Rejection of the power of judicial review in Britain

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1. Introduction

Many in Britain and elsewhere have questioned the democratic legitimacy of the power of judicial review. In particular, they have raised a question as to the compatibility of this power, and its results, with certain values which many believe to be an integral component of most modern societies. The discussion to follow will address the concerns of those who share this view, especially those in Britain.

In assessing whether the power of judicial review is compatible with 'certain values which many believe to be an integral component of most modern societies,' it is appropriate to begin by ascertaining exactly what those values are. The tenor of the topic for discussion appears to envisage the notion that true democracy and majoritarianism are not only synonymous, but considered essential in modern societies. But if that is so, how does one explain the fact that judicial review is endemic in much of the modern industrialized world including Canada,[1] the United States,[2] Germany,[3] and to some extent France[4]—to mention only a few? All of these countries would characterise themselves as democratic, yet all have entrusted the final word on constitutional matters to a judiciary which lacks electoral accountability.[5] It is therefore logical to conclude that either true

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1 *Morgentaler, Smoling and Scott v. The Queen* (1988) 44 DLR 385.

2 *Roe v. Wade* 410 US 113 (1973); *Marbury v. Madison* 5 US 137 (1803).

3 Denninger, E., 'Judicial Review Revisited: The German Experience' (1985) 59 *Tulane L Rev* 1013; Kommers, D.P. *Judicial Politics in West Germany*, chs 1-6.

4 Cummins, R.J. 'The General Principles of Law, Separation of Powers and Theories of Judicial Decision in France' (1986) 35 *ICLQ* 594; Beardsley, 'Constitutional Review in France' (1985) *Supreme Court Review* 189.

5 Kommers, fn. 3 at chs 1-3; Abraham, H.J. 1975, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France,* 3rd edn, Oxford University Press, London, 295-371; Strayer, B.L. 1968, *Judicial Review of*

democracy does not exist in these countries, or that its existence is compatible with, if not dependent upon, the notion of review by an *independent* judiciary. The balance of this paper will be devoted to demonstrating that the latter conclusion best accounts for the endemic support that judicial review has received in most modern societies. More succinctly stated, this paper will demonstrate that true democracy and majoritarianism are anything but synonymous. Once this has been accomplished, the democratic legitimacy of judicial review will become evident.

2. Majoritarianism

To equate true democracy with majoritarianism, one must be prepared to settle on a definition of what majoritarian government is. In a purist sense, majoritarianism denotes a system in which all governmental actions are carried out by elected officials in accordance with the wishes of a majority of their constituents. But how would such a system be implemented? One possibility would be to submit all governmental decisions to the electorate for direct approval by referendum. It is unnecessary to further protract this discussion in order to expose the absurdity of such an idea. The sheer number and complexity of governmental decisions would make it impractical, if not impossible, to submit them all to the electorate. Moreover, when it comes to specialized matters such as law reform, banking and trade practices, it is unrealistic to expect that the average citizen will have the expertise to make informed decisions. In addition, to implement such a system would effectively transform government officials into mindless executives whose sole function would be that of implementing the results of the various referenda. Therefore, unless a different meaning can be ascribed to "majoritarian government," it is clear that no such thing exists in the modern world—at least in the purist sense.

There are many who would argue that notwithstanding the aforementioned factors, majoritarian government can and does exist in a more pragmatic form; that is, it exists in form of representative democracy whereby laws are enacted by elected officials who are accountable to their respective constituencies. But does the fact of *eventual* electoral accountability really ensure that the government will carry out the wishes of a majority of the electorate? I think not. What it does ensure is that if elected officials fail to carry out the

Legislation in Canada, chs 1-2; Bakan, J.C., 'Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought' (1989) 27 *Osgoode Hall LJ* 123.

wishes of their constituents, a day will eventually come when they may be voted out of office and replaced by others who may or may not prove to be equally disappointing. Indeed, the fact that governments and elected representatives are often voted out of office serves as a clear reminder that pragmatic majoritarian government bears little resemblance to majoritarianism in its purist form.

