Who's Afraid of the Constitutional Judge?

Decisionism and Legal Positivism[*]

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The idea of a judicial check on the constitutionality of ordinary legislation has been an object of intense, contentious debate from its inception. It bears recalling that judicial review is something of a latecomer in the democratic states of continental Europe, and that this form of jurisdiction is not unassailable in the British constitutional architecture, either.

The French revolutionary experience was hostile to the idea, and legal positivism which held sway throughout the nineteenth century, finds it difficult to even fathom how the idea might be conceptualized. And so, in the outcome, the question and the practice of judicial review remain a thorny matter for every jurist and every approach in legal philosophy. Accordingly, I will not make so bold as to attempt anything like an adequate account of the many philosophical and legal problems and the many disputes arising in connection with this question and practice.

Instead, I will confine myself to presenting and discussing two moments and corresponding debates that strike me as especially significant and replete with suggestions for serious reflection. I am referring to the debate on the „keeper of the constitution" that saw *Carl Schmitt* and *Hans Kelsen* go head to head during the crisis of the Weimar Republic, and to the more recent and subtle attack directed at judicial review by a contemporary legal philosopher of the highest rank, *Jeremy Waldron*. My (short) discussion of the debate between *Schmitt* and *Kelsen* will serve as the historical background to a question whose interest, by contrast, I would judge to be distinctly theoretical and institutional. My emphasis, then, will fall on the more recent debate, and in particular on the theses advanced by *Waldron*.

I should stress that the question of judicial review is of crucial importance to the philosophy of law. For on this question depends, and around it revolves, the theoretical account we want and can give of the law's relation to power, on the one hand, and to morality, on the other. And so at stake here, we might say, is the very concept of law.

I.

As is known, after World War I, in the debate following the enacting of German Weimar republican constitution, *Carl Schmitt* revives the notion of neutral power, under-

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stood as a freestanding power in two respects: first, it remains unaffected by political struggle; and second, it is discontinuous from the three traditional powers of government (legislative, executive, and judicial) and so cannot be reduced to any of them. This notion had been coined and made current in the early nineteenth century by *Benjamin Constant* in an attempt to characterize the role of the monarch so as to make it compatible with the liberal regime.[1]

In *Schmitt's* theory, a power so described takes on as its specific, express function that of protecting the constitution and its norms. Neutral power is for *Schmitt* that of an organ or entity that in some respects operates above the regular tripartite separation of powers and that consequently cannot as such be entrusted to any judge. Says *Carl Schmitt*: It is coherent, in a state that maintains a separation of powers under the rule of law, that none of these powers should even incidentally be entrusted with defending the constitution, for any such power would otherwise overshadow the others and could itself elude control, thus becoming the lord of the constitution. It is thus necessary to set up a special neutral power next to the others and balance it against them by way of specific functions.[2] In this sense, the only „neutral power" can be the head of state, that is, the President of the Reich in Weimar Germany, and only a neutral power so conceived can serve as the keeper of the constitution.

This is a view of which *Hans Kelsen* offered a pointed criticism, commenting that this alleged *pouvoir neutre* of the executive (the sovereign) is an ideological conceit designed to support the watered-down constitutionalism of the so-called constitutional monarchies of the early nineteenth century. The idea of extending this model to parliamentary republics or to democratic states savours of an authoritarian scheme to free the executive of checks and balances. And in any event the head of state in a liberal form of government is anything but neutral but rather reflects the given political majority.

Accordingly, an institutional role of this nature is unfit for the dynamic of the state we are concerned with, so much so that *Schmitt* ascribes the attribute of a *pouvoir neutre* not to a hereditary monarch but to a head of state chosen directly by the electorate, as was the president of the Weimar Republic. Although it may be that, between the lines, *Schmitt* is casting a wink at the possibility of restoring the monarchy in Germany, the president of the republic he designates as the keeper of the constitution holds an elective office, and so is not politically independent but rather entirely contingent on the political parties' struggle for power. And here *Kelsen* rebuts with a blunt remark: „Only on condition of closing your eyes to reality can you see in election, as Schmitt does, a guarantee of independence."[3] More to the point, he goes on say:

> „There is in particular not a sufficient basis for the view that the independence of a majority-elected head of state is better guaranteed than that of the judges or of officials."[4]

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[1] „Royal power (I mean the power of the head of the state, whatever title he happens to bear) is a neutral power" (*Constant*, Principles of Politics Applicable to All Representative Governments, in: ders., Political Writings, trans. and ed. by Fontana, 1988, 184). Cf. ibid.: „Constitutional monarchy creates this neutral power in the person of the head of state. The true interest of the head of state is not that any of these powers should overthrow the others, but that all of them should support and understand one another in and act in concert."

[2] *Schmitt*, Der Hüter der Verfassung, 1985, 132 ff.

[3] *Kelsen*, Wer soll der Hüter der Verfassung sein?, hrsg. v. van Oyen, 2008, 94.

[4] Ibid.

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So, not only are judges no less politically independent than the head of state, but what helps them achieve that status is their very function as a role deontologically framed by a distinctive professional ethics. It is *Kelsen* himself who makes that point: „Judges are led toward neutrality by their own professional ethics“[5], an argument that in certain respects can be surprising coming from someone who has made the „purity“ of law and the separation between law and morals (and so, a fortiori, the separation between law and virtue) the cornerstone of his entire theory.

