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problema.unam@gmail.com

Universidad Nacional Autónoma de
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HIMMA, Kenneth Einar
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PROBLEMA

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CONSTITUTIONALISM, JUDICIAL SUPREMACY, AND JUDICIAL REVIEW: WALUCHOW'S DEFENSE OF JUDICIAL REVIEW AGAINST WALDRON

Kenneth Einar HIMMA

Resumen:

A Jeremy Waldron se le conoce por el desprecio que ha manifestado con relación a la doctrina constitucional estadounidense que permite a los tribunales invalidar legislación que ha sido promulgada de manera democrática, dado que según Waldron lo anterior constituye una violación a ciertos derechos constitucionales (y cuasi-morales). Él piensa que si existe un desacuerdo importante entre los ciudadanos y oficiales del derecho en relación con cierto tema sustantivo, es ilegítimo que los jueces impongan sus puntos de vista sobre los de la mayoría de la población al invalidar una ley promulgada. Incluso si suponemos, de manera lo suficientemente plausible, que existen limitantes morales objetivas sobre las restricciones que el derecho puede contemplar en relación con el comportamiento de los ciudadanos, los jueces no gozan de un privilegio especial con el que puedan acceder a estas verdades objetivas y deben, como todos los demás, basarse en sus propios puntos de vista e intuiciones subjetivas. Entonces, dado que los jueces al igual que los ciudadanos y legisladores no pueden llegar a mejores y correctas decisiones en relación con lo que exige la moralidad, estos desacuerdos se deben decidir de manera democrática. Como sostiene Waldron, si los desacuerdos sobre los derechos se deben decidir con un recuento de manos, deben ser las manos de los ciudadanos, los cuales tienen la soberanía última en una democracia, no así los jueces que no son electos.

En este artículo, el autor analiza la respuesta de Wilfrid Waluchow a los argumentos de Waldron, los cuales se encuentran plasmados en el nuevo e interesante libro: *A Common Law Theory of Judicial Review*, donde Waluchow intenta justificar la práctica del *judicial review* a través de algo parecido a la justificación que otorga a los jueces autoridad para desa-

rollar el *common law*. El autor inicia con una breve explicación del argumento de Waldron y continúa con las objeciones de Waluchow a Waldron, entre las cuales destaca la concepción de Waluchow de la Constitución como árbol viviente.

Palabras clave:

Teoría del *judicial review*, democracia, moral, objetividad, razonamiento judicial, Jeremy Waldron, Wil Waluchow.

Abstract:

Jeremy Waldron is well known for his disdain of U.S. jurisprudential doctrine that allows courts to invalidate democratically enacted legislation on the ground it violates certain fundamental constitutional (and quasi-moral) rights. He believes that where disagreement on the relevant substantive issues is widespread among citizens and officials alike, it is illegitimate for judges to impose their views on the majority by invalidating a piece of enacted law. Even if we assume, plausibly enough, there are objective moral constraints on what restrictions on behavior may be enacted into law, judges have no privileged access to the objective truth and must, like everyone else, rely on their own subjective intuitions and views. Given that judges are hence no more likely than citizens or legislators to reach the correct decision about what morality requires, these disagreements should be democratically resolved. As he puts it, if disagreement about rights is to be sorted out by counting heads, it should be the heads of citizens who have ultimate sovereignty in a democracy, rather than those of unelected judges, that ought to count.

In this essay, I consider Wilfrid Waluchow's response to Waldron's argument in his outstanding new book, A Common Law Theory of Judicial Review, in which he attempts to provide the practice of judicial review with something akin to the foundation that justifies allowing judges authority over the development of the common law. I will begin with a short explication of Waldron's argument and then consider Waluchow's objections to Waldron, as well as Waluchow's living-tree conception of a common-law constitution with content that evolves through a common law approach to reasoning in constitutional disputes.

Keywords:

Judicial Review Theory, Democracy, Morality, Objectivity, Judicial Reasoning, Jeremy Waldron, Wil Waluchow.

SUMMARY: I. *The Irrelevance of Objectivity: Waldron's Critique of US-Style Judicial Review*. II. *Waluchow's Response to Waldron*.

Jeremy Waldron is well known for his disdain of U.S. jurisprudential doctrine that allows courts to invalidate democratically enacted legislation on the ground it violates certain fundamental constitutional (and quasi-moral) rights. He believes that where disagreement on the relevant substantive issues is widespread among citizens and officials alike, it is illegitimate for judges to impose their views on the majority by invalidating a piece of enacted law. Even if we assume, plausibly enough, there are objective moral constraints on what restrictions on behavior may be enacted into law, judges have no privileged access to the objective truth and must, like everyone else, rely on their own subjective intuitions and views. Given that judges are hence no more likely than citizens or legislators to reach the correct decision about what morality requires, these disagreements should be democratically resolved. As he puts it, if disagreement about rights is to be sorted out by counting heads, it should be the heads of citizens who have ultimate sovereignty in a democracy, rather than those of unelected judges, that ought to count.