Moreover, it is doubtful that the electorates of the modern industrialized world would support the notion that elected representatives should be stripped of conscience and independent judgment in making decisions. In addition, it is impractical to expect that any elected representative could tailor every decision to satisfy a majority of his constituents. Yet the fact that re-election of incumbents is more the rule than the exception demonstrates that elected representatives are judged on their record as a whole—not on the notion that they are always expected to act in accordance with a majority of their constituents. Therefore, in assessing whether judicial review is compatible with certain values which many believe to be an integral component of most modern societies—it is clear that *total commitment* to majoritarian principles is not among those values. Equally clear is the fact that some degree of tolerance for anti-majoritarian principles is prevalent in most modern societies. Nothing could better buttress this point than the acceptance of the institution of judicial review in most of these societies. Therefore, it is logical to assume that the institution of judicial review is a manifestation of some value or values that are viewed as essential in a democratic society. To what value or values is it attributable?

There is always a tendency to assume that democracy and individual liberty go hand in hand; that is, the attainment of the former will result in the protection of the latter.[6] Stated differently, there is a popular belief that a government which emanates from the people needs very few limitations placed upon it, because its rules are identified with the people and should therefore coincide with the interests and will of the nation as a whole.[7] While it is true that the concept of majority rule theoretically ensures that those who are aggrieved by society's rules will constitute a minority, it is also true that majority rule poses the risk that the rights of minorities will be abused.[8] Indeed, if absolute majority rule were to govern, there would be nothing, save for racial tolerance and common decency, to prevent a predominantly caucasian electorate from prohibiting all

6 O'Hagan, T. 1984, *The End of Law?*, Basil Blackwell Publishers, Oxford, 116-157.

7 Ibid.

8 Ibid.

non-caucasians from voting in local elections. I dare say that few proponents of democracy would be in favor of carrying majority rule to such an extreme. Therefore, just as there are pragmatic considerations which militate in favor of majoritarian government, so too are there pragmatic reasons for restricting its powers. The institution of judicial review is simply a manifestation of the fact that societies value certain principles too highly to entrust them to the will of a simple majority of the electorate; judicial review amounts to an expression that while a democratic society accords a high priority to the notion of majoritarian rule, it accords an even higher priority to the protection of certain principles—regardless of whether the particular beneficiaries happen to be in the mainstream of public opinion. If certain principles are to be protected from majoritarian rule, it follows that the responsibility must devolve on some person or body with the requisite independence from political pressure. Independence from political pressure requires freedom from electoral accountability, and an independent judiciary has been the choice of most modern societies.

In the context of this discussion, the power of judicial review means the power of a court to invalidate an act of the legislature.[9] This necessarily entails the existence of a higher body of law which overrides ordinary legislation in cases of conflict. In most modern societies, this higher law exists in the form of a written constitution which declares its supremacy over all other laws.[10] In this context, supremacy denotes a body of law which is not only supreme in its overriding effect on other law, but supreme in the sense that it enjoys a more permanent status than other law since it cannot be amended or repealed through the ordinary legislative process.[11] Rather, the written constitution usually provides that it can only be amended through an arduous process that is designed to make it resistant to the temporal whims of the electorate—either by amendment requiring ratification by public referendum, a super-majority of the States or the national legislature, or both.[12] Therefore, the written constitution is, at least in this sense, an anti-majoritarian document.

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9 Abraham, fn. 5 at 295-371.

10 *The Constitution of the United States of America*, art. VI, s. 2; see fn. 5.

11 Munro, C.R. 1987, *Studies in Constitutional Law*, Butterworths, London, 4-7.

12 Blaustein, A.P. & Flanz, G.H. (eds) 1971, *Constitutions of the Countries of the World*, Oceana Publications, Dobbs Ferry; *The*

Thus, it is apparent that most modern societies conceive of democracy in majoritarian terms, tempered by anti-majoritarian institutions which are designed to curb the excesses that are a natural by-product of majoritarian rule; these institutions are the written constitution and an independent judiciary entrusted with the primary responsibility of safeguarding its supremacy. Since the notions of majoritarian rule and the need for anti-majoritarian institutions to curb its excesses both derive from considerations of pragmatism, there is no apparent reason why the former should be viewed as any more legitimate than the latter. The fact that most modern societies deem both to be essential components of democracy is reason enough to reject the argument that judicial review is bereft of democratic legitimacy. In any event, the foregoing only serves to demonstrate that the term "democratic" does not lend itself to precise definition. Lacking any universal definition, it becomes all the more difficult to assert that judicial review is devoid of democratic legitimacy; that is, unless one is prepared to claim that they enjoy a monopoly on the truth.