By the same token, conferring on the head of state the distinguished role of keeper of the constitution would effectively neutralize the possibility of any judicial review of actions carried out in that role. And since the head of state is a power linked to that of the executive (in many areas sitting atop the executive power as its vertex), by elevating the head of state to the role of „keeper of the constitution“, we may bring about the further effect of shielding the executive from judicial review. *Schmitt's* move would thus end up making the executive unaccountable to legislative and judicial power, at least as an end result. The whole dynamic of the separation of powers would thus be thrown out of kilter, skewed in favour of one of the powers, the executive, which would thus take on an authoritarian, if not autocratic, cast: the rule of law would yield to the rule of men, or rather to that of a single man.

As a further argument against judicial review, *Schmitt* takes up and makes his own the distinction between political decision-making and adjudication, the former an essentially discretionary activity, the latter an activity tending toward the logical and formal. But this is more a fuzzy than a clear-cut distinction. As *Kelsen* immediately replies, adjudication is itself a law-creating activity to some extent entailing discretionary policy decisions. That much *Schmitt* does recognize, but he uses the distinction even so, separating lawmaking as a political activity from adjudication as a deductive activity, neutral and automatic, in an argument aimed at supporting precisely the thesis mentioned earlier, namely, that judicial review is not judicial in nature but is rather „political“.

As *Schmitt* accordingly comments,

> „in any decision, even in that of a court adjudicating a case by subsuming it under the applicable rule, there is an irreducible element of discretionary decision-making which cannot be derived from the content of the rule in question.“[6]

Hence there is no qualitative difference, *Kelsen* points out, between a ruling and a law. At best the difference can be quantitative, a ruling being a decision with greater efficacy, and more relevant to the case at hand: a ruling applies to a concrete case that names specific persons, whereas a law applies to an entire class of cases and situations. There seems to be no justification, then, for *Schmitt's* attempt to introduce a new distinction in the forms of state, that between a legislative state and a judicial state, where law, in the former case, is essentially the outcome of legislative or parliamentary activity, its basic form being that of the statute, and in the latter case the outcome of judicial activity, its typical form being that of the ruling.

Schmitt then posits the cut-and-dried alternative between „arbitrable subject matter“ and subject matter that instead is not amenable to arbitration. A controversy over the

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[5] Ibid., 95.

[6] *Schmitt*, Der Hüter der Verfassung, 1985, 45 f. (my translation).

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constitutionality of governmental law and action in his opinion concerns „nonarbitrable subject matter", whereas for *Kelsen* that alternative turns not on the subject of contention but on the contending parties' willingness to defer to an independent body in settling the dispute: any controversy is arbitrable if the parties in dispute are willing to entrust its solution to the deliberation of an impartial third-party entity.

Schmitt thus delivers his attack proceeding from a certain framing of judicial activity. Adjudication, he says, essentially consists in subsuming a fact under a general class of facts, but this is not an activity we find in judicial review, which instead proceeds by applying one rule to another:

> „When we apply a rule to another rule, we are doing something qualitatively different than when we apply a rule to a class of cases, and when we subsume a law under another law (if any such thing is fathomable), we are engaged in something essentially different than when we are subsuming a class of cases under the laws that regulate it."[7]

Likewise, adjudication brings to bear rules whose content is neither doubtful nor uncertain (except maybe on appeal, where precedent is made), whereas judicial review is almost by definition an activity involving rules with doubtful or controversial content. As *Schmitt* comments: „All adjudication is rule-bound, and it is undermined whenever the content of the relative rules becomes doubtful or controversial."[8]

It is precisely from a rebuttal of this thesis that *Kelsen* proceeds in his defense of judicial review. *Kelsen* takes exception to the view that regular adjudication always applies to rules whose content is certain and uncontroversial, and so that trial courts always or even primarily deal with questions of fact rather than with questions of law: „The rulings of trial courts", *Kelsen* argues, „often require decisions concerning rules whose content is absolutely doubtful".[9] Most cases, *Kelsen* continues, are decided by addressing doubts and disagreements about the content of a legal provision.[10] „It cannot [...] possibly be claimed that uncertain legal content is any different in a constitutional provision than in an ordinary law."[11] There is no doubt, *Kelsen* concedes, that the subsumption of a fact or event under a class is not always so clear in applying a constitutional rule as it is in deciding whether a crime was committed. This is so, among other reasons, because constitutional rules do not just govern the procedure for issuing lower-order rules but also regulate the content of those rules, „as by setting forth principles or directives".

However, even in that case, *Kelsen* argues, we can and indeed have to formulate and rely on a judgment through which to subsume a fact under an appropriate class. In fact, even when a judgment about the constitutionality of a rule of law is focused on its content, there will have to be a preliminary moment in which we ascertain whether that rule exists in the first place, and then whether it was properly issued. The „class" under which a law is to be subsumed in determining its constitutionality is not itself a rule (a higher-order constitutional rule), as *Schmitt* claims, but is the law's mode of production.

For *Kelsen*, then, *Schmitt* misconceives the nature of the judgment about a law's constitutionality by framing that judgment as one involving a comparison between the con-

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[7] Ibid., 42.
[8] Ibid., 19.
[9] *Kelsen*, Wer soll der Hüter der Verfassung sein?, 2008, 69.
[10] Ibid., 69 f.
[11] Ibid., 70.

