As already stated in Chapter 2, the dominant justification for the robust position of the constitutional courts of post-communist states in CEE is based on the role of those courts in the protection of individual rights – in particular, those explicitly entrenched in the respective constitutions. It has been accepted, virtually without critical scrutiny, that constitutional courts must have strong powers to monitor the constitutionality of legislation if constitutional rights are to be meaningful. It is now time to consider the plausibility of this general claim in more detail. The claim, of course, is not specific to CEE; in fact, it is by far the most popular argument used to support the existence of, or demand for, strong constitutional courts. The argument – presented here in a deliberately simplified form – goes usually like this: democracy is not based on blind respect for unrestrained majority will, and individual and minority rights are among the most important constraints upon the majority. The political majority is capable of looking after its own interests, but can we be sure that it will give sufficient protection to the minority and individual dissidents, whether the dissidence is understood in political, moral, religious or personal lifestyle terms? The majority should not be allowed to always prevail over those who disagree with its preferences and choices, and the values reflected in constitutional rights – the argument goes – reflect this “precommitment” regarding the outer borders of the majority’s reach. As the majority cannot be trusted with observing predetermined limits upon its powers, an independent, non-majoritarian institution is needed to police, monitor and enforce those limits. The specific institutional design of such a body may vary from country to country but the general principle remains the same: if perfecting “constitutional democracy” is our aim, then the parliament corresponds to the noun, and the judicial (or quasi-judicial) body to the adjective in that term.

This is a familiar argument, and the counter-argument is also familiar. It is said that countries without judicial constitutional review (e.g., the Netherlands, Sweden, the United Kingdom) protect rights as well as, and sometimes perhaps better than those with strongly entrenched bills of rights that allow judges to strike down unconstitutional statutes. Naturally, any such comparison runs the obvious risk of drawing illegitimate conclusions from a seemingly evident observation. The conclusions would be legitimate if all other things were equal, and if the only variable was the presence or absence of judicial review. However, the condition of ceteris
paribus is never satisfied in comparisons between different countries: “everything else” is never equal, and those other unequal factors can significantly affect the level of rights protection. It might be said, for instance, that there are some factors – such as the nature of the political system, tradition, political culture, societal attitudes – in the Netherlands, Sweden, Australia or the United Kingdom that compensate for the absence of rights-based judicial review. Furthermore, if they had robust judicial review, perhaps the protection of rights in these countries would be even better. Or so those who favour robust judicial review could claim.

The purpose of this chapter is not to provide a conclusive and universally valid answer about the actual role of judicial review in the protection of individual rights. Rather, it will aim to reflect upon what parameters must be taken into account to render the argument, or the counter-argument, regarding the role of judicial review in the protection of constitutional rights valid. It is also important, at the outset, to clarify the relationship between the defence of judicial review on the basis of rights protection, on one hand, and the defence of the democratic legitimacy of constitutional courts on the other. Theoretical and constitutional discussions about judicial review often merge these two dimensions. They usually focus on the question of legitimacy: is it legitimate for non-elected judges (who are therefore not accountable through normal representative-democratic channels) to frustrate the will of the democratically accountable representatives of the people and overturn their legislative choices? If a country’s constitutional text does not explicitly provide for such a judicial role (as in the United States), a court that has “usurped” such power can be (and often has been) directly confronted with the concerns of its critics. If the constitution does provide for judicial review of the constitutionality of statutes (as in most European countries) these concerns are addressed to the constitution’s authors, who were responsible for making this institutional choice. Either way, the question is distinct from that of whether judicial review does or does not help to protect individual rights. We might consider the operation of judicial review to be illegitimate and yet rights-protective. Or, vice versa, we might believe it to be legitimate but detrimental from the point of view of rights.

These are conceptually and politically two distinct questions, although they can be merged in a trivial way. A trivial connection between legitimacy and rights protection would be established by saying that an illegitimate system of judicial review necessarily tramples upon individual rights; that is, it conflicts with our right to have coercive public decisions made only by bodies with the democratically legitimate authority to do so. But the word “necessarily” indicates that this is a trivial proposition; no meaningful conclusion about the overall quality of rights protection in a hypothetical, illegitimate system of judicial review follows from it.

In this chapter, I will therefore resist any temptation to merge the question of the protection of rights with the question of the legitimacy of judicial review, and focus on the former only. Of course, a strong conclusion that constitutional courts are necessary, or even only significant, guarantees of protection of individual rights goes a long way towards supporting the need for constitutional courts, all things considered. In my view, however, nothing is gained by insisting that such a “need” is eo ipso a proof of these courts’ legitimacy. I will therefore explicitly narrow my discussion down to the issue of the role of these courts in promoting constitutional
rights. More specifically, I will attempt to identify the sort of facts and data that we need to know in order to make an informed judgement about that role; in this sense, this chapter may be seen as providing a framework within which the successive chapters – on the role of CEE constitutional courts in articulating various types of constitutional rights – can be located.

1. TWO THEORIES ABOUT JUDICIAL REVIEW

Theoretical conceptions of the role of judicial review in the protection of individual rights range from an enthusiastically positive response to an unqualifiedly negative one. These two extreme positions are best exemplified by the theories of Ronald Dworkin and Jeremy Waldron, respectively. For all the substantive – and fundamental – differences between the two theories, one common aspect renders them equally unsatisfactory: both are relatively insensitive to the facts of the protection of individual rights in existing systems of judicial review. It is not that these two legal philosophers disregard the reality of the legal systems – mainly the United States and the United Kingdom – that they use as their starting points (or as their sources of illustration). On the contrary, both scholars are deeply immersed in the life of these legal systems, and both certainly care about the substantive decisions that the relevant supreme courts and legislatures produce. However, their conclusions about the effect of a system of judicial review on the protection of individual rights in general are not greatly influenced by the reality of these patterns of decisions. The strength of these two theories is therefore independent of empirical facts about the effects of judicial review.