In this essay, I consider Wilfrid Waluchow's response to Waldron's argument in his outstanding new book, *A Common Law Theory of Judicial Review*, in which he attempts to provide the practice of judicial review with something akin to the foundation that justifies allowing judges authority over the development of the common law. I will begin with a short explication of Waldron's argument and then consider Waluchow's objections to Waldron, as well as Waluchow's living-tree conception of a common-law constitution with content that evolves through a common law approach to reasoning in constitutional disputes.

I. THE IRRELEVANCE OF OBJECTIVITY: WALDRON'S CRITIQUE
OF US-STYLE JUDICIAL REVIEW

It is an increasingly controversial feature of US legal practice that the Supreme Court has the authority to declare enactments of Congress invalid on the ground that they violate certain substantive rights, including the right to free speech, the right to religious worship, and the right to be free of unreasonable searches and seizures. To declare a properly enacted bill as invalid is essentially to deny the status of law to that bill. As the Court puts it in language that recalls the paradox of Augustine's natural law view (i.e., there can be no unjust law), an unconstitutional law is no law at all and is as if never enacted. Declarations of unconstitutionality deny the status of law to unconstitutional bills, and officials are legally obligated not to treat them as having the force of law, which includes the important consequence that such norms may not be enforced as such.

Enactments declared unconstitutional are legally invalid and do not count as law on any descriptive notion of law. It is true that, *e.g.*, opponents of the Court's abortion decisions continue to claim that the Constitution, which is the supreme law of the land according to its own terms, does not contain a right to abortion. But they are using the term in a normative sense rather than a purely descriptive sense. That is, they are using the term in a sense that is analogous to the normative sense of "art" when someone points to an abstract painting and says "That isn't art; my kid could do that." On any plausible purely descriptive analysis of law, it is a matter of constitutional law that it defines a comparatively unrestricted constitutional right to abortion during the first trimester.

Criticism of this obviously powerful practice comes from a variety of angles, but nearly all (i.e., those criticisms that are not grounded in moral skepticism) presuppose that judicial review violates the moral right, held by all adult citizens, to self-governance. Critics differ on exactly how it

does this, but all reject US-style judicial review as morally illegitimate on the ground it is "undemocratic."

Some critics seem to think the right to self-governance is unlimited, but this is straightforwardly implausible – no matter how they explain the right to self-governance. Suppose we conceive of the right to self-governance as derived from individual autonomy rights and held by individuals. The right to autonomy has the advantage of having an intuitively plausible basis for a right to self-governance, as the very word autonomy is derived from a Greek word expressing the capacity of being a lawmaker for oneself. The problem is that if the right to self-governance is to support some sort of right to democracy, it is not clear how *my* right to make law governing myself gives me a right to *coercively* restrict anyone else's freedom.

Perhaps, the right to self-governance must be conceived as a special right held by collective entities (e.g., the people as a whole) that is somehow derived from some sort of social contract. There are several problems here. First, even if we can make sense of the idea of collective rights like this (a highly contentious issue), the exercise of that right has impacts on other persons that can clearly violate other moral requirements. Law in legal systems like that of the U.S. is typically backed by coercive enforcement mechanisms. Our collective interests in self-governance extend to our interest in making laws governing *ourselves*, but it does not as clearly extend to our interest in imposing these restrictions on persons who do not vote for, and hence consent to, such laws. My interest in being protected against certain wrongful intrusions by others might be legitimate, but there are limits on how far this interest extends. My right (or our right) to self-governance does not entail an unlimited liberty to coercively restrict the behavior of other people. Totalitarianism is no more acceptable because it is imposed by democratic procedures than it is if imposed by a dictatorship.

Laws permitting slavery are a perfect example of the limits on the right of self-governance or right of participation, as Waldron puts it, which is the “right of rights.” It doesn’t matter how many people might have been willing to vote for laws permitting slavery. If put to a vote rather than allowed in the Constitution, those laws clearly violate the boundaries of any right to self-governance or right to participate, on any plausible theory of democracy. There are moral limits on the extent to which any individual or set of individuals may use coercive measures to restrict the freedom of others. That seems clear.

Second, if this right to self-governance must be derived from some sort of consensual agreement, events of recent years tell us that not everyone consents or participates in the social contract. There are many organizations, such as those belonging to the once flourishing patriot and militia movement, in which members vehemently deny having consented to U.S. legal authority and routinely deny U.S. courts’ jurisdiction over them. Social contract theories—at least ones that assume actual as opposed to hypothetical consent—simply cannot bear the weight they are supposed to bear in justifying democracy.

