hand panels, no clear pattern of relationship between judicial review and

\[\text{Constitutional Review Index} = \left(\frac{J}{4}\right) \left(1 + \frac{(C-1)}{6}\right)\]  

(1)

Where \(J\) is the indicator of judicial review and \(C\) is the indicator of constitutional rigidity (which ranges from 1 to 4). (1) makes more sense than the definition used by La Porta et al. (2004) where the index is constructed as the sum of the two indicators. Indeed, the latter entails that the Index of Constitutional Review may be greater than zero even when judicial review does not exist! High and medium levels of constitutional rigidity mean that the value of the index for countries such as Netherlands and China, where judges do not have the power to review legislative acts, is respectively 0.5 and 0.17. The alternative definition considered by La Porta and his colleagues, the product of the two indicators, is not satisfactory either, because it suggests that, unless constitutional rigidity is greater than zero (or greater than 1 in the non-normalised indicator), judicial review does not matter at all. Yet we have seen that public support can indeed compensate for the absence of constitutional rigidity (see also Dyevre 2010). Note that in the present dataset (1) strongly correlates with the indicator of judicial review (0.98 against 0.87 and 0.72), while the two definitions discussed by La Porta et al. are more closely correlated to the indicator for constitutional rigidity (0.73 and 0.74 against 0.44 for (1)).

\(^{18}\) Normalised to the unit interval \([0,1]\), the Index is computed as:
respect for rights to physical integrity emerges from the data. The two right-hand panels, by contrast, reveal a more clearly positive correlation between judicial review and empowerment rights. Indeed, we can see that countries with both judicial review and high levels of respect for these rights cluster in the upper-right corner of the two panels. These results are confirmed by regression analysis. Model 1a in Table 2 shows that, though positive, the effect of the Constitutional Review Index on the Physical Integrity Rights Index fails to reach statistical significance. The 95% confidence interval of the variable’s coefficient [-1.04, 2.37] includes zero, which means we cannot rule out that the observed positive effect is only due to chance. Model 2a, on the other hand, indicates a both positive and statistically significant effect of the Constitutional Review Index on the Empowerment Rights Index. The value for the main quantity of interest, the variable’s coefficient, is 3.809. This can be interpreted as meaning that, on average, a country seeing its score on the Constitutional Review Index increase from 0 to 1 will see its score on the Empowerment Rights Index increase by 3.809 points. Assuming the dataset is representative of the larger population of countries, we can say with 95% probability that the true effect in the population should be between 1.49 and 6.39 points (this time the confidence interval does not include zero).19

<<Table 2 about here>>

19 For both output variables, the results are essentially the same whether we use the raw Judicial Review indicator or the Constitutional Review Index as input variable.
The difference between physical integrity and empowerment rights can easily be explained by the fact that respect for physical integrity rights is largely independent of legislation. While restrictions to free speech, to worker’s rights, to religious freedom or free movement often result from legislation, violations of physical integrity rights typically happen behind closed doors and can rarely be put down to the legislature’s action or even to its failure to act. Admittedly, there is little constitutional judges can do to prevent this kind of human rights abuse.

Even so, it could still be retorted that the positive correlation between judicial review and empowerment rights is spurious, because countries with judicial review tend to have better human rights records anyway, for reasons that have nothing to do with the existence of judicial review. The countries that practice judicial review simply happen to be richer, more democratic, less violent, etc. Empirical research suggests there is a grain of truth in this argument. A variety of factors have been shown to affect a country’s human rights performance: GDP per capita, democratisation, ethno-linguistic fractionalisation, inequality (Landman 2005). It is possible to control for the effect of these factors, though, by adding them to the regression equation and see if the Constitutional Review Index remains significant. This is what Model 1b and 2b do, respectively for the Physical Integrity and the Empowerment Rights Index. The two models add five input variables to the regression equation: (1) GDP per capita, (2) ethnic fractionalisation, (3) democratisation, (4) inequality (as measured by the Gini