3. Democracy in Britain and the United States

On the other hand, there is one country in the modern western world, namely Britain, whose system of democracy does not include the institutions of the written constitution and the power of judicial review.[13] This only serves to underscore the point that the meaning of "democracy" is largely in the eyes of the beholder. The question to be addressed, therefore, is whether the absence of these institutions can be attributed to a widespread belief that they lack democratic legitimacy.

As noted above, in the United Kingdom there is no document or collection of documents constituting a supreme law in the nature of a written constitution. On the contrary, there is a deeply entrenched doctrine of Parliamentary Sovereignty which places no restrictions on the authority of Parliament to enact legislation as it sees fit.[14] Indeed, it is the very essence of this doctrine that courts must obey Acts of Parliament.[15]

Constitution of the United States of America, art. V; *Basic Law of the Federal Republic of Germany*, art. 144; *The French Constitution*, art. 89; *The Constitution of the Republic of Italy*, art. 138; *The Constitution of the Commonwealth of Australia*, s. 128.

13 Munro, fn. 11 at 4-7, 71-108.

14 Id at 71-108.

15 Ibid.

Though the Crown is the titular head of State, it would be an understatement to point out that it no longer functions as the executive branch of government. Indeed, whatever remains of the Royal prerogative does so by the grace of Parliament which has the power to erode or even eliminate its last vestiges.[16] Instead, the executive branch of the government consists of the Prime Minister and the cabinet ministers that he or she appoints from within the ranks of his or her political party. By convention, the Crown designates a person to act as Prime Minister who can command a majority of the members of the House of Commons.[17] Given that Britain essentially operates under a two-party system, that person will normally be the leader of the party which has a clear majority in the Commons.[18] Normally, the Prime Minister and the other cabinet ministers are Members of Parliament, usually the House of Commons. Therefore, the executive issues from the legislature and there is a considerable co-mingling of the two branches.[19] Through Britain's strong tradition of party loyalty, enforced by the threat of withdrawal of the Party Whip and in some cases the threat of dissolution of Parliament, the executive is normally able to exploit its majority in the Commons to secure passage of its legislative initiatives.[20]

The House of Commons, which consists of elected representatives, is only one of the two Houses of Parliament.[21] The other, the House of Lords, is comprised of members who are essentially appointed for life with total freedom from electoral accountability.[22] Though it was once true that the assent of both Houses was necessary in order for legislation to reach the statute books, this was changed by the *Parliament Acts* of 1911 and 1949.[23] These Acts provide that "finance bills" and other public bills (except bills to extend the life of Parliament beyond five years) passed by the

16 Id at 159-182.
17 Id at 36-37.
18 Ibid; Jennings, W.I. 1957, *Parliament*, 2nd edn, Cambridge University Press, Cambridge, 13-58.
19 Duchacek, I.D. 1973, *Power Maps: Comparative Politics of Constitutions*, Publishers Press, California, 141-210.
20 Jennings, fn. 18 at 13-56.
21 Ibid.
22 Id at 381-453; Horton, P. (ed.) 1985, *Parliament In The 1980's*, Basil Blackwell, Oxford, chs 5 & 7.
23 Wade, E.C.S. & Bradley, A.W. 1985, *Constitutional and Administrative Law*, 4th edn, Longman, London & New York, 177-209.

Commons will become law if the House of Lords refuses to give its assent within a specified period of time.[24] Therefore, the will of Parliament's elected body can no longer be overcome by the House of Lords—it can merely be delayed for a relatively brief period of time.

