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Judicial review, plural weighted voting, and democracy

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ABSTRACT This paper examines an important argument that has received little attention despite its wide implications. This is the claim that judicial review can be equated with plural weighted voting (PwV) because both are justified as instruments to achieve better outcomes, and both violate political equality. We take this argument to be a *reductio*: given that plural voting is unacceptable, judicial review must be rejected. If correct, this claim threatens to undermine much recent liberal democratic theorising. We argue that none of the obvious routes to distinguish judicial review from PwV offer a convincing way to distinguish these two schemes. Furthermore, this has important implications for how we should understand judicial review. The result is thus significant not only for the particular issues mentioned, but also for our understanding of the role instrumental justifications play in democratic theory.

KEYWORDS Liberal democracy; judicial review; plural (weighted) voting; contractualism; political equality.

RESUMO Este artigo examina um argumento relevante que tem recebido escassa atenção apesar das suas vastas implicações. Trata-se da alegação de que a fiscalização constitucional das leis [pelos tribunais] pode ser considerada equivalente a um direito de voto plural (PwV) na medida em que ambos são justificados como instrumentos para atingir melhores resultados e ambos violam a igualdade política. Entendemos este argumento como uma forma de *reductio*: dado que o voto plural é inaceitável, a fiscalização constitucional das leis deve ser rejeitada. Se correcta, esta alegação ameaça muita da recente teoria liberal-democrática. Argumenta-se que nenhuma das vias usadas para distinguir a fiscalização constitucional das leis do direito de voto plural oferece um meio convincente de efectuar uma distinção entre os dois esquemas. Isto tem ainda implicações importantes quanto ao modo como se deverá entender a fiscalização da constitucionalidade das leis. O resultado [desta investigação] é, pois, significativo, não apenas relativamente aos tópicos particulares aqui mencionados, mas também relativamente ao nosso entendimento de qual o papel que as justificações instrumentais devem desempenhar no seio da teoria democrática.

PALAVRAS-CHAVE Democracia liberal; revisão constitucional das leis; voto plural; contratualismo; igualdade política.

Richard Arneson has defended a purely instrumental account of democracy. As he recognised in 1993, this gives rise to the puzzle of “why anyone who accepts judicial supremacy should be a principled opponent of the plural vote proposal” (p. 135).

Arneson’s argument is the following:

Proposition (P1): with respect to democratic equality, plural (weighted) voting (PwV) and judicial review are so similar in their normatively relevant properties that any justification for them must stand or fall together, that is, either both are justified or neither, and for the same reason;

Assumption: PwV is not justified;

Conclusion: Judicial review is not justified.

In this paper we examine Arneson’s argument. The challenge of Arneson’s argument is that PwV and judicial review are indistinguishable. One cannot reject the former without rejecting the latter. PwV strikes many as unjust because it denies equal political rights. Judicial review strikes many as unjust for the same reason. However, liberal constitutionalists reject PwV as unjust, but endorse judicial review as justified. If Arneson’s argument is correct, it threatens the coherence of liberal constitutionalism. For liberal constitutionalism, a democratic order without some kind of judicial review to protect individual rights is unthinkable. If judicial review cannot be justified unless one is forced to justify PwV, then a cornerstone of liberal constitutionalism is undermined.

We examine several solutions to how liberal constitutionalism can escape the implications of Arneson’s argument. In the end we find no fully satisfactory solutions that can help liberal constitutionalism out of this tricky situation. That does not mean that no solution exists, but there are no good solutions through the usual methods available to liberal constitutionalism. We believe that a contractual approach based on Scanlon’s contractualism comes closest to resolving this problem, but as our analysis shows, contractualism is not able to deliver a fully satisfying solution.

P1 might strike some readers as obviously false or implausible such that there is no reason to think more about why it is wrong. To respond

to this, the first section explains why the topic is important – why the answer matters – and the second and third show why the “obvious” arguments against P1 are not compelling. Sections four to six develop the contractual account and shows why this account does not resolve the issue.

1 Why does it matter?

Judicial review characteristically involves judges, who are either unelected or stand at some distance from direct democratic election, reviewing democratically enacted legislation. It is highly controversial in contemporary democratic and legal theory.¹ For its proponents, extra-majoritarian democratic institutions such as judicial review help to protect equal civil and political rights, while for its critics such institutions are undemocratic and violate political equality.