Note that the DEMOC variable from Polity IV codes cases of foreign interruption, of anarchy and of transition respectively -66, -77 and -88, which, to a certain extent, controls for the effect of wars and other instances of violent disruption.
coefficient) and (5) a measure of the perceived independence of courts, which serves to control for the role of ordinary courts in protecting basic human rights.\(^{21}\) As Model 1b indicates, the effect of the Constitutional Review Index on physical integrity does not become statistically significant as a result (the confidence interval still includes zero). More importantly though, Model 2b demonstrates that the effect of judicial review on empowerment rights is robust against alternative explanations. The coefficient of the Constitutional Review Index remains positive (1.90) and its confidence interval \([0.08, 3.73]\) does not include zero.

\footnotesize{\textbf{Figure 6.2 about}}

To make the latter result easier to interpret, we regress the Empowerment Rights Index on the five control variables and then save the residuals. We thus obtain a measure of the respect for empowerment rights that is purged of the impact of these five factors. Figure 6.2 illustrates the relationship between judicial review and this relativised measure of human rights protection.

These findings are in line with La Porta et al. (2004), who find a positive and statistically significant relationship between judicial review and human rights protection, albeit using a different set of measures and controls. There are,  

\(^{21}\) This measure from the Economic Freedom Index is based on the annual \textit{Global Competitiveness Report} question: “Is the judiciary in your country independent from political influences of members of government, citizens, or firms? No—heavily influenced (= 1) or Yes—entirely independent (= 7).” The value for the year 2004 is used, except for Ethiopia and Nepal (2005), and Syria (2006). Note that the correlation with the Constitutional Review Index is neither strong nor positive (-0.07).
of course, other policy areas where the existence of judicial review may be expected to have a beneficial impact on policy outcomes. Unlike the US Supreme Court, which has largely retreated from social and economic policy-making since the New Deal era, European constitutional courts regularly intervene in matters such as taxation, economic regulation and welfare entitlements. Following Maskin and Tirole (2004), who contend that independent judges are most likely to improve policy outcomes in technical areas where politicians are more tempted to pander to the electorate, we expect judicial review to show a positive correlation with wealth creation. Feld and Voigt (2004), however, find a negative correlation between the establishment of a constitutional tribunal and economic performances. Advocates of judicial review may find some solace in studies showing the effect of central bank independence on policy outcomes to be equally mixed. Making central banks independent appears to have no measurable impact on real economic performances (Alesina and Summers 1993). Even in what is supposed to be their central mission, fighting inflation, the confirmatory evidence is not as overwhelming as one what would believe from the theoretical argument (Daunfeldt and de Luna 2008).

5 Conclusion: Democracy and Distrust(ee)

The foregoing analysis warrants the conclusion that the case for judicial review is stronger, though by no means unequivocal, under the Trustee than the Agent Model. If we treat the two models as ideal-types, then the Trustee Model comes closer to describing, and therefore to justifying, the institution and how it operates in reality. There may be some exceptions. Interestingly, where judicial
review comes closest to the Agent Model is perhaps in Scandinavia. The Finnish and Swedish Constitutions spell out a “clear mistake rule” whereby courts have the power to set aside legislative acts but only in case of “evident” or “manifest” contradiction with the constitution. So far the courts have not evinced any intent to broaden or loosen the definition of these terms and a clear case of constitutional violation by the legislature has yet to be identified (Ferreres Comella 2004: 1732). So it might be said that the beauty of judicial review Scandinavian style is that it is never exercised.

This being said, and getting back to the normative debate, we should expect the Trustee Model to meet with strong resistance regardless of whether it provides a better rationale for judicial review. Surely, some legal scholars seem keen on a more consequentialist approach. Both Kumm (2009) and Fallon (2007) articulate a defence of judicial review that is ultimately institutional and outcome-based (though not backed by empirical analysis). Yet judges in general are reluctant to come out as policy-makers. For them, the logic of the Trustee approach is potentially much more demanding. Indeed, optimizing the Trustee

22 Section 106 of the Finnish Constitution of 11 June 1999:

If, in a matter being tried by a court of law, the application of an Act turns out to be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution.