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tent of two rules: „The rule to be judged is compared with the other but is not subsumed under it, nor is that other rule ‚applied' to the former."[12] Constitutional adjudication, says *Kelsen*,

> „lies simply in the fact that a law must be struck down, either in a concrete case or in general, if the form or class responsible for its production contrasts with the rule governing this class, a rule that accordingly stands higher in the hierarchy."[13]

But *Schmitt* also takes issue with *Kelsen's* whole view of law as a hierarchical system. A rule does not stand above another rule just by virtue of its being more resistant to change than that other rule, he argues. A constitution, then, no matter how rigid, cannot on that account be described as superordinate to the law or to executive orders or other acts of the executive. However, *Schmitt* relies here on an idiosyncratic and warped interpretation of *Kelsen's* view, and so *Kelsen* can easily point out in reply that the hierarchy of rules he theorizes has nothing to do with the procedure by which a rule is changed. Rather, a rule's hierarchy depends on its ability to control and prescribe the way another rule is to be produced and what its content may be:

> „As a rule sitting atop legislation, the constitution matters insofar as it frames the lawmaking procedure and also, to a certain extent, the content of the laws (which are to be enacted in keeping with the constitution itself)."[14]

Schmitt argues that a „legislative state" cannot have a judicial organ of judicial review. But here, *Kelsen* objects, we are proceeding in the manner of conceptual jurisprudence, which posits a certain legal essence – the legal „institute" – and from it pretends to deduce a complex of normative consequences having general validity: We are still looking at the same technique, says *Kelsen*, „the technique of taking a legal concept as a presupposition on which basis to deduce the desired legal structure".[15]

Even so, *Kelsen* concedes that *Schmitt's* arguments do have a grain of truth to them. What in particular appears plausible to *Kelsen* is the mistrust toward an insular, nonrepresentative body that by virtue of certain institutional and constitutional features could gain a disproportionate amount of power relative to the other constitutional organs and the other organs of the state: the constitutional body entrusted with judicial review could take on a power so great as to simply be incompatible with democracy under the rule of law. This is especially likely to happen where the constitution mostly deals in generalities, with an abundance of grand concepts and an appeal to broad principles, for in that case much discretionary latitude would be afforded to the constitutional judge in shaping those concepts and principles into practical rules in such a way that a realignment would be observed to happen as power shifts from one organ of state to another. „It cannot [...] be denied", *Kelsen* concedes,

> „that the problem posed by Schmitt as to the ‚limits' of adjudication in general and of judicial review in particular is entirely legitimate. [...] The constitutional provisions a court is called on to apply, especially those which govern the content of future laws, as is the case with the clauses setting forth

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[12] *Schmitt,* Der Hüter der Verfassung, 1985, 42.
[13] *Kelsen*, Wer soll der Hüter der Verfassung sein?, 2008, 72.
[14] Ibid., 74.
[15] Ibid.

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> basic rights and the like, cannot be formulated in language that is too loose: they cannot contain vague watchwords like ‚liberty', ‚equality', and ‚justice'. For that carries the risk of bringing about a power shift – one the constitution does not contemplate, and which would be politically inexpedient – from the parliament to an organ external to it, one that ‚may express political forces entirely different from those represented in the parliament.'"[16]

Kelsen's solution to the question of the legitimacy of judicial review does, however, come up short in its own turn. For in the passage just quoted a conception of basic rights is adumbrated that today looks outdated and unsatisfactory, viewing basic rights as privileges and protections that only a parliament can recognize through its legislative power or through a programmatic rule. It would seem, therefore, that *Kelsen* neither envisions nor accepts that citizens may resort directly to judicial review in seeking enforcement of an individual right. But this is tantamount to undercutting two of the strongest arguments in favour of judicial review.

The first of these is the status of judicial review as an authentic judicial function such that citizens can individually invoke that device to have their basic rights protected. Judicial review would in this sense effect a judicial justice as against a „political" justice, by virtue of its addressing grievances in disputes involving violations of rights. The second argument – in truth a restatement of the first – is that judicial review unfolds within a sphere of governmental activity having its own specific democratic legitimacy, for it is only through this activity that citizens' basic rights can be protected by the legal order in the concrete case: no statute can „make someone whole"; no infringement of basic rights – a foundation of any democratic regime, a guarantee of its axiological framework – can be redressed by legislative action; such reparation can only be offered through a judge, that is, through an office charged with making impartial decisions in settling specific disputes involving individual and concrete juridical positions, especially when citizens are on one side of the dispute and the government on the other. Now, this judicial organ comes in the guise of judicial review, especially where the citizen's basic rights need to be guaranteed even against legislative encroachment.

None of this, however, has anything to do with the main thesis that *Schmitt* deploys against judicial review, arguing that this judicial power represents a further move, indeed the decisive move, toward that pluralist, unauthoritative state in which he sees the demise of the modern liberal state. Recall here that *Schmitt* also backs this thesis with another argument, one that has surprisingly been taken up, *mutatis mudandis*, in the more recent debate on judicial review, especially in the United States: the modern state, *Schmitt* argues, is at one with society and the economy at large and can hardly be separated from them; which is to say that it is no longer a neutral state, the mere „night watchman" of the early libertarianism of the nineteenth century.