Ronald Dworkin enthusiastically endorses the active and powerful role of the US Supreme Court, and advocates the establishment of a similar system in the United Kingdom.1 An empirical problem would thus seem to be raised by those decisions of the Court that are deplorable in terms of rights protection, and also by the instances where the Court was inactive (when it could have acted) towards statutes that had an adverse effect upon individual rights. These decisions should compel an advocate of a “moral reading of the Constitution” to reassess the value of judicial review; after all, Dworkin himself stresses that the “moral reading” thesis is about what the Constitution itself means, and not about whose views on the meaning of the constitution should be binding.2 He has been an energetic critic of many recent (and historical) United States Supreme Court decisions.3 Yet it is hard not to notice that Dworkin, as a critic of this or that decision, has little in common with Dworkin qua a theorist of judicial review. Precisely because Dworkin’s normative vision is so clearly divorced from his concern with specific effects, he can proudly, but implausibly, proclaim: “For two centuries American judges have ruled both national and state legislation invalid because it invaded the rights of freedom of speech or religion or of the due process of law or of the equal protection of law that the United States Constitution recognizes”4.

His normative ideal does not seem to have been affected by the fact that the Supreme Court only began to take the First Amendment seriously well into its second century of operation, and that its record in this area – as in other areas listed
by Dworkin, including the equal protection sphere – has been mixed, to put it mildly.\(^5\) Nor does Dworkin seem disturbed by cases implicating important issues of rights in which the legislature was more rights-protective than the Supreme Court, such as when rights-enhancing legislative measures were invalidated by the Court, or when the legislature enhanced rights that had been affected by restrictive decisions of the Court.\(^6\) A general theory of judicial review should be tested against the actual outcomes that a review produces. The achievements during the liberal Warren and Burger eras must be compared to the losses (from a liberal perspective) produced by the Rehnquist Court, or even the Taney Court.\(^7\) It is likely that the overall balance will be positive, but this needs to be shown. Consider the case of affirmative action. A liberal who believes (as Dworkin does) in the rightness of race-conscious remedial affirmative action could be excused for thinking that this right would have been better protected if judicial review had not been exercised by federal courts in the United States, and if recently invalidated laws or policies had been allowed to stand.\(^8\)

A critic of specific decisions who nevertheless defends the Court’s strong role towards legislation therefore has prima facie reasons for embarrassment. This can be avoided only by showing that there is no conflict between the criticism and the defence, which can be done in two ways. One way is simply to state that, on balance, individuals’ rights are better protected under a system of judicial review because the sheer number and significance of rights-protective judicial decisions greatly outweighs the number and significance of decisions that weaken legislatively conferred rights.\(^9\) This is notoriously difficult to prove in abstracto, and some would simply disagree with the outcome of such an equation, at least with respect to the United States.\(^10\) The other option is to dismiss the “wrong” decisions as aberrations, as cases of system failure that are unavoidable in any human institution. This alternative precludes the need to count and weigh a particular decision’s impact on rights, but it makes Dworkin’s thesis unfalsifiable and hence unverifiable. It acquires an internal self-validation quality and thus becomes immune to confrontation with the reality of the practice of judicial review in a given legal system. This is what I mean by its (relative) insensitivity to facts.

Dworkin’s insensitivity to facts is all the more puzzling because he openly endorses a result-driven test for judging institutional design: “The best institutional structure is the one best calculated to produce the best answers to the essentially moral questions of what the democratic conditions actually are, and to secure stable compliance with those conditions”.\(^11\) This seems to be a sensible beginning for a fact-sensitive balancing of good and bad (that is, rights-protective and rights-limiting) decisions. But Dworkin draws a conclusion from the result-driven test that sounds like conservatism pure and simple: the fact of a given practice validates its value and demands that it be preserved. The question, however, is not
whether these judges do have the final authoritative power over constitutional meanings, but whether – in light of a result-driven test – they should keep exercising such a power. The fact of authority and compliance is not a substitute for a critical review of an established practice. And while the practice is certainly established, it is far from being uncontroversial. This is something that Dworkin admits elsewhere when he refers to “the contemporary debate among American constitutional lawyers about the legitimacy of the United States Supreme Court’s power to overrule the decisions of elected legislators”; it is, he says, a debate “dominated” by “unspoken assumptions” about the centrality of majority rule in a democracy.13

Jeremy Waldron’s right-based criticism of judicially enforceable bills of rights exemplifies the opposite pole in the controversy surrounding judicial review.14 Waldron relies upon the point that the judicial reversal of democratically adopted laws denies an important individual right, namely, a right to democratic self-determination. As he claims: “this arrogation of judicial authority, this disabling of representative institutions ... should be frowned upon by any rights-based theory that stresses the importance of democratic participation on matters of principle by ordinary men and women”.15

Waldron’s argument is unimpeachable as far as democratic legitimacy is concerned: there is a chronic legitimacy deficit in any system that allows democratically unaccountable judges to displace choices made by a democratically elected legislature. Even if the system of democratic representation and accountability is defective, the defects can hardly be remedied by establishing an even less democratically accountable body.16 However, as indicated earlier, the question of legitimacy is conceptually and politically distinct from that of the effect of judicial review upon the protection of rights. And while Waldron’s argument serves as a powerful objection to the legitimacy of constitutional judicial review, it is not conclusive as an argument that judicial review adversely affects the protection of constitutional rights. At best, it adds into the equation a particular type of right that seems to be infringed when judges reverse statutes; namely, the right to democratic self-government through electoral representation.

This is an important right, but not the only one, and perhaps not even the most important one. Thus, Waldron’s argument is incomplete in the context of the protection of rights: the loss of self-government rights in a specific legal system might be more than compensated for by the superior judicial protection of other rights that had been disregarded by the legislature. As Stephen Griffin has observed:

Deciding to place the protection of basic rights in the hands of the judiciary is also a decision to remove such issues from the agenda of the elected branches. This restricts the basic right of citizens to participate in important political decisions respecting the content of such rights. While this consideration is by no means decisive, it provides a salutary reminder that the decision to adopt judicial review involves restricting some basic rights in order to promote others. This immediately raises the question of whether the rights to be promoted are of greater importance than the political rights that are restricted.17

Obviously such a calculus cannot be made in abstraction but only by reference to a particular legal system. Waldron’s argument serves as a reminder that the judicially produced loss of self-government rights has to be included in our
calculation, but it does not determine the result in the final weighing and balancing of different rights.