The ramifications of this debate go much further than democratic theory. For many liberal democrats, judicial review is essential to the protection of fundamental liberal rights – such as freedom of religion, the integrity of the person and freedom of association – from unrestricted majority-rule.² This view is associated with the liberal democratic tradition in which these rights are constitutionally entrenched outside the reach of ordinary politics. For this tradition, judicial review and fundamental rights outside the reach of ordinary politics do not impede political equality. Rather, as the liberal theorist Samuel Freeman argues, democratic theory based on Locke, Rousseau, Kant and Rawls considers judicial review a legitimate democratic institution supplementing majority-rule.³ Judicial review is motivated by the importance attached to fundamental rights, the worry that these rights may be violated by majority-rule, and the view that democracy is more than merely majority-rule.

Moreover, judicial review is only one of a number of proposals to adjust normal democratic procedures that have been offered by liberal

1 Of course, the precise form taken by judicial review - for example, the procedures for electing or appointing judges and the scope of their powers - varies by jurisdiction. We focus on the core case of unelected judges with wide power to review and strike down decisions made by an elected legislature. For papers reflecting some of the controversies, see the Special Issue of *Law and Philosophy* 22(3-4) including Alexander (2003), Harel (2003), Schauer (2003), Sherwin (2003), Spector (2003) and Underkuffler (2003).

2 See Barry (1995), Freeman (1990, pp. 327-70) and Rawls (2005).

3 Freeman (1990).

democrats. Others include: some form of enhanced minority representation, which has been an important demand of multicultural theorists;⁴ the idea that “power should be distributed in proportion to people’s stakes in the decision under consideration” (Brighouse & Fleurbaey, 2010, p. 137); and that people vote on who ought to get more votes on a given issue and dub those with more votes “democratically elected aristocracies” (Heyd & Segal, 2006).

For their critics, such schemes undermine the democratic ideal of political equality. They argue, for example, that judicial review is synonymous with unelected judges having political power superior to voters and elected politicians; that is, the political power to review democratic decisions. This they hold to be incompatible with political equality in modern democracies. Political equality, understood as including, among other things, universal suffrage and roughly equal political power among the electorate (one person, one vote of roughly equal value), makes judicial review incompatible with modern understandings of political equality and therefore objectionable. For example, the influential democratic theorist Robert A. Dahl claims that judicial review is nothing but a form of Platonic “quasi-Guardianship” (1989, p. 188). Thus, for its critics, judicial review is flatly undemocratic - “a deviant institution in the American democracy” (Bickel, 1986, pp. 17-18) - and the default democratic position ought to be one vote, of one value, for each adult citizen within an unencumbered majoritarianism.

There is, then, a great deal at stake in this argument. The justifiability of a central pillar of recent liberal democratic theory - the idea of constitutionally, and so judicially, protected rights - as well as proposals to ensure representation of ethnic (and gender) groups, depends on the outcome.⁵ More generally, liberal democrats claim that “liberalism” and “democracy” are complementary ideals both grounded in the demand to “treat people as equals”.⁶ Those who oppose extra-majoritarian adjustments to democracy (such as judicial review and minority representation) deny this. If there is no principled difference between judicial review and PwV, then given the assumption (which we are taking for

4 See Kymlicka (1989, 1995) and Young (1989, pp. 250-74).

5 It is worth recalling the significant place accorded by Rawls to the US Supreme Court - the “exemplar of public reason”. For reasons given above, this argument seems to us to be important. Many liberal theorists of justice - not least - assume the constitutional protection of fundamental rights and other theorists the possibility of special representation for minorities.

6 See Beitz (1989) for an illuminating discussion of different understandings of political equality, especially ch. 1.

granted in this paper) that PwV cannot be justified, we must reject judicial review. Put differently, “anyone who disagrees... on principle on the ground that any plural vote arrangement conflicts with a fundamental norm of democratic rights of equal citizenship should also be a principled opponent of judicial supremacy in a substantive constitutional order” (Arneson, 1993, p. 135).⁷

So much, then, for the thought that the whole topic may not matter. What of the claim that P1 is obviously false?

2 The prima facie plausibility of the equivalence of PwV and judicial review

P1 holds that with respect to democratic equality, PwV and judicial review are so similar in their normatively relevant properties that the justifications for them must stand or fall together. That is, either both are justified or neither, and for the same reason. In this section we first consider why this proposition has prima facie plausibility and second consider various arguments that purport to show that it is obviously false, clearly implausible, and so on.

2.1. An argument for the normative equivalence of PwV and judicial review

One (in our view compelling) argument for the proposition is that both PwV and judicial review are justified (if they are) *instrumentally*. That is, their justification lies in their producing better outcomes than unconstrained democratic equality.⁸ They do this in different ways: PwV changes the aggregation function whereas judicial review acts as a constraint on the outcomes of the aggregation function, but nevertheless the underlying justification is the same.