Given the diminished legislative veto of the House of Lords, Britain's strong two-party system, and the tradition of party loyalty which enables the government to exploit that two-party system, where are the safeguards to curb the excesses that are associated with majoritarian rule? The answer lies in the fact that Britain's concept of democracy, despite protestations to the contrary, is even more removed from the purist notion of majoritarian rule than those of other modern societies. In point of fact, it has its own special brand of anti-majoritarian institutions which serve to check the abuses that attend majoritarian rule. Therefore, the absence of a written constitution and the power of judicial review cannot fairly be regarded as a manifestation of an intrinsic hostility to anti-majoritarian institutions; rather, it is a manifestation of Britain's preference and long tradition of utilising other anti-majoritarian devices to temper the abuses of majority rule.

As noted earlier, Britain's tolerance for anti-majoritarian institutions within the overall framework of democracy dates back to the early part of this century and prior thereto, before the *Parliament Act* of 1911. In that era, the conservative, non-elected and elitist members of the House of Lords could veto measures passed by the Commons and thereby frustrate, at least in theory, the will of the British electorate.[25] Though the *Parliament Acts* of 1911 and 1949 have addressed this problem in large measure, the fact of the House of Lords' continued power to delay important legislation—not to mention its very existence—is an indication of Britain's willingness to tolerate anti-majoritarian institutions. This willingness can be attributed, at least in part, to the recognition that a non-elective body can serve as a moderating influence on the excesses of those who are subject to electoral accountability.[26]

Another example of Britain's tolerance for anti-majoritarian devices can be found in the terms of the *Parliament Acts* themselves. Any bill seeking to extend the life of Parliament beyond the five year maximum currently prescribed by law is expressly exempted from the Acts.[27] Therefore, any such bill must receive the assent of the House of Lords in order to be duly enacted. The obvious intent of this

24 Ibid.
25 Ibid; Jennings, fn. 18 at 402-430.
26 Wade & Bradley, fn. 23.
27 Ibid.

exemption is to prevent the Commons, in reality the government, from passing legislation that would delay indefinitely its accountability to the electorate. While the exemption is certainly majoritarian in spirit, it also amounts to a recognition that elected representatives are prone to abuse their authority. It is significant that a nation which prides itself on the strongest commitment to majoritarian principles has entrusted the House of Lords with the responsibility of curbing one of the most sinister abuses of the only representative body of Parliament.

The foregoing is an example of one type of flaw in representative democracy—where elected officials accord a higher priority to their own self-interests than those of their constituents. An equally insidious flaw lies in the potential for majorities to abuse the rights of minorities, as in the example of establishing a national religion. Another classical example is the tendency of an emotionally charged electorate to demand immediate legislation in reaction to a particularly heinous crime such as child molestation. This occurred in the recent McMartin pre-school case of alleged child molestation in California. In the midst of hundreds of charges of child molestation, none of which resulted in convictions, there was massive public pressure to limit the right of an accused to cross-examine an alleged victim of child abuse. Although well-intentioned, such legislation would have seriously jeopardised the right to a fair trial. In that instance, the Sixth and Fourteenth Amendments to the United States Constitution prevented an atmosphere of mass hysteria from having this effect.[28] If a situation such as this were to arise in Britain, what besides the House of Lords and its limited veto, would prevent the House of Commons from caving in to severe political pressure?

On the other hand, as noted above, the party in power can delay a General Election for up to five years. If such a sensitive issue were to arise three or four years before a General Election was mandated, there is probably a greater chance that Members of Parliament would be willing to resist this type of political pressure. Voters can have short memories and after passions have subsided, cool reflection can sometimes bring about a change of heart. In addition, the electorate will normally judge political parties and elected officials on their

28 *The Constitution of the United States of America* Amendment VI provides: 'In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...'. This has been construed to guarantee the accused, among other things, the opportunity to face his accusers in court and cross-examine them *effectively*. *Davis v. Alaska* 415 US 308 (1974); *Smith v. Illinois* 390 US 129 (1968); *Douglas v. Alabama* 380 US 415 (1965).

entire record and not on one particular issue. To the extent that the foregoing generalizations hold true in any given situation, it seems fair to describe the government's prerogative to delay a General Election as yet another anti-majoritarian device for curbing the excesses of majority rule. Indeed, a government's decision to postpone electoral accountability can be seen as an admission that the electorate is disaffected with its policies, at least for the time being.