Furthermore, it is not necessarily true that the right to democratic self-determination must be defeated by establishing a system of robust judicial review. Such an effect is only inevitable if a violation of this right is, by definition, understood to occur whenever the legislative majority’s view is not final. This is what Waldron seems to have in mind when he says that “if the process is non-democratic, it inherently and necessarily does an injustice, in its operation, to the participatory aspirations of the ordinary citizens ... whether it comes up with the correct result or not”. In this case, however, the connection between judicial review and a violation of the right to democratic self-determination is trivial. And yet, it is always open to us to question the operation of the system of representation in a given country. It may be possible to show that the preferences of the majority undergo such radical distortions in the political process that a right to be accurately represented by one’s parliamentarians is not actually respected in a given society. This might be due to particularities of the electoral system, the influence of wealth on the process of representation, a biased media, self-interest and myopia of the representatives, and a great number of other political and social factors. In such a society, judicial review might offer individuals a better way of producing results that correspond to the majority’s actual preferences in the legal system. And if that is what the requirement of democratic self-determination is fundamentally about, under some factual circumstances it may better served by judicial review than by the democratically accountable institution. Suppose that a great majority of people favours strict gun control, or wishes to allow doctor-assisted suicide under some conditions, but that the elected politicians systematically oppose these legal measures due to pressure from powerful (though minority) interest groups. Recourse to a non-democratic institution, such as a court empowered to check the constitutionality of laws, might help to overcome the blocked political process. It might help to produce an outcome that, in these respects, better represents majority preferences than the legislative process does. If a particular authority is anointed with democratic validity only by virtue of its electoral pedigree, such an outcome might be thought to lack legitimacy. But it nonetheless passes the test of democratic self-determination.

It will no doubt be noted that this last suggestion resembles a celebrated theory by John Hart Ely who attempted to support the power of judicial review by appealing to the integrity of the democratic process. His claim is that the United States Supreme Court’s power to overturn legislative decisions can only be justified when it helps to remedy the malfunctions of democracy, such as defects in the functioning of communication channels or systemic disregard for the interests of under-represented minorities. Although this chapter is not the right place to review Ely’s theory and consider the claims by his critics (including Jeremy Waldron himself), a brief comment may be useful for further argument.

As a general theory of judicial review, Ely’s thesis strikes me as erroneous. The basic problem concerns the existence of reasonable disagreement about the devices and processes of democracy. The question about why an unrepresentative body should have the last word in the debate about the best procedural devices for
democracy merely *replicates* a dilemma – which Ely recognises as fatal to many theories of judicial review – about an unrepresentative body having the last word on the substance of laws. Further, the values of process are often indistinguishable from the values of substance. For example, freedom of speech is a procedural device that is necessary for the effective functioning of a democracy, but it is also a substantive interest of individuals that is protected by the constitution. So when, for example, the legislature compels broadcasting stations to respect Christian values (as it did in Poland), is it imposing constraints upon the channels of political communication or, rather, upon individuals’ rights to publicly express themselves as they wish? A natural answer would be: “Both”, but the process-oriented theory of judicial review would have us disregard the latter effect and focus on the former. The problem with the former interpretation is that virtually any speech might be seen to be directly or indirectly related to the political mechanisms of democracy. If this is so, the process-based argument collapses into a substance-based argument, and one is indistinguishable from the other.

However, Ely’s theory may be instructive for our purposes in that it points to the fact that there can be democratically endorsed distortions of the representation process (even if not everyone agrees that they really are distortions). The existence of disagreement might be fatal to the problem of legitimacy (why should a court have the final word when the two institutions disagree about the proper devices of political representation?), but not to the problem of rights-protection. From the perspective of someone concerned with how to design institutions that protect individual rights, there is nothing irrational about using a court to remedy legislatively endorsed distortions of the right to self-determination.

Returning to Waldron: it should be remembered his argument is not merely directed against judicial review but also, more fundamentally, against the very idea of a constitutional bill of rights. At that level, however, his critique simply reproduces the fact-insensitivity of his critique of judicial review. According to Waldron, demands for the constitutional entrenchment of a particular right reflect a particular combination of self-assurance (a conviction that the right is fundamental) and mistrust. The latter is implicit in [the proponent’s] view that any alternative conception that might be concocted by elected legislators … is so likely to be wrong-headed or ill-motivated that his own formulation is to be elevated immediately beyond the reach of ordinary legislative revision.

Waldron finds this mistrust incompatible with crediting all citizens with autonomy and responsibility. Of course, whether any proponent of a specific institutional arrangement has reason to mistrust the legislators is contingent upon whether that person believes that the legislators are so “wrong-headed or ill-motivated” when they draft laws that they detract from, rather than contribute to, the citizens’ ability to exercise autonomy and responsibility. It is one thing to mistrust one’s fellow citizens; it is another to mistrust one’s elected legislators. Whether the latter sort of mistrust is symptomatic of the former is entirely context-dependent. It is not a matter of principle.
2. THE FACT-SENSITIVITY OF A THEORY OF JUDICIAL REVIEW

Suppose that you have a relatively clear view about how constitutional rights should operate in your country in specific circumstances. In other words, you have a view about how to translate broad constitutional pronouncements of rights – equality before the law, human dignity, freedom of speech, freedom of association and so on – into specific outcomes of which you approve. What is important is that you approve of these articulations (that is, specifications of the preferred method of application of a general constitutional right to concrete issues) \textit{qua} constitutional rights and not as free-floating values; in other words, you believe that constitutional rights will be imperfectly implemented if the political system translates the broad constitutional pronouncements in a different manner to that which you believe to be the correct one. Suppose, for example, that the constitution declares a right to freedom of speech, but does not make it clear whether defamatory statements about public officials are or are not constitutionally protected, and you believe the proper articulation of that constitutional right demands that such statements should be constitutionally protected (within specified limits). Or, suppose that the constitution provides for a right to equal treatment but does not make it clear whether preferences in favour of a traditionally disadvantaged group count as violation of that right or not, and you believe that they should not. In both these cases, it is important that you do not merely think that the preferred outcome (non-prosecution of speech that is defamatory of politicians and protection of affirmative action respectively) is politically or morally right, but that you think it is the correct articulation of these constitutional rights in the specific fact-situations. In other words, you genuinely hold these outcomes to be the correct interpretation of your constitution, rather than simply your ideological preferences.