Consider, for example, the canonical statement, and defence, of PwV in John Stuart Mill’s work. Mill thought it self-evident that some citizens were capable of making better decisions than others. Whilst he thought that “every one is entitled to some influence”, he was clear that

7 The same would follow, mutatis mutandis, for extra minority representation and any other proposal designed to ensure morally desirable outcomes by limiting straightforward majority rule.

8 See Arneson (1993).

“the better and wiser” ought to have more than others (1991, p. 340). The idea that every person should have an “equal” voice seemed to him quixotic. Moreover, Mill argued that the proposition that some should have a greater say than others in politics (as in other matters) should be unobjectionable: “no one but a fool”, he wrote, “feels offended by the acknowledgement that there are others whose opinion, and even whose wish, is entitled to a greater amount of consideration than his” (1991, p. 335). His proposal was to give plural weighted votes to those with a certain level of education or training.

The point of PwV, then, is in part one of ensuring better outcomes and in part doing so by limiting the writ of majoritarian rule. Indeed, one significant threat to better outcomes is majoritarian rule so, as Arneson puts it, “such limits will better promote morally desirable outcomes than would unencumbered majority rule” (1993, p. 133). The connection to judicial review is clear. Even if we reject Dahl’s characterisation of such review as “quasi Guardianship”, we cannot deny that one of its functions is to block the threat to individual rights that would otherwise exist from unencumbered majoritarianism.

The defence of the proposition, then, is that both judicial review and PwV are justified if their outcomes are superior to those that would be realised through alternative procedures. So, it might be argued, judicial review is justified in circumstances in which it protects fundamental civil and political rights better than any other possible institution. PwV is justified in circumstances in which it produces more just legislation - including by protecting civil and political rights - than any other institution or method of decision making.

The instrumental account of PwV and judicial review shows how they are closely connected. Nevertheless, two important substantial differences between the two schemes need to be noted. Whereas PwV and judicial review can be justified because of producing superior results, judicial review has an important procedural aspect in that stakeholders have the chance to influence the outcome through the judicial process (this is considered below). A second difference is that judicial review is often, although not always, included in a constitution while PwV tends, although not always, not to hold a special constitutional status. Thus, differences remain between the two schemes.

However, these differences and their implications do not affect the instrumental case that is Arneson’s focus or his main objection to both schemes. For Arneson and others, both schemes conflict with equal

political rights. PwV undermines political equality because it allocates plural votes to that part of the electorate that will choose the most desirable outcomes. Similarly, judicial review gives unelected judges the right to strike down unconstitutional legislation. Effectively, this means that unelected judges have more political power than ordinary citizens as, in addition to their single vote in general elections, they have an opportunity to strike down laws after those laws are made. Judicial review described in this way shows a striking similarity to plural votes and this moves Arneson to conclude that that “judicial supremacy is just plural votes by other means... The principles underlying judicial supremacy and plural votes are the same” (1993, p. 135).

3 Two arguments against the normative equivalence of PwV and judicial review

The argument above seems to us not to have attracted the attention it deserves in the literature given the significance of judicial review in liberal democratic theory. Perhaps this is because it strikes people as obviously false, a “strawman”, or as the kind of argument that will be vulnerable to refutation with only little thought. The following sub-sections consider two possible versions of this dismissive response and shows that things are not quite that simple.

3.1. The underlying justifications for PwV and judicial review differ.

One possibility is that the claim that PwV and judicial review stand and fall together given that each is justified in the same way is false because the underlying justifications for PwV and judicial review differ. PwV might have an intrinsic value whereas judicial review is justified instrumentally or *vice-versa*.

3.1.1. The intrinsic value of PwV and instrumental value of judicial review

Consider someone who believes that persons are of different natures (and, possibly, value) and that it is good that this is reflected in their status as voters (perhaps a crude Platonist, who believes that those whose

souls are of “gold” ought to have greater power not only because they are more likely to rule well, but because it is independently good that they do so). Such a person might consider that PwV is justified by an independent value (respect for “gold” souls) whilst arguing that judicial review is instrumentally justified if and when it is needed to ensure better outcomes (even than those delivered by the modified aggregation procedure). This position would show that PwV and judicial review are disanalogous, but given that we have assumed that PwV is unjustified (on egalitarian grounds), this is not something we will consider here.

A more plausible account of the intrinsic value of PwV might appeal to something akin to an argument of Brighouse and Fleurbaey that in a given decision more influence ought to be wielded by those most directly affected. Of course, it is possible to read that as an instrumental claim. Brighouse and Fleurbaey themselves offer such a reading and claim that PwV will, under certain assumptions, avoid some of the issues indicated by Arrow’s impossibility theorem. Alternatively, one might think that those most affected are more likely to think carefully about the options, to inform themselves, and so on, and so are more likely to come to a better decision than would be arrived at by unencumbered majoritarianism.