So conspicuous are the problems with the idea of an unrestricted right to democratic governance that it is, quite frankly, a wonder that anyone would ever be tempted by these ideas. Even Robert Bork, a staunch originalist, has tried to provide a theory of long-standing mistakes that would allow such “mistaken” precedents as *Brown v. Board of Education* to stand, despite the fact that it violates his own theory of judicial interpretation and would violate the majoritarian portion of the Constitution, which presumably is the legal source of the right to participate.

Accordingly, one very tempting line of response to the charge that US-style judicial review is undemocratic is Lockean in character. Although we might have a natural right to self-governance, there are, on this response, objective limits on the natural right to self-governance. Your

right to self-governance is limited by, for example, my natural rights to life, liberty, and property. According to Locke, democratic governance is justified only insofar as it respects the natural rights of life, liberty, and property; insofar as it violates these rights, government is illegitimate and its laws may properly be ignored. Indeed, if the state's decisions systematically fail in protecting objective natural moral rights, citizens have a moral right, on his view, to violent revolution.

As Jeremy Waldron points out, however, the idea that we have objective natural rights to be free of coercive restrictions of certain behaviors does not entail that judges should have the authority to invalidate enactments on the ground that they violate these rights. As Waldron points out, "[a]lthough there may *be* an objective truth about justice, such truth never manifests itself to us in any self-certifying manner; it inevitably comes among us as one contestant opinion among others" (p. 199). Since this is as much true of an official's views about justice as it is of a citizen's, "it is incumbent on the official to proceed in a way that shows some respect for [those] who will be bound by his decision but who may not necessarily agree with its grounds" (p. 202).

Waldron's analysis raises a powerful challenge to U.S.-style judicial review: given that there is no infallible way to decide such disagreements, why should judges decide them rather than elected legislators? The appeal to objectivity here fails because no one has privileged access to objective moral truth; the best we can do is offer our most carefully thought-out analyses and conclusions.

Indeed, one might think that one is likely to get more reliable answers, the more heads one has working on a problem – and there is some empirical evidence that would seem to support this, at least in cases where there are no relevant illicit biases. Since the Supreme Court has only 9 members, while Congress has more than 500, Congress, on this thinking, is more likely to get the moral issues right.

According to Waldron, then, the constitutional judgments of Congress should be deferred to on two grounds: (1) they are more democratic than allowing courts to overturn democratically enacted legislation; and (2) Congress is more likely than any court to get the relevant moral issues right because there are many more people in Congress than on the Supreme Court.

II. WALUCHOW'S RESPONSE TO WALDRON

A. *Judicial Review and the Common Law*

Waluchow points out that common law practices and legal practices involving delegation of legislative authority to non-legislative agencies have the same salient features as judicial review and are hence vulnerable to the same objections as judicial review:

In some contexts, legislatures are asked to set the general rules and other normative standards to be applied, and courts are asked, not only to decide particular cases falling under the general norms but also to develop these norms using case-by-case common law methodology... It is also, once again, worth noting in this context the extent to which, for much the same sorts of reasons, members of administrative bodies are empowered and asked to enact, interpret, and apply specific rules and guidelines pursuant to general legislation enacted by representative assemblies. And many of these individuals, we observed in Chapter 3, are unelected and not directly accountable to an electorate in the way legislators are.

If common-law methodology and delegation of legislative authority are unproblematic from the standpoint of democratic legitimacy, then, on Waluchow's view, judicial review should not be a problem: the distance of decision-makers from the democratic process does not entail any claims about whether the decision-making methodology is undem-

ocratic. Common-law methodology and judicial review stand or fall together, on Waluchow's view.

Assuming common-law methodology and legislative delegation are democratically legitimate, it doesn't follow that judicial review is democratically legitimate. The problem is that judicial review is not subject to legislative constraint, whereas the delegation of legislative authority to administrative agencies and the courts to develop a body of law by common-law methodology is subject to legislative constraint. At any time, for example, the legislature can decide to enact a statute governing an area of law formerly governed by the common law and "overrule" all conflicting common law principles – as happened in the US when many jurisdictions removed sales contracts from the common law of contracts and enacted overriding statutory law. The delegation of authority to agencies or to common law judges can, in effect, be revoked at any time by the legislature.

This, however, is not true of judicial review (at least not as it is practiced in the U.S., which is Waldron's principle concern). By no ordinary means can the Congress overrule a constitutional decision by the U.S. Supreme Court. The Constitution explicitly provides for an amendment process that is, as a matter of fact if not law, the only way that Congress could overrule a Supreme Court decision.