Your support for any particular constitutional right – and through an accumulation of the support for various particular rights, your support for a whole set of rights – is coloured by your view about the correct articulation of those rights. You have no reason to value a particular right unless it is (or you believe that it plausibly can be) articulated in a way of which you approve. For instance, there is no sense in valuing “freedom of speech” unless it can be articulated in a valuable way. If you believe that it is important to protect individuals who criticise officials, and that for this reason those individuals must enjoy a degree of immunity against defamation suits pressed by politicians, then you would only value a “right to freedom of speech” if it is (or can be) articulated in a way that entails such an immunity. Of course, every abstract “right” does many different things, and even if the right to freedom of speech in your country is not, and cannot realistically be, articulated in your preferred way with respect to the defamation of officials, it can do many other useful things; for example, it might protect private speech or protect journalists against having to reveal their sources. But these \textit{other} things are also positive by virtue of a valuable articulation. Unless some such articulation can be made, you would have no reason to value a right to freedom of speech in your constitution. Constitutional rights are precious only by virtue of substantively valuable articulations.
Provided you care strongly about constitutional rights, your view about whether an institutional system that is designed to enforce the constitution promotes or hinders these preferred articulations, on balance and in the long run, will obviously inform your evaluation of the institutional system. (Of course, the same institutional system does many other things besides protecting individual rights, such as providing for the smooth and efficient operation of a governmental system by allocating powers among different branches and institutions. Your overall evaluation must take into account these other functions of the system. This, however, stretches beyond the focus of this chapter, concerned as it is solely with the role of judicial review in protecting constitutional rights; thus we will proceed as if you would only be concerned with rights when evaluating your country’s institutional system). On balance and in the long run: these are important provisos. “On balance”, because to make this assessment you will have to compare the net result of the existing institutional system with the expected net results of alternative institutional systems. Put simply: if you live in a constitutional system with a robust system of judicial review (a system in which the judicial institution may displace legislative articulations of rights), you need to compare the net outcomes of your system with a scenario in which everything else is equal except for the unconditional supremacy of the parliament. “In the long run” is a difficult proviso to specify because its very nature is unclear. It is obvious that you must take a dynamic and historical approach, rather than a snapshot of one particular moment in time that might be an aberration or exception; on the other hand, however, an unduly long time-frame distorts the picture because people harmed by today’s legal system cannot be consoled by the promise that the system will produce more good than harm in the long run.

How can we go about deciding whether the gains of judicial review exceed the losses from a rights-protection perspective? The “score card” of a constitutional court would arguably take the form of Table I. It would not simply call for a comparison between the number and significance of “correct” decisions (invalidations that are conducive to the implementation of a constitutional value that we endorse: Box 1) and “incorrect” ones (invalidations that are detrimental to an implementation of a constitutional value that we endorse: Box 2); the calculus would have to be subtler and more complex. “Incorrect” decisions (Box 3) would have to include the invalidations that are not conducive to a value that we share, as well as decisions that uphold a provision when the court should (from the point of view of a constitutional value that we share) and could (from the point of view of the legal resources available to it, such as the accepted conventions of legal reasoning) have invalidated it.
Chapter 5

Table 1: The calculus of gains and losses resulting from constitutional court decisions:

<table>
<thead>
<tr>
<th></th>
<th>Rights-enhancing decisions (“gains”)</th>
<th>Rights-weakening decisions (“losses”)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Invalidating</strong></td>
<td>Invalidations of “wrong” statutes</td>
<td>Invalidations of “right” statutes</td>
</tr>
<tr>
<td><strong>Upholding</strong></td>
<td>Upholding of “right” statutes</td>
<td>Upholding of “wrong” statutes</td>
</tr>
</tbody>
</table>

The second category might initially seem to be an inappropriate factor to place on the negative side of the score card. After all, one might claim that, if a decision erroneously upholds a rights-problematic statute, it does not detract from a country’s system of rights protection because the legislature would have enacted the provision anyway if there had been no constitutional court to prevent it from doing so. But this is not so. The existence of a constitutional court somewhat relaxes the responsibility – a special duty of care, so to speak – of the political branches to avoid creating legislation that might infringe constitutional rights. The very fact that a court can review the statute might encourage the other branches to be more cavalier with law-making; if bad laws are likely to be struck down anyway, the stakes are not as high. Legislators might try to test a particular provision while knowing that judicial scrutiny is likely, something that they may not have risked this in the absence of such scrutiny. Legislating in the shadow of constitutional review affects the motivations and the risk calculus of legislators. The erroneous endorsement of a rights-implicating provision is therefore a negative – rather than a neutral – factor in the calculus of costs and benefits of constitutional review. This is an important argument developed by Mark Tushnet in his recent book.26

Note that Boxes (3) and (4) of Table I deal with specific decisions by courts in the process of conducting judicial review; that is, decisions in which the courts decide to uphold the validity of specific statutes. This is the argument that, compared with a no-judicial-review situation, a loss occurs when a court decides to uphold a “wrong” statute (Box 4); on the other hand, by upholding a “right” statute (Box 3), the court makes it more difficult to launch a legislative initiative to amend the statute in a way that is negative (from our point of view). For example, a court partly “entrenches” a liberal abortion law that it upholds, and thus makes it more difficult to render the law less liberal in the future. A similar effect occurs in Box 4: when a rights-positive cause loses in the constitutional court, the rights-deterrimental law acquires additional support and it becomes more difficult to annul it in future. As Tushnet suggests, “the rejected claims of rights simply drop out of political consideration instead of becoming ordinary political claims like any other”.27 This is a loss from the point of view of rights protection.