In addition, the power of the government to enforce party loyalty through threats of withdrawal of the Whip and dissolution can be a powerful weapon in combating severe political pressure for ill-advised legislation. Given the strength of the two-party system, any decertified Member of Parliament seeking reselection would face formidable odds. Members of Parliament are also aware that excessive party disloyalty could trigger the government's resignation and a dissolution of Parliament, thereby forcing all Members of Parliament to face the electorate in a General Election. Thus, while members of the Commons are eventually accountable to their constituents, they are perhaps more accountable to the will of their party's leadership.[29] While maintaining a higher allegiance to party leadership is highly anti-majoritarian, it can serve as an effective device for resisting political pressure to enact poor legislation.

Of course, the anti-majoritarian prerogative to postpone electoral accountability can also be highly destructive to the workings of representative government. On matters affecting the entire electorate and not merely a small minority, governments often stray from the policies that won them favor with the electorate. At other times, governments will undertake new initiatives such as the community charge, for example, which are vehemently opposed by a clear majority of the voters. In instances such as these, the prerogative to delay electoral accountability for years is tantamount to making a mockery of the notion of representative democracy. Indeed, a highly unpopular government can remain in power indefinitely, patently against the wishes of the British electorate.[30] What makes this particularly insidious is that Britain's two-party system and strong tradition of party discipline will normally permit such an unpopular government to impose its will until the next General Election.

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29 Jennings, fn. 18 at 13-58.

30 Since the government normally enjoys a clear majority in the Commons, its ability to coerce party loyalty also makes the prospect of losing a "no confidence motion" very unlikely.

While it is true, for example, that an American President and the members of Congress are elected for fixed terms in office,[31] it is also true that America's political system is such that the party in control of the presidency does not necessarily control the Congress. In fact, the Republican Party has controlled the White House for twenty out of the last twenty-eight years. During those twenty years, however, the Republicans have never had a majority in both Houses of Congress—and usually the Democrats have enjoyed a majority in both. Moreover, party loyalty and discipline in the United States are considerably weaker than in Britain. Congressmen and Senators are notorious for flouting the party line in the interest of political expedience. This is only natural, since party loyalty in the United States cannot be enforced by the threats of dissolution or withdrawal of the Party Whip; the former is simply an impossibility under the American Constitution and the latter, while theoretically possible, is hardly ever practiced.

Another major reason why party loyalty is weaker in the United States is that the President is independently elected as opposed to being nominated as the person who can command the support of a majority of the members of Congress.[32] Unlike the situation in Britain, therefore, a vote for a Congressman or Senator is not, in reality, a vote for a particular party, its policies, and its leader to become President.

Another important factor in the American political system is that analogous to the House of Commons, no legislation can become law without the assent of the House of Representatives.[33] This is crucial when one considers that Members of the House serve two-year terms in office.[34] This guarantees that those who flout the wishes of their constituents will be held accountable within a relatively short time. While the President and Senators serve terms of four and six years respectively,[35] neither can legislate without the approval of the House.[36] Thus, the bi-annual Congressional elections permit the electorate to exercise some degree of control over the President and Senate during the years when they are not directly accountable to the people.

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31 *The Constitution of the United States of America*, art. I, ss. 2-3 & art. II, s. 1(1).
32 Id at art. II, ss. 1-3.
33 Id at art. I, s. 7(2).
34 Id at art. I, s. 2(1).
35 Id at art. I, s. 3(1) & art. 2, ss. 1-3.
36 Id at art. I, s. 7(2).

This is not to suggest that the American system has been a paragon of success in ensuring the efficacy of representative government. In fact, it has been far from it. What it does suggest is that there are certain features of the British system of representative government that are anti-majoritarian in nature. In the assessment of this observer, some of these features inure to the benefit of effective representative government and others do not. Regardless of whether they are perceived as a boon to democracy, their presence militates strongly against the notion that Britain has rejected the institution of judicial review because of an intrinsic distaste for anti-majoritarian institutions. The final question to be addressed, therefore, is why Britain has resisted the institution of judicial review as a means of moderating the excesses of majoritarian rule.