This is an important distinction because the case for (representative) democracy entails that only a popularly elected legislature can enact morally legitimate coercive constraints on a citizen's behavior. While the Congress can still delegate authority while being in charge, so to speak, this facility does not apply to its relation to the courts, which are independent of its ability to confer and withhold lawmaking authority. For this reason, it makes far more sense to think that the court's common law authority and the delegation of legislative authority are reconcilable with a commitment to democracy than it does that judicial review is reconcilable with democracy.

It is true, as Waluchow points out, that there are good reasons for allowing the courts charge over various areas of law that might very well be applicable to the judicial review context. As Waluchow points out, legislatures frequently craft statutes in general open-textured terms, knowing that the terms of the statute will give rise to interpretive issues that cannot be resolved without the court's filling in gaps in the law and thereby engaging in some interstitial lawmaking. Legislators simply cannot be expected to anticipate all possible cases and know that judges are in a better position to handle unexpected cases by developing the law in an incremental way in response to litigation involving novel legal issues. The efficiency of judges in addressing this problem is one good reason, consequentialist in character (at least in the sense that it is forward-looking to consequences of allowing judges to do so) to allow judges latitude to develop various areas of the law.

Likewise, one might think (less convincingly, on my view) that entrenching certain moral constraints on legislation into the constitution and allowing judges to decide such issues will have the effect of raising the level of debate among legislatures and citizens in the U.S. One could argue, I suppose, that the abortion debate in the U.S. seems to be at a much higher level, notwithstanding all the anger associated with the issue, than in most other countries. Many countries in Europe, for example, do not seem to have realized the crucial nature of the problem of fetal personhood; if the fetus is a person with a full-strength right to life (and I make no claim to this effect), then its necessary innocence (it is entailed by nomological and moral truths that fetuses can commit no wrongs) entails that abortion is murder and presumably something that ought to be prohibited by any morally legitimate state.

But this is not enough to rescue US-style judicial review from Waldron's attack because Waldron's argument is grounded in claims about moral *rights*. Here it is important to note that it is a conceptual truth about rights that

the infringement of a right cannot be justified on the strength of only an appeal to the desirable consequences of doing so; the infringement of a right can be justified only if necessary to secure some more important competing right. The idea, as it is famously put by Ronald Dworkin, is that rights trump consequences.

Waldron's argument is grounded in two claims about rights. First, he claims that judicial review infringes the right to self-governance. Second, he claims that the only justification for infringing the right to self-governance would be that doing so is necessary to secure some more important right, like a right not to have one's moral rights restricted by law. Assuming we have a right not to have our moral rights restricted by law, judicial review is not necessary to secure this right because we have no reason to think that judges are any more likely than legislatures or the majority to correctly determine which laws restrict the relevant moral rights; judges are as fallible as anyone else when it comes to identifying the requirements of an objective morality. But if so, then we can do as well protecting the relevant moral rights by means that do not violate the right to self-governance (e.g., letting citizens or the legislature decide such matters). Accordingly, judicial review is not justified as the only means for securing protection of these other moral rights.

Of course, Waldron would not want to reject common law methodology, but his argument for its legitimacy will require two steps. To begin, it will involve showing that allowing judges common-law authority over various areas of law does not violate the right of citizens to participate in political decisions and is hence not undemocratic. This will involve showing either that such practices are consistent with the right to self-governance or that any inconsistency with that right is needed to secure some more important right and hence involves a justified infringement. As suggested above, this is not a difficult or implausible argument to make.

Second, we need an argument that judicial common-law practices secure some important moral good. If, for example, Waldron believes he can show it is necessary to secure some important moral right, then it secures an important moral good that would justify infringing the right to self-governance (if there is any inconsistency). If not, then he will have to show that allowing judicial common-law authority conduces to important moral goods because the claim that common-law authority of judges over various areas of law does not necessarily violate democratic ideals does not imply the stronger claim that we should grant them this authority. To justify the stronger claim that judges should be afforded common law authority over various areas of law, we need an argument pointing to the good that will be done by allowing such authority.

Both steps are necessary – and both seem satisfied in the case of the common law authority of judges in systems like the U.S. Such authority is not undemocratic because it is at the discretion and pleasure of the legislature; should the legislature become unhappy with the direction of the law (say because it does not adequately reflect the interests or preferences of the majority), the legislature may rescind the authority by enacting a statute that governs the relevant area. Moreover, there are good utilitarian reasons to allow judges such authority, given that it violates no rights, in the form of the *very benefits Waluchow cites!*

The problem with Waluchow's defense of judicial review (at least as it pertains to US style judicial review) is that Waluchow does not fully engage the issue of whether the right to self-governance is violated by judicial review. While Waluchow points out that we do not think that delegation of legislative powers or the common law violates the right to self-governance, those two practices are easily distinguished from judicial review. This means that Waluchow fully addresses only the second issue of whether allowing judicial review would result in some important moral good.