However, Brighouse and Fleurbaey also press the intrinsic claim that the giving of an extra say to those most closely affected in a decision is right as a matter of “respect” and of enhancing autonomy (independent of whether such a policy will lead to better decisions).⁹

Brighouse and Fleurbaey’s argument is part of a wider defence of a “principle of proportionality” that they see as an alternative to a “principle of equality” with respect to political power. Insofar as they intend to offer an account of the potential acceptability of some non-Millian form(s) of PwV,¹⁰ and thus deny the assumption that forms part of the argument of concern in this paper, their concerns are orthogonal to ours. Moreover, their concern with PwV plays only a minor part in an overall argument in favour of a proportional link between political power and political stakes; an argument that thus encompasses everything from global government to subsidiarity.

More generally, the comparison that concerns us – and others – is between a system of judicial review that applies to national decisions taken by a given electorate and PwV applied to members of that

9 See Brighouse & Fleurbaey (2010, pp. 141-142).

10 See Brighouse & Fleurbaey (2010, p. 141).

electorate. Of course, these are not uncontested and judicial review, in particular, can often concern who has “standing” in a given decision, but P1 and the assumption that PwV is not justified play a role here that is independent of arguments of whether, for example, local decisions should be taken locally and for what reason.

3.1.2. The intrinsic value of judicial review and instrumental value of PwV

The alternative argument against the proposition that judicial review and PwV are justified (or not) for the same reason asserts that it is judicial review that is intrinsically justified by reference to some independent value whereas PwV is justified (or not) by appeal to its delivering better outcomes. For example, Eylon and Harel claim that judicial review is intrinsically valuable because it institutionalises the right to a hearing in a case or with respect to a law with which one disagrees. The idea is that those who believe that some majority decision violates their rights are entitled to voice their concerns before their rights are (as they see it) infringed.¹¹ Of course, it cannot be that the justification lies in the claim that by voicing their concerns in judicial review more morally desirable outcomes would be achieved (although they might be), it must be that it is *intrinsically* valuable to reflect the status of persons as rights holders by giving to each the right to attempt an appeal. Here the point made above regarding the procedural difference between PwV and judicial review becomes relevant because the claim is that judicial review is justified both by delivering superior outcomes, and is distinguished from PwV by its emphasis on procedures for arriving at a final outcome. In particular, these procedures involve hearing reasons and adjudicating in light of those reasons.

However, from the point of view of this paper, the claim that the procedures of judicial review instantiate the equal value of persons and so are intrinsically valuable begs the question. It may be that each person has equal status and rights, but that this should be reflected in judicial review is precisely what is at stake. Majoritarian democracy is one mechanism for making decisions given that equal status. The justification of judicial review - of empowering a select, unelected group to rule on the decisions of the majority - might be that it (instrumentally)

¹¹ See Eylon & Harel (2006, pp. 991-1022). See further Harel (2014, Chapter 6).

gives rise to more morally desirable, rights-respecting, outcomes, but it is hard to see that this particular way of doing things has intrinsic value. Intrinsic value lies in the status of persons not in the procedures in which that status is reflected (or, at least, not without a great deal of further argument).¹²

3.2. The underlying justification for PwV and judicial review is the same and points to clear normative differences between them.

The two arguments above attempt to prise apart judicial review and PwV by showing that their underlying justifications differ and thus that they do not stand or fall together. However, neither is compelling. A different strategy is to argue that with respect to the underlying justification of democratic equality, to which it is true both judicial review and PwV appeal, clear differences appear in their “normative relevant properties” such that one stands (judicial review) and the other falls (PwV).

The most powerful form of this argument – and perhaps the one that best explains the dismissive response to the proposition – appeals to the value of democratic equality. For example, Christopher Griffin argues that “equality in the distributive shares of political power represents an appropriate extension of equality of basic moral status to equality of social standing” (2003, p. 118). Furthermore, a “denial of an equal share of power in the context of disagreement about the basic ground rules of social life is a public declaration of second-class citizenry” (2003, p. 120). In short, the argument is that if we endorse the right account of democratic equality, then PwV is clearly unjustified. However, that is not enough for this to be an argument against P1. For that to be so, it must be that PwV is unjustified whereas a system of judicial review that protects the fundamental rights of all citizens is justified.