Chapter 11, Article 14 of the Swedish Constitution:

If a court or other public body finds that a provision conflicts with a rule of fundamental law or other superior statute, or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision shall not be applied. If the provision has been approved by the Riksdag or by the Government, however, it shall be waived only if the error is manifest.
courts would imply that, instead of hiding behind the cover that they are only applying the constitution, constitutional judges would have to provide a full justification of their decisions. Since there is no reason why constitutional courts should be held to lower standards than central banks, judges would have to engage with social science research, audit policy experts and even make forecasts about the likely consequences of their policy choices. This might also entail picking constitutional judges with a broader range of backgrounds and academic skills.

A more fundamental objection will inevitably come from democrats. To them, the whole idea of Trustee judges may seem plainly unacceptable. Of course, there are authors who deny that Trustee institutions are antidemocratic. Giandomenico Majone, for one, maintains that EU institutions like the Commission and the Court of Justice do not suffer from a democratic deficit because they essentially deal with regulatory matters. Democratic legitimacy, he argues, is a requirement that only applies to redistributive legislation (Majone 1996). More plausibly though, the Trustee approach relates to a sceptical view of democracy that has a long pedigree in the liberal tradition and which, for a part, lies at the origins of our system of representative government (Manin 1997). Echoing Sieyès and Madison, Tocqueville famously questioned America’s ability to conduct a successful foreign policy because of the tendency of a democracy to “obey its feelings rather than its calculations and to abandon a long matured plan to satisfy a momentary passion”. To reconcile judicial review with the democratic ideals of those who reject this tradition, some might want to embrace the minimalist, Scandinavian model – which, however, appears to make little
difference with not having judicial review at all. Others might want to restrict judicial review to very specific policy areas where the case for judicial oversight is overwhelming. But then comes the problem of ensuring that judges do not overstep their bounds. The present paper may suggest that formal (regulatory) rules are not always effective in containing the power of public decision-makers.

References


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Figure 1. Litigation and the Indeterminacy of Legal Rules.
Notes: Calculations based on the Supreme Court Database. The unit of observation is the constitutional provision considered by the Court (N = 4234), so that more than one provision may be considered in the same decision. Where the Court considers a provision of the Bill of Rights that has been made binding on the states through the incorporation doctrine, identification is to the specific guarantee rather than to the Due Process Clause of the Fourteenth Amendment.
Notes: The Court chooses the outcome closest to its ideal point in the set defined by the ABC triangle so that any alternative outcome, including a return to the initial compromise, will make at least one party less well off.
Figure 4. Constitutional Rigidity and Judicial Activism in 35 Democracies.

Notes: The regression line represents the equation: Judicial Activism = 0.174 + 0.438(Constitutional Rigidity) + e. OLS method is used. 95% confidence interval line is shown in grey.
Figure 5. Redistributive vs. Efficiency-Oriented Policies
<table>
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<tr>
<th>Variable</th>
<th>N</th>
<th>Mean</th>
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<th>SD</th>
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<td>Empowerment Rights Index (mean 1996-2005)</td>
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Figure 6.1. Judicial Review, Physical Integrity Rights and Empowerment Rights
### Table 2. Regressing Measures of Human Rights Protection on Constitutional Review

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Notes: 95% confidence intervals are in brackets. OLS method used.
Figure 6.2. Judicial Review and Empowerment Rights after Eliminating the Effect of GDP, Ethnic Fractionalisation, Democratisation, Inequality and Judicial Independence

Notes: The residuals of the Empowerment Rights Index are computed as: \( e = \text{Empowerment Rights Index} - (-5.423 + 1.076(GDP) - 0.917(\text{Ethnic Fractionalisation}) + 0.115(\text{Democratisation}) + 0.84(\text{Inequality}) - 0.043(\text{Judicial Independence})) \). The equation of the regression line in the graph is: Residuals Empowerment Rights Index = \(-1.037 + 1.861(\text{Constitutional Review Index}) + e\). OLS method is used. 95% confidence interval is shown in grey.