One very popular explanation is that the British people are reluctant to trust non-elected officials with what amounts to a super-legislative power.[37] Though the topic of judicial restraint has

37 Zander, M. 1985, *A Bill of Rights?*, 3rd edn, Sweet & Maxwell, London, 26-90; Goodman, F., 'Mark Tushnet on Liberal Constitutional Theory: Mission Impossible' (1989) 137 *U Pennyslvania L Rev* 2259; Miller, A. S. & Howell, R. F., 'The Myth of Neutrality in Constitutional Adjudication' (1960) 27 *U Chic L Rev* 661. Britain is a signatory to the European Convention on Human Rights: Finnie, W., 'The ECHR: Domestic Status' (1980) 2 *JLS* 434. Although it is true that under art. 15, signatories may derogate from their obligations under certain circumstances, art. 53 provides that the signatories must abide by decisions of the European Court of Human Rights in any case to which they are parties. Further, art. 50 provides that if the Court finds that a measure taken by a signatory is in conflict with its obligations under the Convention, it shall afford any necessary and just satisfaction to the injured party. It is also noteworthy that under art. 39, the judges on the Court are elected 'by a majority of votes cast from a list of persons nominated by the Members of the Council of Europe.' Therefore, the British electorate has very little influence over the selection of judges. Thus, to the extent of its obligations as a signatory to the Convention, Britain's Executive Branch has assented to the notion of judicial review. Parliament, however, has yet to incorporate the ECHR into Britain's domestic law: Finnie, ibid. While this may be viewed by some as an indication of the British electorate's reluctance to trust judges, it is significant that Parliament has declined to invoke its sovereignty to withdraw from the Convention. Thus, there is nothing to prevent a British subject from seeking judicial review in the European Court of Human Rights once he has exhausted his remedies under domestic law; ECHR, arts 25 & 26; *Brogan v. United Kingdom* (1988) 11 EHRR 117.

captured the imagination of many prominent statesmen and legal scholars,[38] it is difficult to dispute the fact that any supreme law which serves as a basis for judicial review is susceptible to differing interpretations. It is doubtful whether any written constitution, for example, was or could be designed to provide absolute guiding principles for the resolution of all disputes. Therefore, constitutional interpretation necessarily entails the task of balancing competing interests, and it is only realistic to conclude that judges are guided by their own value preferences in this balancing process. In the final analysis, a constitution is really nothing more than an expression of the values of an effective majority of justices who construe it at any given time. Thus, the argument follows, the power of judicial review is often tantamount to the power of a super-legislature.

While there is considerable force in this reasoning, how can it be reconciled with Britain's penchant for exporting written constitutions and the power of judicial review to many of its former colonies? Was it Britain's intention to deliberately burden its former colonies with an inherently flawed system of democracy? If not, can the absence of judicial review be explained as a particular lack of trust in English judges? This appears rather unlikely. Probably the best explanation is one of traditional abstinence and a strong consensus among the British electorate that Britain's brand of democracy has been quite successful without it. For the sake of analysis, however, let us return to the argument that a power of judicial review is often tantamount to a power to act as a super-legislature.

If it is true that a constitution is really nothing more than an expression of an effective majority of justices who construe it at any given time, then it is equally true that it could not provide an effective safeguard against majoritarian abuse if judges were subjected to electoral accountability. If Judges were elected by popular vote or removable by the other branches of government for making unpopular decisions, what would be the likely impact on the efficacy of judicial review in checking majoritarian abuses? Although the answer is far from obvious in every instance, there is too great a risk that the constitution would be transformed into a mirror image of what the judiciary perceives as the clear public consensus of the day. While one cannot discount the effect of public opinion on even the most independent of judiciaries, an emasculation of judicial independence can only exacerbate these tendencies. Therefore, if the institution of judicial review is to maintain any semblance of efficacy in checking the potential abuses of majoritarian government, an

38 Abraham, fn. 5 at 295-371.

independent judiciary is absolutely essential. Such independence does, however, result in a tendency to act as a super-legislature. But there are methods of maintaining an independent judiciary and, at the same time, confining its proclivity to act as a super-legislature within acceptable limits. One such method is expressed in Article III, s. 2 of the United States Constitution:

> In all cases affecting Ambassadors, other public Ministers and Consuls ... the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction ... with such exceptions, and under such regulations as the Congress shall make.39

In *Ex Parte McCardle*,[40] the Supreme Court literally construed this language as granting Congress the power to determine the types of cases in which the Supreme Court can exercise appellate jurisdiction. While *Ex Parte McCardle* upheld an Act of Congress which abolished the Supreme Court's appellate jurisdiction over cases involving habeas corpus petitions, no other result-oriented restrictions on the Court's appellate jurisdiction have since been enacted.[41] Significantly, *Ex Parte McCardle* was decided in the post-Civil War Reconstruction Era (1868). On a few occasions, however, bills have been introduced seeking to overturn unpopular Supreme Court decisions by stripping the Court of its appellate jurisdiction over cases involving the issues in controversy.[42] In 1979, for example, Senator Jesse Helms proposed an amendment to a bill that would have deprived the entire federal judiciary of any power to review state laws relating to voluntary prayer in public schools.[43] This proposal, which was defeated in committee, was a response by the "religious right" to several Supreme Court decisions holding various forms of voluntary prayer in public schools to be violative of the First and Fourteenth Amendments.[44]

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39 *The Constitution of the United States of America*, art. III, s. 2. It should be pointed out that under art. III, s. 1, lower federal courts exist at the behest of Congress. Moreover, this section has been construed as granting Congress the power to limit the jurisdiction of the lower federal courts as it sees fit. Hart, H. & Wechsler, H. 1973 *Federal Courts*, 2nd edn, The Foundation Press, Brooklyn, 1-37.

40 *Ex Parte McCardle*, 74 US 506 (1868).

41 Barrett, E.L. & Cohen, W. 1985, *Constitutional Law: Cases and Materials*, 7th edn, The Foundation Press, New York, 41.

42 Id at 41-42.

43 Id at 42.

44 Ibid.

The fact that Congress has declined to tamper with the Supreme Court's appellate jurisdiction for more than a hundred years[45] speaks volumes concerning the charge that it has arrogated unto itself the power of a super-legislature. If the Court has autocratically flouted basic American values as many claim, why hasn't the Congress, consisting of two representative bodies, expressed the will of the American electorate by invoking its power under Article III? It is noteworthy that not a single bill of the type proposed by Senator Helms has received the assent of either House since *Ex Parte McCardle* was decided in 1868. Whether or not the constitutional framers so intended, the effect of Congress' power under Article III has been a moderating influence on both the Court and the Congress. In particular, it has allowed the judiciary to maintain its independence while confining its proclivity to act as a super-legislature within acceptable limits. If the Court were to stray too far from the mainstream of American thinking, the pressure for Congress to act could become irresistible. If Congress were to strip the Court of its appellate jurisdiction, especially its jurisdiction to review state court decisions, the Constitution would no longer fulfil its function of binding the states together as one national union under one supreme law.[46] Indeed, without appellate jurisdiction to review state court decisions, the Constitution would no longer have one meaning, but several.[47] For obvious reasons, neither the Court nor Congress would be anxious to provoke a constitutional crisis of this magnitude. Thus, the mere existence of Congressional power under Article III has added an element of self-restraint to both branches of government.

Another nightmare scenario emanating from Article III is the possibility that the Court would declare unconstitutional any attempt by the Congress to significantly limit its appellate jurisdiction. In that event, a famous quotation from then President Andrew Jackson is apposite: 'The Court has made its decision. Now let's see them enforce it.' In the event that the Court so incensed the electorate that Congress were to pass such a bill and the President were to sign it, it is entirely possible that the executive would refuse to enforce the Court's decision. If this were to happen, the principle of separation of powers would crumble and along with it the entire constitutional

45 Id at 41.

46 See *Martin v. Hunter's Lessee*, 14 US 304 (1816) (upholding the constitutional authority of the United States Supreme Court to exercise appellate jurisdiction over State Court decisions). Justice Story's opinion for the Court speaks of the far reaching implications of holding otherwise.