Indeed, Waldron's point is that judicial review is undemocratic precisely because it cannot be overturned by any ordinary legislative act; changing a Supreme Court ruling requires recourse to a cumbersome amendment process that makes it very difficult to change the Constitution. Accordingly, even if it is true that allowing judges the power to review legislative acts for constitutionality has some benefits, it is irrelevant because, on Waldron's view, judicial review violates the right to participate or self-governance (and is, for that reason, undemocratic). The violation of a right can never be justified by just an appeal to the good consequences of doing so; as the matter is sometimes put, rights trump consequences.

Waluchow has an important reply that he repeats at various points throughout the book – namely, that he does not equate judicial review with the set of practices affording judicial supremacy to courts in the U.S. As Waluchow points out in various places, the courts' determinations need not be considered binding on the legislature, but may be considered advisory in character. There are, as Waluchow observes, a variety of different ways to involve the courts in the practice of judicial review without affording them supremacy over decisions about the constitutionality of properly enacted bills.

That judicial review need not be accompanied by judicial supremacy is true, but Waldron's arguments are against the U.S.-style judicial review that is paired with judicial supremacy. I do not know what Waldron would say about more modest forms of judicial review advocated by Waluchow; however, as a logical matter, he is open to accept any and all of them. Waldron's argument is directed at one specific practice of judicial review coupled with judicial supremacy. Insofar as Waluchow's arguments are made with the background assumption that the question of judicial review should be kept distinct from the question of judicial supremacy, as he suggests, his arguments simply misfire

because they fail to engage Waldron on what he would take to be his crucial point.

B. Is Waldron Caught in A Cartesian Circle?

Waluchow suggests that Waldron gets caught in the same kind of vicious circle that causes so many problems for Descartes. As will be recalled, Descartes's *Meditations* begins with a principle of methodological doubt: "I will reject any belief about which I cannot be rationally certain because it is possible for me to be mistaken." This leads Descartes to reject not only empirical beliefs, but also mathematical and logical beliefs, leaving him with only certainty that he exists. From this modest beginning, however, he goes on to show God's existence and then infers an epistemological principle – namely, what is clearly and distinctly perceived is true.

The problem is that Descartes must presuppose the very principle he derives from God's existence in order to prove God's existence – and hence is caught in a vicious circle. This is because God's existence is supposed to be proved by a logical deduction from premises to conclusion, which requires that he be justified in applying the relevant principles of logic. But, once Descartes has thrown everything up to doubt, he has no epistemic principles until he gets God's existence. So Descartes is caught up in the following dilemma: he cannot derive an epistemic principle unless he can show God exists (and hence is no deceiver), but he cannot reason to God's existence without an epistemic principle. This is the famous Cartesian circle.

Waluchow believes that Waldron is also caught in a vicious "Cartesian circle." As Waluchow describes the problem:

[M]uch of Waldron's critique [of judicial review] rests on the key premise that there is "disagreement all the way down." From this, we are told, it follows that we cannot agree on

fixed points of pre-commitment that are presupposed by constitutional conceptions and that enable us to avoid the many objections to which charters and judicial review are said to be susceptible. It further follows, according to Waldron, that we have no plausible option but to allow those with a stake in decisions about rights a continual say in their interpretation and application. We must, that is, affirm the fundamental "right of rights," to participate in decisions affecting one's own salient interests. And this, we are further told, rules out constitutional conceptions and judicial review. Yet if disagreement truly does go "all the way down," then nothing in Waldron's account rules out reasonable disagreement about "the legitimacy of the collective decision-procedures themselves in addition to the disagreement that animates the call for those procedures" (250).

Accordingly, Waluchow argues that Waldron is caught in a circle: he needs the right to participate as a ground for holding that people should participate in all political decisions insofar as disagreement goes all the way down, but he needs some agreement at the foundation on a right to participate in order to hold that we have a right to participate. According to Waluchow, Waldron is caught in the same kind of dilemma that causes problems for Descartes's reasoning.

I think this mischaracterizes the argument. Waldron is doing what every philosopher does. He is grounding an argument in premises that he believes most people will accept without trying to justify those premises; the point is to show the implications of certain prior commitments. In this case, the argument can be read as conditional: if you are committed to the idea that we have a fundamental right to participate in political decisions affecting us, then that idea, together with the fact that people disagree all the way down, entails that judicial review is illegitimate. He is not assuming that there is no disagreement about the right to participate or that he has established this claim – though I think he believes, plausibly enough, that most people in democracies accept this claim because he does not intend it

as entailing, by itself, a procedural conception of democracy.