It is not, however, enough to confine ourselves to a definite set of judicial-review decisions in the calculation of gains and losses from the point of view of one’s preferred interpretation of rights. Judicial review can affect the implementation of rights not merely through the impact of actual decisions (that is, when specific cases
have already reached the court), but also by its very existence (regardless of whether a challenge to a rights-implicating statute has been actually launched). The fact of judicial review just being there – “judicial overhang”, as Tushnet calls it – can have rights-positive or rights-negative consequences. On the positive side, the existence of judicial review can constructively influence the motivations and incentives of legislators if it makes them more cautious of rights than they might have been in its absence, and they end up adopting statutes that more closely accord with our understanding of rights. Further, the existence of judicial review – and publicly available information about the case law of the court(s) exercising this power – can have an educational effect and promote the “right” understanding of constitutional rights among the legislators and the general public. However, this does presuppose a degree of awareness about judicial decision-making that is often not reflected in the general public or legislators.

On the negative side, one has to consider cases in which legislative irresponsibility is generated by judicial review; that is, when the awareness of possible review makes legislators less attentive to constitutional rights, with the possible result that a sub-optimal law will never be invalidated. Another negative consequence could be legislative apathy in the implementation of constitutional rights (along the lines: “if something is wrong, the court will remind us of it”). The very existence of judicial review can also have a negative educational effect; it might help to generate the perception that rights discourse is an obscure activity reserved for lawyers, and that deliberation about the political values that give rise to specific articulations of rights is something over which neither the population nor its elected representatives have any control. As Ronald Dworkin puts it, “[t]here is little chance of a useful national debate over constitutional principle when constitutional decisions are considered technical exercises in an arcane and conceptual craft”. However, while this last effect is regrettable from the viewpoint of a participatory conception of democracy, it is not necessarily detrimental to any specific articulation of preferred rights. It might be a neutral matter from an individual’s perspective on which rights should be articulated, and it will only register on the “losses” side if one has reason to believe that public apathy about rights in general will detrimentally affect one’s own set of preferred articulations of rights. This may or may not be the case.

Table 2. The calculus of gains and losses resulting from the very existence of the system of judicial review:

<table>
<thead>
<tr>
<th>Affecting legislative incentives and behaviour</th>
<th>Rights-enhancing effects (&quot;gains&quot;)</th>
<th>Rights-weakening effects (&quot;losses&quot;)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Affecting society at large (educational role)</td>
<td>(1) Promoting consideration of rights in legislation</td>
<td>(2) Promoting legislative negligence towards rights</td>
</tr>
<tr>
<td></td>
<td>(3) Promoting pro-rights attitudes</td>
<td>(4) Promoting apathy vis-à-vis rights</td>
</tr>
</tbody>
</table>
It must again be emphasised that the effects in Boxes (1) and (3) count as “gains” only if the very existence of judicial review promotes an articulation of “rights” that accords with our preferred understanding of particular “rights”. In this sense, the calculation in Table II is just as substance-dependent as that in Table I. For example, suppose someone believes that, properly understood, the right to equality mandates affirmative action in some circumstances but the court in her country consistently passes decisions that invalidate affirmative action under the constitutional right to equality (and thus count as losses under Table I, Box 2). The fact that this attitude of the court affects a “consideration of rights” by the legislature (in the sense that it discourages parliament from even trying to establish affirmative action by statutes) cannot count as (1) in Table II; it must be (2). It would not make any moral sense to say: “I believe in the rightness of affirmative action, but I still believe that it is better to have legislators consider rights when deciding about affirmative action, even if a result of this consideration – operating as it does in the shadow of judicial review – is that politicians will refrain from enacting affirmative action programs”. If the acceptance of affirmative action is the correct interpretation of the right to equality, then “judicial overhang” (which, by virtue of its existence, paralyses legislators from instituting affirmative action because they know that it is likely to be invalidated) cannot count as a gain from the point of view of rights protection.

3. RIGHTS PROTECTION AND DISAGREEMENT ABOUT RIGHTS

Tables I and II in the previous sub-chapter illustrate the consequential calculations that can be conducted by someone who has a preferred articulation of rights and who uses it as a yardstick for assessing the net benefit of a system of judicial review. But this is not the end of the story. We have thus far been disregarding the consequences of significant disagreements about the preferred articulation of constitutional rights. Suppose that I have a set of preferred interpretations of constitutional rights; let us call this $S-1$. Imagine that the constitutional court of my country consistently gives effect to articulations that contradict these preferred articulations; we can call the Court’s actual set of authoritative rights articulations $S-2$. Would I still have any good moral and political reason to support robust judicial review in my country?

The answer is, “it depends”. I must assess the chances of having my preferred interpretations enforced by the legislature. If they are higher than the chances of convincing the court to adopt my own understandings, then I acquire a good prima facie reason against supporting the system of judicial review. It is, however, only a prima facie reason; in real-life situations there is likely to be a degree of overlap between my preferred interpretation of the rights ($S-1$) and that of the Court ($S-2$). After all, if the Court gives effect to $S-2$, there must be a constituency that espouses $S-2$ and expects the Court to enforce it. It is hard to imagine that there is no overlap in the articulations of rights offered by different constituencies in one society: such a radical division would be a sign of a very fundamental breakdown in social cohesion, and it seems unlikely that any system of judicial review could operate in the context of such fundamental dissensus. In reality, there must be a degree of overlap between different constituencies. Therefore, the fact that the Court articu-
lates at least some constitutional rights in the same way as I do gives me at least one good reason to support judicial review. This reason can still be overridden by my dissatisfaction with the Court’s articulation of other constitutional rights but the picture is no longer uniformly negative towards judicial review. I will now need to consider how important those other rights are to me in comparison with the right with respect to which the Court’s articulation coincides with mine; I will also need to consider how likely it is that the legislative interpretation of all those rights would be closer to my preferred articulation than to that of the Court.