Quite the contrary, the modern state is an interventionist state: to a greater or lesser extent a welfare state. In fact, as *Schmitt* complacently comments, it is a „total" state. Its actions often consist of measures by which to manage the economy and address social issues. And that is not a context in which judicial review can do its job effectively, for the judge lacks the information and expertise needed for a proper assessment of the matter in issue. Then, too, compounding this problem is a cumbersome procedural framework preventing the judge from acting promptly. It is *Schmitt's* view that, no less than is the case with the parliament, the constitutional judge remains overly captious, too

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[16] Ibid., 75 f.

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concerned with the lawfulness of legislative acts and not enough with their effectiveness, in a confluence of events in which what counts is a readiness to move into action, and to do so according to what is substantively legitimate on the merits. And the legitimacy of action so conceived is predicated, here too, on its effectiveness. In this sense, behind this decisionism lies the „realist" or „pragmatist" concern of those for whom what is valid coincides with what is effective, and truth with what works. Here Schmitt is not so far from those contemporary American jurists – such as *Cass Sunstein*,[17] and especially *Richard Posner* and his son *Eric Posner* – whose law and economics approach paves the way for a crudely decisionistic practice:[18] in their view, the validity of a ruling is judged on its consequences (its economic ramifications) more so than in relation to any normative frame of reference.

As a final clinching argument, *Schmitt* once more points out that, as a power exercised through an appointive office, judicial review lacks democratic legitimacy: „The installment of such a keeper of the constitution", he claims, „would bring about a political consequence in direct contrast to the democratic principle."[19] And, similarly: „From a democratic standpoint, it wouldn't be possible to entrust such functions to the robed aristocracy of the bench."[20] However, *Kelsen* points out, there is in principle nothing to prevent a constitutional judge from being elected directly by the people or by the parliament, and in that case constitutional review could not be criticized as undemocratic:

> „A constitutional court elected by the people or even by the parliament, like that of the Austrian Constitution of 1920, is far from being a ‚robed aristocracy of the bench.'"[21]

It is anything but clear that *Kelsen's* reply here is adequate and convincing, especially if by a lack of democratic credentials is meant the lack of a decision-making process that can be shown to ultimately rest on the general will of citizens acting through their representatives: even when judges are elected, it would be a stretch to describe them as representatives of the people. And yet that is precisely the question that can make or break judicial review as a legitimate power in a democracy, and it is again on this question that the more recent theoretical debate hinges. Let us now therefore take a closer look at this debate.

II.

Perhaps no contemporary legal philosopher has been as resolute and insightful as *Jeremy Waldron* in criticizing judicial review, with a battery of arguments aimed at showing that this judicial power has little or no basis in either theory or practice. In this second part of the discussion I will focus on what strikes me as his four most compelling arguments in support of that view.

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[17] *Sunstein*, Beyond Marbury: The Executive's Power To Say What the Law Is, The Yale Law Journal 115 (2006), 2580–2610.

[18] *Posner/Vermeule*, Terror in the Balance: Security, Liberty, and the Courts, 2007, 12.

[19] *Schmitt,* Der Hüter der Verfassung, 1985, 155.

[20] Ibid., 156.

[21] *Kelsen*, Wer soll der Hüter der Verfassung sein?, 2008, 100.

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1.

Judicial review, *Waldron* points out, essentially rests on the basic principles of democracy: its ultimate object is democracy itself; indeed the practice essentially consists in a judgment about what democracy is. But as an institutional practice and power (rather than as a philosophical pursuit alone), the making of a judgment about what democracy is cannot be set apart from the actual practice of democracy: it amounts to exercising democracy itself, and indeed the two practices are mutually entailing. It stands to reason, then, that a judgment about democracy should only be made through democratic tools and organs (those which represent the people's will).

And yet, as *Waldron* points out, the office of the judge can hardly be qualified as an organ or tool in the sense just indicated. Indeed, as one who claims the power to evaluate the conditions for the democratic legitimacy of democratically enacted laws, the constitutional judge tends to be antidemocratic, entrusted with a function that resolves itself into „the disempowerment of ordinary citizens, on matters of the highest moral and political importance“[22], meaning that citizens are no longer able or entitled to have a say on such matters.

2.

Waldron's second critical move is as follows: Judicial review passes judgment on human rights, that is, on the basic rights of individuals. It must therefore be interwoven with moral judgments. But then, before the judge can be recognized as having such a power – the power to deliberate and decide in matters involving basic rights – it must be possible to claim that the judge's powers of moral reasoning outstrip those of the lawmaker. That proposition, however, is open to doubt.

Indeed, the judge's commitment to upholding the law makes for an overparticular concern with precedent and the technicalities of legal procedure. The lawmaker, by contrast, is not so constrained, and this greater freedom is better suited to dealing with issues involving basic rights, for these are „not issues of interpretation in a narrow legalistic sense“ but are rather „watershed issues“. And here a legislative body can claim a twofold advantage over courts of law: for one thing it can reason without formal strictures and with an eye to the common good; and for another it can make decisions that will take into account the interests of the citizenry at large, considering that courts are staffed by a sole judge or by a panel of judges, whereas a legislature is much more composite, its collegiateness much more plural, and so is better equipped to address issues of general interest.

3.