In any event, I think Waldron's argument can be summarized accurately as follows:

1. Other things being equal, each person has a right to participate in political decisions that significantly impact her freedom.
2. Allowing unelected judges (who are not accountable to the electorate) to invalidate democratically enacted legislation on the ground it violates some moral right is inconsistent with the right to participate.
3. An act that is inconsistent with a right *R* infringes (as opposed to violates) *R*.
4. Therefore, allowing unelected judges to invalidate democratically enacted legislation on the ground it violates some moral right infringes the right to participate.
5. An infringement of a right is a violation of that right unless justified.
6. The only possible justification for infringing the right to participate is that the right to participate is limited by moral rights of citizens and judges are more likely to reach the correct result with respect to whether a legislative act violates some moral right than would be reached by democratic procedures.
7. It is false that judges are more likely to reach the correct result with respect to whether a legislative act violates some moral right than would be reached by democratic procedures.
8. Therefore, allowing unelected judges to invalidate democratically enacted legislation on the ground it violates some moral right *violates* the right to participate.

A couple of explanatory notes are in order here. First, the argument comes in response to, and implicitly concedes, the claim that the right to participate is qualified and limited by such natural moral rights as the rights to life, liberty, property and equality (though the contours of these

rights might be disputed). It is, for this reason, that the right to participate in premise 1 is not fairly interpreted as a principle that expresses a conception of procedural democracy (Indeed, this is part of what is being expressed by the "other things being equal" clause).

Second, the claim that X infringes a right does not entail that X violates that right. Only unjustified infringements constitute violations of that right; and only violations of a right are wrongful. It is permissible to justifiably infringe a right. This is an uncontroversial conceptual truth about the notions of "infringement" and "violation."

Third, although I have not explicitly represented the claim that disagreement is all the way down, it figures into the argument as the justification for premise 6's claim that it is false that judges are more likely to reach the objectively correct result about the relevant moral rights than any more democratic procedure. If disagreement about rights is all the way down (and includes disagreements that divide judges) and judges have no special epistemic access to the objective moral truth, then it seems implausible to think they are more likely than anyone else to reach the right results about our objective moral rights.

As should be evident, there is no claim being made here that everyone agrees on the right to participate. The claim is rather that *accepting* a right to participate, together with some other uncontroversial claims, entails that judicial review violates the right to participate. Again, the meta-structure of the argument is that if you accept these premises (and supporting reasoning), you are committed to denying the legitimacy of judicial review.

And it should be clear that there is absolutely nothing illegitimate with the meta-structure of the argument. We are finite beings with finite minds and can process only arguments with a finite number of steps at any given time. Even if it turns out to be true that the justification of the system of beliefs is coherentist in the sense that the whole thing is tested against epistemic norms or reliable processes (or, as

Quine might put it, the corporate body of beliefs is confirmed or disconfirmed as a whole), the project of giving local justifications remains legitimate and is both finite and linear. This means no local justification for any claim can begin without assuming something. Waldron is no less entitled to this move than anyone else.

Indeed, part of what makes Waldron's challenge so powerful is precisely that premise 1 should seem plausible regardless of what one's view of judicial review is. I am, like Waluchow, in favor of judicial review and believe that even a US-style judicial review is justified (though my enthusiasm for it has been tempered by recent Supreme Court decisions). But I find premise 1, as stated, and the implicit qualification on the right to participate expressed in premise 6, eminently plausible. I think that we have an objective right to participate that is qualified by objective moral rights to life, liberty, property, equality, etc.

Accordingly, there is no Cartesian dilemma in Waldron's argument properly construed. He is not asserting that everyone agrees on the right to participate. The argument is, rather, contrived to convince those who antecedently believe there is a qualified right to participate that judicial review is illegitimate. Since the premise does not imply a procedural conception of democracy, it is, in fact, likely to be accepted by the most liberal constitutional theorists, like Dworkin, as well as far more conservative theorists and jurists, like Antonin Scalia. It is a formidable argument precisely because the claim about the right to participate is sufficiently modest as to be facially compatible with a variety of positions on democracy and judicial review.

Indeed, there is something deeply problematic with the counterargument to Waldron here. While Descartes was clearly caught in a circle because he rejected reason on the ground valid reasoning could be mistaken but then tried to justify his conclusions on the strength of putatively valid reasoning, Waldron is not in the same straits. The claim that argument is inherently suspect bars you from relying

on an argument to establish your conclusion; once you have relied for one result on the claim that we are not justified in using valid reasoning to reach a conclusion, you can't go on and rely on valid reasoning to reach a conclusion.