Note that although this reasoning identifies an area of consensus, the overlap recognised in the preceding paragraph has nothing to do with Rawlsian “overlapping consensus”; as a matter of fact, it is just the opposite. Overlapping consensus in Rawls’s scheme occurs as a result of the congruence of conclusions reached by different people on the basis of different grounds. Rawls postulates that we should ignore the disagreement over the justifications in favour of the consensus regarding the conclusions. That type of agreement has little relevance to a rights advocate who reflects upon whether or not she should support a system of judicial review. Her problem is not that people have different reasons for supporting the same conclusions, but rather that other people have reached different conclusions on the correct articulation of constitutional rights, and that the Court has chosen to give effect to those people’s articulations rather than to her own. In other words, the Rawlsian “overlapping consensus” is part of the political theory and, as such, is addressed to the authoritative bodies in the society (such as the courts); in contrast, this chapter is about which institutional system a citizen concerned with rights should support when faced with an institutional conclusion that differs from her own interpretation.

Now suppose that I have identified a degree of overlap between S-1 and S-2, and I know that a sizeable social constituency supports S-2. Of course, I believe that members of this group are mistaken and that constitutional rights are suffering due to their error. Neither of these facts – the overlap or the existence of a constituency favouring S-2 – are conclusive factors in my support for judicial review. It would be perfectly rational for me to demand that the S-2 constituency acts through democratic political mechanisms only, and that it attempts to win the support of a legislative majority for the S-2 conception. At this point, much depends on my theory of rights. If I believe that the standard of justification required to support rights-implicating action is different to that required for many other types of action (as most rights theorists indeed believe), and that rights-implicating actions require the giving of more careful reasons than do other authoritative decisions, I may have reason to believe that the judicial decision-making process is more likely to properly consider rights than is the political process. This is a familiar type of argument: courts are said to be more immune from political pressures, less subject to short-term political incentives, more at home with reasoned deliberation, more transparent in their giving of reasons, etc. As Ronald Dworkin puts it: “A judge who is insulated from the demands of the political majority whose interests the right would trump is ... in a better position to evaluate the argument [of principle]”. In contrast, legislatures are thought not to be “ideologically committed or institutionally suited to search for the meaning of constitutional values, but instead see their primary
function in terms of registering the actual current preferences of the people. . . .” 34. Michael S. Moore summarises the argument thus: “The institutional features of judicial office – notably job security – make judges better able to focus their deliberations on the moral aspect of any problem, putting aside all the questions of political expediency with which legislators must grapple”. 35

I do not want to labour these well-known arguments. Instead, I would like to emphasise their contingent nature: they are context-dependent and hinge upon the institutional design of a specific court vis-à-vis the legislature in the same country. The giving of reasons is almost non-existent in some judicial review systems (consider, for example, the brief, terse, purely legalistic grounds for decisions given by the French Conseil constitutionnel; it has no place for dissenting opinions, or discussion of the moral issues involved, and the French voter can surely learn more about the motives of his or her elected legislators than those of the Conseil constitutionnel judges). But even that paragon of deliberation and public reason-giving, the United States Supreme Court, has led Ronald Dworkin to admit to the “tentative” nature of the suggestion that “judicial review may provide a superior kind of republican deliberation”. 36 However, the contingency of the argument does not indicate that it is weak; it only means that it will apply to some countries and not to others. We began this chapter by claiming that any theory of judicial review must be fact sensitive: the facts about the comparative institutional properties of courts and of legislatures are among the most important ones that need to be considered. From the point of view of protecting constitutional rights, it is crucial to establish a link between the protection of rights and the institutional differences between courts and legislatures.

Such a link is usually asserted in the following way. Rights, the argument goes, are based on sound moral grounds rather than on mere expressions of preferences that might be purely interest-based. The institutional situation of courts, which have to support their decisions with reasons and are thus subject to public scrutiny, may suggest that they are in a privileged position when it comes to reasoning in terms of rights. As one American constitutionalist has stated, “the duty to write opinions gives judges an incentive to examine the reasons for their decisions, since they know they will have to justify the result in a document subject to public criticism”. 37 One could therefore conclude that there is a link between a particular institutional feature of courts – a duty to justify their decisions in a publicly transparent fashion – and the tendency to consider a given matter from the angle of the implicated rights, as opposed to testing it merely against the preferences of the constituency of a given institution.

“Reason-giving”, however, is too crude a concept to be understood as a factor of improving the rights-orientation capacity of a given institution. It also matters what sort of reasons a given institution (a court, a legislature, etc) is qualified, and expected, to give. Reason-giving connects with a rights-orientation if an institution is expected to provide general moral reasons for its authoritative decisions: rights are then seen to reside in those moral rationales for a particular authoritative reading of the constitution, of a “moral reading” of the constitution, to use Ronald Dworkin’s words. 38 We may indeed justify an institutional design in which a particular
institution will review the enacted statutes under the criteria of their consistency with the proper reading of constitutional rights, where that reviewing institution will be required to provide good moral reasons for its decisions, as a guarantee that it will be guided by rights-considerations rather than pandering to the preferences of its constituency. But there is nothing particularly judicial about such a review; indeed, such a vision is almost antithetical to the institutional capacities, qualifications and skills of courts. This is because courts (including constitutional courts) are typically not expected, nor do they normally attempt, to provide the sort of general moral scrutiny of statutes that is called for in an institutional vision just outlined. To the contrary, they normally represent their decisions as purely “legal”, based on specialised technical reasoning that attempts to stay away from direct appeal to moral and political reasons.