If this is right (and the argument pursued below is a version of it, so we think that broadly it is), it is not at all obviously so and it is not enough simply to assert that PwV violates democratic equality whereas judicial review does not. Plato and Mill (in very different ways) thought

12 We are grateful to an anonymous reviewer for pushing us on this point. The reviewer’s claim is that the argument supporting the intrinsic value of judicial review rests on the fundamental *procedural* distinction between an adjudicatory process and mere voting. We cannot fully respond here, although we think that the burden of proof lies with those who would wish to assert this, but note that democratic theorists and (most importantly) proponents of PwV might balk at the presumed contrast with *mere* voting. Voters, after all, are also meant to consider reasons and come to a judgement as to what is best.

an unequal distribution of political power was consistent with “treating people as equals” given normatively significant differences between people (the quality of their souls, the level of their education) as of course do we when it comes, for example, to children and the insane.¹³ Much more importantly, there are those – including Arneson, Dahl, Sugden, and Waldron – who think that judicial review is inconsistent with democratic equality. As Sugden puts it, just as we can reject PwV, so “for the same reasons, we may say that Arneson’s argument does not justify the special role of the judiciary in the American constitution” (1993, p. 154).

In short, democratic equality, and what it demands, is what is in question and what needs to be shown. In particular, what is needed is an argument that responds to what we have argued remains an important challenge: if we reject PwV because it conflicts with the demands of democracy, then must we reject judicial review, and other forms of block on unencumbered majoritarianism, for the same reason? The issue is how to distinguish PwV and judicial review, which is the object of the rest of this paper. Before that, though, it is worth very briefly considering one final response which seeks not to resolve, but to dissolve, the difficulty described in the initial proposition.

4 Dissolving the difficulty?

The challenge we have described – and defended as a challenge – is that PwV and judicial review are normatively similar; that many liberal theorists are committed to judicial review, but wish to exclude PwV; and that given the significance of judicial review in their arguments, it is (at least) a source of theoretical embarrassment that one can seemingly not have one without the other. We respond to this challenge in the next section, but first it is worth considering a different kind of reply grounded in taking seriously the instrumental claims made by the proponents of the two policies. That is, one could accept the claim that PwV and judicial review are justified, when they are, by their improving outcomes in comparison with unrestricted majoritarianism, but deny that they are so-justified precisely because they do not deliver. Or, one could accept that they sometimes deliver and that inevitably the messy business of politics requires compromises amongst values.

13 See Wall (2007, p. 436).

A version of the first argument is offered by Jeremy Waldron who famously argues that the supposed advantages of judicial review for protecting rights are significantly overvalued by liberal theorists and that it would be far better to leave such matters to the legislature.¹⁴ If right, and assuming Waldron is sceptical of the instrumental case for PwV, then both can be rejected as failing in their own terms.

Versions of the latter are offered by Charles R. Beitz in his treatment of political equality. Beitz rejects PwV on grounds of unfairness to those deprived of plural votes (1989, pp. 31-49), but he acknowledges that outcomes (or “best results” as he calls it) matter when assessing democratic institutions. The conflict between fair procedures and best results, he suggests, must be resolved through a compromise between these two conflicting demands. However, he does not say how such a compromise can be reached.

Similarly, in a discussion of PwV, David Estlund rejects weighted voting because “the educated portion of the populace may disproportionately have epistemically damaging features that countervail the epistemic benefits of education” (2008, p. 215). Nonetheless, Estlund is aware of the importance of best results in democracy (his justification of democracy emphasises the epistemic value of democracy), and ultimately he ends up with a compromise similar to Beitz in that he endorses some outcome oriented schemes such as judicial review, but without suggesting how to distinguish between acceptable and unacceptable schemes.

These positions seek not to resolve the challenge described above so much as to take the heat out of it (to dissolve it). For Waldron, there is no reason to retain a commitment to judicial review, so the thought that such a commitment might bring with it a similar endorsement of PwV does not matter. For Beitz and Estlund, compromise between fair procedures and achieving “best results” is inevitable so the proposition under examination (P1) does not pose a challenge so much as describe our political predicament. That said, neither offers a way of thinking through that predicament, which is what we hope to provide below.

We have now examined many of the proposals to distinguish PwV from judicial review and our argument is that none of them are fully convincing. One further possibility is available, which is to ask if a contractual account can resolve this issue. Below we take seriously the

14 See Waldron (2006, pp. 1346-1406).

challenge as a theoretical not an empirical matter and develop a contractual response. Our analysis shows that a contractual response cannot resolve this issue fully.