The claim, however, that disagreement about moral premises goes all the way down cannot bar you from giving an argument using moral premises. If it did, then we are all barred from giving moral arguments because I don't see how any of us could deny that moral disagreement goes all the way down. There is no moral claim (of any robust substance) that does not have at least one dissenter. But none of this stops us from making moral arguments – and it shouldn't. Moral arguments, like any other kind of argument, must start from some premises that are assumed, rather than shown, to be true – and the ones most appropriately assumed are those most likely to be accepted by one's intended audience. In this case, Waldron's argument is pitched at an audience that antecedently accepts something like his premise 1.

It is true, of course, that Waldron might not be able to convince someone who antecedently rejects premise 1 to change her mind about it, but that is true of any argument. I assume what seems obvious to me because the appearance of obviousness is my ground for accepting it; I have no better argument for those assumptions than that they seem obvious to me. If you do not accept one of my assumptions, I am stuck: I have nothing more to say other than it seems obvious; should you deny that move, I have no more to offer. I might be unable to make my burden of persuasion to this person, but not because I am caught in a Cartesian circle, vicious or otherwise. There is nothing here remotely resembling a Cartesian circle – nor is there one involved in Waldron's argument.

Again, however, it bears noting that there is an important disconnect between Waluchow's own position and the position of Waldron he is criticizing. If Waluchow believes that

some other form of judicial review is justified that does not afford courts with the power of judicial review, then he is implicitly conceding to Waldron the point Waldron is trying to make. Insofar as he undermines Waldron's arguments, Waluchow is cutting himself loose from an argument that can help him carve out a justification for a more modest view of judicial review – and seems, for now, to leave him without a strong reason to reject, as it seems he must, the very practice of judicial review Waldron finds objectionable.

*C. Are Judges More Likely to Reach the Objectively
Correct Results on Whether Democratically Enacted
Legislation Violates a Moral Right?*

It will be helpful to recall the structure of Waldron's argument before considering what is, I think, the best of Waluchow's arguments against Waldron. Waldron's argument attempts to show that judicial review is illegitimate even if we assume that an objective moral right to participate is limited by other objective moral rights, such as the right to speech. On Waldron's view, judicial review might be a legitimate means of protecting these other objective moral rights if we had reason to think that judges are more likely to be correct in their views about whether democratically enacted legislation violates these rights than legislators or ordinary citizens. But, according to Waldron, there is no reason to think that judges are any better than anyone else at determining how these rights constrain the content of the law; judges, like everyone else, have to rely on their subjective views about what morality requires – and these are no more likely than anyone else's to be correct. Accordingly, judicial moralizing is problematic inasmuch as it involves the imposition of the judge's moral views on a population in the face of widespread moral disagreement.

Indeed, Waldron believes that the legislature is more likely to arrive at the correct answer to such questions than

the judiciary. On this view, the more heads working on a problem, the more likely it is that the correct or best solution is found. For this reason, legislative bodies, which contain many more members than judicial bodies, are more likely than the judiciary to reach the objectively correct answer to moral issues involving what rights constrain, as a matter of objective morality, democratic lawmaking efforts.

Waluchow rejects the idea that judges are not more likely than democratic majorities to reach the objectively correct result on whether legislation violates a moral right. Waluchow observes, for example, that legislators are likely to feel pressure from a number of sources that do not exert significant pressure on judges. First, legislators are, while judges are not, elected and hence directly accountable to the electorate; a legislative official, then, will feel some pressure to represent her constituency's position even if it is at odds with what is objectively true. Second, legislators are susceptible to partisan pressure associated with being members of a political party that is openly competing for legislative offices with rival parties; it is, however, no part of a judge's position or motivation that she represent partisan interests. Insulated from such pressures, judges are free to attempt to determine the objective fact of the matter on such issues – or so things appear in theory.

Still, it is worth noting that more and more judges are being elected for temporary terms and must come up for re-election. Unfortunately, this affords them with the same sorts of unsavory motivation that clearly, if one watches CSPAN, affects the quality of legislative debate to such an extent that one cannot come away with any optimism about either the ability or integrity of our representatives. Indeed, the state of debate has reached, on my view, such a low-level of intellectual quality because largely consisting of dueling sound bites for TV coverage that I wonder whether the case for democracy is badly overrated. The motivations of legislators, Democrat and Republican, seem far more

concerned with remaining loyal to party positions and re-election than with the truth.