Nothing in this argument, of course, hinges upon a formal characterisation of constitutional courts as part of the judicial branch; indeed, it was suggested in Chapter 2(2) that constitutional courts in CEE, similarly to their West European counterparts, in many respects resemble legislative chambers sitting in judgement on the laws enacted by lower chambers. The point is that in some other respects these courts do behave in a quasi-judicial rather than parliamentary way, and from the point of view of the issue currently under discussion here (the deliberative character of constitutional courts and its relationship to rights-orientation) these courts are quite defective as instruments of the sort of broad moral reason-giving called for when rights are at stake. The sort of reasons that constitutional courts usually provide for their decisions, even if quite fundamental moral dilemmas are at stake in a fairly transparent fashion, are the reasons that normally do not figure in actual arguments for a particular reading of a constitutional right. Rather, they are technical legal arguments, mimicking the reasoning of “ordinary” judges. True, they do give reasons for their decisions, but these reasons are so stylised, formalistic and technical that they do not qualify as the reasons that we – the concerned citizens – appeal to when arguing about the best articulation of an abstract constitutional right.

To be sure, these stylised, formalistic and technical reasons normally offered by courts often are just a disguise for open moral or political arguments; they hide the sort of moral reasons that are normally expected to figure in the reasoning about rights articulations. This being said, it does not render courts any more qualified to orient public deliberation in the direction of rights: the general lack of judicial candour is not a redeeming feature but rather an institutional defect of courts in this particular regard. This is because the connection between reasoning and rights-orientation resides not merely in having reasons, but also, and crucially, in giving the reasons for one’s decision: the public transparency and explicitness of the reasons underlying a particular decision is seen as a factor maximising rights-orientation. If, however, the reasons publicly offered by a given institution hide rather than reveal the actual reasoning leading to an authoritative decision, then the potential for connecting this institution with progressive rights-orientation is lost, or at least seriously compromised. The connection between the deliberative nature of a given institution and the deliberation on rights in society at large is eroded when the former is constrained by canons and conventions that have no equivalent in the public discourse on rights, and therefore cannot resonate with the deliberative
process in general. In other words: for the reason-giving feature to be part of the institutional structure aimed at maximising the rights-orientation of an institution it must be seen as an aspect of this institution’s public accountability; the canons of appropriate judicial reasons publicly offered, which tend to disguise the actual reasons behind a decision, undermine the possibility of such accountability.

The giving of reasons is just one of a number of institutional circumstances that may affect the comparative incentives and capacities of courts (vis-à-vis the legislature) to reason in terms of rights rather than mere preferences. The circumstances of selection and tenure of judges is another: those judges who are selected in a process that links them with particular institutions (such as the president), or groups (such as parties in the parliament) that have a clear interest-orientation, may feel constrained to pursue interests rather than values in their decision-making; while judges who have limited tenure and depend upon interest-based political forces for their re-election or a comfortable post-tenure appointment may have disincentives against pursuing the best moral values in their rights-articulating decisions (as indicated earlier, in Chapter 1(3)). In contrast, constitutional judges whose appointment results from a process which mixes and merges the input of various institutions, and those who have a secure life tenure, may find it “easier … to act on their moral convictions”. The established structure of argument and deliberation might be yet another factor: even if judges have an incentive to reason in terms of rights, they might lack the capacity to do so if proceedings are structured in a way that limits their ability to engage in a serious consideration of all of the aspects that might influence their preferred articulation of the constitution. In a highly adversarial model of appellate judicial proceedings – such as in the United States – those same factors that are often cited as improving the impartiality of a trial can simultaneously handicap judicial inquiries into a wide range of moral issues that might be relevant to the rights in question. Deliberation can actually be impoverished rather than improved if judges, in contrast to the legislature, “get their information solely from the briefs and records prepared for the case sub judice”, “are prohibited from seeking outside advice (except by way of amici curiae briefs)”, and if “[o]nly the parties to the case may be heard in each matter, and public participation in the process, whether by letter-writing or by demonstration, is very much discouraged”. Surely the link between certain institutional features and a rights-orientation in judicial deliberation must be contingent upon the degree to which the judiciary is subject to such limitations on access to sources of information and alternative arguments.

Suppose, arguendo, that we have successfully established a link between the institutional design of the court and the tendency to take rights seriously. All this tells us is that, in a system with judicial review, our political system is more likely to give effect to some understandings of rights than it would in the absence of judicial review. But returning to the hypothesis that we introduced earlier, if the rights articulation of our particular court is more likely to be S-2 than S-1, do we have a reason to support such a system? In other words, is it better for us to have S-2 than weak (or non-existent) protection of rights across the board? In order to answer this, we need to pose a fundamental question: what good is produced by protecting rights in abstracto that is distinct from the good produced by protecting specific
articulations of rights? The usual answer is: the very idea of rights presupposes limits upon the exercise of political power, and so protecting rights – any rights – limits political power, regardless of whether we agree on the specific limits of those rights. But is this answer compelling?

Consider Waldron’s response to this point, given in the context of his criticism of the contention that we need counter-majoritarian measures to give effect to the idea of rights:

[W]e should not underestimate the extent to which the idea of rights may pervade legislative or electoral politics. The idea of rights is the idea that there are limits on what we may do to each other, or demand from each other, for the sake of the common good. A political culture in which citizens and legislators share this idea but disagree about what the limits are is quite different from a political culture uncontaminated by the idea of limits, and I think we sell ourselves terribly short in our constitutional thinking if we say that the fact of disagreement means we might as well not have the idea of rights or limits at all.42

To translate Waldron’s point into the language of the question I have just formulated: it is better to have a political system in which rights matter, that is, they are taken seriously and are protected, regardless of whether we agree with the dominant articulation of those rights, than to have a system “uncontaminated” by rights. Rights express an idea of “limits” upon the sacrifices we might impose and demand in the name of the common good, and this idea is valuable per se. However, I am unsure as to whether this idea of “rights as limits” gives us as much mileage in supporting the very idea of rights, as Waldron seems to suggest. Our disagreement over the proper articulation of rights is not merely disagreement about the proper limits of rights; rather, we disagree about whether a particular articulation is a limit in the first place.