5 Ends and means

Let us assume that both judicial review and PwV do, as a matter of fact, produce better – including morally better – outcomes than does unencumbered majoritarianism. If we were straightforward consequentialists, both would be justified relative to unencumbered majoritarianism and whether they stood or fell together would depend on the consequences of each compared to the alternatives. However, liberal theorists of justice need hardly be concerned about that. After all, we should not be surprised if the policy implications of doing nothing other than maximising overall good outcomes (however understood) sometimes clash with liberal commitments. The point of course is that the *reductio* appeals not to consequentialism as an all things considered theory of political morality, but to a more restricted instrumentalism.

However, this must be too quick. For any given morally desirable outcome, there may be various means to achieve it. But, it does not follow that all means are equally acceptable judged merely on their results. For example, we might be able to ensure that a racist candidate for elected office is not successful either by engaging him in public debate or by spreading malicious gossip amongst his supporters that he has black ancestry. That both policies will achieve the same end does not show that they are equivalent. This does not mean that the challenge of judicial review and PwV is met, but instead (as noted above in relation to Estlund and Beitz) reinforces the need for an account that distinguishes acceptable from non-acceptable means.

The case of the two approaches taken to the racist standing for election is a simple one. However, judicial review and PwV present a much greater challenge. After all, they seem to involve the same claim: that it is necessary to give a select group greater say in the political process than would otherwise be dictated by unencumbered majoritarianism in order to ensure more morally desirable outcomes.

In the next section we analyse how contractualism can distinguish between PwV and judicial review. To do this, we deploy the contractualist framework developed by T. M. Scanlon. In doing so, we are not

aiming to present “a contractualist argument”, still less to limit the interest of the paper to those who are of this methodological persuasion. Rather, we believe that contractualism offers a singularly effective way of thinking through how to combine deontological and consequentialist concerns. In particular, contractualism incorporates a concern for consequences, but makes that concern subject to the judgement of *individuals*.¹⁵ Scanlon’s version of the contractualist procedure (although we are not concerned with following it in its full glory) is to ask whether a proposal for the general regulation of society could be justified on grounds that no-one (suitably motivated) could reasonably reject. Our interest is less in the outcome of that test as it is in the way in which deliberating over what can be reasonably rejected brings out distinct features of PwV and judicial review - particularly in the ways in which they *aggregate* interests.

6 Aggregating between and within lives, judicial review, and PwV

Before proceeding to the substance of the argument, it is worth saying a little about aggregation. In subjecting proposals to the reasonable rejection of *individuals*, contractualism seems “to go too far... [in] disallowing any appeal to aggregative benefits”. Scanlon’s response is to distinguish aggregation “within lives” from aggregation “across lives” (1998, 230). What matters here is how the aggregation is to be done. To distinguish judicial review from PwV contractualism must show that there are affinities between judicial review and contractualist reasoning and between PwV and aggregating across lives such that we can endorse the former without having to endorse the latter.

The following often discussed example from Scanlon is helpful in understanding the important difference between judicial review and PwV:

Suppose that Jones has suffered an accident in the transmitter room of a television station. Electrical equipment has fallen on his arm, and we cannot rescue him without turning off the transmitter for fifteen minutes. A World Cup match is in progress, watched by many people, and it will

¹⁵ See Scanlon (1998, p. 229).

not be over for an hour. Jones's injury will not get worse if we wait, but his hand has been mashed and he is receiving extremely painful electrical shocks. Should we rescue him now or wait until the match is over? Does the right thing to do depend on how many people are watching – whether it is one million or five million or a hundred million? (1998, p. 235)

Jones has a legitimate claim to be saved that trumps the benefits and enjoyment of the World Cup viewers. That is, as Scanlon puts it, “if one can save a person from serious pain and injury at the cost of inconveniencing others or interfering with their amusement, then one must do so no matter how numerous these others may be” (1998, p. 235).¹⁶

Consider two ways of resolving Jones: (1) instant judge (2) instant plebiscite

- (1) structurally looks at Jones's rights
- (2) could do what is done in (1), but that is unlikely.

Of course, it is worth noting that (2) amended by PwV might indeed deliver the answer that Jones should be rescued, which is precisely why Arneson's puzzle is real.

How does this analysis of aggregating across and aggregating within lives help with the distinction between judicial review and PwV? It might be thought that it is unlikely to do so given that Scanlon's distinction is ultimately about the outcomes (the decisions themselves) rather than about the procedures that generate those decisions. However, one argument could be that there are structural differences between judicial review and PwV that express, or instantiate, the normative grounds on which Scanlon's distinction is built.