47 Ibid.

structure. By creating the potential for constitutional confrontations of this magnitude, Article III has served as an ingenious device for moderating the excesses that are associated with an independent judiciary armed with the power of judicial review; it serves as a sobering reminder that the Court's power ultimately depends on maintaining the respect and goodwill of the American electorate. It is perhaps the Court's recognition of this fact that explains why Congress has declined to invoke this power for more than a hundred years. So long as there is some means of assuring that the judiciary remains ultimately accountable to the people, the argument that judicial review is anathema to democratic precepts is difficult to sustain.

4. Conclusion

The foregoing discussion does not take issue with the fact that judicial review depends on the existence of a higher law which is often susceptible to differing interpretations. Nor does it take issue with the fact that judges effectively legislate when they select from among several tenable interpretations. What the discussion does dispute is the notion that true democracy and majoritarianism are synonymous and therefore, the institution of judicial review is devoid of democratic legitimacy.

In truth, majoritarianism in its purist form does not exist, nor is it likely to exist in the modern world. All modern systems of democracy, regardless of their professed commitments to majoritarian tenets, contain anti-majoritarian elements. This paper has strongly urged that these elements are not mere happenstance, but in most cases carefully measured responses to what are perceived to be the potential excesses of majoritarian rule. To the extent that a society's vision of democracy accords certain principles a higher priority than the notion of majoritarian rule, the institution of judicial review is an effective means of ensuring that those principles are respected. Indeed, anti-majoritarian institutions may well be the only effective means of ensuring that certain principles transcend majoritarian precepts. In point of fact, most modern societies conceive of democracy in majoritarian terms, tempered by anti-majoritarian institutions which are designed to curb the excesses that are a natural by-product of majoritarian rule—especially the tendency to abuse the rights of minorities. Thus, if both are viewed as essential components of democracy, it is difficult to argue that judicial review lacks democratic legitimacy because it is anti-majoritarian in nature. To be sure, there has never been a universally accepted definition of the term "democratic".

While it is true that Britain is a modern society which has thus far rejected the institution of judicial review, it has not done so on the basis that it lacks democratic legitimacy. This is evidenced by the fact that British democracy contains several anti-majoritarian components—most notably the House of Lords, a key exemption in the *Parliament Acts*, and a strong two-party system buttressed by a tradition of party loyalty which enables even the most unpopular governments to impose their legislative will and delay electoral accountability for up to five years. Moreover, Britain has seen fit to export written constitutions and the power of judicial review to many of its former colonies. Unless one is prepared to argue that this has been a sinister plot to burden its former colonies with inherently flawed systems of democracy, it is fair to conclude that Britain does not regard judicial review as bereft of democratic legitimacy.

To demonstrate that judicial review is compatible with modern notions of democracy is not to discount its potential liabilities. No judiciary can effectively perform the task of judicial review without the requisite degree of independence from political pressure, which essentially requires freedom from electoral accountability. At the same time, the judiciary must be subject to some form of accountability, lest it will be deserving of the "super-legislature" epithet. Thus, the task of achieving a proper balance between judicial independence and accountability is both difficult and crucial.

Of course, the institution of judicial review depends upon the existence of a supreme law which has an overriding effect on other conflicting laws. If one accepts that it is doubtful that any body of supreme law was or could be designed to provide absolute guiding principles for the resolution of all disputes, one must also accept that individual biases and value judgments can never be extirpated from the process of judicial review. Indeed, constitutional interpretation necessarily entails the task of balancing competing interests, and it is realistic to assume that Judges will be guided by their own value preferences in undertaking this task.

What can be accomplished is the confinement of the judiciary's tendency to act as a super-legislature within acceptable limits. Article III of the United States Constitution has achieved this in large measure by granting Congress the constitutional authority to limit or even abolish the Supreme Court's appellate jurisdiction. This creates the potential for a constitutional crisis of such magnitude that its mere presence has had a profound moderating influence on both the judicial and legislative branches. In the final analysis, Article III ensures that ultimate legislative authority derives from the electorate; it serves as a remote but very effective form of judicial

accountability. While Article III is only one means of moderating the potential excesses of an independent judiciary armed with the power of judicial review, it demonstrates that the task of striking a proper balance between judicial independence and accountability is not insuperable. The fact that Congress has not invoked this power for more than a hundred years is an indication that the American people are content with the balance that has been achieved.