Take, for example, a disagreement over the constitutional status of abortion as a consequence of specific articulations of two intersecting rights: the right to life and the right to privacy. A “pro-choice” advocate will believe that the proper articulation of these two rights will result in the constitutional protection of women’s reproductive decisions: imposing a duty on women to give birth against their wishes would transgress the state’s limits on what we may do to each other. A “pro-life” advocate will claim that to tolerate abortion is to impose an intolerable penalty on the foetus, and would violate the limits on what the government may permit one person to do to another. Proponents of both views can argue about the limits on the sacrifices that can be extracted for the purpose of the common good, and each might consider that the opposing position violates these limits. The pro-choice person’s “limit” is a restraint on governmental action, and the pro-life person’s “limit” is a restraint on individual action, but this is not relevant to the very idea of rights as “the limits on what we may do to each other”. It would be relevant if we believed that the only intelligible rights are those that give us claims against official action, but this would be an excessively restrictive conception of rights.

Here is another example. Imagine that we disagree about whether the right to free speech should protect me if I defame politicians (unless a politician can prove actual malice on my part). Suppose I believe that this articulation gives effect to a limit on what the government can do to me; namely, I cannot be required to pay
damages to the politician whom I have defamed, even if such a requirement to pay damages could be seen as contributing to the common good (because it would establish counter-incentives to irresponsibility in public expressions). However, someone who disagrees with this articulation of rights – a defamed politician, for instance – might say that his preferred articulation of the right to free speech is that I should pay damages. His preferred articulation gives effect to the idea of rights as limits – it limits what I can say about him, even if my comments could contribute to the common good – and consequently limits the state’s authority to support the defamer’s position. According to the politician, my impunity will reflect a system “uncontaminated by the idea of limits”. So the disagreement is not just about where the proper limits lie, but also about what properly constitutes a limit. This means that, in abstraction from articulations of rights that we actually hold to be valuable, an appeal to rights as limits cannot provide a reason for preferring a regime of rights over a regime of no-rights.

4. PRUDENCE AND JUDICIAL REVIEW

Consider a familiar pattern of reasoning. We all want our respective rights articulations to be enforced in our society, but we cannot all have it because we disagree among ourselves, and $S-1$ and $S-2$ have areas of incompatibility. The second-best solution would be to have some articulations of rights enforced (even though they will not all be my articulations) on the basis of an expectation of reciprocity, rather than having rights counting only weakly in authoritative decisions. I submit to your articulation regarding some rights because, if I don’t, I might lose the dominance of my articulation of another right.

How strong is this argument in the overall configuration of reasons in favour and against judicial review? Not very strong, I would suggest. Some characteristics of rights reasoning render the analogy with standard prudential reasoning less than adequate. Standard prudential reasoning derives much of its attractiveness from an appeal to simple utility maximisation: it makes good sense for me, as a utility maximiser, to concede some value $V-1$ today in order to gain another value $V-2$ tomorrow if $V-2$ is more important to me than $V-1$. But rights reasoning does not benefit from such an appeal because, in contrast to utility-maximisation, it is not solely agent-oriented. Under the standard prudential argument there is an identity of the subject and the beneficiary of the reasoning process; however, any such identity is not necessarily present in reasoning about rights because we often demand rights that benefit others. If I support affirmative action it is not necessarily (and perhaps not typically) because I am a likely beneficiary of the preferences granted by such a policy. Rather, I support it as a proper articulation of the right to equal treatment because I believe that it is consistent with my understanding of the correct meaning of equality rights, and because I believe that it is just to treat others in this way.

This “other-regardedness” of rights reasoning indicates the limits of the prudential argument when applied to judicial review of constitutional rights. Prudential reasoning involves a sacrifice of $V-1$ today in the expectation of securing $V-2$ tomorrow. The prudential sacrifice would, however, have a different form with
respect to rights: it would be necessary to sacrifice some rights for some people in order to gain some other rights, possibly for other people, in the future. Therefore, if I decide to “sacrifice” \( V-1 \) now in order to protect \( V-2 \) in the future, I am in fact choosing the winners and the losers of a particular system of institutional design. It is, however, true that it is often impossible to precisely identify the likely beneficiaries of a specific, authoritative articulation of rights. The rights to free speech, freedom of religion, freedom from unjustified seizure, and the whole set of rights implicated in the judicial process, cannot be characterised, \textit{ex ante}, as benefiting one class of citizens more than others. I might have a stake in fighting for the strong protection of criminal defenders, even if it is rather unlikely that I will ever be in their position. Still, the possibility of becoming a criminal defender one day cannot be excluded, and I wish to insure myself against weak protection in that case. To the extent that such a motivation for arguing in favour of a particular rights articulation is plausible, the analogy with the standard prudential argument holds. To the extent that it is not plausible (that is, where the disparate impact of the different rights I am advocating is reasonably identifiable with respect to specific classes of people), my support for judicial review must rely on non-prudential arguments.

5. CONCLUSIONS

The role of constitutional courts in protecting constitutional rights cannot be captured by any simple formula or defined as “matters of principle”: it can be declared neither that, as a matter of principle, a robust power of constitutional review is necessarily an important ingredient of protection of human rights nor that it inevitably damages such protection. The starting point for an assessment of the role of judicial review must be a careful calculus of gains and losses resulting from a system of judicial review in a given country. The gains and losses resulting from a set of specific decisions, and also those resulting from the very existence of judicial review in that country, must be assessed. (The latter includes the ways in which judicial review affects legislative behaviour – positively or negatively – and the educational role it has in improving rights-consciousness within the community at large.) The outcome of this complex calculation clearly depends upon our preferred articulations of abstract rights, and people who disagree with our articulations will also disagree with the final verdict concerning the role of judicial review in rights protection. This fact of disagreement must also be taken into account in the reckoning. While we might doubt the general net benefit of judicial review, we might have some prudential reasons to support it; that is, it might be rational to support judicial review if the institutional particularities of judicial institutions, compared with those of the political branches, render courts more sensitive to rights considerations in general. This judgement, however, will be contingent on specific institutional comparisons and cannot be made in abstraction from the particular circumstances in a particular country. The review of the activities of constitutional courts in post-communist countries of Central and Eastern Europe in the succeeding chapters may hopefully help us to form such a judgement about how they have contributed to the protection of rights in that region.