Consider first judicial review. The purpose of judicial review, as we have understood it in this paper, is to ensure that majoritarian decisions

16 As Scanlon notes, it is instructive to contrast this with another example in which “we are deciding whether to build a new system of transmitting towers that will improve the quality of reception for many television viewers” and where it is “highly probable that in the course of this project a number of workers will suffer harms at least as great as Jones's.” In evaluating this, we do not – just as we do not in the first Jones example – consider across all the lives where the most benefit will lie. Rather we ask what level of care should be exercised in building the towers and whether that level of care is met. If it will be, the remaining issue is what constraints on the (individual) lives of those affected would follow from abandoning the project on the basis of a stringent test of risking no harm at all. This might – and in many cases of public works (roads, transmitters, etc.), does – result in works that risk, and in reality impose, harms on others. But, the justification of those works is not the general good achieved, but the lack of grounds on which any individual could reasonably reject a properly designed scheme of works with adequate protections. See Scanlon (1998, pp. 236-238).

do not violate the rights of individuals. In other words, an unencumbered majoritarian decision procedure can aggregate across lives (across the voting citizenry). If, for example, it were possible to have an instant online vote as to whether to turn off the transmission of the world cup football match and release Jones, the decision is dictated by the aggregating of preferences and may result in Jones continuing to suffer the electrical shocks until the end of the game.

In such a case, imagine (an equally unrealistic immediate) judicial review of the decision not to rescue Jones. In this case, the judges consider (or, ought to consider) Jones's rights and duties; that is they ideally consider the majoritarian proposal from the perspective of the individual claimant. In striking down the majoritarian proposal that Jones ought not to be rescued, the judges "represent" Jones and Jones's veto over the majoritarian interest in being able to continue to watch the World Cup final.

What of PwV? Of course, a system of PwV may ensure that the wish of the unencumbered majority that the broadcast continue is blocked. The argument for weighted voting, after all, is that it leads to better – including morally better – outcomes. Thus, once those whose votes have extra weight are included the decision may be to respect the individual claim that the likes of Jones have to be rescued. If there is a difference between judicial review and PwV, then, it cannot lie in the *outcome* (since the justification of both relative to unencumbered majoritarianism lies in their realising better outcomes), but in the *means* by which that outcome is achieved.

This point is important and worth emphasising. We grant that PwV might generate the correct result. It is open to the proponent of PwV – or, more importantly – the opponent of judicial review – to say that *if* all that matters is that individuals are protected from objectionable interpersonal aggregation, then we (and contractualism generally) should be indifferent between the mechanisms by which this occurs. However, that is to accept Arneson's claim that those judicial review and PwV stand or fall together, which we (and others) take to be a serious challenge to most defenders of liberal democracy. The point is that, given that judicial review and PwV can both deliver the correct results, the difference between them (if there is a difference) must lie in the way in which they arrive at those results.

We have argued that judicial decisions typically concern individuals and their rights and duties, and we believe that *if* judicial review is to be

compatible with democratic equality, then judicial reasoning and decision-making ought to follow the contractarian injunction to take seriously the “distinction between persons”. This clearly has implications for the ways in which judges should make their judgments. Thus, in a way that recalls Rawls’s idea of the Supreme Court as the exemplar of public reason,¹⁷ proponents of judicial review can claim that the means by which morally better outcomes are ensured can be represented as a proxy of contractualist deliberation that ensures that the outcome of aggregating across lives does not trump the claims of the individual.

How does this differ from PwV? In one sense, there is no necessity that it does so. Just as judges can ask the question of whether a law or policy respects the claims of individuals, so can voters (and an important part of Waldron’s argument is that theorists have overestimated judges, and underestimated ordinary voters, when it comes to concerns about justice). Thus, our argument is not that voting - and by extension PwV - is *necessarily* merely a matter of interpersonal interest aggregation. Rather, whereas there is an affinity between judicial review and contractualism’s concern for the individual, there is no such affinity in the case of PwV. Indeed, the proposal to amend the simple model of each person having one vote of equal value by introducing PwV, is itself a recognition that mere voting is likely to be problematic precisely in its affinity to mere aggregation.

Moreover, these affinities are likely to be strengthened as one moves away from simple single person Jones-like examples to highly complex political questions. No matter how complex the policy, judicial issues typically come down to the rights and duties of individuals in ways that public policy questions decided by voting do not.

Does this suffice to reject PwV? Not quite, for the following reason. Consider the proposal to have PwV itself, rather than the outcome of any such votes. Even if PwV deprives a person of equal political rights, it might nevertheless be that the individual enjoys greater protection against injustice in a society with PwV – where that individual is not one who is entrusted with a weighted vote – than she would in a system of unencumbered majoritarianism. Hence, when calculating the advantages and disadvantages of PwV, the advantages outweigh the disadvantages, even for the individual whose vote does not attract extra weight.