And, I suppose, one can argue that the process of appointment to a Supreme Court is a political one that leaves successful appointees feeling beholden to those who have appointed them. But I doubt this does much work: the history of Supreme Court Justice appointments has been filled with surprises; the most liberal Justices have been inadvertently chosen by the most conservative of Presidents. One might feel beholden for the honor of being chosen for the Supreme Court, but a life-time appointment insulates one from having to compromise one's own best evolving judgments on an issue to satisfy someone who may no longer be president. In any event, it should be clear that the potential for corruption is significantly less in such cases.

Moreover, judges are obligated to produce a written opinion that supports their conclusions with reasons and responds to potential objections and counterarguments, while legislators need not justify their actions by producing a written statement of reasons. The idea here is that the obligation to produce written opinions ensures that judges will pursue a more reliable methodology for answering questions about how objective morality constrains democratic lawmaking efforts. Whereas legislators are free to vote their constituents' interests or party's position without having to produce a public justification that can be evaluated and hence need not think through a moral issue in an impartial and rigorous way, judges must produce such a justification, which ensures that judges will analyze the issues in an impartial and rigorous way. It seems clear that impartial and rigorous analysis is truth-conducive.

If what I have seen of congressional debates in the US is any indication, Waluchow is correct. Congressional debate all-too-often takes the form of catchy sound bites that express a party's position without giving any attempt to justify it. Representatives rarely explicitly engage each other, or criticize each other's views in an intellectually rigorous

way. In contrast, judicial opinions are filled with lively debate between majority and minority positions, and the public character of these debates forces judges to consider and engage opposing arguments. Even the worst of judicial opinions and dissents attempt to give intellectually respectable arguments for its conclusions.

But the fact remains: the quality of debate in Supreme Court opinions is substantially higher than the quality of legislative debate with all its mind-numbing, appalling partisan posturing and slogan-mongering. Words like "socialist" and "unpatriotic" for representatives on the right have become substitutes for anything resembling a reasoned critique of nationalized health care and opposition to the war, while representatives on the left have their own catchphrases designed to stand in for real thinking – a sorry state of affairs indeed.

Of course, a majority opinion is, as Waldron points out, as much the product of bargaining with other members of the Court as is a legislative decision, but this doesn't change the fact that judges have to consider better arguments and counterarguments than legislators do – and hence are likely to craft a more sophisticated and nuanced position with better supporting analysis than legislators. The fact that judges have to respond with an intellectually rigorous public opinion ensures that they will consider the arguments and counterarguments more carefully and hence that judges are more likely than legislators to change their minds about a position in response to the evidence.

Waldron might respond that this paints an unflattering portrait of legislative activity, but this is no reason to reject it. It is pretty clear from empirical evidence that legislators succumb frequently to the pressures of being re-elected and maintaining strong alliances within their party. For example, although Republicans are as unhappy with the US war in Iraq as anyone else, they are loathe to admit the obvious – that the war was a mistake – for fear of showing weakness or of damaging party prospects in the next election. Oft-re-

peated slogans like “cut-and-run” and “surrender is not an option” show just how much more concerned Republican representatives are with party unity than with truth – and, again, Democrats do their own share of slogan-mongering. Unelected Supreme Court Justices surely have their party loyalties, but they are not subject to the same kind of pressures. Whatever deficiencies there might be among Supreme Court Justices, they utterly pail in comparison to those of elected Congressional representatives.

Accordingly, courts seem to be in a better position than legislators to pursue the most reliable methodology we know of for addressing moral issues: an impartial, quasi-philosophical, interpretive analysis that explicitly displays the underlying premises and the connections between premises and conclusions, as well as evaluates the possible objections and counterarguments. While it is not necessarily true that judges will, and legislators won’t, pursue such a methodology, it is far more likely in a system like that of the US that judges will do so than that legislators will. Looking at the state of Congressional versus Supreme Court debate, it seems about as obvious as it can be that the state of the latter is vastly superior to that of the former.

If there is some sort of general epistemological truth, as Waldron seems to believe, that the more heads working on a problem, the more likely it will be successfully resolved, this principle will apply only in circumstances in which the bigger set and the smaller set are exclusively motivated by a desire to solve the problem. The more exogenous and irrelevant motivations enter the picture, the less applicable the principle is.

But while Waluchow, on my view, wins the exchange here, it isn’t of help to him if his goal is to justify a more modest form of judicial review that is uncoupled from judicial supremacy. If courts are, as a matter of empirical fact because of their comparative insulation from political pressures, to get the matter right, why give them only an advi-

sory role *vis-à-vis* the legislature? Why hand the matter back to that very entity whose point of view is likely to be clouded by political biases and other irrelevant motivations? Waluchow seems to win the battle here against Waldron, but in virtue of doing so loses the war by cutting out a potential source for his own more modest position.