Waldron lays out his third argument by offering a criticism of so-called precommitment, or predecision, the idea of the constitution as a self-imposed obligation or pact we commit to ahead of time, by analogy to the plan Ulysses devised for the purpose of hearing the sirens' song: he had his crew plug their ears with wax and tie him to the mast of

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[22] *Waldron*, A Right-Based Critique of Constitutional Rights, Oxford Journal of Legal Studies 13 (1993), 45.

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his ship, instructing them not to unbind him no matter what, even if he should later command them to cut him loose.[23]

There are two main reasons that *Waldron* offers explaining why it is misconceived to analyze the constitution as an example of precommitment.

a) For one thing, this thesis overlooks the pluralism of moral and political views within a community of citizens. A classic example of precommitment is that of the designated driver: two friends go out to dinner agreeing that only one of the two will be drinking, handing the car keys over to the other, who will promise not to hand them back even if the „drinking buddy", having become intoxicated, should implore the „non-drinking buddy" for them when it comes time to drive back home. As *Waldron* observes, the point here is to govern any potential conflict between a presently rational self and a future self that may become irrational and foolhardy in a state of drunkenness. So far, so good. But what if the conflict arises between two legitimate subjectivities, equally rational and self-controlled? *Waldron* brings the example of a woman who converts to a certain creed and locks up all her books of philosophy and theology critical or hostile to that creed, whereupon she hands the key over to a friend, exhorting her not to unlock the books even if it means overriding a request to do so. Suppose now that the convert should begin to doubt the foundation and truth of her newfound creed and should entreat her friend ever more insistently to hand back the key to the chest of books, offering arguments in accord with her changed intellectual frame of mind. What should her „trustee" friend do? Will the precommitment pact still be valid? Or will it be more reasonable and fair-minded to set aside that constraint out of respect for the apostate friend's autonomy and capacity for reason, even though it was with the apostate herself that the precommitment originated?

This problem, *Waldron* argues, shows that an allegiance to precommitment is not always the right course. As the example highlights, this can be appreciated even when only a single person is involved, for even here predecision fails to appreciate that subjectivity can legitimately come into contrast with itself or, more to the point, that subjectivity is not a monolithic entity but rather takes shape in a dialogue with different other „selves" within the same „self". And these „selves" will not necessarily be amenable to classification as either rational or irrational: the two parties in conflict are often both reasonable, both worthy of respect and consideration.

This plurality of „selves" then multiplies, growing into a much more fundamental situation, as we move beyond the sphere of the individual and into that of the community. For change and transformation, and indeed the upturning of positions, are part and parcel of the collective context of the community – of society as an entity made of thinking heads, many if not all of them reasonable and equally capable of governing their own lives. It follows that a community cannot be „straitjacketed", as it were, through a certain precommitment, something that may later prove unacceptable to the bulk of the population and may furthermore be extraneous, lived as heteronomous in a group constantly in flux, always taking in new members, or renewing with each new generation (as *Hannah Arendt* was wont to say).

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[23] For a full treatment of precommitment and the relative issues, especially the paradox of its conflict with democratic self-government, see *Holmes*, Passions and Constraints: On the Theory of Liberal Democracy, 1995, chap. 5.

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b) At the same time – and this is the second reason why *Waldron* thinks precommitment is a bad metaphor for the constitution – where judicial review is concerned, this idea is typically accepted and interpreted by a collegiate organ, a panel court, and this body is liable to internally replicate the very contrast or changing opinion whose presence and significance is disregarded when thinking about the larger community, the body social. But then, if that is the case, it would follow – at least on a democratic principle – that precommitment ought to be interpreted by the whole of the electorate rather than just by a select circle of politically unaccountable judges.

4.

But *Waldron's* favourite line of criticism in his rejection of judicial review is the one that keeps cropping up through various guises in his writing: call it the disagreement argument. The basic idea here is that moral evaluations are logically subjective, unqualifiedly so, and that as such they can only be traced to a single substantive view which everyone subscribes to: „Each person", he writes, „regards her own view as better than any of the others."[24] There is no integrity or coherence that can be sought outside the sphere of the single subjectivity: „The integrity of a substantive theory of social policy or social justice is the integrity of a single mind."[25]

It follows that any agreement on substantive matters of value is unlikely and cannot last: indeed it is not at all possible. Value judgments, and so also our conceptualization of rights, remain irreducibly controversial. And yet if we want to peaceably coexist, we do have to strike some sort of agreement, especially as disagreement in this whole area is immediately a harbinger of intolerance. For as *Waldron* sees it, the subjectivity of individual moral judgment inclines each person to regard any divergent moral judgment by any other person as „a standing affront".[26]

In such a situation of inevitable plurality, with the attendant assailability and contentiousness of normative positions, agreement can come only by way of a procedural solution (certainly not by recourse to rights or values, precisely because people in good faith will battle over their scope and substance). There will have to be someone whose decisions will hold good for all, regardless of their content. It will be necessary to agree on some way of reaching universally binding and incontrovertible decisions. That, *Waldron* believes, can be achieved by setting up a sovereign organ whose resolutions will have to be taken as obligatory commands.