17 See Rawls (2005, p. 231).

If this is correct, then such a person might not reasonably reject the proposal for a scheme of weighted voting. Although notice that what is compared here is a person's situation without PwV compared with a situation of equal voting rights. Schematically, this claim can be presented in the following way: Contractualism allows aggregation within lives. Each individual, aggregating within his/her life, can reasonably endorse a proposal for PwV assuming that the anticipated results of such a proposal being enacted provides greater protection for the individual's claims than would a system of unencumbered majoritarianism.

However, note the comparison above is between PwV and unencumbered majoritarianism. If those are the only choices, and we make the empirical assumption that the former would lead to better – including morally better – outcomes, then PwV may indeed be justified. But, that is not the shape of the argument. Rather, the argument concerns the (dis)analogy between PwV and judicial review. Assuming (as we have done) that both are instrumentally valuable in achieving better outcomes, the question is on what grounds contractualist citizens ought to prefer judicial review to PwV?

First, because PwV manifests a failure to treat citizens as equals. Whatever the basis for allocation of voting weights may be, it signals that some citizens have a greater say by virtue of some characteristic that they share (intelligence, independence, or whatever). In reality, such inequality will be associated with unequal social status and unequal respect. However, even in a “PwV ideal” in which all citizens recognise the purely instrumental nature of the scheme – that is all recognise that it just so happens that giving more votes to some subset of citizens leads to better outcomes for all and that this conveys no other standing – the citizens have reason to prefer a system in which such unequal status is not conferred on some. Of course, one might argue that judicial review also fails to treat citizens as equals because of the power conferred on judges to overturn democratic decisions. In one sense this cannot be denied: judges enjoy unequal political power when compared to ordinary citizens.

Contractual reasoning comes some way in distinguishing these two schemes, but in the end the differences seems less significant and the argument must be stretched beyond plausibility to be able to distinguish these two schemes. So, in the end, the contractual analysis is unable completely to distinguish judicial review from PwV.

7 Conclusion

We began with a puzzle to the effect that liberal democratic theories of a familiar - indeed, dominant, kind - defend judicial review on instrumental grounds. That is, they hold that the reason to give certain select citizens - in this case some judges - legal powers over and above those of ordinary citizens is that doing so advances the cause of justice and ensures against injustice. This gives rise to Arneson's puzzle. If *that* is the argument, then there is no principled reason not to give such additional extra powers to graduates in a scheme of PwV if, as it happens, such powers advance the cause of justice and ensure against injustice.

The distinction between judicial review and PwV, then, cannot depend on an assessment of the outcomes of each scheme. It is a contingent and empirical matter whether judicial review and/or PwV - or some other non-majoritarian scheme - happens best to advance justice and retard injustice. However, we have argued that this does not leave liberal democratic theories without a response to Arneson. Outcomes can be achieved in different ways and it is here that a distinction can be made between procedures that instantiate individual claims and those more expressive of a mere aggregation across claims.

This matters in part because despite the many years that have passed since Arneson set his puzzle, liberal democratic theorists continue to give the hostage to fortune he identified with respect to PwV. Consider, for example, a recent piece by Jeffrey Howard in which he writes, "if citizens would retard, rather than advance, the achievement of justice by making the [a] decision democratically when there is an alternative mechanism available, they ought to opt for the alternative" (2019, p. 182). Howard is arguing against the claim that "decisions should be made democratically *no matter what*" (2019, p. 181), but his argument for "alternative mechanisms" provides the gate through which PwV could pass.

Our argument has been that judicial review and PwV cannot be completely distinguished in so far as both are justified on instrumental grounds and considered from this perspective. If that is right, where does that leave liberal constitutionalism as a theoretical approach, and democratic decision-making? It means the ideal of political equality is harder to realise in practice than many theorists have thought. Abstract ideas about political equality become blurry when paired with the institutional arrangements that will ensure political equality. Defending

political equality seems harder than anticipated by traditional liberal democratic theories.

Furthermore, the difficulty in distinguishing judicial review from PwV puts pressure on what makes democracy a morally justified and legitimate form of government. Is democracy justified instrumentally, for its good consequences, or because of its intrinsic adherence to political equality? Instrumental justifications open up for both judicial review and PwV as both seem justifiable if the consequences are superior to alternative schemes. Intrinsic justifications must omit both judicial review and PwV as both may conflict with an idea of political equality.

We do not see our analysis in this paper as a justification of PwV. Our main point has been to show that judicial review and PwV are more similar than many believe and that distinguishing between these two schemes is harder than many believe. It might be a definite solution to the problem we have analysed in this paper exists, but as yet none of the obvious routes to distinguish judicial review from PwV yields definite answers.

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