The best form for such an organ is that of a legislative body that decides by majority vote and whose decisions can be said to represent the will of the people (essentially the description of a parliament). In this way, the inherent subjectivty and partisanship of normative positions would not work out to the detriment of the greater number:

> „The integrity of a substantive theory of social policy or social justice is the integrity of a single mind: but we are faced with many minds and many theories on almost every issue. Procedures of political decision-making are a response to this plurality: that is, they are a response generated by a felt need that there should be on certain matters one view that counts as ours, even despite the fact that we disagree."[27]

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[24] *Waldron*, Oxford Journal of Legal Studies 13 (1993), 32.
[25] *Waldron*, Freeman's Defense of Judicial Review, Law and Philosophy 13 (1994), 34.
[26] *Waldron*, The Dignity of Legislation, 1999, 51.
[27] *Waldron*, Law and Philosophy 13 (1994), 34.

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Now, given the inherent questionability of moral and normative positions, what it means to set out a body of rights that can trump a legislature's resolutions through a judicial organ empowered to interpret and safeguard those rights is to invite controversy over legislatively enacted rules and entrust its solution to a select number of persons – the judges – even though such a solution must necessarily be at once political and procedural. Judicial review, in other words, has done nothing if not reopen the Pandora's box of disagreement, a box the legislator's sovereign will had shut tight through the use of parliamentary procedure. Under a system of judicial review, however, the box can be closed back up only through the will of a few, rather than through the deliberations of the plurality of citizens as represented in a parliament.

„Matters of fundamental rights", the proper object of judicial review, „are matters of deep and extensive disagreement among citizens".[28] Here we find ourselves before a series of „intractable conundrums"[29], so it is difficult to see how we can put our trust in judicial review as the right solution. A constitutional judge's answer will always be partisan, subjective, as is that of the legislator, but with the important difference that the legislator's decision will always be democratic, while the judge's will reflect the will of a handful of lords of the law, of a „robed aristocracy of the benches", to use *Schmitt's* expression.

III.

Let us see now what can be offered by way of a rebuttal to *Waldron's* four criticisms and arguments. I would start from the last of these, the disagreement argument, for this is the cornerstone of *Waldron's* entire conception in this regard.

As *Habermas* has observed, *Waldron* wavers between legal positivism and epistemic pluralism. Legal positivism is generally noncognitivist, and in fact makes a point of describing law as not being predicated on truth: this is the view that positive normative propositions do not have any cognitive content but instead more or less directly translate into facts, modes of behaviour, or empirical attitudes, that is, they can ultimately be analyzed into commands, decisions, sentiments, habits, and the like. Epistemic pluralism, by contrast, believes that normative positions make some claim to truth or correctness, even though such claims can never be borne out. We also know that legal positivism generally comes in two varieties: decisionism, under which any decision is better than no decision, for in this way we can at least overcome disagreement; and functionalism, which sees in positive law an appropriate device of for coordinating the behaviour of many, where disagreement is the semantic or discursive expression of their interaction.

The problem here is that we cannot have it both ways vis-à-vis the claim to correctness: we either offer some kind of support for that claim – which we should want to do if we subscribe to epistemic pluralism – or we do not recognize that claim at all, in which case we wind up sliding into the noncognitivism of legal positivism. And that wavering is precisely what *Habermas* identifies as the problem with *Waldron's* view.[30]

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[28] Ibid., 35.

[29] Ibid.

[30] *Habermas*, On Law and Disagreement: Some Comments on ‚Interpretative Pluralism', Ratio Juris 16 (2003), 187 ff.

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In other words, as *Habermas* points out, on the one hand *Waldron* is quite emphatic about the deliberative role and value of procedure – and in this sense he appears to be upholding the superiority of legislative deliberation over that of the judiciary – but on the other hand it is clear that, no matter how deliberative a formal procedure may be, it will need to rest on some cognitive foundation if it is to confer any legitimacy on a majority decision. *Waldron* says that we do not move on to mere procedure – we do not „call the question" or put something to the vote – unless discussion and deliberation have been exhausted. But what does it mean for deliberation to have been „exhausted"? It could either mean that we have found a good reason for voting in a certain way or that we have run out of reasons and arguments: in the former case, epistemic pluralism can be reconciled with the possibility of satisfying some kind of cognitive claim; in the latter case we slide back into decisionism tout court, as when, in speaking of judicial decision, *Waldron* underscores that „a given opinion has no impact whatever on the weight accorded to the vote it supports".[31] At some point in the deliberative process the discussion is cut short and the force of numbers determines the outcome. But that will not suffice in itself as a justificatory principle. Indeed, if it did, it could as such replace deliberation altogether: why should we waste time debating if what counts in the end is not the best or most plausible argument but the mere fact that a majority has prevailed over a minority? Wouldn't it be fairer at this point – as well as more effective – to go straight to the vote, without dwelling on the reasons the vote is supposed to express?

There is, too, a further objection that can be raised against the disagreement thesis. *Waldron* assumes that the moment a legislative decision is made, disagreement on the issue is done away with once and for all, nullified as it is in the positive law, which in this way can put a definite stop to the controversy over rights. If there is disagreement over rights (and this, for *Waldron*, is an integral part of our being in society), rights cannot trump the operation of legislative provisions, especially when these come about as the result of the will of the majority.[32] Unlike positive legal provisions (whose epistemological and semantic status in truth remains somewhat obscure in *Waldron's* construction), substantive rights retain a normative status which makes them inherently controversial. And what is meant by rights is constitutional or basic rights, understood as preceding and trumping the laws, for, as it were, they sit atop the laws.

Waldron, however, appears to forget that positive rules do not indefinitely quell the possibility of controversy: if anything, they serve to regulate controversy. And he also seems to forget that legal provisions create rights in their own turn. Now, as *Ronald Dworkin* has vividly and compellingly demonstrated in his so-called rights thesis, rights are the very „cause" and prime object of legal controversy: the parties in controversy clash precisely because they each assert a right. At stake here are not just the basic rights of citizenship but, much more often and prosaically, the rights brought into being through ordinary legislation. These legislatively enacted rights often turn out to be no less controversial than the basic rights, and under the principle of legality of the rule of law – the principle *nemo judex in causa sua* (No one should be a judge in their own

[31] *Waldron*, Law and Philosophy 13 (1994), 31.
[32] *Waldron*, Moral Truth and Judicial Review, American Journal of Jurisprudence 43 (1998), 77.

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cause), a principle that *Waldron* considers to be ultimately empty[33] – it is not the law-maker but the judge who decides on these rights.

So, disagreement not only exists in the background, before the lawmaker enacts a positive law, but also arises after enactment: such disagreement can fester into a virulent controversy in the wake of a legislative enactment no less than in its background, that is, in the more rarefied world of constitutional rights and provisions – unless, that is, we believe that controversy can find a substantive, cognitive solution rather than just a procedural or empirical one. If a legal provision takes any normative content or any value relevant to action, and if such content and value resist treatment by methods of ascertainment that can reliably be counted on for their cognitive power and intersubjective hold – what appears to me to be the gnoseological presupposition underlying *Waldron's* disagreement thesis – the problem of disagreement will crop up again when it comes to apply (and interpret) the provision in question. Noncognitivist legal positivism and decisionism may trust that they can close the lid on disagreement and controversy by relying on the fact of the positive legal provision, but alas they cannot prevent disagreement and controversy from breaking out at any level in the normative legal system or at any moment.

Let us now consider the objections that can be raised against *Waldron's* three other criticisms. I believe there are two arguments we can deploy against the view that precommitment cannot serve as the core principle on which to justify constitutional constraints. It can plausibly be argued, to begin with, that the constitution is primarily made up of constitutive rules, that is, secondary rules (in the terminology of *H.L.A. Hart*) or power-conferring rules. If that is the case, then the idea of self-limitation, or precommitment, cannot account for the complexity and nature of the „scope of action" framed under a constitution, especially in the case of democratic constitutions. That is to say a constitution does not only set forth duties and obligations but also and preeminently confers powers: something is recognized as a possibility of action, and a corresponding power is thereby made possible; it is not so much a matter of limiting or constraining as it is one of enabling or empowering.

But, one can object, such constitutions are generally understood to contain a normative core conceived as unchangeable and „off limits", a sort of „Wesensgehalt", an „essential concept" that cannot legitimately be tinkered with, not even through a formal procedure of constitutional amendment. And here, in this area, precommitment does very much hold its own as a principle of self-limitation, with a validity having something of an ontological quality about it.

Even so, this is a point one can make by relying not so much on the idea of precommitment as on the invalidity arising in cases of pragmatic or performative contradiction. One such contradiction is what we would give rise to by demanding that a key be returned to us once we have resolved not to have it back by promising not to make that demand: this signals a problem, a lack of coherence in conduct. The contradiction is not logical or semantic but, as its name indicates, practical or pragmatic: it does not arise in itself but rather comes into being through a subsequent evaluation of the circumstance. Now, when the performative contradiction takes as its object that which makes democratic life itself possible and appreciable – meaning those basic rights whose mutual

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[33] This on the reasoning that judges, in the very act of judging, ultimately rule on their own competence to judge (especially so where constitutional judges are concerned). On this point see *Waldron*, Law and Disagreement, 1999, esp. 296 ff.

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recognition among citizens sets the stage for democratic discussion and deliberation – one will find it hard to explain why such an evaluation, the one through which the contradiction is found and then solved, cannot be entrusted to a third and impartial organ, that is, to a specially designated judicial body. This body would not be entrusted with deliberating *ex novo*, without reasoning on a specific case: on the contrary, at the parties' request it would have to confine itself to judging a concrete case centred on given events and invoking certain rules.

If we are to counteract something like *Waldron's* strategy on his own terms, we should have to espouse and offer a rather idealized and naive image of the legislator.[34] Indeed, *Waldron* champions a Rousseauan view, without taking into account the brute reality of the facts, while also ignoring two more-recent developments of parliaments. The first of these is that parliaments have now largely taken on a „party form", in that they are structured and perhaps even dominated by political parties in their current, self-serving avatar, such that the plurality and independence of parliamentary positions turns out to be drastically downsized. And, in the second place, legislative power today often presents itself as an appendage of executive power: not that the executive is the issue of parliament but, owing to the control that parties exert through the „party form", the converse can rather be observed, in a situation where parliamentary deliberation is largely shaped by the more or less contingent, transparent, and instrumental political exigencies of the executive and its party. It is the executive's policies and platform – along with a certain remaking of the „reason of state", conspiring with the pressure of special interests (if not personal ones, as the Italian political landscape has recently revealed) – that often prevail in parliamentary debate.

The Iraq War launched in 2003, and the parliamentary discussion that led up to and authorized that war in the United States and Great Britain, are testimony to the amoral chumminess of parliamentary deliberation, in a manner I would not hesitate to describe as tragically evident. Likewise, the Guantanamo Bay Detention Camp and the torture that was carried out in that site and elsewhere by United States authorities is the outcome of parliamentary debate, and it is only by way of judicial decision that those practices have effectively been legally and morally contested. While the British parliament subscribed to the indefinite suspension of *habeas corpus*, the same suspension was declared illegitimate by the House of Lords – a judicial organ in some respects having the function of a constitutional court. This was done by invoking, among other things, the basic rights and morally laden principles understood to be prevalent and permanent by comparison with the contingent decisions of a parliamentary majority. After all, it is *Waldron* himself who, outraged at the resumption of torture and its justification in American legal scholarship, makes his case against these practices (as morally and above all legally illegitimate) by recourse to what he calls legal archetypes, described as foundational taboos: absolute moral values inherent in the rule of law.[35]

If it is true that, in this critical pass which our legal systems have gone through, it was the courts that rose to the occasion and upheld the law, while the parliaments heeded their basest instincts and abetted the executive branches in carrying out their authoritarian designs, then – at least as concerns that which we most cherish, namely in the con-

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[34] This is in essence the criticism that *Thomas Nagel* directs at *Waldron* in reviewing The Dignity of Legislation. See *Nagel*, Rock Bottom, London Review of Books 21, no. 20 (14 Oct. 1999).

[35] See *his* bold and intelligent Torture and Positive Law: Jurisprudence for the White House, Columbia Law Review 105 (2005), 1681–1750.

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text of this discussion, the ability to live in freedom and dignity – we have reason to seriously doubt the thesis that the legislator's moral reasoning is superior to that of the constitutional judge. At least the judges can easily step back and untether themselves from the policy orientations of the executive and from its conditioning (or manipulation), and also, importantly, from the lobbies and pressure groups, which more and more brazenly seek to influence legislative decision-making, and increasingly succeed in doing so.

Once more the temptation, in replying to *Waldron's* view that the parliament's moral reasoning is superior to that of the constitutional judge, is to point out the example of the Italian parliament, which in this decade has been steadfastly engaged in putting through provisions designed to grant impunity to a single man, the former leader of the ruling coalition – an experience in light of which one is prompted to ask *Waldron*, pointedly, „Does it really appear to you that what goes on in there is moral reasoning?" Our experience of this first patch of the second millennium appears to teach that, had it not been for the courts, torture would have been admitted as evidence at trial in the United Kingdom, and foreigners would have been denied the right of *habeas corpus*; and that, had the courts not intervened in Italy, the corrupt undertakings of the country's wealthiest and most powerful man would have been declared legal on a permanent basis.

Let us finally consider *Waldron's* first critical thesis, under which judicial review would fundamentally disempower citizens, with the courts taking their sovereignty away, whereas the legislatures would secure a good chunk of sovereign power for them. *Waldron* goes so far as to claim that in judicial review there is something contrary or inimical to „the principles of political equality usually thought crucial to democracy".[36] To this thesis I would object as follows.

„We want to have our say",[37] says *Waldron*. And he comments that we would not be able to do this at trial or before the courts, but that precisely contradicts what we know about courts and trials: that they offer a structured way for people to make their case, with much latitude for the parties to each express their point of view.

It is at trial that citizens can raise individual claims and assert their rights. It is at trial that they can claim they are in the right. It is at trial that they can seek redress for a wrong they have suffered. And it is likewise at trial that they can be heard individually. In certain respects, and almost paradoxically, legislative deliberation drowns citizens and their individual claims in the mare magnum of the general will. At trial individuals are recognized as such, identified by their names, whereas in legislative deliberation they figure as members of a general class, not as holders of rights or as claimers of interests specifically ascribable to this or that person, but only as bearers of universalizable claims and interests. A trial specifically addresses a single case, one for which each of the parties concerned seeks an *ad hoc* ruling or finding. While an *ad personam* law, tailored to a specific individual, would count as an aberration – an arbitrary exercise of power – a ruling generally can only be directed at specifically named parties: it must precisely be *ad personam*.

And therein lies the democratic legitimacy of adjudication: it lies not so much in the judge's application of a rule expressing the general will as in the opportunity offered for people to assert the individual rights that democracy is committed to providing and protecting. Rights without judges guaranteeing them are an argument in legislative delib-

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[36] *Waldron*, The Core of the Case Against Judicial Review, Yale Law Journal 115 (2006), 1395.
[37] *Waldron*, Law and Philosophy 13 (1994), 45.

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eration: they are one argument among other, sometimes stronger arguments that can be made (as by introducing utilitarian or policy considerations). Rights before the judges, that is, „actionable" rights, are the basic reason for deliberation aimed at settling a judicial controversy.

It may well be that on this point turns the whole question of judicial review. We might perhaps do without a centralized agency reviewing the constitutionality of laws and acts. But we cannot do without judicial review as such if we care about constitutional rights. If we want basic rights to do their work as anything more than mere rhetorical devices, as more than „shards" of norms – if we want them to be authentic norms – then we will need a judge before whom they can be asserted. Fearing the constitutional judge in the sense of constitutional adjudication (be this vested in a specialized court or just granted to the ordinary judge) would be tantamount to fearing the full force and validity of constitutional rights.

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